

THE INVOCATION OF REMEDIES UNDER THE CHARTER OF RIGHTS AND FREEDOMS: SOME PROCEDURAL CONSIDERATIONS

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I. Introduction

This paper focuses on the manner in which applications under the *Charter*¹ can be integrated into the existing litigation framework, particularly in criminal matters. The *Charter* itself provides little guidance, apart from the cryptic reference to "court of competent jurisdiction" in s. 24(1) and the obscure reference to "proceedings under subsection (1)" in s. 24(2). Neither reference sheds much light. Nor is it clear whether s. 24 speaks to all applications for relief in respect of alleged violations of the *Charter*, or whether s. 52(1) of the *Constitution Act, 1982* admits of other procedural possibilities. This question also has important implications for remedial flexibility and for issues of notice in constitutional cases.

It is true that we have some experience of integrating into our trial process applications based upon the *Canadian Bill of Rights*² and its provincial equivalents.³ This may be helpful, although the very limited scope given to the *Bill of Rights* and the lack of remedial flexibility in it make that experience, at best, marginally relevant to most of the fact-based remedial applications that are forthcoming under the *Charter*. We can also derive some modest assistance from our experiences with traditional 'division of powers' constitutional litigation.⁴ In the end, however, this experience leaves us ill-equipped at the procedural and, to some extent, the evidential level. At the substantive level, the temptation will be strong to draw on American, European and other foreign material.⁵ Textual similarities between the *Charter* and equivalent foreign enactments make this course legitimate, if done in moderation. It is more difficult in the procedural area. The experiences of unitary states or of differently structured federations may not be helpful in resolving problems that are a product of our federal structure. This is particularly true when we focus on the role of the provincial courts in criminal litigation.⁶ Furthermore, the explicit

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1. Part I of the *Constitution Act, 1982*, sections 1-34.

2. R.S.C. 1970, Appendix 3.

3. These enactments remain in force, albeit with no greater status than they had prior to the adoption of the *Charter*. In areas such as the protection of property they may still be resorted to and may come to attract the more developed procedural regime that the *Charter* will engender notwithstanding that they lack constitutional status.

4. For a description of the procedural context of pre-*Charter* constitutional litigation, see B.L. Strayer, *Judicial Review of Legislation in Canada*, Toronto 1968, Chapters 5 and 6.

5. E.g., D.C. McDonald, *Legal Rights in the Canadian Charter of Rights and Freedoms*, Toronto 1982.

6. As so-called 'inferior' courts constituted and staffed entirely under provincial authority playing the crucial pre-trial and trial role in operating a national scheme of criminal justice, these courts have no parallel that I am aware of in any other common law jurisdiction. It is clear that there are institutional tensions between these courts and the 'superior' courts that can only be exacerbated by the implications of the recent Supreme Court of Canada decision in *McEvoy v. A-G N.B. and A-G Canada* (1983), 4 C.C.C. (3d) 289. These tensions are most likely to reflect themselves in the degree of remedial flexibility to be allowed the provincial courts under the *Charter*, the procedures which can be followed in those Courts, and the scope of judicial review by superior courts through prerogative applications.

remedial flexibility conferred by s. 24(1) of the *Charter* and the limited scope of s. 24(2) way well make American experience less than helpful.⁷

II. Notice of constitutional questions

There are two distinct strands of reasoning in the history of 'constitutional notice' provisions in Canada. First, there is the obvious interest in ensuring that the government whose legislation is impugned has notice of the issue, and a concomitant right to be heard. Although it arose in the context of division of powers, the validity of this rationale is not obviously confined to that context. Second, where the relative competences of the provinces and the federal government are in issue, it seems desirable that both levels of government be advised, if only to ensure that the potentially competing views can be heard. The latter rationale is more clearly a function of the division of powers context for constitutional litigation, and reflects the political realities of any federal system. These two lines of reasoning have not been reflected equally in the various constitutional notice provisions in provincial legislation. In Alberta, for example, it was not until 1981 that the second rationale was recognized at all.⁸

The constitutional foundation for these provincial notice requirements has always been somewhat questionable.⁹ There is no difficulty where constitutional questions arise in the courts of a province, in proceedings whose substance and procedure is under the provincial jurisdiction. But, in many cases, particularly in the criminal law, the substance and procedure is under federal jurisdiction. Here, the provincial notice requirements can only be justified under s. 92(14) of the *Constitution Act, 1867*, as a facet of the "constitution" or "organization" of provincial courts. The requirements must then be seen not as purely procedural matters, but as provincial limitations upon the jurisdiction of courts, exercising authority conferred on them by the federal power. It is for this reason, no doubt, that the Ontario notice provision has been treated as inapplicable in criminal matters.¹⁰

In those provinces, like Alberta, where the notice provision does not expressly exclude criminal matters, the normal practice has been to give notice. It is noteworthy that constitutional experts from the various governments appear to argue the merits, without any objection to the validity of the statutory provision that enables them to be heard. Nevertheless, it is also clear that the Alberta courts treat these provisions as procedural rather than jurisdictional. This treatment is most apparent when an adjournment is granted to enable notice to be given. If the provision is

7. The lack of remedial flexibility in the United States in respect of illegally obtained evidence is the classic illustration. It is much easier to operate a pre-trial hearing to rule on this matter where the range of legitimate considerations is based upon one remedy only.

8. *Judicature Act*, R.S.A. 1980, c. J-1, s. 25, as amended by S.A. 1981, c. 51, s. 2.

9. See generally, Strayer, *supra*, n. 4, at 39-48.

10. The notice provision is found in the *Judicature Act*, R.S.O. 1980, c. 223, s. 35; s. 152 provides that the Act is not to affect "the practice or procedure in criminal matters". See *R. v. Dickson and Corman* (1982), 3 C.C.C. (3d) 23 (Ont. Co. Ct.). There is no equivalent provision in the Alberta *Judicature Act*.

treated as jurisdictional, then there is no valid proceeding that can be adjourned, unless one takes the view that constitutional litigation can proceed *inter partes* in the absence of notice with the ensuing decision having no impact beyond the proceeding in question. However, such a view is theoretically rather dangerous, since it could result in the *de facto* sterilization of legislation on constitutional grounds while leaving the legislation formally extant as valid. This may indeed be a risk in criminal matters where the provincial government will ordinarily be represented on the prosecution side, rather than the federal government, and the federal government is responsible for the legislation in issue.

Prior to the enactment of the *Charter*, these constitutional and functional issues were little explored. It was sometimes assumed that the 'notice' provisions applied where the *Canadian Bill of Rights* was invoked in an attempt to sterilize federal legislation, notwithstanding the at best quasi-constitutional status of the *Bill of Rights* itself. The application of the provisions could be justified only by a belief that the government whose legislation was being impugned should be given an opportunity to be heard. (Division of powers was not a factor in *Bill of Rights* litigation, unless one took a practical rather than a juridical view of the fragmented jurisdiction in the criminal process, which is occasioned by the provincial responsibility for 'administration' of the criminal law.) Overall, therefore, it is not altogether surprising that the application of the notice provision to matters arising under the *Charter* has occasioned some difficulty.¹¹

It seems to be generally accepted that the 'notice' provisions do not apply where an applicant is seeking a remedy based on a *Charter* violation found in the particular facts of the case.¹² The disputed question is the application of the provisions where the remedy sought is a declaration that a law is invalid as inherently violative of the *Charter*. It is sometimes suggested that only specific fact-oriented applications come under s. 24(1) of the *Charter* whereas applications for declarations of invalidity find their root in a separate procedure derived by implication from s. 52(1) of the *Constitution Act, 1982*. While such a view would make a clear distinction between cases where notice is and is not required, there is an alternative position that all applications to invoke the *Charter* must come under s. 24(1).¹³ If the latter is the correct view, the functional distinction still remains but becomes more difficult to apply in practice since most remedial applications would have an inherent potential for the sterilization of legislation. Were the notice provisions to apply in every case in which the *Charter* is raised, the mountains of paper that would ensue would soon

11. Compare the reasoning of the trial judge in *R. v. Stanger* (1982), 70 C.C.C. (2d) 247 (Alta. Q.B.) with that of the Court of Appeal (1983), 26 Alta. L.R. (2d) 193. See also *Re Koumoudouras and Municipality of Metropolitan Toronto* (1982), 67 C.C.C. (2d) 193 (Ont. H.C.); *R. v. Leggo* (1982), 69 C.C.C. (2d) 443 (Alta. Prov. Ct.).

12. See *R. v. Leggo*, *ibid.*

13. For the more limited view see E.G. Ewaschuk, Q.C., *The Charter: An Overview and Remedies* (1982), 26 C.R. (3d) 54 at 67-68. See generally, A.A. McLellan and B.P. Elman, "The Enforcement of the Canadian Charter of Rights and Freedoms: An Analysis of Section 24" (1983), 21 *Alta. L. Rev.* 205 at 212-13.

smother the system.¹⁴ There is an additional problem. Where the legislation in question is part of the general law of procedure or of evidence, it may not be apparent that the *Charter* will be invoked in any particular case until the trial is well under way.¹⁵ Assuming that we rule out a speculative autonomous application for a declaration of invalidity, either we must accept the necessity for a potentially disruptive adjournment or recognize that in such a case any ruling is simply *inter partes*. In the latter event, the matter could, of course, be converted into a constitutional question on appeal by the giving of the requisite notice. It seems, therefore, that there are at least some practical reasons militating against a notice requirement at the trial level, except, perhaps, in cases where the applicant specifically seeks a declaration of invalidity from the beginning.

A more fundamental objection to the application of notice requirements in *Charter* cases is that the notice provisions are themselves *ultra vires* as they interpose an unwarranted fetter on the vindication of the rights and freedoms guaranteed by the *Charter*. This view commended itself to the trial judge in *R. v. Stanger*.¹⁶ On appeal, the Alberta Court of Appeal addressed the issue even though it was moot, all proper notices having been given. McClung J.A., dissenting, expressed no opinion on the point.¹⁷ For the majority, Stevenson J.A. said:

This court has already said in *Broddy et al. v. The Director of Vital Statistics* [since reported (1982), 23 Alta. L.R. (2d) 77] that where there was a failure to comply with [the *Judicature Act*, R.S.A. 1980, c. J-1, s. 25(1)] the matter was not properly before it. The court did not refuse to hear the issue but declined to deal with it in the absence of notice. Had the party seeking a declaration of invalidity sought an adjournment to permit notice to be given, different considerations would apply. ... I do not read the *Judicature Act* as doing anything other than requiring that notice be given to the state which has an interest in declarations about the validity of legislation. It is not legislation in relation to criminal procedure and in the cases before us there is no conflict with the procedural provisions of the *Code*.

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*.¹⁸

In thus overcoming the fundamental objection that notice provisions are *ultra vires* the *Charter*, the court ignored the logistical difficulties and financial costs of an adjournment and, indeed, the possibility that an adjournment may not be granted.¹⁹ Nonetheless, the interest of the state may be sufficiently strong to justify this approach.

14. On the other hand, the provincial Attornies-General seem to be able to cope with being notified of many prerogative applications. See, for example, *Alberta Rules of Court*, R. 739(3)(a), 827(3)(a).

15. This point is clear in a case where the Crown seeks at trial to rely on the doctrine of recent possession in relation to a property offence. Particularly where the trial is summary, defence counsel cannot possibly know in advance what the Crown's intentions are unless the Crown volunteers the information. Such a case also raises the additional point that all the notice provisions refer to constitutional attacks upon the validity of legislation or an enactment. Accordingly, no notice would be required in any event to legitimate review of the common law doctrine of recent possession. That the *Charter* extends to the common law seems clear from the rendering of the English 'law' as «règle de droit» rather than «loi» in the French text of the *Constitution Act*, 1982, s. 52(1).

16. *Supra*, n. 11.

17. But his concurrence with the majority on this point may be inferred from his membership of the court in *Broddy v. Director of Vital Statistics* (1982), 23 Alta. L.R. (2d) 77, relied on by the majority in *Stanger*.

18. *Supra*, n. 11 at 218.

19. Or is the court suggesting that an adjournment must be granted as of right in such a case? In that case, what might the implications be under s. 11(b) of the *Charter* given the present state of the docket in many trial courts?

Unfortunately, however, the court did not address the question of why the Attorney General of Alberta should be entitled to notice in this case. The case involved the validity of s. 8 of the *Narcotic Control Act*, and ss. 42-43 of the *Food and Drugs Act*. Both are federal enactments. All applicable procedures and rules of evidence are federally prescribed; prosecution is in the hands of federally appointed prosecutors.²⁰ There is ample reason for alerting the federal power to the constitutional issue. It is difficult, however, to discern the nature of the provincial constitutional interest, notwithstanding that the Attorney General of Alberta appeared as an intervenant.²¹ Perhaps the rationale is that any reasoning employed by the court in coming to a decision would necessarily have implications for the validity of other similar legislative provisions which have a more clearly defined provincial element. Is this the sort of interest to which notice provisions are directed? The court disposed, cryptically, of a 'division of powers' argument that s. 25(1) of the *Judicature Act* is invalid because it relates to the federal head of power over criminal procedure. However, the court did not deal at all with the point that its own characterization of s. 25(1) as procedural rather than jurisdictional, arguably destroys any basis for that section's validity as provincial legislation under s. 92(14) of the *Constitution Act, 1867*, in the circumstances of the *Stanger* case.

In the result, it is presently almost impossible to develop a textually permissible construction of provincial notice provisions which would simultaneously overcome both 'division of powers' and *Charter* objections without drawing functionally artificial distinctions among types of proceeding. While one sympathizes with the desire of the Alberta Court of Appeal to ensure that *Charter* questions are properly argued from the state's perspective, and are amenable to appeal at the suit of the state, the legislature has simply not provided an adequate vehicle to achieve these ends. Perhaps this is more the fault of the Federal Parliament for not enacting its own notice provision, than it is the fault of the provincial legislatures.²² Even so, the provincial provisions could usefully be re-drafted with explicit reference to the *Charter*.

III. Standing

Where it is proposed to bring an application based upon s. 24(1) of the *Charter*, it is sometimes difficult to separate the abstract question of standing to bring on the application in some court, from the propriety of bringing it on in a particular court as a "court of competent jurisdiction".

20. This may be yet another facet of the holding in *R. v. Hauser* (1979), 8 C.R. (3d) 89 (S.C.C.), that the *Narcotic Control Act* is valid Federal legislation under the 'peace, order and good government' power rather than under the 'criminal law' power. Accordingly, the finding that the *Judicature Act* s. 25(1) is not 'criminal procedure' may not preserve it from attack as an unwarranted intrusion into the domain of procedure in federal matters.

21. The argument of the Attorney-General of Alberta at the trial was that the provincial interest arose from: its responsibility for the administration of justice; its obligations in prosecuting crime; and its general interest in the problem of reverse onus provisions. See *R. v. Stanger* (1982), 70 C.C.C. (2d) 247 at 248. But it has already been suggested, *supra*, n. 20, that the first and second reasons cannot have anything to do with this particular case.

22. Existing Federal provisions are found in the respective Rules of Court of the Supreme Court of Canada and the Federal Court. See *Strayer*, *supra*, n. 4 at 42-43; P.W. Hogg, *Constitutional Law of Canada*, Toronto 1977, at 78. Does this lend support to the view that the Federal government has no interest in seeing constitutional questions characterized as such at the Provincial Court level or indeed at the trial level generally in criminal matters?

Thus far, on the whole, the courts appear to have been able to keep these matters distinct.²³ Under s. 24(1), the potential applicant's title derives from the words "whose rights or freedoms... have been infringed or denied". The French text is potentially more expansive.²⁴ Whichever version one focuses on, the prescription for standing is non-discretionary and requires an actual violation of the *Charter*, which violation affects the applicant. Accordingly, standing under s. 24(1) is really little more than an exercise in the construction of the various rights and freedoms set out in the *Charter*.²⁵

There is, however, an extra dimension even under s. 24(1). There will be cases where some official action has affected the public at large, or some discernible segment thereof, even though it may also have affected specific individuals more particularly. Can a member of the more general class bring himself within s. 24(1), even in cases where no member of the more specific group is inclined to raise the matter? This was essentially the situation in the pre-*Charter* case of *Nova Scotia Board of Censors v. McNeil*.²⁶ It was also the position in *Edmonton Journal v. A-G Alberta et al.*,²⁷ where a newspaper was held to be entitled to invoke s. 11(d) of the *Charter* to attack s. 12(1) of the *Juvenile Delinquents Act*,²⁸ a prescription for *in camera* juvenile hearings.²⁹ Accordingly, it seems that under s. 24(1) the applicant need not necessarily be the primary victim of the alleged violation, so long as the violation can in fact be shown to have affected him.

Much more difficult is the situation where legislation exists that has not yet, or indeed could never, impact directly on the applicant, yet the applicant asserts standing as a concerned citizen. It would require a major expansion of the text of s. 24(1), in either its English or its French versions, to accommodate this situation. Accordingly, it becomes crucial once again to determine whether s. 52(1) of the *Constitution Act, 1982* has an implied remedial life, independent of s. 24(1), in respect of *Charter*

23. For example, *Re Gittens and the Queen* (1982), 68 C.C.C. (2d) 438 (Fed. T.D.) where Mahoney J. declined to entertain an application for *habeas corpus*, with or without *certiorari* in aid, to prevent execution of a deportation order specifically on the ground that the Federal Court Trial Division has no jurisdiction to grant *habeas corpus*. It would have been only too easy for Mahoney J. to say that the applicant lacked standing to bring on the application before him.
24. See A. Gauthron, "French/English Discrepancies in the Canadian Charter of Rights and Freedoms" (1982), 12 *Man. L.J.* 220. The French phrase «victime de violation...» implies that there may be standing to assert the violation of a right inhering in another where that violation impacts on the applicant. But at the end of the day this may serve more to reinforce an expansive interpretation of "the principles of fundamental justice" in s. 7 of the *Charter* than to engender a debate about standing *per se*.
25. Consider the situation that arose in *Re Crooks and the Queen* (1982), 2 C.C.C. (3d) 57 (Ont. H.C.), aff'd. (1982), 2 C.C.C. (3d) 64n (Ont. C.A.), where it was held that one co-accused separately charged was a compellable Crown witness at the trial of the other co-accused, s. 11(c) and 13 of the *Charter* having no application; accordingly a motion to quash a subpoena was denied. In one sense, this is a decision that the applicant lacked standing. *Quaere* what might the position have been had the applicant also invoked s. 7? The U.S. Supreme Court has clearly recognized in recent cases that standing is often best viewed as an exercise in construction, albeit the question is really one of choice of rhetoric. See *Rakas v. Illinois* 439 U.S. 128 (1978). However, the U.S. context is one much affected by the primacy and rigidity of the remedy of exclusion of evidence. The greater remedial flexibility available in Canada under s. 24 could incline our courts to a different rhetoric.
26. [1976] 2 S.C.R. 265.
27. (1983), 146 D.L.R. (3d) 673 (Alta. Q.B.).
28. R.S.C. 1970, c. J-3.
29. This situation arose because the court refused to read s. 2(b) of the *Charter* as conferring a right of access on the public or the press to judicial proceedings. *Sed quaere*. But the factual context involved a specific exclusion of a reporter from juvenile court, just as in the *McNeil* case the Nova Scotia censors had excluded the public from viewing the film *Last Tango in Paris*.

violations.³⁰ There seems to be a general consensus, but no unanimity among commentators that the wider constitutional test of standing, as propounded by the Supreme Court of Canada in *Minister of Justice (Can.) v. Borowski*³¹ and *Thorson v. A-G Canada (No. 2)*,³² should apply in such cases. This test has already been applied by Deschênes C.J. in *Quebec Association of Protestant School Boards v. A-G Quebec (No. 2)*,³³ perhaps by Dea J. in *Edmonton Journal v. A-G Alberta et al.*,³⁴ and by Cattanach J. of the Federal Court Trial Division in his very recent decision not to strike out an application by a concerned citizen to challenge the validity of the federal government decision to allow the testing of Cruise missiles in Canada. The decision of Dube J. in *Collin et al. v. Kaplan et al.*³⁵ is not to the contrary, since the proposal to double-bunk new inmates in a penitentiary, which was there in issue, would not on its face apply to the applicants as existing inmates and would likely be challenged by someone more directly affected. This could include the applicants themselves if they could demonstrate a personal impact, once the proposal became operational.

Overall, then, it seems that a sensible breadth is likely to be given to the requirement of standing. We must nevertheless recognize that applications, predicated upon this sensible breadth, will be brought in the superior courts rather than in the provincial courts, as the latter have no authority to accept an application not in a cause otherwise properly before it.

IV. Mode of Application

Much may depend here on whether or not the application is or is not made in the context of an already extant cause. Where there is no extant cause, it is reasonable to assume that the originating application and subsequent steps must follow the procedures already prescribed for originating applications in the court in question.³⁶ The crucial issues here are likely to be standing and jurisdiction,³⁷ rather than the mode of originating process. Although some of the *Charter*-based originating applications made to superior courts exhibit substantive characteristics which are distinctly innovative, there is little sign of procedural originality by counsel, or

30. See text at n. 13, *supra*, and articles there cited. See also H.S. Fairley, "Enforcing the Charter: some thoughts on an Appropriate and Just Standard for Judicial Review" (1982), 4 *Supreme Court L. Rev.* 217; D. Gibson, "Enforcement of the Charter of Rights and Freedoms (section 24)" in *Canadian Charter of Rights and Freedoms — Commentary* (Ed. W.S. Tarnopolsky and G.A. Beaudoin), Toronto 1982.

31. [1981] 2 S.C.R. 575.

32. [1975] 1 S.C.R. 138.

33. (1983), 140 D.L.R. (3d) 33 at 41-42 (Que. S.C.).

34. *Supra*, n. 27.

35. (1982), 1 C.C.C. (3d) 309 (F.C.T.D.).

36. I include here as originating applications, applications for judicial review or prerogative relief in the context of a cause already extant in an inferior court, since such an application is indeed an originating one so far as the superior court receiving it is concerned.

37. Particularly in applications for judicial review or prerogative relief, the question may well not be so much one of jurisdiction *vel non* as of the discretion whether or not to exercise an admitted jurisdiction.

encouragement of such originality from bench. The appropriate rules of court are not put to flight by invocation of the *Charter*.³⁸

Where there is an extant cause and it is proposed to move in the context of that cause before the court is seized of it, adequate procedures will exist, at least in a superior court. On the criminal side, where an application is proposed which, if successful, would prevent the trial from proceeding, a notice of motion is frequently given. An instructive illustration of this procedure is set out in detail in the recent decision of de Weerd J. in *R. v. Dennis, Kubin & Frank*.³⁹ In April, 1982, after a preliminary inquiry, the accused were committed for trial. The trial date was finally set for September 12, 1983. The circumstances were such that dispositive applications, based on s. 11(a) and s. 11(b) of the *Charter* were appropriate. In the case of Dennis, counsel filed a notice of motion seeking a stay of proceedings on August 24, 1983, returnable August 29, 1983, on which date there was an adjournment until September 12, 1983, the date set for trial. Notices of motion seeking similar relief on behalf of Kubin and Frank were not filed until the date set for trial. No issue was made of this, since there was no prejudice to the Crown in the circumstances. In the result, the stay was refused, but the indictment was quashed as an adequate remedy in the circumstances. This case illustrates how an effective use of procedure, at least on behalf of Dennis, can also serve the goal of effective judicial administration.

In situations where success on the *Charter* issue brought before the court will not dispose of the case, it is submitted that there is no necessity to proceed by notice of motion even in the superior courts. The matter can be raised by motion or by submission in the ordinary course of the proceedings, although a formal notice of motion may be a welcome courtesy in some cases.⁴⁰ Thus, it is submitted that there is no need to adopt any formal procedure when it is sought to exclude evidence, unless we use formal pre-trial hearings in the American style to resolve such issues.⁴¹

In the inferior courts, notices of motion are not part of the regular procedure in criminal matters, whether the court is holding a preliminary inquiry or a trial, and whether the charge is an indictable or a summary

38. Thus, any application for a declaration must ordinarily be brought on in Alberta by statement of claim unless the matter is one that turns on the construction of a statute, *inter alia*, and no material facts are in dispute. In such a case the matter may come on by originating notice: *Alberta Rules of Court*, Rule 410(e). There is no suggestion that this procedural framework has become inappropriate merely because the *Charter* is invoked. The originating notice may be useful even in cases where the respondent is proposing to rely on s. 1 of the *Charter*, because the dispute may then focus on the weight to be accorded the facts adduced rather than on the accuracy of the facts themselves. Certainly in such cases the courts may wish to encourage the use of affidavits and exhibits annexed thereto rather than *viva voce* evidence, and the originating notice allows the court greater control in this respect than does the statement of claim.

39. *N.W.T.S.C.*, unreported, Sept. 19, 1983. I am grateful to Mr. Justice D.C. McDonald, Alberta Court of Queen's Bench, for bringing this decision to my attention.

40. Even informal notice to the other side and to the court administrator would be helpful, given the very real problems of judicial administration involved when scheduled trials do not occur, or continue for a substantially longer period than was contemplated. There is a great difference between prescription of procedure and existence of courtesy, but absence of the latter tends to lead to the former.

41. Such a course was essayed in *Re Siegel and the Queen* (1983), 1 C.C.C. (3d) 253 (Ont. H.C.) and met with an extremely frosty reception. It is to be observed however that this was an originating application brought on before the High Court by way of originating notice when the extant cause had not yet got beyond the bail show-cause stage, and was emphatically not set down for trial in the High Court.

conviction offence. It is submitted that this should remain so, and most judges appear to share that view.⁴² In family and juvenile matters, however, the procedure is different. In *Re W*,⁴³ it was held that in a child protection case an application to exclude evidence must be made by notice of motion, returnable before the scheduled trial date.⁴⁴ In small claims matters, the procedure is by design sufficiently informal, to accommodate either litigants in person or their agents.⁴⁵ Thus, there would seem to be no room for the added complexities of notices of motion and the like.

V. Timing of Application

A. During the trial

Where an application is made during the trial, there is some difference of opinion as to the temporal flexibility to be allowed counsel in bringing it before the trial judge. In *R. v. MacIntyre*,⁴⁶ there was a search for and seizure of drugs. Defence counsel made no objection to the introduction of the drugs and the certificate of analysis into evidence as duly proved exhibits. Then, at the close of the Crown's case, counsel moved for a non-suit, arguing that these exhibits should be excluded from evidence, under s. 24(2) of the *Charter*, as having been obtained in violation of s. 8 of the *Charter*. Veit J., of the Alberta Court of Queen's Bench, took the view that this was a legitimate tactic on the part of defence counsel. In *Imough*,⁴⁷ on the other hand, Judge Megginson of the Ontario Provincial Court expressed the firm opinion that applications to exclude evidence should be made at the time the evidence is tendered, so that all necessary issues can be canvassed in one *voir dire*. It is not clear, however, whether he intended this to be a definite procedural prescription, variable only by leave, or simply a desire for efficient trial management coupled with a warning to counsel that another approach could result in an ill-disposed judge.

It does seem apparent that an evidentiary ruling made during a proceeding is reviewable by the judge at any stage during that proceeding, and that this is so notwithstanding the failure of opposing counsel to object.⁴⁸ It does not follow that a trial judge must, upon application, reopen an evidentiary ruling to allow further evidence to be adduced on a

42. See for example, *R. v. Peters*, 1 C.R.R. 180 (Sask. P.C.) (*per* Wedge, P.C.J.) quoted in McLellan and Elman, *supra*, n. 13, at 216.

43. (1982), 17 A.C.W.S. (2d) 147 (Ont. Prov. Ct.).

44. This decision may be though unduly rigid, but it is not necessarily in conflict with *Re Siegel*, *supra*, n. 41. In *Siegel*, the application was an originating one before a court not otherwise seized of the extant cause whereas in *W* the application was required to be made before the court and indeed perhaps the judge already seized of the matter for trial. But the fundamental question still remains whether all the appropriate factors can be explored before excluding evidence in a pre-trial hearing. See text, *infra*.

45. The role of agents in summary conviction matters on the criminal side could found a distinction between them and indictable matters in respect of the desirability of formal procedures as perhaps could the normal criteria for making legal aid available.

46. (1982), 69 C.C.C. (2d) 162 (Alta. Q.B.).

47. (1982), 9 W.C.B. 106 (Ont. Prov. Ct.).

48. *R. v. Tunke* (1975), 25 C.C.C. (2d) 518 (Alta. S.C.-T.D.). Albeit that the failure of counsel to object is likely to weigh against a successful appeal through the application of s. 613(1)(b)(iii) of the *Criminal Code*.

voir dire. It is submitted, however, that a trial judge should consider any relevant evidence that is otherwise properly before him, even if it was adduced subsequent to the evidentiary ruling on the admissibility of the impugned evidence. This will sometimes be the case where the court has ruled, based on evidence adduced in a *voir dire*, that a statement is voluntary, and subsequent evidence, properly led by the defence with a view to the weight to be attached to that statement, has cast doubt on that initial ruling.

Applying the above principles in the context of the *Charter*, there would seem to be some support for the approach taken in *MacIntyre* allowing tactical flexibility to the defence. However, there is a difference: in *Charter* applications the onus is on the accused to establish the violation of his rights,⁴⁹ and therefore his title to exclusion of evidence,⁵⁰ whereas in the non-*Charter* cases the onus is on the Crown, as the proponent of the evidence in question, to establish its admissibility. In non-*Charter* cases, where the issue is admissibility, it is submitted that the proper course is to effectively re-open the original *voir dire*, if the matter is to be re-opened at all. In *Charter* cases, where the issue is exclusion, it is submitted that any further *voir dire*, necessitated by the pursuit of tactical flexibility, is at the bidding of the defence. Accordingly, if the defence wishes to recall one of the Crown witnesses from the original *voir dire*, that witness is now called by the defence and can only be examined in chief in the ordinary course.⁵¹

Whatever may be the case with rulings on the admissibility of evidence, it is much less clear that tactical flexibility is warranted in non-*Charter* procedures, such as the presentation of applications for stays of proceedings, for quashing of informations and indictments, or for other similar remedies.⁵² Such matters are normally precluded, except perhaps by leave, once the course of evidence is begun. It is not clear why tactical flexibility in such matters should be granted as of right in *Charter* cases. There can be little forensic danger in establishing the factual basis for such remedies at an early stage, since none of the evidence given will be evidence in the trial proper. It is harmful to any rational system of judicial administration that the judge hearing a case should be invited to abort it on the ground that it should never have been allowed to start, especially in situations where those grounds were known or ought reasonably to have been known from the start. It is thus submitted that, at the very least, where counsel advances at a late stage a *Charter* application that could reasonably have been made at an early stage in a trial, (other than an

49. Academic arguments to the contrary notwithstanding, this point seems to have been accepted with virtual unanimity in the *Charter's* first 18 months. See text, *infra*.

50. It does not necessarily follow that as a matter of law the accused must undertake the burden of persuasion in respect of the criteria necessary for invocation of s. 24(2) of the *Charter*, but as a practical matter the evidence will not be excluded unless the court is so persuaded.

51. *Quaere*, would the trial judge have at least a discretion to re-call such a witness for cross-examination?

52. A clear example is the motion for a non-suit. If one is not made, or if one is made but wrongly rejected, any evidence adduced by the defence can, it seems then be taken into account to supplement the Crown's case. See *Vander-Beek & Albright v. The Queen* (1970), 2 C.C.C. (2d) 45 (S.C.C.), albeit that that case involves a joint trial of co-accused.

application to exclude evidence) the delay is a proper factor to be taken into account in determining the appropriate remedy under s. 24(1) of the *Charter*.⁵³

B. Before the trial

The crucial question here is whether or not our courts should develop a pre-trial hearing to determine if evidence should be excluded.⁵⁴ The answer depends in part on our approach to judicial administration.⁵⁵ More fundamentally, it depends on the theory of evidentiary exclusion which is embodied in s. 24(1) of the *Charter*. At present, it is unclear if the exclusion of evidence can occur only under s. 24(2), or if an exclusion can also be made under s. 24(1). Under s. 24(2), the exclusion of evidence is mandatory if the listed criteria are met⁵⁶ but is otherwise not permissible. Where those criteria are not met, however, can the exclusion of evidence be granted as a s. 24(1) remedy?⁵⁷ It has been suggested, however, that there is unlikely to be much difference in the criteria applied under the two subsections, even if both are available.⁵⁸ However that debate may be resolved, the question remains: are we to exclude or give more weight to those values connected with the investigatory phase of the justice system, or to those connected with the judicial phase, when considering the exclusion of evidence? Perhaps we should adopt a broad-minded combination of both sets of values. Arguments which are derived from the judicial administration perspective, and which militate against pre-trial hearings, may be thought less weighty if we give less weight to values connected with the judicial phases of the criminal process.

The debate is neatly encapsulated in the judgments of the British Columbia Court of Appeal in *R. v. Collins*⁵⁹ and *R. v. Cohen*.⁶⁰ A clear majority of the Court (Nemetz C.J.B.C., Seaton, Craig and Taggart J.J.A.) favoured a mixed approach which would tip the balance towards the judicial phase. Only Anderson J.A., dissenting in *Cohen*, seemed to favour an approach that, while still mixed, nevertheless would tip the balance towards the investigatory phase. The view of the majority was clearly much influenced by the concurring judgment of Lamer J. in *Rothman v. The Queen*,⁶¹ a pre-*Charter* case. It is true that s. 24(2) provides for the

53. This presupposes that the trial and all that has transpired therein can be viewed as part of "the circumstances" envisaged in s. 24(1). Alternatively, perhaps the applicant's remedial preference is relevant and is evidenced by the timing of the application.

54. See *supra*, n. 41, and text *thereat*.

55. The case based upon the "administration of justice" against pre-trial hearings is crisply stated in *Re Siegel*, *supra*, n. 41; *R. v. Imough*, *supra*, n. 47.

56. This is not to deny that s. 24(2), in fact, confers a potentially discretionary exclusionary power if the range of permissible invocative criteria is drawn widely and vaguely enough.

57. See *R. v. Therens* (1983), 148 D.L.R. (3d) 672 (Sask. C.A.).

58. See *R. v. Jackie* (1983), 10 W.C.B. 203 (Sask. Q.B.). *Sed quare*, given the circumstances of *Therens*, *ibid*.

59. (1983), 33 C.R. (3d) 130 (B.C.C.A.).

60. (1983), 33 C.R. (3d) 151 (B.C.C.A.).

61. [1981] 1 S.C.R. 640. It is remarkable how much attention has been paid to the highly restrictive criteria set out in what is, after all, simply a concurring judgment expressing the views of only one judge in a case that dealt with the admissibility of statements. A few judges at least have recognized these concerns in *Charter* cases: see, e.g. *R. v. Carriere* (1983), 32 C.R. (3d) 117 at 140 (Ont. Prov. Ct).

exclusion of evidence only where "the admission of it in the proceeding"⁶² would bring the administration of justice into disrepute, and not where the mode of obtaining the evidence *per se* would have that effect. Accordingly, the development of a mixed set of criteria is almost inevitable. That this was the intention of the drafters is reasonably certain: the object was to find a short form of language that would effect a compromise between the apparently rigid rule of exclusion based solely on the illegality of the means employed to obtain the evidence, and the equally rigid pre-*Charter* Canadian position that was based solely on the use of the evidence at trial, regardless of how it was obtained. All this tells us is that the new Canadian position is to be a compromise; it defines neither the ingredients of that compromise nor their respective weights.

Recently, Mr. Justice D.C. McDonald of the Alberta Court of Queen's Bench extra-judicially propounded nine factors which he felt were suggested in current case law as being factors which the courts are taking into account when reaching a decision on the exclusion of evidence.⁶³ It will be apparent that some of these factors, although listed separately, are simply different sides of the same coin:

- i) Is there a cause and effect relationship between the police impropriety which is established and the obtaining of the evidence in question;
- ii) Was the violation by the police intentional;
- iii) Was the violation by the police in good faith;
- iv) The urgency or otherwise of the impugned police conduct;
- v) The seriousness of the breach of social values involved in the police conduct;
- vi) Was the violation by the police merely technical in nature;
- vii) The gravity of the offence or charge;
- viii) The extent of the prejudice to the accused if the evidence is admitted;
- ix) The existence of an alternative remedy that is effective.

One cannot sensibly determine the proper procedure for dealing with this question, whether before trial or during trial, until the legitimacy, content and weight of the criteria are settled.

C. Post-trial

There is nothing in the *Charter* itself that speaks to the legitimacy of a post-trial application for a remedy. However, there are no signs of post-trial applications to the trial judge even being made, let alone heard. While appellate review is clearly legitimate, it remains unclear how far courts will go in treating *Charter* applications and the grant of *Charter* remedies as questions of law, instead of questions of fact, for appellate jurisdictional

62. The French text of s. 24(2) reads «leur utilisation». The appropriate English equivalent would seem to be "the admission of it into evidence" rather than "the admission of it in the proceedings". The use of the expression "the proceedings" suggests not merely a focus on trial values but on values in the particular trial actually involved, thus militating even more strongly against a pre-trial hearing to exclude the evidence.

63. At seminars organized by the Legal Education Society of Alberta and given in Edmonton and Calgary on September 30 and October 1, 1983, respectively. Mr. Justice McDonald participated in these seminars on short notice and did not prepare a written paper. I attended both seminars as a panelist, and the statement herein of the factors which I attribute to Mr. Justice McDonald is taken from my own notes.

purposes. This is particularly important, given that the right of the Crown to appeal is confined to questions of law.⁶⁴ As well, it remains to be seen how far appellate courts will develop theories of waiver, or invoke s. 613(1)(b)(iii) of the *Criminal Code*, in cases where *Charter* rights are asserted for the first time at the appellate level.

V. The Role of the Trial Judge

Two questions arise. First, given the remedial flexibility conferred by s. 24(1) and the apparent relevance of circumstances revealed at trial to the selection of the appropriate remedy, how far is the judge obliged to settle the question of remedy at the time that the application is made? If the judge is obliged to deal with the matter at once, the timing of the application becomes even more crucial. For example, consider a situation where there has been delay and the accused has been in custody. If the accused moves for a stay of proceedings for violation of s. 11(b) at an early stage, can the judge make the necessary findings relating to the violation and then postpone the question of remedy until after the verdict? If the accused is found not guilty, no remedy would be appropriate within the criminal trial context, whereas if the accused is found guilty the appropriate remedy could well be a non-custodial or an unusually short custodial sentence. If the judge cannot postpone the question of remedy, then there may be some disadvantage to the accused in early application, since a remedy related to sentence may be foreclosed. If the judge can postpone the question, then there may still be little point in an early application. A possible solution is to allow multiple or successive applications for remedies, based on the same violation. This might encourage counsel to bring an application at an early stage in the proceedings, in the hope of getting a stringent remedy which would terminate the matter *de jure* or *de facto*, without precluding the possibility of less stringent relief at a later stage.

The second question concerns the power or duty of the trial judge to act *ex proprio motu* in finding a violation of the *Charter* or in granting a remedy. There have been some suggestions that the trial judge does have such a rôle.⁶⁵ Where the problem relates to the validity of legislation, however, it is submitted that the trial judge should stay out of the matter, with the possible exception of inviting counsel to consider the question⁶⁶ and offering an adjournment so that constitutional notice can be given if necessary. To do anything more would raise the problems associated with purely *inter partes* constitutional adjudication, and the validity and effect of constitutional notice requirements. Furthermore, the whole key to the

64. See *R. v. Cohen*, *supra*, n. 60, where this issue is addressed in the context of *Code* s. 605(1)(a).

65. *The Queen in Right of N.B. v. Fisherman's Wharf Ltd.* (1982), 135 D.L.R. (3d) 307 (N.B.Q.B.), where the trial judge took a *Charter* argument and incorporated it into his reasons for judgment notwithstanding that counsel had not raised it and, *semble*, were not even given an opportunity to make submissions on it. See also *R. v. MacDonald* (1982), 16 M.V.R. 101 (Ont. Prov. Ct.), *per* Charles Prov. Ct. J.

66. Where either party is acting *pro se* or is represented by an agent, particularly one with no legal training, the problems are even more acute since either the judge must then himself formulate the constitutional argument or ensure legal representation. In the present financial climate, no legal aid scheme is likely to be unduly receptive to an increased burden of constitutional litigation in cases that do not otherwise meet its criteria. The constitutional dimensions of a 'right to counsel' in its positive sense are scarcely yet explored.

Charter is that, by virtue of s. 1, none of its guarantees are absolute. It is one thing to say that the burden is on the Crown, under s. 1, to justify reasonable limits. It is another thing altogether to say that the judge can act without the Crown even having an opportunity to justify those limits. Accordingly, both principle and logistics suggest judicial caution in this area.

Where the question is the existence of a violation of the *Charter* on the facts of the case, and the granting of an appropriate remedy, the matter may be more difficult. Nothing in s. 24(1) appears to preclude the judge from making a finding that the *Charter* has been violated, in the absence of an application. The requirement of an application in s. 24(1) is related to the granting of a remedy. On the other hand, in most cases, there seems to be little point in the judge making such a finding gratuitously. Nevertheless, where the factual material to found the violation is already before the court such a course may not be too objectionable, unless it should prejudice the Crown in making a case for the existence of a reasonable limit under s. 1. It is submitted that the question is entirely different if the judge proposes to call or examine witnesses, relevant to these issues. Once again, where counsel are involved the prudent judge is unlikely to want to go beyond making suggestions or inviting counsel to consider the matter. Where the accused is unrepresented, there are further problems. The offer of an adjournment to secure legal representation is one possible solution. In a very clear case, perhaps one involving admitted flagrant impropriety in the conduct of a search, the judge may even go to the lengths of formulating an application for exclusion of evidence and inviting the accused to adopt it. But if the accused declines to do so, even in the face of this judicial pressure, surely the judge can go no further. By this stage, of course, the Crown may well have got the message and may itself withdraw the impugned evidence or otherwise assist in disposing of the matter!

Underlying all of this is the question of the waiver of *Charter* rights. After all, the *Charter* is designed to guarantee these rights, generally speaking, to specified classes of person. It does not follow that these rights are absolute, subject always to s. 1, in the sense that the state must demand that they be invoked and enforced. Where an accused is aware, or is made aware, that he may be the victim of a violation of his rights, surely it is up to him to decide whether or not to pursue the matter and to select the method of such pursuit. Provincial court judges in particular should not play the rôle of common barrators; counsel can usually be relied on to do an adequate job in this regard.

VI. Court of Competent Jurisdiction

A. General

“Competence” has three possible dimensions: the subject-matter, the parties and the available remedies.⁶⁷ Nevertheless, the remedial dimension is necessarily distinct from the other two, even if the remedy granted must be within the pre-*Charter* competence of the court.⁶⁸ This is so because while both subject-matter and parties are defined quantities at the time of the application,⁶⁹ the remedy is not. There is no requirement in s. 24(1) that the applicant specify any particular remedy, and nothing to bind the court to that remedy if so specified.⁷⁰ That counsel should have a remedy in mind, and be prepared to make submissions on alternatives, goes without saying; but that is a matter of advocacy, not of jurisdiction. The difficulty arises where the application is to a court of limited remedial competence and there is no possible adequate remedy which that court can grant.⁷¹ Should the court then decline jurisdiction, or, indeed, hold that it has no jurisdiction?⁷² Again, what of the situation where application is made, specifying a particular remedy, to a court which has no competence in respect of that particular remedy but may well be competent in respect of other adequate remedies?⁷³ Should such a court decline jurisdiction if there is another court that could grant the remedy sought?⁷⁴ What if there is no other such court?⁷⁵

These reflections lead me to the conclusion that remedial problems should not normally be viewed as factors concerning jurisdiction over the application itself. Such problems may result in an application being dismissed for want of any available remedy. A principled doctrine for declining to exercise jurisdiction, should be developed, similar to the *forum non conveniens* doctrine in the conflict of laws, particularly where the application is remedy-specific. There are already signs of this happening with respect to the relationship between the superior courts and the provincial

67. See McLellan and Elman, *supra*, n. 13, at 217.

68. There is no agreement on this point among the commentators. Professor Gibson, *supra*, n. 30 at 502, and Professor Hogg, *Canada Act 1982 Annotated*, (1982) at 65 suggest that jurisdiction over subject-matter and parties may found an extended remedial competence. *cf.* Ewaschuk, *supra*, n. 13 at 69-71.

69. The relationship between ‘subject matter’ and ‘remedy’ can be difficult, in the sense that the subject matter may dictate the remedy and therefore the remedy may come to determine jurisdiction in this oblique fashion. See *Re Koumoudouros and Municipality of Metropolitan Toronto*, *supra*, n. 11.

70. On the contrary, s. 24(1) specifically leaves the selection of remedy to the court.

71. In saying this, I assume that even if the views of Professors Gibson and Hogg, *supra*, n. 68 commend themselves on the ambit of remedial competence, the result will be an extension of remedial competence not an abolition of remedial incompetence at least in the case of inferior courts.

72. Perhaps the safest course is to accept jurisdiction but dismiss the application?

73. Much may depend on how formal the application is required to be. See the discussion of “Mode of Application”, *supra*. Even if the application is in formal originating form, the modern trend at least in the superior courts is to allow an appropriate amendment or simply treat an inappropriate application as if it were an appropriate one. Such a tendency is observable in a province like Alberta which as yet lacks an integrated form of application for judicial review.

74. Problems of territoriality may give rise to such a situation, as for example where the remedy sought affects land in another province, but injunctive relief against a person within the jurisdiction may suffice.

75. Could the *Charter* serve as a catalyst for the development of a Federal Court diversity jurisdiction akin to that exercised by the federal court system in the United States?

courts in the context of judicial review in criminal matters.⁷⁶ It is important that any court which has jurisdiction over the subject-matter and the parties be also cognisant of its remedial limitations and aware of the implications for administration of justice of any decision to accept or decline jurisdiction.

The implications for the administration of justice are significant. They arise in the context of judicial review in criminal matters. Superior courts are recognizing a need not to disrupt the flow of a criminal trial unduly. A similar problem arises at a more strictly administrative level in the provincial courts. The urban docket court has all the jurisdiction of the provincial court in criminal matters, but is not necessarily designed to handle applications which might take up a significant amount of time and require the calling of evidence. One does not have to appreciate the rigidity of such courts in order to understand the need for a modified *forum non conveniens* doctrine operating at the purely administrative level within the framework of a particular court.

B. Jurisdiction over Subject-Matter

Generally speaking, this is likely to be a problem in statutory courts, lacking any traditional ancillary or inherent jurisdiction,⁷⁷ rather than in the 'omnicompetent' superior courts of the provinces. However, even these 'omnicompetent' courts are sometimes statutorily fettered, particularly in the area of judicial review, by jurisdictional arrangements within the court structure of a province,⁷⁸ by privative clauses,⁷⁹ and by the Federal Court of Canada. As the *Gittens*⁸⁰ case illustrates, the exclusive jurisdiction of the Federal Court can cause major problems, with no obvious solution in sight at this time.

C. Jurisdiction over parties

It is a reasonable assumption that a party is a person who is properly impleaded *dehors* the application under the *Charter*. This question has not been litigated. Nevertheless, interesting problems arise. For example, is a witness a party? There has been litigation dealing with the situation where the witness wished to make the application in reference to an alleged

76. *E.g.*: *Re Baptiste and the Queen* (1982), 65 C.C.C. (2d) 510 (B.C.C.A.); *Re Kendall and the Queen* (1982), 2 C.C.C. (3d) 224 (Alta. C.A.). Indeed, this is inherent in the increasing emphasis upon the discretionary nature of even those prerogative remedies that are jurisdictionally appropriate.

77. As for example a Court of Appeal: *R. v. Lyons (No. 2)* (1982), 70 C.C.C. (2d) 1, (B.C.C.A., Seaton J.A.); *R. v. Cameron* (1982), 3 C.C.C. (3d) 496 (Alta. C.A.).

78. As, for example, in Ontario in the relationship between the High Court and the Divisional Court. See *Re Koumoudouros and Municipality of Metropolitan Toronto*, *supra*, n. 11.

79. There is nothing in the *Charter* that renders such clauses inherently suspect. See, for example, *Re Terzian et al. and W.C.B.* (1983), 148 D.L.R. (3d) 380 (Ont. Div. Ct.), where it was held that the right to bring a civil suit is not embraced in the right to 'security of the person' in s. 7 of the *Charter*. On the other hand privative clauses forbidding recourse to *habeas corpus* may still now be *ultra vires* by reason of s. 10(c) of the *Charter*. See *Re Jack and the Queen* (1982), 1 C.C.C. (3d) 193 (Nfld. S.C.); *Re Cadeddu and the Queen* (1982), 4 C.C.C. (3d) 97 (Ont. H.C.), appeal abated (1983), 4 C.C.C. (3d) 112 (Ont. C.A.).

80. See *Re Gittens*, *supra*, n. 23 and *Re Gittens and the Queen*, unreported, Ont. H.C., 17 April 1982, where Eberle J. of the Ontario High Court held that that Court was not competent to quash a deportation order or stay its execution, but was competent to deal with *habeas corpus* in such a case. In the Federal Court, Mahoney J. held that that Court was competent to quash the order or stay its execution but was not competent to deal with *habeas corpus*.

violation of the *Charter* that affects him *qua* witness.⁸¹ But what of the situation where it is sought, on the application of the accused, to grant a remedy against that witness, but not *qua* witness? It is submitted that in such a case the witness is not a party and therefore the court has no jurisdiction over him. This is quite independent of any question of purely remedial competence.

D. Judicial review and prerogative applications

This vexed aspect of the relationship between provincial courts and the superior courts has already been intimated.⁸² As inferior courts, there is no doubt that the provincial courts are amenable to judicial review.⁸³ Two questions arise. First, what are the jurisdictional limits on such review? Second, what are the discretionary limits? As to jurisdictional limits, the trial judge is not amenable to judicial review for a ruling made on a *Charter* application⁸⁴ during the course of the trial, whether the ruling was right or wrong, if that ruling was made within his jurisdiction.⁸⁵ If the judge has ruled that he has no jurisdiction to entertain the application or to grant a particular remedy, then that ruling is itself a jurisdictional question which is amenable to judicial review.⁸⁶ As to the discretionary limits, review may be refused if an appeal lies from the ruling in question.⁸⁷ More importantly, there is a general discretion to refuse relief if the application is inappropriately timed.⁸⁸ This discretion is particularly important given the danger of fragmenting the trial.

Different considerations may perhaps apply where there is a constitutional issue as to the validity of the enactment under which the accused is charged, and where this issue is raised before the course of evidence has begun.⁸⁹ Furthermore, where a successful application would necessarily terminate the trial, judicial review may be appropriate.⁹⁰ So too,

81. The cases all hold or imply that a superior court has jurisdiction to entertain an originating application in such a case, but that this is concurrent with the jurisdiction of the trial judge to whom the application should ordinarily be made in the first place. See: *Re Amorelli and the Queen* (1983), 9 W.C.B. 319 (Que. S.C.); *Re Chase and the Queen* (1982), 142 D.L.R. (3d) 507 (B.C.S.C.); *Re Crooks and the Queen*, *supra*, n. 25.

82. Text, *supra*, at n. 76. See also *supra*, n. 6.

83. While different considerations might apply to the pre-trial role epitomized in the preliminary hearing and in the bail show-cause hearing, it is submitted that judicial review, as opposed to appellate review, of trial rulings is no longer appropriate or necessary and should be abolished. The historical antecedents of this review lie in an untrained magistracy. The almost universal professionalisation of the provincial court or its equivalent in Canadian jurisdictions, coupled with its position as the major criminal trial court with an ever-increasing jurisdiction, have together destroyed this historical foundation and rendered the perpetuation of judicial review demeaning and unnecessarily disruptive. This is not to say that where Justices of the Peace continue to do trial work, there may not be a case for persisting with the present position. The text here is confined to the trial rôle. The pre-trial rôle will be examined *infra*; (see text at n. 100).

84. There is probably no magic in the fact that a *Charter* application is involved, unless we recognize a special 'constitutional issue' exception to the normal barriers to judicial review. See *Re Rutherford and the Queen* (1981), 63 C.C.C. (2d) 97 (B.C.S.C.).

85. *Re Anson and the Queen* (1982), 1 C.C.C. (3d) 279 (B.C.S.C.); *aff'd*, but on discretionary rather than jurisdictional grounds (1983), 4 C.C.C. (3d) 119 (B.C.C.A.).

86. *Re Bruneau and the Queen* (1982), 69 C.C.C. (2d) 200 (B.C.S.C.).

87. *Re Anson*, *supra*, n. 85; *Re Regina and Holmes* (1982), 2 C.C.C. (3d) 573 (Ont. H.C.). This might almost be viewed as a jurisdictional limit in the case of *mandamus*.

88. *Re Kendall*, *supra*, n. 76; *R. v. Cameron*, *supra*, n. 77; *Re Potma and the Queen* (1983), 2 C.C.C. (3d) 383 at 394 (Ont. C.A.); *Re Anson*, *supra*, n. 85.

89. *Re Anson*, *supra*, n. 85, in the Court of Appeal, at 129.

90. *R. v. Burns* (1982), 144 D.L.R. (3d) 132 (Ont. H.C.); *Re Primeau and the Queen* (1982), 1 C.C.C. (3d) 207 (Sask. Q.B.). But *c.f.* *Re Krakowski and the Queen* (1983), 146 D.L.R. (3d) 760 (Ont. C.A.). All these cases involved applications for stays or prohibition based on s. 11(b) of the *Charter*.

where a self-contained issue is raised, which goes to the fundamental fairness of any possible trial, pretrial review at least, may be appropriate.⁹¹ However, it seems clear that there is a pronounced preference for putting a matter first before the trial judge. The matter could then be subject to review rather than be brought on for the first time as a prerogative application.⁹²

Finally, it may be noted once again that *habeas corpus* may not be subject to any of the restraints mentioned above. The courts have invoked s. 10(c) of the *Charter* to justify ignoring the privative clause in s. 459.1 of the *Criminal Code*, relating to the review of bail determinations.⁹³ There is a tantalizing implication in the decision of the Alberta Court of Appeal in *R. v. Cameron* that *habeas corpus* might be available to review an adverse trial ruling in cases involving s. 11(b) of the *Charter*.⁹⁴ This suggestion is particularly intriguing, since it is not clearly tied in to the *Charter* guarantee of *habeas corpus* found in s. 10(c). Surely we are not embarking on the development of a general doctrine of review predicated upon a new *Charter* - guaranteed right of *habeas corpus*, at least where the applicant is in custody?

E. The Preliminary Inquiry

The generally accepted view is that the judge presiding at a preliminary inquiry has the jurisdiction to grant the remedy of exclusion of evidence (and probably other remedies such as the stay of proceedings, or a refusal to commit for trial) although the matter is not entirely free from doubt.⁹⁵ One problem here is that, in some provinces, it is by no means clear that the provincial courts have any jurisdiction to grant a stay for abuse of process, even assuming the existence of this doctrine. This question has become confused with the jurisdiction to grant a stay under s. 24(1) of the *Charter*.⁹⁶ It is submitted, however, that there are much more fundamental concerns underlying the question of remedial capability on a preliminary inquiry than have hitherto been clearly addressed.

No appeal lies from anything done at a preliminary inquiry. Traditionally, nothing is finally settled at a preliminary inquiry. Thus, it is now trite that where evidence is excluded at the preliminary inquiry, the question of admissibility is still entirely open at the trial itself. Even a refusal to commit for trial is, in effect, reviewable by the direct indictment pro-

91. Dictum in *Re Potma*, *supra*, n. 88.

92. See the 'witness' cases, see *supra*, n. 81. See also *Re Krakowski*, *supra*, n. 90; *Re Chabun* (1982), 70 C.C.C. (2d) 380 (N.W.T.S.C.).

93. See *Jack and the Queen* *supra*, n. 79. I am aware of several unreported applications that have been entertained by the Alberta Court of Queen's Bench in such circumstances.

94. *Supra*, n. 77, at 697.

95. See the discussion in McLellan and Elman, *supra*, n. 13 at 239-241.

96. This is unquestionably a very live problem in Alberta, as I found out at a recent seminar I participated in for the Provincial Court Bench. Clearly a number of judges have real doubts about their right to enter a stay, although this is not being reflected in the law reports so far.

cedure, which has itself been upheld against *Charter* attack.⁹⁷ It is true that aspects of the preliminary inquiry, including a decision to commit, are reviewable by way of prerogative applications, but the fact still remains that such review is very limited in scope, notwithstanding the absence of any appeal.⁹⁸

The question that arises is: should we now seek to confer a finality on *Charter* rulings at a preliminary inquiry, equivalent to that enjoyed by similar rulings at a trial? This would not preclude some form of appellate review, of course, but it would mean that the rulings would no longer be susceptible to collateral attack by re-opening the issue at the trial, or by invocation of the direct indictment procedure. If we do not take this step, is there any real point in counsel making *Charter* applications at the preliminary inquiry? True, counsel can always hope that the Crown will be sufficiently uninterested or embarrassed that it will not pursue the matter, but that is hardly a secure environment for the protection of constitutional rights. We could, of course, limit the granting of *Charter* relief at a preliminary inquiry to purely interim or interlocutory relief, such as releasing an accused from custody, but this is hardly satisfactory; or we could explicitly categorize any relief granted as purely temporary in nature. But the nagging question still remains: why is it that we are prepared to accord a certain authority to a provincial court judge when sitting at trial and yet deny that same authority to that same judge when sitting at a preliminary inquiry?⁹⁹

The circumstances dealt with by de Weerd J. in *R. v. Dennis, Kubin and Frank*¹⁰⁰ may focus the issue. It will be recalled that in that case de Weerd J. quashed an indictment as the appropriate remedy for violations of ss. 11(a) and 11(b) of the *Charter*. In so doing, he commented that, in his view, the territorial judge presiding at the preliminary inquiry should have acceded to the application made there to quash the information. Assume now that had accepted the defence counsel's submission that a stay was the proper remedy, and would have been so at the time of the preliminary inquiry. A stay entered by his Lordship would be dispositive unless overturned on appeal. Had the territorial judge entered such a stay, it would have settled nothing. Possibly, the accused could have applied to the Superior Court for a stay or a prohibition at the time of the preliminary inquiry. But then we are confronted with the potential for that very spate of prerogative applications that the appellate courts seem so anxious to avoid.

97. See *Re Stolar and the Queen* (1983), 9 W.C.B. 289 (Man. C.A.); *Re Taubler and the Queen* (1983), 9 W.C.B. 474 (Ont. H.C.). However, where the direct indictment procedure operated unfairly in respect of one of several co-accused by denying to him the discovery that the other co-accused had received through an abortive preliminary, a stay was granted to that one co-accused at least until such time as the Crown made adequate discovery to him: *R. v. Rosamond* (1983), 149 D.L.R. (3d) 716, (Sask. Q.B.).

98. See *Forsythe v. The Queen* (1980), 53 C.C.C. (2d) 225 (S.C.C.), suggesting that the absence of any appeal may relax the normal restraints on prerogative relief; but *c.f. A-G Quebec v. Cohen* (1979), 46 C.C.C. (2d) 473 (S.C.C.), esp. at 476-7 (per Pigeon J.).

99. Thus the considerations set out *supra*, n. 83, seem equally applicable at the pre-trial as at the trial stage to which they are there confined.

100. *Supra*, n. 39.

If the current movement to restrict the availability of the preliminary inquiries and to permit direct committals is successful, some of these problems may vanish. They will no doubt be replaced by equally thorny questions arising at bail show-cause hearings, or in the context of judicially supervised discoveries or pre-trial conferences. At the end of the day, we must decide whether or not, on balance, we trust our provincial court judges to do a reasonable job. If we do, we must accord them most of the authority¹⁰¹ of a superior court judge, leaving it to the courts of appeal to correct their mistakes, and not to the Crown or to a superior court judge.¹⁰²

VII. The Burden of Proof

In the very early days of the *Charter*, this topic was much agitated. I had previously taken the position¹⁰³ that, in criminal matters, the obligation of the accused, asserting his entitlement to a remedy under s. 24 of the *Charter*, was only to adduce evidence sufficient to raise the issue of the violation of the *Charter* upon which he relied. It would then fall to the Crown to negative that violation beyond a reasonable doubt. This effectively integrated the rights and freedoms in the *Charter* with general defences. This approach found little favour, and I am not aware of its having been even discussed, let alone adopted, in any *Charter* case. Until the Supreme Court of Canada has ruled, it must be treated as settled law that the applicant for a *Charter* remedy must establish his title thereto on a balance of probabilities.¹⁰⁴

The burden of proof under s. 1 of the *Charter* has created little difficulty. The burden is on the proponent of the limitation. The quantum of proof in such cases is a little more controversial. It is submitted that the proper quantum of proof is the balance of probabilities, once it is accepted that that is itself a very elastic formulation and is amenable in application to the gravity of each situation.¹⁰⁵

VIII. The Course of Evidence

My concern here is with the course of evidence in applications for a remedy under s. 24 of the *Charter*, and not with the impact of the substantive guarantees of the *Charter* on the law of evidence. Much will no

101. Authority, but not status. See *supra*, n. 6. And nothing here is designed to impact on the right to preside at jury trials.

102. The logic of this argument is that not only must prerogative review be abolished, as has already been suggested *supra*, n. 76, but that appeals in summary conviction matters must go direct to the court of appeal. Of course, the long-standing English practice, adopted now to some extent in Alberta, of having superior court judges sit regularly on the court of appeal in criminal matters could be adopted to reduce the logistical problems that this might cause. *A fortiori*, everything said here about the position of the provincial court applies where appropriate to county and district court judges in those provinces which still retain those courts.

103. In a number of unpublished papers and seminar presentations.

104. There is a certain irony in this in that some courts of appeal appear to be taking a very dim view of reverse onus provisions which require the accused to disprove an ingredient of liability on a balance of probabilities. See *R. v. Carroll* (1983), 4 C.C.C. (3d) 131 (P.E.I.C.A.); *R. v. Stanger*, (1983) 10 W.C.B. 237 (Alta. C.A.). But the irony will only become acute if this movement extends to invalidate affirmative defence provisions that impose a similar obligation on the accused, such as *Code* s. 730(2). Of course, such provisions can be invalidated under the 'rational connection' test derived from *R. v. Shelley* (1981), 59 C.C.C. (2d) 292 (S.C.C.) and given constitutional status in *R. v. Oakes* (1983), 2 C.C.C. (3d) 339 (Ont. C.A.) and *R. v. Stanger*, *supra*, without any irony at all. And see *R. v. Holmes* (1983), 4 C.C.C. (3d) 440 (Ont. C.A.).

105. *Hanes v. Wawanese Mutual Insurance Co.*, [1963] S.C.R. 154.

doubt depend on the precise form in which the application is made. For example, originating applications in the superior courts will attract a course of evidence appropriate to the form of the application. In prerogative applications, this would normally be affidavit evidence.¹⁰⁶ No particular difficulties would seem to arise in this type of application, albeit the parties appear sometimes to forget that the facts must appear as admissible evidence, and not merely as a submission.¹⁰⁷ Greater difficulties can arise where the application is made at and during the course of an extant trial. Some of the trial management issues have already been addressed in relation to the mode and timing of the application.¹⁰⁸ There are more fundamental questions, however.

The crucial questions here relate to the extent to which evidence relating to an alleged *Charter* violation should or can be heard *seriatim* on the trial proper; the extent to which such evidence should or can be collected together in one or more *voir dire*; and the problem of which party is to be treated as the proponent in such *voir dire* as may be held. A brief hypothetical will focus these issues. The police make a warrantless search of a café for drugs. In the process, drugs are found in D's clothing. The police arrest D on a charge of possession for the purposes of trafficking. D is advised of this charge, but is not advised of his right to retain counsel; he is, however, advised of his right to remain silent. D makes a statement that is reduced to writing by the investigating officer. D makes an election for trial in provincial court. At the trial, the Crown calls the investigating police officers, *inter alia*, to lay the foundation for admissibility into evidence of the drugs seized and of the statement. The defence wishes to raise s. 8 of the *Charter* as a ground for excluding the drugs. This argument will be based on the circumstances of the particular search and seizure, and will not involve any attack on the fundamental validity of the warrantless search power itself. The defence also wishes to be able to contest the admissibility of the statement as being involuntary; as being obtained in violation of s. 10(b) of the *Charter*; and as being obtained as a result of a violation of s. 8 of the *Charter*. D is prepared, if necessary, to testify in relation to the admissibility of the drugs and the statement, but does not wish to testify in his own defence at the trial proper. The defence would prefer to be able to cross-examine the police officers involved rather than be forced to examine them in chief only. How should counsel and the judge seek to organize these matters?

106. See text at "Mode of Application," *supra*.

107. See, for example, *Soenen v. Thomas*, Alberta Q.B. unreported, August 23 1983. Applicant sought relief in respect of the manner in which visual rectal inspection of detention centre inmates was conducted, *inter alia*. D.C. McDonald J. said, at 24 of the typed reasons:

"The applicant's allegations as to the existence and nature of this kind of search has [*sic*] not verified by his affidavit.... Counsel for the respondent objected to the applicant being permitted to assert facts not verified by affidavit. Although I allowed the applicant, during his oral submission, to state the facts I have related, I consider the objection to be well-founded. Therefore I do not accept as facts the circumstances related by the applicant...."

The applicant appeared *pro se* in this case, but the point remains.

108. *Supra*, under these respective headings in the text. Nor should one forget the reasonable convenience of witnesses in ensuring that the time frame for testimony is not unduly fragmented.

From the defence point of view, the most desirable course may well be that one omnibus *voir dire* be held at which the Crown will be treated as the proponent and will call the police officers as its witnesses. This will ensure the right of the defence to cross-examine these officers not merely on the identification of the drugs and the voluntariness of the statement, but also on all facts relevant to the various *Charter* matters. It will also mean that D is only required to testify once and that his testimony is not admissible against him as part of the Crown's case at the trial proper.

A completely different course might appeal to a rather strict Crown counsel of analytical bent. Assuming for the moment that everything is to be decided in *voir dire*, the Crown might argue that there should be several separate *voir dire*. The first would be at the request of the Crown to establish the admissibility of the drugs. Cross-examination of the police witnesses would be limited to the identification of the drugs tendered as the ones seized. Presumably, D would not testify on these issues. Assuming that the drugs were properly proved, a further *voir dire* might then ensue to deal with s. 8 of the *Charter*, in relation to the seizure. Here, the Crown might argue, the proponent of the issue is D. Accordingly, the defence must call its witnesses first. This puts the defence in the position of having to call D, probably as its first witness, and of having to decide whether or not to call the police officers as its own witnesses. Once this *voir dire* is over, the issues relating to the drugs are clear, and the judge should rule. In so doing, the judge will be unaware of the conduct of the police subsequent to the seizure, since that is irrelevant to the application of s. 8 to the seizure. Even if the judge excludes the drugs, the case is not necessarily over because of the contents of the statement. Next, then, there should be a third *voir dire*, with the Crown as proponent, to determine the voluntariness of the statement in accordance with the traditional tests. This *voir dire* may be expanded to encompass all the *Charter* issues under s. 10(b) and s. 8, on the ground that a statement obtained in violation of the *Charter* cannot be said to be voluntary. However, there is a strange impact on the burden of proof. On the one hand, the Crown is obliged to negate beyond a reasonable doubt any taint arising from the admitted failure to advise D of his right to counsel, in order to establish voluntariness. On the other hand, D is required to establish that taint, in the context of s. 24(1) or (2) of the *Charter*, in order to secure relief. So, it may be necessary to hold two separate *voir dire*, if the judge is satisfied on the voluntariness issue.

It is no doubt possible to pursue this technical approach further, but I will forbear from doing so. If we adopt the omnibus *voir dire*, either we must assimilate our adjectival law in *Charter* matters and in related non-*Charter* matters, or we must expect the judge to keep a number of intertwined issues clearly separate, in circumstances which would render this almost impossible. The vices of the multiple *voir dire* are readily apparent: the total picture is hopelessly fragmented, and witnesses are given little

consideration. If this multiple approach is adopted, there is also a possibility that the defence will wish to raise its *Charter* points at different times in the trial.¹⁰⁹

What should the judge do? Must the answer reflect the traditional identity of procedure in jury and non-jury trials? If so, trial management perspectives are even more likely to move us towards the omnibus *voir dire*, with the accompanying essential adjustments in theory. A rather random examination of a number of provincial court trials, none involving quite such a complex of issues or counsel of unduly persistent bloody-mindedness, suggest that the life of the law, even of new-found constitutional law, is indeed experience not logic. The results are sensible. Common sense is the principle. This is the common law tradition. Perhaps it is the tradition of any civilized legal system. Perhaps that is the way it should be.

109. Is the creation of total confusion a legitimate exercise of the tactical flexibility that defence counsel may enjoy in *Charter* applications?

