Legislation

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JUDICATURE ACT, R.S.O., 1980, c. 223, s. 35—NOTICE OF CONSTITUTIONAL ISSUE—Section 35 of the Judicature Act requires that a notice be served in any proceedings in the courts of Ontario in which it is sought to challenge the constitutional validity of any act of the Parliament of Canada or of the Legislature of Ontario. Section 35 reads:

> 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.
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> (2) The notice shall state what Act or part of an Act is in question and the day on which the question is to be argued, and shall give such other particulars as are necessary to show the constitutional point proposed to be argued.
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> (3) Subject to the rules, the notice shall be served six days before the day named for the argument.
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> (4) The Attorney General for Canada and the Attorney General for Ontario are entitled as of right to be heard either in person or by counsel notwithstanding that the Crown is not a party to the action or proceeding.
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> (5) Where in an action or proceeding to which this section applies the Attorney General for Canada or the Attorney General for Ontario appears in person or by counsel, each shall be deemed to be a party to the action or proceeding for the purpose of an appeal from any adjudication as to the constitutional validity of any Act or enactment in question in the action or proceeding and each has the same rights with respect to an appeal as any other party to the action or proceeding.

The purpose of this note is to examine and to comment upon the following questions:

(1) Is section 35 of the Judicature Act *ultra vires* the Legislature?

(2) Is section 35 valid but inapplicable when a challenge to legislation is based on the Canadian Charter of Rights and Freedoms?

(3) Is section 35 valid but inapplicable to proceedings in the criminal courts?

(4) Is section 35 valid but inapplicable to any proceedings in which the validity of federal statutes is challenged?

The Legislature adopted the predecessor to section 35 in 1893 following the Privy Council decision in *Russell* v. *The Queen*,[1] a case described by Duff J. in *Re Board of Commerce Act*[2] as "in great part an unargued

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[1] (1882), 7 App. Cas. 829 (P.C.).

[2] (1920), 60 S.C.R. 456, at p. 507.

case''. In that case, the constitutional validity of the Canada Temperance Act, 1878, was passed upon without argument from either the federal Attorney General or any provincial Attorneys General. Most of the other provinces, including Quebec, New Brunswick, British Columbia, Manitoba, Saskatchewan and Alberta, have since enacted similar notice requirements.

It is not clear from the wording of section 35 of the Ontario Act that notice is required where the issue raised is the *applicability* of legislation rather than a straight-forward denial of *validity*. *Sandy* v. *Sandy*,[3] for example, determined that the Family Law Reform Act[4] has no application to land situate on an Indian reserve, although its language is general enough to encompass such land. The Act remains intact, but its reach has been circumscribed. Put another way, this statute is unconstitutional to the extent that it purports to apply to land situate on an Indian reserve. The end result is the same—the provincial statute did not govern in the circumstances of the case.

The Rules of the Supreme Court of Canada were amended in 1976 to ensure that all Attorneys General in Canada receive notice, in proceedings before that Court, whether the issue is one of validity or of applicability of legislation. This feature has been carried forward in Rule 32 of the new Rules of the Supreme Court of Canada enacted in January, 1983.[5] Section 116 of the Draft Courts of Justice Act,[6] which is intended to consolidate and replace several Ontario statutes including the Judicature Act, makes it explicit that a notice will be required whenever the constitutional validity or constitutional applicability of a statute is called into question.

Prior to the Canadian Charter of Rights and Freedoms[7] coming into effect, most counsel seemed content to comply with the notice requirement in Ontario, both in civil and criminal cases, and in relation to both federal and provincial legislation. It is fair to suggest that the absence of controversy over the propriety of the section 35 notice requirement until very

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[3] (1979), 107 D.L.R. (3d) 659, 27 O.R. (2d) (Ont. C.A.).

[4] S.O., 1978, c. 2.

[5] Rule 32 provides, inter alia, that any party to an appeal who intends to question the constitutional validity or applicability of a federal or provincial statute or regulation or to claim infringement or denial of his rights under the Charter of Rights and Freedoms may apply to the Chief Justice or a Judge of the Court to state the question, whereupon notice of such question is given to the Attorney General of Canada and to the Attorneys General of all of the Provinces.

[6] The proposed section 116(1) reads:

> Where the constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature or of a regulation or by-law made thereunder is in question, the Act, regulation or by-law shall not be adjudged to be invalid or inapplicable unless notice has been served on the Attorney General of Canada and the Attorney General of Ontario in accordance with subsection (2).

[7] Constitution Act, 1982.

recently results from the following practical considerations. The courts have traditionally welcomed the participation of Attorneys General in such litigation and they have, on occasion, expressed their concern when Attorneys General have failed to intervene and assist with submissions on constitutional issues.[8] The section 35 notice requirements are not onerous; they are minimally intrusive and for all practical purposes can be accommodated without interfering with the speedy processing of litigation. Finally, there is an appreciation that these notice requirements facilitate rather than hamper the functioning of a federal system. As stated by Strayer, "they ensure that the appropriate governments have an opportunity to be represented so that the constitutional issues may be thoroughly canvassed by those having a continuing concern and interest with respect to the validity of legislation".[9] The fundamental objective of such notice requirements is to help make the courts "effective agents in the operation and supervision of the federal structure".[10]

The advent of the Charter and the hundreds of cases since April 17, 1982 in which the validity of legislation has been challenged have lent urgency to the hitherto vague and peripheral concerns expressed from time to time about the propriety of any pre-conditions to the raising of constitutional issues in the courts.[11] Some recent decisions[12] contain statements which cast doubt on the propriety of such notice requirements. The time is therefore opportune to examine their constitutional validity.

Essentially two arguments, one general and one specific, have been levelled at the provincial notice requirements. The general argument is that judicial review, particularly on constitutional grounds, should not be

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[8] For example, in *Her Majesty the Queen in Right of the Province of Ontario* v. *Board of Transport Commissioners*, [1968] S.C.R. 118 at p. 129, (1967), 65 D.L.R. (2d) 425, at p. 434, the following was stated on behalf of the Court:

> ". . . , it must be said that while at the hearing of this appeal the Court had the benefit of a thorough argument from both sides on the first question, no one appeared to oppose appellant on the constitutional issue. Counsel for the Board of Transport Commissioners declined to offer argument on that point in view of the Board's practice to refrain from dealing with such issues and the Attorney-General of Canada was not represented at the hearing. It is undesirable that this Court should be obliged to rule upon constitutional issues without the benefit of argument for both sides and the hope is expressed that, in the future, *whenever the constitutional validity or application* of federal legislation is in issue, this Court will always have the benefit of argument by counsel on behalf of the Attorney-General of Canada." (Italics supplied).

[9] B.L. Strayer, Judicial Review of Legislation in Canada (1968), p. 48.

[10] *Ibid.*

[11] *Ibid.*, pp. 39-48.

[12] *Regina* v. *Stanger* (1983), 70 C.C.C. (2d) 247, at pp. 248-249 (Alt. Q.B.), rev'd on appeal (1983), 2 D.L.R. (4th) 121 (Alta. C.A.); *Re Gandam and Minister of Employment and Immigration* (1982), 140 D.L.R. (3d) 363, at p. 368 (Sask. Q.B.); *Regina* v. *Oakes* (1982), 38 O.R. (2d) 598, at pp. 600-601 (Ont. Prov. Ct.). Contra: *Re Koumoudouros and Municipality of Metropolitan Toronto* (1982), 136 D.L.R. (3d) 373, at p. 377 (Ont. H.C.).

restricted at all. Recent Supreme Court of Canada decisions such as *Attorney General of Quebec* v. *Farrah*[13] and *Crevier* v. *Attorney General of Quebec*[14] have established that section 96 of the Constitution Act, 1867 guarantees the inherent power of judicial review of superior courts and tend to reinforce the general argument. Veit J.'s dictum in *R.* v. *Stanger*,[15] although disapproved on appeal, is a good succinct statement of this point of view:

> I would go further. We are dealing here with the *Constitution Act, 1982*, and if I were to accede to your suggestion, it seems to me that I would be acceding to a suggestion that the situation exists that across Canada, from province to province, and perhaps by way of ordinance in the Territories, each province could make access to the Charter rights dependent on different circumstances, which seems to me to be against the spirit of a Canadian Constitution. Along that line, it seems to me that s. 52(1) of the *Constitution Act, 1982*, which declares that the constitution of Canada is the supreme law of Canada, does not accord well with a submission that notice must be given to invoke the supreme law of Canada. Surely, a supreme law ought to be able to be invoked without special notice.

The specific argument is that if a notice requirement can be sustained at all it can only be valid with respect to challenges to provincial statutes. With respect to federal statute law, Parliament has authority to vest jurisdiction in provincial courts which then have a duty to apply and interpret that law. With respect to criminal statutes and the Criminal Code of Canada[16] in particular, the argument is even more pointed—surely a notice requirement extending to challenges to the validity of Criminal Code sections is legislation in relation to criminal procedure under section 91(27) of the Constitution Act and for that reason not a proper concern of provincial legislation.

In recent cases it has also been suggested that a notice requirement, even if otherwise valid, is inapplicable when legislation is challenged by reference to the Charter. That suggestion is, it is submitted, based on two major fallacies, and they should be dealt with before considering the validity of the general and specific objections.

The first fallacy is that there is a distinction between the limitation on legislative authority consequent on the federal-provincial distribution of legislative powers (''real'' constitutional cases) and the limitation on legislative authority resulting from the advent of the Charter (''new-era'' constitutional cases). This fallacy appears in the decision of Estey J. in *Gandam*.[17] The applicant in that case sought judicial review of a deportation order under the Immigration Act.[18] It is not clear from the reasons

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[13] [1978] 2 S.C.R. 638, (1978), 86 D.L.R. (3d) 161.

[14] [1981] 2 S.C.R. 220, (1981), 127 D.L.R. (3d) 1.

[15] *Supra*, footnote 12, at p. 249 (C.C.C.).

[16] R.S.C., 1970, c. C-34, as am.

[17] *Supra.*, footnote 12.

[18] S.C., 1976-77, c. 52.

precisely how the Immigration Act was alleged to violate the Charter, but the court asserted that an inconsistency with the Charter does not mean that legislation is *ultra vires*. As a result, the Court refused to apply the recent Supreme Court of Canada decision in *Jabour* v. *The Law Society of British Columbia*,[19] and concluded that only the Federal Court of Canada has jurisdiction to entertain the proceedings. Estey J. explained his conclusions as follows:[20]

> The applicant on p. 3 of his written argument states:
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> > Where certain provisions in a statute are inconsistent with the principles contained within the Canadian Charter of Rights and Freedoms, *Constitution Act*, 1981, and where the application of those provisions result in the infringement of certain rights guaranteed to everyone by the Charter, then the constitutionality of that statute is in issue.
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> If this statement means, as I believe it does, that in a federal statute certain sections be "inconsistent" or I believe a better phrase is "infringe upon" the Charter, a constitutional issue arises, then it is in my opinion absolutely incorrect. *A section of a statute may be absolutely within the power of the Parliament of Canada, but infringes upon the Charter. However, such a situation does not bring into being a constitutional question dealing with the validity of statutes*. Section 52(1) of the Charter reads in part:
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> > 52(1) . . . any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
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> The question which would arise is merely as to the existence of an inconsistency between the statute and the Charter and not as to the fact whether such section or sections of the Act be *ultra vires* or *intra vires*. The Charter in such a situation provides in very plain language that a person who deems that his rights or freedoms have been infringed upon or denied "may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances".

It is submitted that the italicized statements are incorrect. Whether the defect is constitutional invalidity or constitutional inapplicability of legislation, the defect is a result of the legislative authority being circumscribed. The challenged legislation is unconstitutional because either the legislature has entered forbidden territory or it has legislated in terms which are too broad and all-encompassing.

Can there be any meaningful distinction between laws which are "of no force and effect" as contemplated in section 52(1) of the Charter because they are "inconsistent with" the Constitution, and colonial laws which were held to be "absolutely void and inoperative" because they were "repugnant to" the provisions of an act of the U.K. Parliament? Section 2 of the Colonial Laws Validity Act[21] provides that:

> 2. Any colonial law which is or shall be *repugnant to* the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under the authority of such Act of Parliament, or having in the colony the *force and effect* of such Act, shall be read subject to such Act, order, or

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[19] *Jabour* v. *Law Society of British Columbia* (1982), 137 D.L.R. (3d) 1 (S.C.C.).

[20] *Supra.*, footnote 12, at p. 368.

[21] 28 & 29 Vict., c. 63 (U.K.).

> regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely *void and inoperative*.

A law held to be of no force and effect is for all practical purposes, if not in strict theory, no longer a law; it does not further ensure its demise to declare it to be absolutely void and inoperative.

Shortly after the *Gandam* decision, Walker Prov. J. in *R.* v. *Oakes*[22] also asserted that there is a material difference between a challenge for distribution of legislative powers reasons and one for *Charter* reasons:[23]

> It must also be remembered that the *British North America Act, 1867* [now *Constitution Act, 1867*] is still in force. In my view the constitutional validity referred to in s. 35 of the *Judicature Act* refers to the legislative competence surrounding any enactment of the Parliament of Canada or the provincial Legislature. By that I mean, determination of whether or not the impunged enactment is *ultra vires* or *intra vires* the enacting Legislature. Where however, in a case such as the present the validity of the legislation is not being questioned in respect to the division of legislative powers set forward in the *British North America Act, 1867* but rather whether the enactment has been rendered inoperative or invalid by the Charter; I hold that it is not necessary to complete service of the notice contemplated by the *Judicature Act*. In my opinion it is sufficient for counsel to bring the motion before the Court pursuant to the provisions of the Charter.

Again, I would observe that the distinction made between "*ultra vires*" on the one hand, and "inoperative or invalid" on the other is not supported by any reasons.

The second fallacy concerning the relation between section 35 and the Charter is found in *R.* v. *Stanger*.[24] In *Stanger*, the validity of the reverse onus provision in section 8 of the Narcotic Control Act[25] was under attack. Veit J. relied on section 52(1) of the Constitution Act, 1982 to support her view that a notice requirement is appropriate when one seeks to invoke in court the "supreme law of Canada". The implication of this resort to section 52(1) is that the Canadian Constitution must have been less supreme before April 17, 1982. That surely is also a fallacy, and the majority of the Alberta Court of Appeal so held on appeal.[25a]

It is submitted that section 52(1) of the Constitution Act, 1982 makes explicit in the body of the Constitution what we formerly had to discern with reference to the Colonial Laws Validity Act[26] and the Statute of Westminster.[27] The Constitution has always been the supreme law of Canada and there cannot be degrees of invalidity. If the notice requirement is valid for cases premised on distribution of powers considerations, it is

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[22] *Supra.*, footnote 12.

[23] *Ibid.*, at pp. 600-601.

[24] *Supra.*, footnote 12.

[25] R.S.C., 1970, c. N-1.

[25a] (1983), 2 D.L.R. (4th) 121, at p. 146 (Alta. C.A.).

[26] *Supra.*, footnote 21.

[27] 22 Geo. 5, c. 4 (U.K.).

submitted that it is valid where the alleged overstepping of legislative authority is based on Charter considerations. An excess of legislative authority by any other name is still an excess of legislative authority.

The distribution of legislative powers under the Constitution Act circumscribes the legislative authority of Parliament and the Provincial Legislatures and so does the Canadian Charter of Rights and Freedoms. Any legislature which oversteps the bounds of its legislative authority acts *ultra vires*; this is so whether it enacts laws which are not valid for any purpose whatsoever, or merely enacts laws which are too broad in their coverage and which are not valid, therefore, for some purposes only. Constitutional invalidity and constitutional inapplicability are products of *ultra vires* action by legislatures. It is submitted that recent judicial pronouncements in Charter cases suggesting that notice requirements, such as those in section 35 of the Ontario Judicature Act, may be ignored, are in error.

Finally, it should be emphasized that section 35 of the Judicature Act does not apply in cases where there is no challenge to the constitutional validity of legislation. Thus, if the issue is one of the alleged inadmissibility of evidence under section 24(2) of the Charter, a section 35 notice is not required.

If, therefore, the notice requirement applies at all, it applies to all constitutional challenges. The issue remains of whether the objections to its validity set out above are sound. It is suggested that they are not. Section 35 is legislation in relation to the "Administration of Justice in the Province" under section 92(14) of the Constitution Act, 1867. The administration of justice in the province insofar as it concerns the operation of the provincial courts means the interpretation and application of provincial and federal law. This broad interpretation of section 92(14) was clearly understood and established from the beginning. In his speech when the Bill to enact the British North America Act, 1867, came before the House of Lords, Lord Carnarvon stated:[28]

> To the Central Parliament will also be assigned the enactment of criminal law. The administration of it indeed is vested in the local authorities. . . .

Dickson J., in his judgment in *R.* v. *Hauser*,[29] echoed the same understanding of the provinces' responsibility for the administration of justice:[30]

> Head 27 of s. 91 of the *British North America Act* empowers Parliament to make substantive laws prohibiting, with penal consequences, acts or omissions considered to be harmful to the State, or to persons or property within the State. The amplitude of the criminal law power, to which the Lord Chancellor referred in speaking of "the criminal law in its widest sense" in *Attorney General for Ontario* v. *The Hamilton Street Railway Company*, [[1903] A.C. 524 (P.C.)] is of necessity attentuated, in

[28] As quoted in J. Doutre, Constitution of Canada (1880), p. 117.

[29] [1979] 1 S.C.R. 984, (1979), 98 D.L.R. (3d) 193.

[30] *Ibid.*, at pp. 1026-1027 (S.C.R.), at pp. 226-227 (D.L.R.).

> respect of the administration of criminal justice by the exclusive authority conferred upon provincial Legislatures by s. 92(14) . . . Nor can "criminal procedure" be equated with "criminal justice" or defined in such a way as to drain of vitality the plenary power of s. 92(14): *Di Iorio and Fontaine* v. *The Warden of the Common Jail of Montreal and Burnet* [[1978] 1 S.C.R. 152] . . .

According to the well-known rules of classification and characterization of legislation for assignment under the distribution of legislative authority, the section 35 notice requirement is legislation in relation to the administration of justice. The notice requirement affects procedure in criminal matters, but it is submitted that it cannot be said to be legislation in relation to criminal procedure. The object and purpose or "pith and substance" of the requirement is to ensure that the provincial courts, superior, county and others, can be effective arbiters of our federal system.

The above reasoning applies not only to federal criminal statutes but also to other federal statutes which are invoked and applied in the provincial courts. Should Parliament enact its own notice requirement for the purpose of challenges to the constitutional validity of its statutes, that requirement would prevail over the Ontario requirement to the extent of any inconsistency. This would appear to be the current position under the doctrine of federal paramountcy. Parliament has enacted no such requirement.

There is no direct authority on this issue, and, as in the case of the *Senate Reference*[31] and the more recent *Patriation Reference*,[32] one must look for assistance in the nature of our federal constitution. My submission is that the section 35 notice requirement facilitates rather than impedes the effective operation of our federal system and of our federal institutions. This assessment is reinforced by the nature of the notice requirement which, as stated earlier, is minimally intrusive. For example, failure to give notice does not prohibit courts from entertaining the constitutional issue. The failure of notice becomes a factor only where the court would have ruled the challenged measure invalid. That six or even ten days' notice should be required "before the day on which the question is to be argued" can hardly be characterized as a significant obstacle to the expeditious processing of any case. In the division of legislative powers jargon, the section 35 notice requirement "affects" the judicial review function protected by section 96 of the Constitution Act, 1867 (or by the theory that this type of judicial review is implied by the nature of our federal constitution), but it is not legislation in relation to that matter — it is not a denial of this right of judicial review.

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[31] *Sub. nom. Re Authority of Parliament in Relation to the Upper House*, [1980] 1 S.C.R. 54, *Reference re Legislative Authority of Parliament to Alter or Replace the Senate* (1979), 101 D.L.R. (3d) 1.

[32] *Sub. nom., Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, *Reference re Amendment of the Constitution of Canada* (1981), 125 D.L.R. (3d) 1.

In summary, then, the section 35 notice requirement is highly compatible with and promotes the effective operation of our federal constitution. It is legislation in relation to the administration of justice in the province and, while it affects procedure in criminal matters, it is not legislation in relation to that matter of exclusive concern to the Parliament of Canada.[33]

JOHN CAVARZAN*

[33] To this effect see Stevenson J.A., speaking for the majority, in *Regina* v. *Stanger*, *supra*, footnote 25a, at p. 146.

* John Cavarzan, Director of the Constitutional Law Division, Ministry of the Attorney General, Toronto, Ontario.