# APPLYING THE CHARTER TO DISCRETIONARY AUTHORITY

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*The as applied approach to dealing with the Charter considers infringements of rights within the confines of the circumstances of each case. The Supreme Court decision in Slaight Communications adopts such an approach as a way to remedy and control improper use of discretionary authority. The paper begins with a detailed examination of the Slaight decision and then continues on to explore the differences between a facial review of a statute granting discretionary power and an as applied review of the discretionary decision. Problems arise when dealing with the as applied approach and the s. 1 requirement of the Charter that limitations on Charter rights be prescribed by law. The author deals with the law in this area examining such issues as the requirement of precision in laws, the connection between the law and the official impugned action and the requirement of standards for an adjudicator's authority. It is submitted that the Supreme Court's approach to limiting rights could be seen as lacking a clear underlying thesis. The problem of vagueness could result in a lack of foreseeability, but a greater concern is the effect of the vagueness on the control of discretion. The author concludes by enumerating a number of advantages that justify further development of the as applied approach.*

*Une façon d'aborder les violations des droits et libertés garantis par la Charte consiste à examiner les circonstances propres à chaque cas. Dans la décision rendue dans Slaight Communication, la Cour suprême procède ainsi dans le but de contrôler les abus du pouvoir discrétionnaire. Le présent article commence par un examen détaillé de la décision; il explore ensuite la différence entre la "facial review" d'une loi qui accorde un pouvoir discrétionnaire et la révision "as applied" de la décision discrétionnaire. Les problèmes surviennent quand on adopte l'approche qui tient compte des circonstances et le principe de l'art. 1 de la charte qui stipule que les droits et libertés ne peuvent être restreints que par une règle de droit. L'auteur traite du droit dans ce domaine et examine les questions telles que l'obligation de précision des règles de droit, le lien entre le droit et l'action officielle contestée et l'obligation de normes relatives à l'autorité de l'arbitre. Il avance que l'approche de la Cour suprême en matière de restriction des droits semblerait ne pas être étayée par une thèse sous-jacente claire. Ce problème d'imprécision pourrait provoquer des incertitudes ou, plus encore, l'effet d'un certain vague sur le contrôle du pouvoir discrétionnaire. L'auteur conclut en énumérant les avantages justifiant qu'on pousse plus avant l'approche "as applied".*

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## I. INTRODUCTION

In *Slaight Communications Inc.* v. *Davidson*[1] the Supreme Court of Canada adopted an as applied approach in dealing with the impact of the *Canadian Charter of Rights and Freedoms* on an administrative decision. The Court held that s. 2(b) of the *Charter* was infringed, not by the statute that granted the discretionary authority pursuant to which the decision issued, but by the decision itself or, in other words, by the application of the statutory power. The Court further found that the decision itself constituted a reasonable limit on s. 2(b) rights and was accordingly justified under s. 1 of the *Charter.*

An as applied approach considers infringements of guaranteed rights and freedoms within the confines of the particular circumstances of a case before the court, and grants remedies that apply only to the specific case, although the judgments will, of course, have varying significance as precedents. A facial review of laws considers not only any infringement that has arisen, but those that may potentially result from the terms of laws. "Laws" as employed in this context refers to rules of general application, as opposed to the specific decisions or actions implementing those rules. Facial remedies, involving the invalidation or modification of laws, have direct significance beyond the subject case.

The as applied approach is relatively new in *Charter* jurisprudence, particularly in contexts in which significant reliance is placed on s. 1. The approach is common in American Bill of Rights jurisprudence, and in fact is considered to be the generally appropriate means of ensuring that constitutionally guaranteed individual rights are respected. Invalidation of a statute or other law generally, and not only as applied in a particular case, is the exception rather than the rule.[2] But the general approach of the Canadian courts has been to consider and deal with the validity of challenged statutes generally.[3]

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1. [1989] 1 S.C.R. 1038.

2. C. Rogerson, "The Judicial Search for Appropriate Remedies under the Charter: The Examples of Overbreadth and Vagueness" in R. Sharpe ed., *Charter Litigation* (Toronto: Butterworths, 1987), p. 233 at 253-258.

3. *Ibid.* at 276-277. Of course, there have been exceptions (*ibid.* at 278-280). The Supreme Court has previously advocated an as applied approach rather than facial review of a statute, although this related to the application of a definitionally qualified right, where less reliance is placed on s. 1 and a number of the issues to be discussed herein do not arise. See *R.* v. *Albright*, [1987] 2 S.C.R. 383. (A statutory provision for the proof of previous motor vehicle convictions by entry of a certified extract of a driving record, without prior notice to the accused, was held not to violate the right to a fair trial (s. 11(d)), although its application might. The Court held that where a rule of law,

An as applied approach to the *Charter* has potential advantages to those seeking to preserve the socially useful aspects of flawed legislation, since it allows constitutional applications to be kept intact, while unconstitutional applications are invalidated on a case-by-case basis. In this way it is arguably less intrusive upon the legislative role and less likely to create actual or apparent conflicts between the legislatures and the courts than facial review and invalidation of laws.[4] Certainly where an as applied approach can be used without violence to legislative intent, as in the context of imprecise grants of discretionary authority, it is a useful technique to minimize such conflict. On the other hand, as applied review in the context of mandatory statutory provisions, resulting in constitutional exceptions that conflict with the clear terms of such provisions, may be seen as judicial rewriting of statutes. This is arguably beyond the institutional competence of courts and an improper interference with legislative functions. A growing body of case law dealing with the "constitutional exemption" or similar relief discusses these concerns.[5] But these problems do not arise in the case of discretionary authority, when a decision-maker acts within the terms of an empowering statute, although in contravention of the *Charter*.[6]

An as applied approach also has potential advantages from the perspective of those seeking effective ways to enforce *Charter* rights. It will be argued that because an as applied approach deals in a specific and focused way with the impact of particular circumstances upon rights and freedoms, it offers a significant form of protection of rights

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statutory or otherwise, is framed in such a way that it would be *per se* a violation of the right to a fair trial, then the statute should be declared to be inoperative or the common law declared to be otherwise. On the other hand, where the rule does not irrevocably result in such a situation, the rule itself is not in violation of the *Charter*. If its application in a particular case results in a violation of the *Charter*, a challenge to that application should come through section 24 and a remedy would inure to the benefit of the accused on proof of prejudice. The Court was satisfied that only in rare cases would the application of the rule in question result in such a violation.) See also *R.* v. *Lyons*, [1987] 2 S.C.R. 309, at 347-48; and *R.* v. *Beare*, [1988] 2 S.C.R. 387, at 410-411 (the existence of prosecutorial discretion to make or not make a dangerous offender application and police discretion to fingerprint or not, did not violate principles of fundamental justice (s. 7) or give rise to an arbitrary detention or imprisonment (s. 9) and if the discretion were arbitrarily or improperly used a s. 24 remedy would be available). See also reference to the challenges to official action in the context of inherently qualified *Charter* rights, noted *infra*, note 80.

4. Rogerson, *supra*, note 2, at 238-239, 255-256, 269-270.

5. The remedy is sometimes characterized as a form of reading down of statutes and sometimes as individualized as applied relief. See, for recent examples: *R.* v. *Chief* (1989), 51 C.C.C. (3d) 265 (Y.T.C.A.); *R.* v. *Westfair Foods Ltd. and Canada Safeway Ltd.* (1989), 80 Sask. R. 33 (C.A.). Additional authorities are extensively cited in the *Chief* decision.

6. This distinction was discussed by Blair J.A. in dissent in *McKinney* v. *University of Guelph* (1987), 46 D.L.R. (4th) 193 (Ont. C.A.). He was concerned to avoid any form of judicial rewriting of legislation, including that which he felt implicitly occurred through the majority's case specific application of s. 1 (finding that an exception to age discrimination legislation allowing mandatory retirement was reasonable in the context of university professors, although the legislation itself was general in form and not so limited). However, he noted that where the *Charter* operated to control the conduct of public officials as well as the validity of statutes, "some flexibility is possible in applying it to different factual situations" (at p. 268, relying on, *inter alia*, *R.* v. *Ladouceur* (1988), 59 O.R. (2d) 688 (Ont. C.A.)).

that may not be practically available if facial review only is employed. At the same time, there are dangers involved in the overuse of an as applied approach. It introduces an element of uncertainty, and because of this can deter the exercise or enforcement of constitutional rights and freedoms. The combination of advantages and concerns makes efforts to establish guidelines to the appropriate use of as applied and facial review methods both difficult and worthwhile.

*Slaight Communications* serves a useful function in demonstrating the way in which an as applied approach can remedy and control improper use of discretionary authority. But there remain unresolved issues relating to the appropriate use of the technique in this context. The objective of this work is to explore these, to attempt to establish appropriate limitations to as applied review, and to show that in the context of discretionary powers and within such appropriate limitations the approach is a valuable addition to *Charter* methodology.

This work will not address the use of an as applied approach or constitutional exemptions in the context of mandatory statutory or regulatory provisions. There are two reasons for the decision not to pursue this analogous issue in this article. First, as noted above, significant issues arise in that context and not in the present context relating to the institutional roles of the courts and the legislatures. Second, certain important issues which do arise with regard to discretionary authority either do not occur in the case of mandatory legislation or occur in quite a different form. Particularly, concerns related to vagueness and the impact of the "prescribed by law" requirement in s. 1 of the *Charter* are quite different in the two contexts. Vagueness is an inherent part of the delegation of discretionary authority; the breadth of the discretion is directly related to uncertainty in the application of the law. This has significance for the assessment of whether or not discretionary decisions are prescribed by law. Uncertainty can also occur in mandatory laws, but does not necessarily appear and will take a different form.[7]

Among the specific issues to be addressed in this article are the following. First, in *Slaight Communications* the Supreme Court, in proceeding with as applied review, also precluded facial review of the underlying statute. There are situations where it is important to go beyond an as applied approach and review not only a particular decision, but the empowering statutory provision itself. These situations will be discussed.

Second, there are unresolved issues regarding the circumstances in which as applied review is available. For example, does it extend to forms of statutorily authorized discretion other than administrative? Particularly, is judicial discretion subject to this form of *Charter* review? Further, is an as applied review of the application of a law available

7. Rogerson, *supra*, note 2 at 241-243 describes the related distinction between vagueness and overbreadth in laws. Overbroad laws are drafted too broadly and "have the potential to catch more conduct that the government is constitutionally permitted in the pursuit of its legitimate goals." "Vagueness is the problem of imprecision and uncertainty." The two concepts are "conceptually distinct" although they may occur together in practice and may be linked by the courts.

in addition to facial review of the law, or is it limited to circumstances where the law generally does not affect *Charter* rights and freedoms?

The most difficult and significant problem in *Slaight Communications* arises from its cursory holding relating to the s. 1 requirement that limitations on rights be prescribed by law. The Supreme Court held that where a discretionary order pursuant to statute rather than the statute itself is challenged on the one hand and asserted to be a reasonable limit on rights and freedoms on the other hand, that order is prescribed by law because the underlying statutory provision is prescribed by law. If this is so with respect to a very broad or even unfettered statutory discretion, the decision is inconsistent with earlier authority on what is prescribed by law, notably the case of *Ontario Film and Video Appreciation Society* v. *Ontario Board of Censors*.[8] This jurisprudence and subsequent Supreme Court of Canada jurisprudence pertaining to the prescribed by law requirement will be explored. The impact of this requirement upon vague laws, and particularly upon broad legislative grants of discretionary authority will be assessed.

While much of the Supreme Court case law either ignores or gives short shrift to concerns about broad discretionary authority that may restrict *Charter* guarantees, the *Board of Censors* holding that such authority is not prescribed by law and thus not capable of constituting a justifiable limit under s. 1 of the *Charter* could prevent the appropriate development and utilization of as applied review. Broad discretionary authority may give rise to an unwarranted risk to rights and freedoms, or may be useful and relatively harmless, depending on a number of factors, such as the degree of anticipated impact on rights and freedoms, the effect in particular circumstances of requiring proof of an as applied infringement, and the need on the part of the decision-maker for flexible powers. These relevant considerations determine whether facial review or as applied review is the better approach in the circumstances. The final portion of this article compares the practical effect of facial and as applied review of discretionary authority, determines that a sensitive analysis is needed to decide on the appropriate form of review, and suggests that one is available in the assessment of reasonableness under s. 1 or in the selection of an appropriate remedy.

## II. *SLAIGHT COMMUNICATIONS INC.* v. *DAVIDSON*

In *Slaight Communications Inc.* v. *Davidson* the Supreme Court held that while a labour relations adjudicator's order that an employer provide a specified letter of recommendation in response to inquiries about a dismissed employee violated freedom of expression, it was justified under s. 1 of the *Charter*. Ron Davidson had been employed by Slaight Communications Inc. as a radio time salesman. He was dismissed allegedly due to unsatisfactory sales performance. He filed a complaint under s. 61.5 of the Canada Labour Code[9] which provides a statutory adjudication process for unjust dismissal claims.

8. (1983), 147 D.L.R. (3d) 58; affirmed 5 D.L.R. (4th) 766 (Ont. C.A.).
9. R.S.C. 1970, c. L-1, as amended by S.C. 1977-78, c. 27, s. 21.

The appointed adjudicator heard the complaint, found that Davidson had been unjustly dismissed, and exercised his power under s. 61.5(9) of the Code[10] to order, in addition to payment of compensation and costs, that the employer give the complainant a letter of recommendation with a stipulated content[11] and that the employer answer any inquiries about Davidson "exclusively by sending or delivering a copy of the said letter of recommendation".[12]

Slaight Communications applied to the Federal Court of Appeal to set aside the latter two provisions of the adjudicator's order. The Court of Appeal dismissed the application, the majority holding that the order was within the powers conferred upon the adjudicator by s. 61.5(9) and that while it imposed limitations on the employer's freedom of expression as guaranteed by s. 2(b) of the *Charter*, it was justified under s. 1 of the *Charter*.[13] The majority decision indicates that the order, not the statute, violated s. 2(b), but was prescribed by law as it was "one the Adjudicator was authorized, under paragraph 61.5(9)(c), to make"[14] and was further demonstrably justified in a free and democratic society. However, these points were not discussed in any detail.[15]

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10. *Ibid.* ss. 61.5(9) provides:
Where an adjudicator decides pursuant to subsection (8) that a person has been unjustly dismissed, he may, by order, require the employer who dismissed him to
(a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;
(b) reinstate the person in his employ; and
(c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

11. The letter was to state that:
(1) Mr. Ron Davidson was employed by Station Q107 from June, 1980 to January 20, 1984, as a radio time salesman;
(2) That his sales "budget" or quota for 1981 was $248,000, of which he achieved 97.3%;
(3) That his sales "budget" or quota for 1982 was $343,500, of which he achieved 100.3%;
(4) That his sales "budget" or quota for 1983 was $402,200, of which he achieved 114.2%;
(5) That following termination in January, 1984, an adjudicator (appointed by the Minister of Labour), after hearing the evidence and representations of both parties, held that the termination had been an unjust dismissal.
(*Supra*, note 1, at 1047.)

12. *Ibid.*

13. *Slaight Communications Inc.* v. *Davidson*, [1985] 1 F.C. 253.

14. *Ibid.* at 262.

15. The majority judgment was written by Mahoney J.A. and concurred in by Urie J.A. In dissent, Marceau J.A. found the negative remedy (precluding the employer from making statements about the employee other than as included in the letter of recommendation) both outside the statutory power and in contravention of the *Charter*. On the latter point, he held as follows with regard to s. 1:

> I have had occasion in the past to express some doubts as to the exact purpose and meaning to be attributed to section 1 of the *Charter* and more precisely as to whether the provision contained therein was meant to be given

In the Supreme Court the majority, in a decision by Dickson C.J., held that both the positive order, specifying the contents of the letter of recommendation, and the negative order, prohibiting other responses to inquiries about Davidson, were within the adjudicator's statutory jurisdiction. Lamer J. (as he then was) concurred with respect to the former only, finding the negative order patently unreasonable and therefore outside the statutory power. The majority further found that both orders limited the employer's freedom of expression, but in a manner justifiable under s. 1. Lamer J. again concurred with respect to the positive order, and did not reach this question with respect to the negative order. Beetz J. dissented, finding both parts of the order capable of misrepresenting the employer's own opinion, and therefore a breach of s. 2(b) that could not be justified under s. 1.

To reach the *Charter* issues, which all members of the Court did with respect to at least the positive order, the Court had to consider the question of the *Charter's* applicability to the adjudicator's administrative decision. Lamer J.'s reasons on this point were expressly concurred in by all members of the Court. Further, to apply s. 1 successfully, it had to be determined that the limitation on freedom of expression contained in the order was prescribed by law. Again Lamer J. dealt with this issue, with the implicit concurrence of the majority.

The *Charter* applied to the adjudicator's order without question, Lamer J. held, because:

> The adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives *all* his powers from the statute. As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible

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> application on a case-to-case basis, each one being considered according to its particular context and with due regard to its distinctive features. It seemed to me that the control to be imposed was on the legislative function of the State, and that the limits contemplated were limits expressly determined by rules of general application, hence the phrase "prescribed by law" and the reference to the characteristics of a free and democratic society. If such was the case, the justification required had to be that of the rules themselves as adopted and made applicable, not of their application in a particular instance (this incidentally appears to be the view taken by Peter W. Hogg in *Canada Act Annotated*, pages 10 and 11).

(*Ibid.* at 267.) He further held that, in any event, he did not find the order to be demonstrably justified in the circumstances.

Lamer J. described Marceau J.A.'s decision on this point as follows:

> He did not think it possible to say that the limitation was prescribed by law, since the extent of the limitation was not indicated by the legislation in question.

(*Supra*, note 1 at 1069.)

> to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied. Such an interpretation would require us to declare the legislation to be of no force or effect, unless it could be justified under s. 1. Although this court must not add anything to legislation or delete anything from it, in order to make it consistent with the *Charter*, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the *Charter* and hence of no force or effect. Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed. Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the *Charter* and he exceeds his jurisdiction if he does so.[16]

Lamer J. cited in support an excerpt from Hogg's *Constitutional Law of Canada*[17] suggesting that the *Charter's* limits on legislative powers should "flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority."[18]

Section 61.5(9) of the Labour Code was accordingly interpreted as conferring on the adjudicator a power to require the employer to take steps to remedy consequences of an unjust dismissal "provided however, that such an order, if it limits a protected right or freedom, only does so within reasonable limits that can be demonstrably justified in a free and democratic society".[19] Thus the statutory grant of an imprecise discretion can confer power to limit *Charter* rights in a *prima facie* sense, but not to infringe rights unreasonably or unjustifiably. This is made clear in the following quote:

> It is only if the limitation on a right or freedom is not kept within reasonable and justifiable limits that one can speak of an infringement of the *Charter*. The *Charter* does not provide an absolute guarantee of the rights and freedoms mentioned in it. What it guarantees is the right to have such rights and freedoms subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. There is thus no reason not to ascribe to Parliament an intent to limit a right or freedom mentioned in the *Charter* or to allow a protected right or freedom to be limited when the language used by Parliament suggests this.[20]

Lamer J. concluded that the *Charter* applies to an administrative order that involves the exercise of discretion in one of two ways. The statute granting the discretion may confer "expressly or by necessary implication, the power to infringe a protected right".[21] If so, the statute must be subjected to a s. 1 test. Alternatively, the statute granting the discretion may confer "an imprecise discretion and ... does not confer either expressly or

16. *Supra*, note 1 at 1077-1078.
17. 2nd ed. (Toronto: Carswell, 1985) at 674.
18. *Ibid.* at 671.
19. *Supra*, note 1 at 1079.
20. *Ibid.*
21. *Ibid.* at 1080.

by necessary implication, the power to limit the rights guaranteed by the *Charter*".[22] In this case, it is not the statute which is subject to a s. 1 test, but the order.[23]

With regard to the application of s. 1 of the *Charter*, Lamer J. held that the limitation on freedom of expression imposed by the adjudicator's order was prescribed by law because it was an exercise of the discretion conferred on the adjudicator by statute. This is interesting and somewhat problematic because previous Supreme Court decisions have indicated that to be prescribed by law a limitation must be expressly provided for by or result by necessary implication from the terms or operating requirements of a statute, regulation or common law rule, and Lamer J. found that the statute in this case was not reviewable under the *Charter* because it did not expressly or by necessary implication confer a power to limit rights. These previous decisions and this holding will be discussed in the part of this article dealing with the prescribed by law requirement.

The Court then went on to hold that the limitation was reasonable because the order in all of the circumstances was reasonable.[24] This is the essence of an as applied approach to the *Charter*. The full scope of the statutory power need not be shown to be reasonable, only its application in the case before the court.

## III. FACIAL REVIEW OF STATUTES GRANTING DISCRETIONARY POWERS

Lamer J. provided a two part analysis respecting the application of the *Charter* to an exercise of discretion: he referred to review of statutes that expressly or by necessary implication confer a power to infringe the *Charter*, and review of decisions only where the statute does not expressly or by necessary implication confer a power to limit *Charter* rights. In the circumstances in *Slaight Communications* only the adjudicator's decision

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22. *Ibid.*

23. In the first branch of this two part approach Lamer J. used the term "infringe" and in the second branch he used the term "limit". If this distinction in terminology was intended, the analysis is not logically complete, and it is not clear whether facial review of the statute or as applied review of the order is called for in the case of statutes that do not expressly or by necessary implication grant a power to unreasonably infringe rights, but do expressly or by necessary implication grant a power to limit rights in a *prima facie* sense. Note that Lamer J. consistently used the term "infringe" when referring to a limit on rights that is not reasonable or justified, and "limit" when referring to a *prima facie* conflict with rights that is reasonable and justified (for example, see *supra*, the quote accompanying note 20). This point will be pursued later, when the availability of facial review for laws granting discretionary powers is discussed (*infra*, note 25).

24. The exploration of the reasonableness of the order was commenced by Lamer J. with respect to the positive order and continued by Dickson C.J. with respect to the negative order. The finding clearly depends on the particular circumstances of the case and not on limitations implicit in the adjudicator's statutory power. Dickson C.J. referred to a number of peculiar circumstances of the case in addressing this issue, including the fact that the employer had demonstrated bad faith, and there was therefore a need to ensure that he would not subvert the effect of the positive order. Further factors referred to included the limited number of recipients of the information as ordered by the adjudicator and the specific nature of that information. *Supra*, note 1, at 1053-1055.

was reviewable. Section 61.5(9) of the Labour Code did not require *expressly or by necessary implication* that the adjudicator limit *Charter* rights and freedoms. It did however *authorize* him to limit rights.[25] It did this by granting a broad discretionary authority in a context that would not necessarily or typically conflict with any *Charter* guarantees, but that might in the circumstances of a particular decision result in a conflict. The limitation was not *mandated* by the statute, but was *permitted* by it. In such circumstances it seems appropriate that any conflict with the *Charter* be located in the decision rather than the statute and that only the decision should be reviewable.[26] On the other hand, where a statute expressly or by necessary implication affects a *Charter* guarantee, in the sense that exercise of the authority will inevitably or typically impact on *Charter* rights or freedoms, then it would seem that conflict with the *Charter* should be located in the statute and statutory review should be required.[27]

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25. The result of Lamer J.'s analysis, assuming that the term "limit" in the second branch was intended to have the meaning he had earlier assigned to it, is that the adjudicator's authority under the Labour Code included the power to limit rights, but the statute did not expressly or by necessary implication confer this power and therefore was not itself reviewable under the *Charter*. This does seem rather convoluted. It may be that the use of the term "limit" in the second branch of the test was an error, and what was intended was a repetition of the term "infringe" as employed in the first branch of the test. In this case only statutes which clearly grant a discretionary power to unreasonably infringe rights would be reviewable under the *Charter*, and all other cases would be dealt with exclusively by a *Charter* review of the specific decision. This approach has the benefit of simplicity, but gives rise to significant difficulties when applied to certain forms of discretionary authority.

    It is the author's view that the use of the term "limit" in the second branch of Lamer J.'s analysis was not an error, and that an unexplored distinction was being drawn. The nature of this distinction, between limitations that are mandated as opposed to permitted by statute, or that are express or necessarily implicit as opposed to simply authorized, is explored in the text.

26. The usual test of whether a statutory provision conflicts with a *Charter* right involves an inquiry into whether the purpose or effect of the statute contravenes a particular guarantee, without any stipulation that the purpose or effect be express or necessarily implicit: see, e.g., *R.* v. *Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R.* v. *Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Irwin Toy Ltd.* v. *Quebec (Attorney General)*, [1989] 1 S.C.R. 927. These cases have generally involved mandatory statutory provisions, not grants of discretion (although there was a discretionary element in *Irwin Toy*), and the Court has appeared to assume that any violation of the *Charter* occurred in the statute and not merely its application (although the Court did leave open the possibility of limiting a remedy so that it would affect only certain applications of a statute: see the reference to a "constitutional exemption" in *Big M Drug Mart*, at p. 315). This difference in approach can probably be attributed in part to a distinction between mandatory statutory provisions and grants of discretionary powers, and in part to a tradition of facial review that has resulted in an insensitivity to the issue.

27. A test based on mandated versus permitted impacts on rights is not necessarily inconsistent with Lamer J.'s judgment, in spite of the difficulties relating to his terminology discussed in notes 23 and 25. In the initial part of his reasons relating to the application of the *Charter* to the adjudicator's order, Lamer J. was concerned with interpreting the scope of the adjudicator's statutory jurisdiction so as to create maximal consistency with the *Charter*. In this context the statutory jurisdiction was defined as including jurisdiction to limit rights, with no stipulation that this must be demonstrated by the express language of the statute or be necessarily implicit from its terms. Jurisdiction to infringe rights, on the other hand, must be so demonstrated. In the subsequent statement of a two part test, Lamer J. was addressing the reviewability under the *Charter* of a statute or order by locating a conflict with rights in one or the other. This different task could reasonably call for the application of a different approach, including a requirement that even jurisdiction to merely limit

This approach is justified in terms of what may be reasonably expected of the legislature. Where the legislature is granting discretionary authority in a context that involves a clear impact upon *Charter* rights and freedoms, it is reasonable to require it to anticipate and take steps to prevent unreasonable interferences. These steps would normally be in the form of statutory limits on the discretionary power. The legislature's duty in this regard is supervised by *Charter* review of the statute. But where the legislature grants authority that only incidentally may affect *Charter* guarantees, it seems unreasonable to expect it to anticipate potential breaches and take steps to prevent them.[28]

It is important to ensure that statutory grants of discretion with significant impact upon *Charter* rights are reviewed per se and that review is not limited to an as applied form in this context. For example, consider a grant of discretionary power to censor films as in the *Ontario Board of Censors* case.[29] A censor board will necessarily limit freedom of expression, and it is expressly given authority to do this. The limitation on s. 2(b) is mandated, not merely authorized, by the statute. However, if the limits of such a board's authority are imprecise as to which films it may or may not ban, by the reasoning in *Slaight Communications* the board will not have authority to act in such a way as to infringe the *Charter*. No unreasonable restriction of s. 2(b) is mandated by the statute.[30]

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rights must be express or necessarily implicit, or in other words must be mandated and not only permitted by the statute, in order to justify review and potential modification of the statute itself.

28. *Re Zylberberg and Director of Education* (1986), 29 D.L.R. (4th) 709 (Ont. Div. Ct.); rev'd (1988), 65 O.R. (2d) 641 (C.A). O'Leary J. in the Divisional Court concluded that a school board's discretionary authority to permit prayer in the classroom did not per se violate s. 2(a), although implicitly conceding that the coercive use of the authority could violate s. 2(a). He therefore distinguished *Ontario Film & Video Appreciation Society* v. *Ontario Board of Censors*, *supra*, note 8, as follows:

> In the *Ontario Film* case the task given the board was to censor. It was intended that the board would, in the course of its duties, infringe the freedom of expression guaranteed by s. 2(a) [sic] of the *Charter*. When the board did censor a film its conduct in doing so could only be justified if the censoring was within reasonable limits prescribed by law...Here s. 28(1) does not direct the doing of anything that would infringe freedom of religion or that is to be carried out in a way so as to discriminate on the basis of religion. The fact that some misguided school board or teacher could in carrying out the direction to hold religious exercises infringe a right guaranteed in the *Charter* does not mean that the Legislature had to anticipate such an occurrence and had to lay down strict rules so such could not happen.

The Court of Appeal reversed, finding that prayer in the schools was inherently coercive and thus per se violated s. 2(a).

29. *Supra*, note 8.

30. This assumes that censorship of films per se is not an infringement of the *Charter*, but overbroad or unreasonable censorship would be. If censorship or licensing provisions as such are considered to be overregulation in the circumstances, regardless of their application, then a statute granting censorship or licensing powers infringes, and not merely limits, *Charter* rights and freedoms: *Re Information Retailers Association of Metropolitan Toronto Inc. and Toronto* (1985), 52 O.R. (2d) 449

Nonetheless it seems quite inadequate to deal with the impact on *Charter* rights by means of as applied review only. This would conflict with the approach in *Ontario Board of Censors* and in other Canadian cases[31] and also with American jurisprudence which has created exceptions to the usual as applied approach for such circumstances.[32] Only by review of the statute itself can the court require that authority to censor be limited by clear and specific standards, consistent with the holding in the *Board of Censors* case.

This article concludes with a comparison of the practical impact of as applied and facial review of discretionary authority. It argues that the existence of an unfettered discretion that significantly impacts upon *Charter* rights and freedoms, such as a discretion to censor, creates a potential for abuses of rights that may not be adequately contained by as applied review alone. It is important that the court should inquire into whether, in the circumstances, as applied review sufficiently protects rights, or invalidation or modification of a grant of authority is necessary. The ability to review the statute, and not only decisions pursuant to it, is a *sine qua non* for such an inquiry.

While an as applied approach may not be adequate in situations where there is a significant conflict between a grant of discretionary authority and the *Charter*, it is useful and appropriate in situations where the conflict is minimal. For example, consider the judicial discretion to provide for access to or custody of children in the best interests of the children. This discretion can be exercised in a manner that would affect a parent's religious freedom[33] or equality rights,[34] but would not necessarily or typically do so.

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(C.A.) (licensing scheme for sellers of adult books or magazines characterized as over-regulation).

31. For example: *Reference re Education Act of Ontario and Minority Language Education Rights* (1984), 10 D.L.R. (4th) 491 (Ont. C.A.) (holding that grant of unfettered discretion to school boards regarding the provision of minority language instruction or facilities violated s. 23 of the *Charter*); *International Fund for Animal Welfare Inc.* v. *Canada (Minister of Fisheries and Oceans)* (1988), 83 N.R. 303 (F.C.A.) (striking down an unlimited discretion to license approaches to the area of a seal hunt); *MacPhee* v. *Nova Scotia Pulpwood Marketing Board* (1988), 49 D.L.R. 228 (N.S.S.C.) (holding that the Board's failure to enact limits by rule or regulation (pursuant to its statutory authority to do so) with respect to its statutorily unlimited discretion to register bargaining agents rendered the legislative scheme for registration an unjustifiable violation of ss. 2(d) and 15 and declaring the subject application (and implicitly any application for registration or deregistration) a nullity pending the adoption of such standards (striking down the discretionary power in effect, although not the statutory grant of it as such)); *Comite pour la Republique du Canada-Committee for the Commonwealth of Canada* v. *The Queen* (1987), 36 D.L.R. (4th) 501 (F.C.A.) (holding that the Department of Transport policy pertaining to solicitation at airports, involving a general prohibition with an unlimited discretion to the Minister to grant exemptions, was unreasonable; however the remedy granted was case specific, declaring that the government had not observed the Comite's fundamental freedoms). See also *Mahe* v. *Alberta*, [1990] 1 S.C.R. 342 (holding that the real obstacle to s. 23 rights was not "permissive" statutory provisions, but inaction by the school board; however the remedy granted (a declaration of entitlement; present statutory provisions left intact) was determined by the special nature of s. 23 rights and by the practical concern that invalidating the legislation would not assist in realization of those rights).

32. *Shuttlesworth* v. *Birmingham*, 394 U.S. 147 (1969); L. Tribe, *American Constitutional Law*, 2nd ed. (1988), at 1055-1057.

33. *Hockey* v. *Hockey*, (1989) 21 R.F.L. (3rd) 105 (Ont. Div. Ct.).

34. *Palmore* v. *Sidote*, 104 S. Ct. 1879 (1984).

While it is important to prevent such exercises of the discretion, there is little to be gained by reviewing a grant of authority that has such obvious social utility and only an incidental impact on the *Charter*.

Other forms of authority are more difficult to categorize. For example, a discretionary authority to prevent approaches to the area of a seal hunt, enacted to protect licensed sealers against interference or harassment, was found by the Federal Court of Appeal to have the effect of restraining freedom of expression.[35] Assuming that physical interference with the hunt is not protected by s. 2(b), if the authority were exercised to prevent such interference, s. 2(b) rights would not be affected. However, if the authority were exercised to prevent access to information about the hunt or demonstrations against the hunt there would be an effect on freedom of expression. The effect is thus not mandated in a strict sense, but it is potentially significant and a usual or anticipated occurrence. In borderline circumstances, it is preferable to allow statutory review and not only as applied review. Because of this the concept of *Charter* conflicts mandated by or necessarily implicit in a statute should include those that would follow in the usual course, or be within the normal and contemplated operation of the statutory power. Allowing statutory review does not necessarily lead to invalidation or modification of grants of discretion. The grant of discretion may be reasonable and justified under s. 1, while the exercise of the discretion may be unreasonable. Alternatively, the choice of remedy could range from striking down the entire grant of authority to exclusively as applied relief. But statutory review, and not exclusively as applied review, is a necessary condition for these options to be present.

One could argue that facial review of the underlying statute should be undertaken in all circumstances, with the s. 1 test or the selection of remedies providing flexibility and resulting in facial or as applied relief where appropriate. A number of the factors that would affect the decision are similar, whether one is considering an initial choice between facial and as applied review, or a choice as to the application of s. 1, or as to a facial or as applied remedy. The same result may well occur in whatever context the choice is made. The concluding discussion indicates that in the circumstances in *Slaight Communications*, even if the statute itself were reviewed, the general grant of discretionary power should be found to be reasonable or the remedy should be limited to the specific case. However, in the category of cases where the conflict between the grant of discretionary authority and the *Charter* is incidental and insignificant in comparison with the general scope of the authority, undertaking a facial review of the statute seems an unnecessary and potentially costly step.[36]

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35. *International Fund for Animal Welfare Inc.* v. *Canada*, *supra*, note 31.

36. For example, it seems much more likely that the Attorney General would consider it necessary to intervene if the grant of authority as such were being reviewed, rather than simply a specific order. The Attorney General did not intervene in *Slaight Communications Inc.* v. *Davidson*, *supra*, note 1. Much broader issues of social policy could be raised, complicating the argument, and potentially the evidence as well.

## IV. AS APPLIED REVIEW OF DISCRETIONARY DECISIONS

*Slaight Communications* relates to review of a discretionary order of an administrative tribunal. One may therefore inquire whether as applied review is also available for other forms of discretionary authority, particularly judicial discretion. In the writer's view, the approach is equally applicable to any delegated discretionary authority pursuant to legislation.[37] This is consistent with the citation from Hogg's *Constitutional Law of Canada* that was relied on by Lamer J. Professor Hogg argued that the *Charter* would apply to "regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority."[38] Further, judicial discretion pursuant to statute has the same characteristics referred to by Lamer J. with respect to administrative discretion. Lamer J. noted that "an administrative tribunal may not exceed the jurisdiction it has by statute".[39] While the issue when applied to judicial authority is not referred to in jurisdictional terms, it is clear that exceeding the boundaries of a statutory grant of discretion would be a reversible error of law. Lamer J. also stated that "it must be presumed that legislation conferring an imprecise discretion does not confer the power to infringe the *Charter* unless that power is conferred expressly or by necessary implication."[40] This presumption, dealing with the scope of legislative authority as such and imposed in order to minimize conflict between the statute and the *Charter*, is equally applicable in the context of grants of judicial discretion.[41]

A potential limit to the availability of as applied relief appears in *Slaight Communications*. Lamer J. stated that statutes or decisions based thereon might be

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37. The analysis in *Slaight Communications Inc.* v. *Davidson*, *supra*, note 1 does not apply to common law judicial authority. However, a distinction between as applied and facial review of the common law is largely illusory, as the common law rules of general application are simply a compendium of individual applications. Thus, in those limited circumstances in which the *Charter* applies to common law, where there is some independent form of government action involved, *Charter* review combines features of both as applied and facial review and remedies. For example, in *B.C.G.E.U.* v. *British Columbia (Attorney General)*, [1988] 2 S.C.R. 214 the Court posed the following question: "whether the law of criminal contempt and the injunction to enforce the law pass scrutiny under the *Charter*", stating that "this issue must be dealt with pursuant to s. 1" (at p. 245). The subsequent assessment of reasonableness related to the specific injunction and the conclusion was that the *order* was justified by s. 1. Note, however, that *R.* v. *Albright*, *supra*, note 3, suggests in dicta that there is a distinction between a declaration that a common law rule that infringes the *Charter* "is otherwise" and a s. 24 challenge to the application of a common law rule in a particular case.

38. *Supra*, note 17.

39. *Supra*, note 1, at 1079.

40. *Ibid.*

41. *Moore* v. *Canadian Newspapers Co. and Webster* (1989), 34 O.A.C. 328 (Div. Ct.) stated in dicta that a court order requiring the publication of an apology and retraction in a defamation case would be a reasonable limit prescribed by law, and that the court determining whether such an apology was required would be "in effect considering the same issues in determining whether to make the order as another court would be considering in determining whether or not the right to make such an order is demonstrably justified in a free and democratic society" (citing *Slaight Communications Inc.* v. *Davidson*, *supra*, note 1).

reviewed under the *Charter*, suggesting that these may be mutually exclusive alternatives.[42] The circumstances in which only as applied and not statutory review should be available have already been discussed. However, there does not appear to be any reason to exclude as applied review in addition to statutory review where the latter is available. The case of *R.* v. *Ladouceur*[43] provides support for this view.

*Ladouceur* and the earlier *R.* v. *Hufsky*[44] have important implications for a number of the issues to be discussed here. They both concerned S. 189a(1) of the *Highway Traffic Act*[45] which provided that:

> A police officer, in the lawful execution of his duties and responsibilities may require the driver of a motor vehicle to stop and the driver of the motor vehicle, when signalled or requested to stop by a police officer who is readily identifiable as such, shall immediately come to a safe stop.

In *Hufsky* the random stop was in the context of an organized "spot check" program, while in *Ladouceur* it was a "routine check" random stop, not conducted as a part of an organized program. The statute itself and both applications of it were found to be prescribed by law and reasonable by a unanimous court in *Hufsky* and by the majority in *Ladouceur*.

In both cases the grant of an unfettered discretion to stop vehicles was held to result in a limit on the *Charter* right not to be arbitrarily detained and the statute was reviewed and upheld under the *Charter*. The possibility of additional as applied review and relief was addressed in *Ladouceur*. Cory J. for the majority, in dicta, indicated that the *Charter* would apply to review police decisions to stop vehicles, as well as the statutory authority. He referred to concern about "the perceived potential for abuse of this power by law enforcement officials" and stated that where stops were "unlawful" because unrelated to driving offenses, "the evidence from the stop could well be excluded under s. 24(2) of the *Charter*".[46] Sopinka J. for the dissent in the same context noted that the majority proposed to control abuse of discretion by *Charter* review, and did not question the legal

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42. Lamer J. introduced his two branch analysis of the application of the *Charter* to the exercise of a discretion by stating that the principles that he had discussed and then summarized led "to *one* of the following two situations" (*supra*, n. 1, at 1079). This contrasts with the approach advocated by Peter Hogg, that was relied upon by Lamer J. in support of his analysis (*supra*, note 17 and accompanying text). Professor Hogg argued that because the *Charter* limits legislative authority, "any body exercising statutory authority...is also bound by the *Charter*." His general language indicates that this would be invariably the case, and would not depend upon whether or not the underlying statute is itself subject to challenge on *Charter* grounds.

43. (1990), 108 N.R. 171 (S.C.C.). So does *Jones* v. *The Queen*, [1986] 2 S.C.R. 284 at 307 (statutory school certification scheme upheld; dicta that improper conduct or decision by school authorities could be reviewed in an application under s. 24 of the *Charter*).

44. [1988] 1 S.C.R. 621.

45. R.S.O. 1980, c. 198.

46. *Supra*, note 43 at 196.

availability of such review, but noted that practically it may be difficult to establish a *Charter* violation.

This approach, permitting as applied review and relief in addition to statutory review, is also consistent with the approach adopted by the Supreme Court in *Schmidt* v. *Canada* pertaining to extradition:

> However, it does not follow from the fact that the [extradition] procedure is generally justifiable that the manner in which the procedures are conducted in Canada and the conditions under which a fugitive is surrendered can never invite *Charter* scrutiny. The pre-eminence of the Constitution must be recognized; the treaty, the extradition hearing in this country and the exercise of the executive discretion to surrender a fugitive must all conform to the requirements of the *Charter*, including the principles of fundamental justice.[47]

In these cases the Supreme Court has assumed, with very little discussion, that as applied review should always be available in addition to facial review of a statute. This assumption seems both warranted and unsurprising. As indicated in *Schmidt* v. *Canada* it is justified and required by the supremacy of the Constitution with respect to all aspects of government action, whether legislative, executive or administrative.[48] Further, the approach has the advantage of ensuring that a specific application of a statutory power, in addition to the underlying power itself, is directly measured against *Charter* standards with respect to its impact upon *Charter* rights and freedoms. *Charter* review has been developed for the purpose of properly protecting these rights and freedoms and would therefore be expected to perform this function better than any indirect form of rights protection by means of statutory interpretation or administrative review. This point will be further pursued in the comparison of as applied and facial forms of *Charter* review.

## V. PRESCRIBED BY LAW

In any *Charter* case in which significant reliance is placed on s. 1 the availability of an as applied approach is linked with the meaning of the s. 1 requirement that limitations on *Charter* rights be "prescribed by law". To the extent that the phrase requires that limitations be imposed by precise rules of general application an as applied approach to the *Charter* is in effect precluded. As applied review allows the development of case specific limitations on *Charter* rights which likely would not meet this requirement. Further, as applied *Charter* review is simply unnecessary if such a requirement is strictly applied. If *Charter* rights can only be limited by precise general rules that are reasonable in all of their applications, then case specific constitutional review really adds nothing. Compliance with the rules themselves ensures compliance with the *Charter*.

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47. [1987] 1 S.C.R. 500, at 520-521.

48. See also, *Operation Dismantle Inc.* v. *The Queen*, [1985] 1 S.C.R. 441.

It has been argued that the "prescribed by law" requirement means that limitations on rights must meet this general description, although there has not been much discussion of the degree of precision required. It has been accepted that there is flexibility as to the form of law contemplated by the phrase,[49] but propounded that legal limits are different in substance than non-legal limits. They must arise from rules of conduct laid down in advance, and they must have the qualities of accessibility and precision. Legal limits must be adequately available to the public and drafted with sufficient clarity that citizens can foresee their potential application and regulate their conduct accordingly.[50]

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49. The Supreme Court has held that the phrase includes statutes, regulations, and common law: *R.* v. *Thomsen*, [1988] 1 S.C.R. 640; *R.* v. *Hufsky*, *supra*, note 44; *R.W.D.S.U., Local 580* v. *Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573. The Court also considered law society rules under s. 1 in *Black* v. *Law Society of Alberta*, [1989] 1 S.C.R. 591 without specifically discussing the "prescribed by law" point.

50. P.W. Hogg, *supra*, note 17 at 684-686; Gibson, *The Law of the Charter: General Principles* (1986) at 152-155.

The requirements of accessibility and precision were developed by the European Court of Human Rights interpreting the phrases "prescribed by law" and "in accordance with the law" as they appear in the European Convention on Human Rights. The Convention contains a number of express limitations clauses, each specific to certain guaranteed rights or freedoms, rather than one general clause. Some of the clauses require that limitations be "prescribed by law", others require that they be "in accordance with the law". The French version of the Convention uses the same phrase in all cases, "prevues par la loi". The two English phrases have therefore received the same interpretation: *Silver* v. *U.K.* (1983), 5 E.H.R.R. 347, at 371; *Malone* v. *U.K.* (1984), 7 E.H.R.R. 14, at 39-40.

The Court has held that the prescribed by law requirement entails the following:

(1) an interference with rights must "have some basis in domestic law": *Silver* v. *U.K.*, at 372, interpreting *Sunday Times* v. *U.K.* (1979), 2 E.H.R.R. 245. The Court held in *Sunday Times* that the domestic law could be either written statutory law or unwritten common law. In *Silver*, the Court also recognized delegated legislation;

(2) the law must be adequately accessible to the public: *Sunday Times* v. *U.K.* at 271. The concern here is basically with publication of the law: *Silver* v. *U.K.*;

(3) the law must be "formulated with sufficient precision to enable the citizen...if need be with appropriate advice — to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail." However, absolute certainty is unattainable and excessive certainty may lead to rigidity, so "many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice": *Sunday Times* v. *U.K.*, at 271.

Where judicial discretion is involved, the interpretation or practice is found in judicial decisions applying the common law or statute, and the Court has referred to these to satisfy the requirement of precision: *Sunday Times* v. *U.K.*; *Chappell* v. *U.K.* (1989), 12 E.H.R.R. 1. With regard to administrative practice additional issues arise as to whether the practice is binding on the tribunal and whether it is accessible to the public. Provided it has both these characteristics, the practice is taken into account in assessing whether a law is sufficiently precise: *Silver* v. *U.K.*, at 372. In these circumstances the limits of the discretion need not be contained in the law itself.

## A. THE *BOARD OF CENSORS* LINE OF AUTHORITY

Several *Charter* cases dealing with the delegation of discretionary authority have focused particular attention on the requirement of precision in laws. These cases, in common with most *Charter* jurisprudence, employed a facial review of the statutes involved. But the concern with precision causes these decisions to go further; they not only select facial review but in effect they preclude as applied review.

Perhaps the most notable is *Ontario Film and Video Appreciation Society* v. *Ontario Board of Censors*.[51] The Board of Censors had been granted a discretion to censor films, without any standards as to the exercise of that discretion included in the statute or provided for by regulation. The Board from time to time issued its own standards, described in a publicly available document, to which it claimed to adhere in exercising its discretion. These standards were without legal force, and indicated the Board's own practice only. Because of this, the Ontario Divisional Court held that the Board's standards per se did not comply with the s. 1 requirement that limits be prescribed by law. Further, the Board's standards, as they were not themselves prescribed by law, could not be used to give precision to the statutory provision conferring a discretionary power on the Board.[52] Standing alone, the statutory grant of discretion did not satisfy the prescribed by law requirement because of its breadth and vagueness:

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Recent decisions involving administrative tribunals whose practice is open to the public have seemed more concerned with ensuring that adequate safeguards exist by way of appeal or judicial review to prevent arbitrary action. The Court has indicated that the limits of discretion must be indicated with "sufficient" clarity, but has not engaged in a detailed examination of the foreseeability of limits: *Gillow* v. *U.K.* (1986), 11 E.H.R.R. 335, at 350; *Olsson* v. *Sweden* (1988), 11 E.H.R.R. 259.

(4) the quality of the domestic law must be compatible with the rule of law, in the sense that it must provide a measure of protection against arbitrary interferences by public authorities with the rights and freedoms guaranteed by the European Convention: *Olsson* v. *Sweden*; *Chappell* v. *U.K.* In this context too the issue of safeguards against abuse of the law is raised: *Silver* v. *U.K.*

51. *Supra*, note 8.

52. Similarly, in *Weatherall* v. *Canada (Attorney General)*, [1989] 1 F.C. 18 (C.A.) a Commissioner's Directive limiting the searching of male inmates by female guards to emergency situations was not prescribed by law because, even though its adoption was provided for by the Penitentiary Act, it was not given the force of law, but was simply a rule "for the organization, training, discipline, efficiency, administration and good government of the [Penitentiary] Service". Thus the Directive could neither constitute a reasonable limit in its own right nor modify to within reasonable bounds a power contained in the Penitentiary Service Regulations permitting searches of inmates by guards where reasonable to detect contraband or maintain the order of the institution without any limitation on cross-gender searching of male inmates by female guards.

This refusal to consider administrative practice for the purpose of giving precision to or bringing within reasonable limits a discretionary power makes the prescribed by law requirement as interpreted in these decisions significantly more restrictive than as interpreted by the European Court of Human Rights (*supra*, note 50).

> [A]lthough there has certainly been a legislative grant of power to the board to censor and prohibit certain films, the reasonable limits placed upon that freedom of expression of film-makers have not been legislatively authorized. The *Charter* requires reasonable limits that are prescribed by law; it is not enough to authorize a board to censor or prohibit the exhibition of any film of which it disapproves. That kind of authority is not legal for it depends on the discretion of an administrative tribunal. However dedicated, competent and well-meaning the board may be, that kind of regulation cannot be considered as "law". It is accepted that law cannot be vague, undefined, and totally discretionary; it must be ascertainable and understandable. Any limits placed on the freedom of expression cannot be left to the whim of an official; such limits must be articulated with some precision or they cannot be considered to be law.[53]

In *Re Luscher and Deputy Minister, Revenue Canada, Customs and Excise*[54] a prohibition against the importation of immoral or indecent material was declared of no force and effect because of the vagueness of the language. While the Federal Court of Appeal appeared to rely on the s. 1 requirement of reasonableness, holding that "[a] limit which is vague, ambiguous, uncertain, or subject to discretionary determination is, by that fact alone, an unreasonable limit", it also referred to the *Board of Censors* case and to *Sunday Times* v. *United Kingdom*[55], both of which deal with uncertainty in the context of the prescribed by law requirement. In any event, the common conclusion is that s. 1 limits cannot be uncertain or vague and that "a limitation of a guaranteed right must be such as to allow a very high degree of predictability of the legal consequences."[56]

Subsequent *Charter* cases have applied the same approach.[57] However, the perceived

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53. *Supra*, note 8 at 67 (Ont. Div. Ct.). The Ontario Court of Appeal affirmed the decision without expressly agreeing with this point, but subsequently, in *Reference re Education Act of Ontario and Minority Language Education Rights*, *supra*, note 31, specifically approved and adopted the point, finding that a School Board could not be given an unfettered discretion to limit minority language education rights.

54. (1985) 17 D.L.R. (4th) 503 (F.C.A.).

55. *Supra*, note 50.

56. *Re Luscher and Deputy Minister, Revenue Canada, Customs and Excise*, *supra*, note 54 at 506. Vagueness concerns under the *Charter* are generally, although not exclusively, dealt with as potential violations of the prescribed by law requirement or the s. 7 fundamental justice requirement. This was the approach of the Supreme Court in *Irwin Toy Ltd.* v. *Quebec (Attorney General)*, *supra*, note 26, and is reflected in the discussion of the void for vagueness doctrine in the concurring judgment of Lamer J. in *Reference Re ss. 193 and 195(1)(c) of the Criminal Code* (1990), 109 N.R. 81 (S.C.C.). The reasonableness test set out in *R.* v. *Oakes*, [1986] 1 S.C.R. 103 does not expressly proscribe vague limits, although vagueness will affect the breadth of legislation and the proportionality requirement may thus be infringed.

57. *International Fund for Animal Welfare Inc.* v. *Canada*, *supra*, note 31 (unfettered discretion to permit or deny permits to attend a seal hunt not prescribed by law and not proportional to the legislative objectives); *Comite pour la Republique du Canada-Committee for the Commonwealth of Canada* v. *The Queen*, *supra*, note 31, per MacGuigan J. (policy of Department of Transport based on its ownership rights pursuant to civil and common law of excluding all solicitation at airports, subject to discretionary exemption by the Minister, was "accessible, well-defined and so foreseeable" and was thus prescribed by law. In apparent contradiction, however, the proportionality test was failed largely due to the vague and discretionary nature of the exemption.); *Reference re Minority Language*

need for a very broad discretion in some circumstances has led to a different conclusion. In *Gallant* v. *Correctional Service Canada*[58] the *Penitentiary Act* grant of discretion to transfer an inmate between institutions, "a discretion that is tempered only by the principles of procedural fairness that apply insofar as circumstances permit", was held to be a "law" that met the requirements of s. 1.[59] Further, the Supreme Court has held that executive discretion is directly reviewable under the *Charter*, and is a law within s. 1, although it is not limited by statutory or other legal standards.[60]

The cases which have insisted that precise standards for the exercise of discretion be contained in statutory or regulatory form have reflected concerns both with the foreseeability of a limit on rights and with control of administrative action. On the former point, the *Luscher* judgment asserted that citizens must know "with tolerable certainty the extent to which the exercise of a guaranteed freedom may be restrained" so that they will not "be deterred from conduct which is, in fact, lawful and not prohibited."[61] On the latter point, the *Board of Censors* decision disparaged limits "left to the whim of an official",[62] and subsequent decisions have repeated and elaborated upon this language.[63]

The requirement for precise standards as developed in these cases appears quite strict, although the limited number of applications makes this evaluation somewhat speculative. Further, the approach precludes or renders completely superfluous an as applied approach. The entire scope of the statutory authority must be articulated with precision. This is

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*Educational Rights* (1988), 49 D.L.R. (4th) 499 (P.E.I.S.C., App. Div.) (school board's discretion to determine whether a sufficient number of students can be assembled for the purpose of providing French language education violated s. 23, not proven to be a reasonable limit, and in addition not prescribed by law); *Henry* v. *Canada* (1987), 10 F.T.R. 176 (broad authority of prison officials to censor mail not prescribed by law as criteria too vague. This point was made in dicta as the court found that no unreasonable search had occurred in the case). In addition, some decisions have accepted that discretionary powers must be limited by specific guidelines, but found the guidelines provided sufficiently specific: *Re Southam Inc. and The Queen* (1984), 14 D.L.R. (4th) 683 (Ont. H.C.); aff'd 26 D.L.R. 479 (Ont. C.A.)(re power of youth court judge to exclude persons from the courtroom); *S.* v. *K.* (1986), 55 O.R. (2d) 111 (Dist. Ct.) (re power of Director to reduce mother's allowance benefits); *M. (R.E.D.)* v. *Dir. of Child Welfare*, [1987] 1 W.W.R. 327 (Alta. Q.B.)(re power of provincial court judge to authorize medical treatment of a child contrary to parents' wishes).

58. (1989), 92 N.R. 292 (F.C.A).

59. *Ibid.* at 300 per Pratte J.A.

60. *U.S.* v. *Cotroni*, [1989] 1 S.C.R. 1469, at 1500, stated without discussing the point that there was no merit to the contention that the executive power to surrender which derived from the Extradition Act was not "law" under s. 1. Further, the holding in *Operation Dismantle Inc.* v. *The Queen*, *supra*, note 48 that executive acts pursuant to the royal prerogative are reviewable may be taken as implicitly recognizing that the exercise of the prerogative could constitute a limit prescribed by law.

61. *Supra*, note 54, at 506.

62. *Supra*, note 8, at 67 (Div. Ct).

63. *International Fund for Animal Welfare Inc.* v. *Canada (Minister of Fisheries and Oceans)*, *supra*, note 31, at 316; *Comite pour la Republique du Canada-Committee for the Commonwealth of Canada* v. *The Queen*, *supra*, note 31, at 521 (discretionary exemption from ban on solicitation found to be unreasonable, *inter alia*, because it was "arbitrary (no criteria)...and potentially based on irrational considerations (who knows what they really involve?).")

ascertained by examining the statute on its face, detached from the circumstances of the case before the court. A decision applying a statute that meets this requirement and the requirement of reasonableness would not seem to need further constitutional review, for compliance with the statutory standards would be dispositive of compliance with constitutional standards. This result depends on the specificity required; to the extent the statutory authority may be broadly or generally phrased, there may be incidents of statutory compliance that violate the *Charter*. But the *Board of Censors* discussion, calling for "legislatively authorized" reasonable limits, indicates that this is not expected and that the limits in the legislation should be sufficiently precise to ensure that any exercise of discretion within the statutory boundaries is reasonable by *Charter* standards.[64]

## B. SUPREME COURT JURISPRUDENCE

### 1. Connection Between Law and Official Action

The major decisions out of the Supreme Court to date interpreting the "prescribed by law" requirement have identified the necessary connection between a law and a form of official action in order to find the latter prescribed by law. The Court seems to have focused on the words "prescribed by" more than the characteristics of law. The test established is that an action or limit upon rights is prescribed by law if:

> ...it is expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements. The limit may also result from the application of a common law rule."[65]

The focus upon the "prescribed by" aspect has been elaborated in a recent concurring judgment by Sopinka J. in *R.* v. *Hebert*.[66] He described the use of undercover officers to obtain jailhouse confessions as:

> ...certainly legal, in the sense that it is not *proscribed* by law; but it does not follow that this tactic is *prescribed* by law. The word "prescribe" connotes a mandate for specific action, not merely permission for that which is not prohibited.[67]

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64. *Supra*, note 8 at 67.

65. *R.* v. *Therens*, [1985] 1 S.C.R. 613, at 645, per LeDain J. in dissent, with the concurrence of McIntyre J., and on this point, Dickson C.J.C. The majority judgment was less explicit, but not inconsistent with this test: Estey J. held that "[t]he limit on the respondent's right to consult counsel was imposed by the conduct of the police officers and not by Parliament" (at 621). LeDain J.'s test has been subsequently adopted and applied by the Court. See *R.* v. *Thomsen*, *supra*, note 49; *R.* v. *Hufsky*, *supra*, note 43; *R.* v. *Simmons*, [1988] 2 S.C.R. 495; *R.* v. *Hebert*, [1990] 2 S.C.R. 151.

66. *Ibid.*

67. *Ibid.* at 18, per Sopinka J. with Wilson J. concurring. The majority simply concluded that the conduct was not prescribed by law as it was not done "in execution of or by necessary implication from a statutory or regulatory duty, and it was not the result of application of a common law rule" (at 39, per McLachlin J.).

A police officer's failure to advise of the right to retain and instruct counsel, prior to taking a breath sample, was held not to be prescribed by law but simply a matter of the conduct of the officer. There was nothing in the statutory provision[68] that explicitly or implicitly precluded contact with counsel or being advised of the right to counsel.[69] Similarly, customs officials who performed a search without advising of the right to counsel were limiting rights in a way not prescribed by the Customs Act.[70] On the other hand, a police officer who failed to advise of the right to counsel prior to administering a roadside breathalyser test was acting in a manner prescribed by law because the practical implication of the statutory provision was that there would be no opportunity for contact with counsel prior to compliance with the demand.[71]

The examples given above did not directly involve the exercise of discretionary powers. In the context of breathalyser demands and searches, police are granted limited discretionary powers with respect to the decision to make such a demand or search, but not with respect to the manner or conduct of the test or search, and the alleged violations of rights arose because of the latter, not because of the discretionary decisions. However, two cases applying the same test have directly involved the exercise of discretion: *R.* v. *Hufsky*[72] and *R.* v. *Ladouceur*[73]. In these cases it was held that police officers who randomly stopped motor vehicles pursuant to a statute conferring "an authority on a police officer, to choose in his absolute discretion, the drivers of motor vehicles whom he will require to stop" were limiting the right not to be arbitrarily detained in a way prescribed by the statute, because the power to randomly or arbitrarily detain was implicit in or derived from the statute.[74] The statement of the test in these cases is less strict, although

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68. Criminal Code, s. 235(1) provided: "Where a peace officer on reasonable and probable grounds believes that a person is committing, or at any time within the preceding two hours has committed, an offence under s. 234 or 236, he may, by demand made to that person forthwith or as soon as practicable, require him to provide then or as soon thereafter as is practicable such samples of his breath as in the opinion of a qualified technician...are necessary to enable a proper analysis to be made in order to determine the proportion, if any, of alcohol in his blood, and to accompany the peace officer for the purpose of enabling such samples to be taken."

69. *R.* v. *Therens*, *supra*, note 65.

70. *R.* v. *Simmons*, *supra*, note 65.

71. *R.* v. *Thomsen*, *supra*, note 49. Criminal Code, s. 234.1 differed from s. 235 in that the peace officer was empowered to require the suspect to provide the sample of breath "forthwith" rather than "then or as soon thereafter as is practicable", and further in providing that the breath sample is for the purpose of analysis by means of a "road-side screening device".

72. *Supra*, note 44.

73. *Supra*, note 43.

74. On the prescribed by law point LeDain J. for the court in *R.* v. *Hufsky* held:

> As indicated in *Therens* and *Thomsen*, a limit prescribed by law, within the meaning of s. 1 of the *Charter*, may arise by implication from the terms of a legislative provision or its operating requirements. There is, in my opinion, the implication of a limit on the right not to be arbitrarily detained arising from the terms of s. 189a(1) of the *Highway Traffic Act*, which confers an authority on a police officer to choose, in his absolute discretion, the drivers of motor vehicles whom he will require to stop. In other words, it authorizes the

the earlier case law is not distinguished. While the statutory authority perhaps does not mandate a limit on s. 9 rights, to adopt the language of Sopinka J.,[75] in that police officers could choose to exercise the power only when reasonable grounds to suspect the commission of an offence exist, such a limit seems to be clearly contemplated and inevitable in the normal use of the statutory authority. Thus it would seem fair to describe the limit as necessarily implicit from the terms or operating requirements of the statute.[76]

Against this background, consider *Slaight Communications*. Lamer J. found the limitation on freedom of expression found in the adjudicator's order to be prescribed by law because:

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random stop of motor vehicles.

(*Supra*, note 44 at 633-634.)

In *R.* v. *Ladouceur* Cory J. for the majority simply held that the police officer's power to stop vehicles was "derived" from the Act or from a common law prescription and was thus prescribed by law. Sopinka J. for the minority concurred in the result but dissented in finding that the statute in a "routine check" application was unreasonable because of, *inter alia*, the possibility of decisions based on irrelevant and potentially discriminatory considerations:

> ...the roving random stop would permit any individual officer to stop any vehicle, at any time, at any place. The decision may be based on any whim. Individual officers will have different reasons. Some may tend to stop younger drivers, others older cars, and so on. Indeed, as pointed out by Tarnopolsky J.A., racial considerations may be a factor too.

(*Ibid.* at 205.)

Sopinka J. would therefore have interpreted the statute as unreasonable in the context and so limited its application to organized programs of stopping. He found it unnecessary to address the question of whether the limit was prescribed by law.

75. *R.* v. *Hebert*, *supra*, note 65.

76. The issue of vagueness or the breadth of discretion in terms of the prescribed by law requirement was not addressed in either of these decisions, although it had been briefly addressed by the Ontario Court of Appeal in *R. v. Ladouceur*, *supra*, note 6. Tarnopolsky J.A. observed that the statute gave "a discretion so wide that some police officers can use it to choose the younger driver over the older, the less sartorially respectable over the more sartorially respectable, the owner of an older or cheaper car over the one who drives a more expensive or a more commonly driven car, even a person obviously visible as being of a minority group over one who is more clearly of the majority" (at p. 707). Partly due to these concerns, he found the stop power was not a reasonable limit under s. 1. This finding was adopted by Sopinka J. in the Supreme Court as referred to, *supra*, note 74. Tarnopolsky J.A. made no finding on the prescribed by law point, but did note that arguably the power given under s. 189a could not be considered law according to the standards set in *Ontario Film and Video Appreciation Society* v. *Ontario Board of Censors*, *supra*, note 8. Brooke, J.A., dissenting, found the power to make a random stop to be a reasonable limit. On the question of abuse of discretion he declared himself unwilling in the absence of evidence to attempt to control such conduct.

> The adjudicator derives all his powers from statute and can only do what he is allowed by statute to do. It is the legislative provision conferring discretion which limits the right or freedom, since it is what authorizes the holder of such discretion to make an order the effect of which is to place limits on the rights and freedoms mentioned in the *Charter*. The order made by the adjudicator is only an exercise of the discretion conferred on him by statute.[77]

None of the above-referenced case law was mentioned. Had it been, there would have been some difficulty in reconciling this finding with the earlier jurisprudence, since the "express or necessarily implicit" test has been abandoned (Lamer J. having previously declined to review the statute itself because it did not expressly or by necessary implication limit rights), and a test of legislative authority substituted.

The approach can, however, be characterized as an extension of the more liberal application of the prescribed by law test earlier seen in *Hufsky*, which application may be specific to discretionary powers. The specific order in *Slaight Communications*, that limited a *Charter* right, was not express or necessarily implicit in the statute, but the authority to make discretionary decisions was. In the context of discretionary powers, that appears to be sufficient to meet the prescribed by law test. Any exercise of a clear grant of discretionary authority is prescribed by law, without a showing that the exercise, as well as the grant of discretion, is express or necessarily implicit in the law.[78]

What general principles can be drawn from these cases? The forms of law referred to in the phrase "prescribed by law" include, and may be limited to, statutes, regulations and common law. There must be a demonstrated connection between the law and the action that limits rights. The required connection is precise and direct.[79] But need the law have the substantive qualities of accessibility and precision? While these cases do not discuss these issues as such, the requirement that official action be within the express

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77. *Supra*, note 1, at 1080-1081.

78. One decision which does not fit this analysis and may be seen as denying any content to the prescribed by law requirement is *U.S.* v. *Cotroni*, *supra*, note 61. As noted earlier, the Supreme Court held without discussion that the executive power of surrender derived from the Extradition Act, R.S.C. 1970, c. E-21 was a "law" within s. 1. That is consistent with the above analysis. But the majority further held that the prosecutorial discretion to prosecute in Canada or not to prosecute in Canada and to allow another country to seek extradition did not prevent the extradition process from being justified under s. 1. As noted by Sopinka J. in dissent, this discretion is not only without stipulated criteria, it is not expressly granted in any statute, and is simply a matter of "political discretion" (at 1519). One would expect on this basis, as found by Sopinka J., that there was no limit prescribed by law. The majority decision may, however, be explained by the fact that the limit on the *Charter* right to remain in Canada did not occur as a result of the exercise of the discretion, but because of the general provision in the law for extradition. The discretion, when exercised, would lessen the impact of the general provision. Further, the majority did not seem to consider the exercise of the discretion crucial to the reasonableness of the limit.

79. The required connection is, for example, considerably greater than that formulated by the European jurisprudence, that the action must have some basis in domestic law (*supra*, note 51). This may be explained by the European requirement to interpret in the same way both the phrase "prescribed by law" and the arguably broader phrase "in accordance with the law."

terms of a statute, regulation or common law, or be necessarily implicit from the terms or operating requirements of such a law, would clearly provide the first of these qualities and in many cases the second. Generally speaking, to the extent a law is vague, no limit on rights would flow from it expressly or by necessary implication. But this is not the case where a law grants a discretion; limitations on rights resulting from the exercise of discretion may be considered to flow from the law expressly or by necessary implication, but nonetheless may be unforeseeable due to the broad or undefined scope of the discretion.

Another point to consider is whether there is anything in the prescribed by law concept as developed in these cases that is inconsistent with an as applied approach to application of the *Charter*. The answer would appear to be that it imposes certain limitations on such an approach and shifts the focus in certain circumstances from an as applied examination to a facial examination of the relevant law. For example where police and customs officers violated rights by their conduct only it was not open to them to establish that the violation was reasonable in all of the circumstances. Because s. 1 could not apply, *prima facie* violations of unqualified *Charter* rights constituted infringements of the *Charter*, without consideration of reasonableness.[80]

Thus, when dealing with cases where reliance is placed on s. 1, an as applied approach is available initially in the sense that specific official actions are directly reviewable under the *Charter*.[81] However, when it comes to justification of those actions the inquiry shifts

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80. This contrasts with the approach that may be applied when a violation of a *Charter* right is alleged to exist in official action, as opposed to a statutory provision, but the right involved is inherently qualified. In such a case the reasonableness of the official's action in all the circumstances may be assessed in determining whether there has been a *prima facie* violation of the *Charter*, without requiring that the action arise from the clear terms of a statute or other law: e.g., *R.* v. *Rahey*, [1987] 1 S.C.R. 588 re s. 11(b) right to be tried within a reasonable time; *R.* v. *Manninen*, [1987] 1 S.C.R. 1233 re s. 10(b) right to be given a "reasonable opportunity" to retain and instruct counsel. (Note that the inherent qualification in the latter case arises from judicial interpretation of the right to retain and instruct counsel without delay, and contrasts with the court's unqualified interpretation of "the right to be informed of that right" also found in s. 10(b). The resulting difference in approach to these two branches of what is essentially a single right is difficult to justify. Sopinka J. in a concurring judgment in *R.* v. *Debot*, [1989] 2 S.C.R. 1140 noted this difference, and suggested neither the right to counsel nor the right to be informed should be treated as absolute.)

These cases are frequently determined without regard to s. 1, and employ an exclusively as applied approach. Where the conduct is determined to be reasonable in all the circumstances, there is no violation, and thus no opportunity to refer to s. 1. If the conduct is found to be unreasonable, it could not be saved under s. 1 because of the prescribed by law requirement, but this point is generally superfluous since it would likely be unreasonable in that context as well. See, e.g., *R.* v. *Duarte*, [1990] 1 S.C.R. 30 (unauthorized interception of private communications by police constituted an unreasonable search and violated s. 8, and was also unreasonable under s. 1; question of whether the search was prescribed by law was not addressed).

81. The "prescribed by law" requirement operates against the government or other party seeking to justify a limit, but not against persons relying on the *Charter*, at least so far as obtaining individual relief is concerned. As earlier discussed, *Slaight Communications Inc.* v. *Davidson*, *supra*, note 1, applies

from the specific action in the circumstances of the case to the terms of the applicable law. Because of the requirement of a close connection between the law and the challenged action, there is generally no need to return to an as applied approach to consider the application of the law. If the law does not mandate the action, that is the end of the matter. If the law does mandate the action, and the law is reasonable, then the action is reasonable.

An exception to the foregoing occurs where the law grants a discretionary power. In this case unless the entire scope of the statutorily authorized discretion is reasonable, applications may be unreasonable while the law in simply granting a discretion may be reasonable. In this situation the Supreme Court cases to date seem to be adopting an as applied approach to guarantee that rights are not violated by the exercise of the discretion, and to be applying the prescribed by law test in such a way as to allow this.[82] However,

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a similar test to determine that statutory review is not available, but does apply the *Charter* in any event. Similarly, in *R.* v. *Therens*, *supra*, note 65, it was not disputed that the actions of the police officer, even though they were not prescribed by law, were government action under s. 32 of the *Charter*. A more general relationship between law and action is permitted in this context, and appropriately so, as it leads to a more general protection of rights.

For the same reason it has been argued that a broader definition of law is appropriate when considering "law" as it appears in s. 52(1) than in the "prescribed by law" requirement: see Gibson, *supra*, note 50, at 153 (see also Dickson, C.J.C. in *Operation Dismantle* v. *The Queen*, *supra*, note 48, at 459, suggesting that s. 52(1) may apply to "all acts taken pursuant to powers granted by law".) A broader approach in the context of s. 52 is not as vital to the protection of rights as it is in the s. 32 context, because s. 24 provides an additional means of enforcement. Where a remedy is directed to an act pursuant to powers granted by law, as opposed to the general grant of power, it seems likely and logical that this would occur under the rubric of s. 24, rather than s. 52(1) (see *R.* v. *Albright*, *supra*, note 3). The question of remedy, and the applicable remedial provision was not addressed in *Slaight Communications Inc.* v. *Davidson*, *supra*, note 1.

This point was pursued by Wilson J. in the dissent in *McKinney* v. *University of Guelph*, S.C.C., December 6, 1990, unreported, a decision issued after the completion of this article. Having found the University's mandatory retirement policy to be government action under s. 32, she found that it is also "law" under s. 15 and noted that the meaning of "law" in s. 15 and s. 52 is broader than the meaning in s. 1. The context calls for a broad interpretation in the former instances and a narrower interpretation in the latter: "Section 1...serves the purpose of permitting limits to be imposed on constitutional rights when the demands of a free and democratic society require them. These limits must, however, be expressed through the rule of law. The definition of law for such purposes must necessarily be narrow. Only those limits on guaranteed rights which have survived the rigours of the law-making process are effective." La Forest J., Dickson C.J. and Gonthier J. concurring, agreed in dicta that a mandatory retirement policy, and "all acts taken pursuant to powers granted by law" as referred to by Dickson C.J. in *Operation Dismantle*, would constitute "law" within s. 15. This dicta was applied by a majority in *Douglas/Kwantlen Faculty Assn.* v. *Douglas College*, [1991] 1 W.W.R. 643 (S.C.C.).

82. Wilson J. in dissent in *McKinney* v. *University of Guelph*, *ibid.* also took this approach. She held that, like the adjudicator in *Slaight Communications Inc.* v. *Davidson*, *supra*, note 1, universities "derive their authority over employment relations with their faculty and staff through their enabling statutes. These provisions do not in and of themselves infringe the *Charter*. Instead, it is the action that has been taken pursuant to them which has led to the violation. It is not necessary, therefore,

the limits to this approach are not yet clear, and there may be circumstances in which the *Board of Censors* requirement of precise and reasonable statutory or regulatory standards for the exercise of the discretion would apply. As pointed out earlier, this would effectively preclude an as applied approach in such circumstances.

2. The Issue of Vagueness

The Supreme Court directly confronted the question of vagueness and its relationship to the prescribed by law requirement in *Attorney General of Quebec* v. *Irwin Toy Ltd.*[83] Provincial legislation prohibited commercial advertising directed at persons under 13 years of age.[84] The statute was challenged as being too vague in three ways. It was argued that the provisions were confusing and contradictory. It was also argued that the courts were given insufficient guidance on how to interpret the ban, so that an inordinately wide discretion was vested the judge. In addition, an attack was made on the scope of discretion to promulgate regulations.

The third argument was rejected on the ground that the regulations would themselves constitute limits prescribed by law.[85] Dealing with the argument that the statute was confusing and contradictory, the majority simply concluded that in fact the statute was capable of a sensible construction. On the judicial discretion point, the majority noted that "absolute precision in the law exists rarely, if at all."[86] Nonetheless there must be at least "an intelligible standard according to which the judiciary must do its work".[87]

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to determine specifically whether the actual policies compelling retirement at age 65 are "law" within the meaning of s. 1." La Forest J. did not deal with the prescribed by law point specifically, although he did find in dicta that the mandatory retirement policy would constitute a reasonable limit under s. 1.

83. *Supra*, note 26.

84. *Consumer Protection Act*, R.S.Q., c. P-40.1, ss. 248 and 249 provided:

> 248. Subject to what is provided in the Regulations, no persons may make use of commercial advertising directed at persons under 13 years of age.
> 249. To determine whether or not an advertisement is directed to persons under 13 years of age, account must be taken of the context of its presentation, and in particular of
> (a) the nature and intended purpose of the goods advertised;
> (b) the manner of presenting such advertisement;
> (c) the time and place that it is shown.
>
> The fact that such advertisement may be contained in printed matter intended for persons 13 years of age and over, or intended both for persons under 13 years of age and for persons 13 years of age and over, or that it may be broadcast during air time intended for persons 13 years of age and over, or intended both for persons under 13 years of age and for persons 13 years of age and over, does not create a presumption that it is not directed at persons under 13 years of age.

85. *Supra*, note 26 at 981, citing *R.* v. *Thomsen*, *supra*, note 49.

86. *Ibid.* at 983.

87. *Ibid.*

Without such a standard, if the legislature granted "a plenary discretion to do whatever seems best in a wide set of circumstances",[88] there would be no limit prescribed by law.[89]

The majority found that the provisions in question provided an adequate intelligible standard in determining what advertisements were subject to restriction. The advertisements must have commercial content and must be aimed at persons under 13 years of age. Further, the judge was required to take into account three factors to determine whether the advertisement was so directed. The courts were not given a discretion to ban whichever advertisements they pleased.

While the Supreme Court has thus held there must be some limits placed when delegated discretion affects rights, the test is very broadly phrased. The requirements in *Board of Censors* that limits be "ascertainable and understandable"[90] and in *Luscher* that they "be such as to allow a very high degree of predictability of the legal consequences"[91] appear to be much stricter. Perhaps the Court's lack of concern about precise standards in *Irwin Toy* can be attributed to the fact that judicial discretion was involved. There may be less concern about the control of judicial discretion as judges are obviously trained and independent decision-makers. Appeals are available, and in some circumstances judgments can be stayed pending appeal. Further, guidelines to the proper exercise of the discretion will be established in published case law, so that foreseeability is less of a problem than in the administrative context.

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88. *Ibid.*

89. The Court left open the question of whether there might be a stricter test of vagueness under the s. 7 requirement of fundamental justice (*ibid.* at 1001-1004). In the subsequent *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, *supra* note 56. Lamer J. in a concurring judgment discussed the void for vagueness doctrine and noted that vagueness challenges have been raised under both s. 7 and s. 1, citing in the latter regard *Luscher and Deputy Minister, Revenue Canada*, *supra*, note 54, but not *Irwin Toy*. As the appeal was argued under s. 7 he "proceed[ed] with [his] analysis on that basis" and held that the test was: "...whether the impugned sections of the Criminal Code can be or have been given sensible meanings by the courts. In other words is the statute so pervasively vague that it permits a "standardless sweep" allowing law enforcement officials to pursue their personal predilections?" Dickson C.J. in the majority agreed that vagueness was a principle of fundamental justice, declined to "repeat" Lamer J.'s analysis and held briefly that the statutory provisions were "not so vague, given the benefit of judicial interpretation, that their meaning is impossible to discern in advance." Neither Justice, unfortunately, referred to the *Irwin Toy* decision in this context, and it is difficult or impossible to determine from the language alone whether these tests are intended to be stricter than that stated in *Irwin Toy*. While the *Reference* was argued before the *Irwin Toy* judgment issued it would nonetheless be very helpful to have a cross-reference here. In this instance and other Supreme Court cases on prescribed by law issues there is a lack of such references, that makes analysis of the case law difficult and speculative. The difficulty involved in reconciling *R.* v. *Hufsky*, *supra*, note 44, *R.* v. *Ladouceur*, *supra*, note 43 and *Irwin Toy* is discussed in the following text. This problem is contributed to, again, by the Supreme Court's failure to refer to *Hufsky* or any of the other prescribed by law cases in *Irwin Toy* and its subsequent failure to refer to *Irwin Toy* in *Ladouceur*.

90. *Supra*, note 8, at 67.

91. *Re Luscher and Deputy Minister, Revenue Canada*, *supra*, note 54, at 506.

The question of sufficient standards for the exercise of discretion was not dealt with in *Slaight Communications*.[92] It seems likely that the adjudicator's discretion was guided by an intelligible standard that would meet the *Irwin Toy* test, but unlikely that it was sufficiently circumscribed to meet the *Luscher* test, which is the most strictly phrased. The adjudicator was empowered only to grant remedies affecting specific parties to a complaint and directed at compensating for unjust dismissal of one party by the other. However, there were no guidelines in the statute relevant to the adjudicator's treatment of freedom of expression concerns, so that his authority to limit s. 2(b) rights, as opposed to his general authority, was not highly predictable.[93]

While the precision or lack thereof of the standards for the adjudicator's authority in *Slaight Communications* is debatable, the administrative discretion considered in *R.* v. *Hufsky*[94] and *R.* v. *Ladouceur*[95] clearly had no precise standards, and in fact no standards at all. These decisions, dealing with an unfettered grant of discretion to police officers to stop motor vehicles, far from indicating that a stricter test of certainty should apply in an administrative context, apply no test at all. They are difficult to reconcile with *Irwin Toy*. The Court's description of the authority granted to the officer, to choose in his "absolute discretion", what vehicles he will stop,[96] hardly accords with the requirement of an intelligible standard. Perhaps the fact that the discretion dealt simply with the stopping of vehicles on public highways was sufficient to remove it from the *Irwin Toy* proscription against "a plenary discretion to do whatever seems best in a wide set of circumstances".[97] If so, then the *Irwin Toy* test precludes only a completely unfettered discretion operating with regard to a broad scope of activities, and its practical impact is even less than might be initially supposed.

## C. SUMMARY OF SUPREME COURT DECISIONS

Does the Supreme Court authority ensure that limits on rights are accessible and predictable? The Supreme Court's approach lacks a clear underlying thesis, and because of this the boundaries of what may be prescribed by law remain unclear. Generally the Court has focused on the connection between actions and commonly accepted forms of law, and has not elucidated the essential qualities of law, although the *Irwin Toy*[98] case is an exception and indicates that the phrase may require more than form. As discussed

92. *Supra*, note 1.

93. As noted above, Marceau J., in dissent in the Federal Court of Appeal expressed doubt as to whether the adjudicator's authority to limit rights was prescribed by law, and Lamer J., referring to this, said that Marceau J. "did not think it possible to say that the limitation was prescribed by law, since the extent of the limitation was not indicated by the legislation in question" (*supra*, note 13). Lamer J.'s subsequent determination that the limit was prescribed by law, without any comment on this point, suggests that there was no requirement that the extent of this limitation be indicated in the legislation.

94. *Supra*, note 44.

95. *Supra*, note 43.

96. *Supra*, note 44 at 634.

97. *Supra*, note 26.

98. *Ibid.*

above, an incidental result of this focus is that distinctive approaches and conclusions apply depending on whether the law in question is mandatory or grants a discretionary power. In the former case, limitations on guaranteed rights and freedoms must be reasonably clear and therefore foreseeable or they will not be considered to be prescribed by law; in the latter case it appears that limitations may be imposed in the exercise of a very broadly defined or potentially even unfettered discretion, so that foreseeability is largely lost.

Is the *Board of Censors*[99] line of authority overruled by Supreme Court decisions? This is not yet clear but may be implied by the *Slaight Communications*[100], *Hufsky*[101], *Ladouceur*[102] and *Irwin Toy* decisions for reasons discussed above. *The Board of Censors* approach involving facial review of an empowering statute and requiring that discretionary authority be limited by precise standards is certainly not the exclusive means of protecting *Charter* guarantees from discretionary restrictions. What are the implications of this for protection of rights and freedoms?

## VI. FACIAL REVIEW AND THE REQUIREMENT OF PRECISE STANDARDS v. AS APPLIED REVIEW – THE IMPACT ON PROTECTION OF RIGHTS

### A. "CHILLING"

Advocates of the *Board of Censors* approach would argue that it achieves foreseeability of limits on rights and freedoms, something that the as applied approach lacks. It thus prevents the occurrence of a chill on the exercise of guaranteed rights and freedoms.[103]

However, chilling or deterrence does not occur simply because of the vagueness of a law, but depends on the context in which the vagueness occurs. Where a law directly proscribes or regulates the conduct of the public, then a citizen unsure of the scope of the law must either risk prosecution or other peril, or self-censor his or her own conduct in

99. *Supra*, note 8.
100. *Supra*, note 1.
101. *Supra*, note 44.
102. *Supra*, note 43.
103. The term, which has appeared in a number of *Charter* cases, developed in American First Amendment jurisprudence. See generally Tribe, *supra* note 32, 1034-1035; and *Rocket* v. *Royal College of Dental Surgeons of Ontario*, [1990] 1 S.C.R. 232.

a manner that may be more restrictive than the law.[104] So, in these circumstances vagueness in the law will result in a chill.

If violation of the proscription or regulation carries with it criminal penalties, the law is additionally perceived as unfair because of its lack of notice or fair warning of the potential for punishment. American laws of this type may be declared unconstitutional under the due process clause pursuant to the void-for-vagueness doctrine.[105] The Supreme Court of Canada has recently held that the principles of fundamental justice also prohibit vague criminal laws as they apply to individuals.[106]

Even if the law does not give rise to individual criminal liability, or does not otherwise invoke s. 7, it nonetheless creates concerns of a constitutional stature if its direct proscription or regulation of conduct may lead to any form of peril for the exercise of guaranteed freedoms. Examples would include fines, liability for civil damages and professional discipline. While life, liberty and security of the person may not be at stake,[107] such risks may equally deter constitutionally protected conduct.[108]

Where, however, laws do not directly proscribe or regulate conduct, but empower the court or an administrative official to do so, vagueness associated with the grant of authority will not have a chilling effect. The proscription or regulation only comes into effect with the issuance of an order in specific terms, so that there is no vagueness in the

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104. As noted above, *Re Luscher and Deputy Minister, Revenue Canada*, *supra*, note 54, raised the concern of deterring lawful conduct. The vague provision in the Customs Act struck down in that case related to a direct prohibition of conduct: namely, a prohibition on the importing of immoral or indecent material. While discretionary authority was involved in the form of classification of material sought to be imported, the prohibition applied to the vaguely defined category of goods, and not only to goods following classification: Customs Tariff, R.S.C. 1970, c. C-41, s. 14. Similarly, vagueness in the definition of books subject to special display rules affected a direct regulation of the conduct of booksellers, and thus could have a chilling effect: *Re Information Retailers Association of Metropolitan Toronto Inc and Toronto*, *supra*, note 30. Vagueness in obscenity laws, as alleged but not found in *R.* v. *Red Hot Video Ltd.* (1985), 45 C.R. (3d) 36 (B.C.C.A.), or in the Criminal Code offence of spreading false news, as alleged but not found in *R.* v. *Zundel* (1987), 35 D.L.R. (4th) 338 (Ont. C.A.) would also affect a direct prohibition of public conduct.

105. Penal laws may engage the void-for-vagueness doctrine simply because of their status as such, and need not necessarily impact on the exercise of constitutionally protected conduct. L.H. Tribe, *supra*, note 32, at 1033; Note, "The Void-for-vagueness Doctrine in the Supreme Court" (1960) 109 *U. Penn. L. Rev.* 67 at 85-86 (although the author is of the view that the primary function of the void-for-vagueness doctrine is to provide a buffer-zone for the protection of constitutionally guaranteed freedoms). The point is mentioned here in the context of laws that affect constitutionally protected conduct because the discussion primarily concerns the impact of vagueness outside of the scope of s. 7, in the application of s. 1 to limitations of other rights and freedoms.

106. *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, *supra*, note 56. This issue had been earlier left open in *Irwin Toy Ltd.* v. *Quebec (Attorney General)*, *supra*, note 26.

107. See the concurring judgment of Lamer J. in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, *ibid.*

108. *Rocket* v. *Royal College of Dental Surgeons of Ontario*, *supra*, note 103 (prospect of professional discipline proceedings under overbroad advertising regulation likely to deter dentists from advertising in a constitutionally permissible fashion).

law as it directly impacts the citizen.[109] This form of law, where the discretionary decision is prospective only, and has no retrospective effect, is common in the area of delegated discretion. It was the form of law involved in *Slaight Communications*. Even if the scope of the adjudicator's power were considered to be vague, the order directed by him to the parties was not. Thus for this type of law, a discretionary proscription, chilling is not a concern.

Another common form of delegated discretion involves discretionary permission. The law may simply proscribe certain conduct in the absence of an exempting order, or it may require review and licensing of certain conduct. This type of law was involved in the *Ontario Board of Censors* case. Here again there is no problem with vagueness leading to a chilling effect, provided the general proscription or requirement for review, and the specific licensing or exempting decision are clear.[110] There is, however, a prior restraint, which may give rise to additional problems, if the conduct in question is time-sensitive and particularly if constitutional review following violation of the general proscription or denial of an exemption is prohibited by a bar against collateral attacks.[111] However these problems do not relate to foreseeability or a chilling effect, but to ensuring prompt and substantively correct decisions about constitutionally protected conduct, in other words to controlling the exercise of the discretion.[112]

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109. This assumes that the terms of the order itself are precise. If they are not, there may be a chill resulting from the order. Thus the order itself should be "sufficiently clear and precise to be understood and enforced": *Re Bryntwick and National Parole Board* (1986), 32 C.C.C. (3d) 321 (F.C.T.D.) (finding a parole condition restricting certain meetings and communications to be sufficiently precise).

110. This was the case with the requirement to submit all films to the Board of Censors and the prohibition against exhibiting any film not specifically approved by the Board dealt with in *Ontario Film and Video Appreciation Society* v. *Ontario Board of Censors*, *supra*, note 8. If the general proscription or the requirement to submit to the administrative authority is vague, and if the requirement to obtain an exemption or other review is onerous in any significant way, there may be a resulting chill. For example, in *Re Information Retailers Association of Metropolitan Toronto Inc. and Toronto* booksellers were required to obtain licenses to sell adult books and magazines. The court held that because of the perceived social stigma and the nuisance involved in obtaining such a license, there might be "a tendency on the part of some booksellers to comply with the law by not selling books which by any stretch of the interpretive imagination can be said to fall within the ambit of the by-law" (*supra*, note 30 at 472).

111. Tribe, *supra*, note 32 at 1043-1054. Collateral attacks are prohibited with regard to injunctions in Canadian law, probably including injunctions that are invalid for constitutional reasons (*Canadian Transport (U.K.) Ltd.* v. *Alsbury* (1952), 7 W.W.R. (NS) 49; aff'd [1953] 1 S.C.R. 516), and "injuctions" granted by administrative tribunals that are filed and enforced as court orders (*Canada (Human Rights Commission)* v. *Taylor*, S.C.C. Dec. 13, 1990, unreported), per McLachlin J., dissenting (the majority did not reach this point). However, this is likely not the case regarding administrative orders as such: *Jones* v. *The Queen*, *supra*, note 43 (dicta that denial of certificate by school authorities would not be sufficient to meet a defence based on freedom of religion).

112. J.C. Jeffries, "Rethinking Prior Restraint" (1983) 92 Yale L.J. 409 at 421-426.

## B. CONTROL OF DISCRETION

For both the *Slaight Communications* and the *Ontario Board of Censors* forms of discretionary authority, therefore, the exclusive legitimate concern related to vagueness in the grant of discretionary authority is the issue of control of the exercise of the discretion. If the prescribed by law requirement does not preclude the grant of an unregulated discretion, how can abuses of discretion that unreasonably violate rights and freedoms be prevented? The answer provided by the Supreme Court, as discussed above, is an as applied approach.

Traditionally administrative law principles have provided some protection against unreasonable exercises of discretionary powers. Apparently unfettered grants of discretionary authority are not truly absolute. The discretion must be exercised reasonably. Nonetheless, allowing *Charter* review in addition to traditional judicial review has advantages for the protection of rights and freedoms. *Charter* review focuses the analysis and provides a structure that has been developed for the purpose of protecting rights. Dickson C.J. in *Slaight Communications* described the benefits as follows:

> The precise relationship between the traditional standard of administrative law review of patent unreasonableness and the new constitutional standard of review will be worked out in future cases. A few comments nonetheless may be in order. A minimal proposition would seem to be that administrative law unreasonableness, as a preliminary standard of review, should not impose a more onerous standard upon government than would *Charter* review. While patent unreasonableness is important to maintain for questions untouched by the *Charter*...in the realm of value inquiry the courts should have recourse to this standard only in the clearest of cases in which a decision could not be justified under s. 1 of the *Charter*. In contrast to s. 1, patent unreasonableness rests to a large extent on unarticulated and undeveloped values and lacks the same degree of structure and sophistication of analysis.[113]

An as applied review imposes constitutional limits on the exercise of official discretion. Facial review requires the legislature to place specific statutory limits on grants of discretion. The difference in the nature of the limits that must be enforced on a case-by-case basis, constitutional versus statutory, gives rise to two disadvantages of as applied review in terms of control of discretion. These are increased uncertainty and expense in the enforcement process.

Constitutional limits will generally be more difficult to define or predict than statutory limits would be. Laurence Tribe asserts that this is the basic justification for facial invalidation of laws, although his discussion of the point is in the context of laws that directly proscribe or regulate conduct, where vagueness may chill constitutionally

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113. *Supra*, note 1 at 1076-1077.

protected conduct.[114] But uncertainty may also affect the control of discretion, in that it may discourage attempts to protect rights. Related to this is the issue of expense. A significant burden is placed on the citizen to prove a violation of the Constitution. In spite of the onus shift under s. 1, it will often be more difficult to prove a violation of the *Charter* than of a specific statutory provision. Not only are the *Charter* concepts much broader, but the citizen may have to respond to social policy evidence and argument on the issue of reasonableness.

On the other hand, statutory limits must also be enforced in the courts and uncertainty and expense would not be completely avoided. In circumstances in which judicial proceedings are likely to be invoked in any event, the onus of raising constitutional objections may not create a significant deterrent. Thus increased uncertainty and expense should be considered, but should not be determinative in all circumstances. A number of other factors affect the benefits obtained by, and cost of imposing, a requirement for statutory limits on discretionary authority.

For example, the need for flexibility in the exercise of the discretion should be considered. If the need for flexibility is so great that standards cannot realistically address the varied factors and interests that the decision-maker will have to address, the cost of requiring specific standards is great (or the benefit small because the standards themselves would have to be very general in form). Examples would include the court's discretionary authority to determine and act in the best interests of the child,[115] and arguably a prison

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114. Tribe, *supra*, note 32 at 1031:

> The risk of introducing vagueness when attempting to reconstruct statutes reveals a structural relationship of general importance in the interplay of overbreadth and vagueness. This relationship is most sharply focused in a hypothetical statute: *"It shall be a crime to say anything in public unless the speech is protected by the first and fourteenth amendments."* This statute is guaranteed not to be overbroad since, by its terms, it literally forbids nothing that the Constitution protects. The statute is nonetheless patently vague, although it is identical with the gloss Chief Justice Rehnquist would apparently put on every law in order to "save" it from an overbreadth challenge...The problem with that solution is that it simply exchanges overbreadth for vagueness. Indeed, the premise underlying *any* instance of facial invalidation for overbreadth must be that *the Constitution does not, in and of itself, provide a bright enough line to guide primary conduct*, and that a law whose reach into protected spheres is limited *only* by the background assurance that unconstitutional applications will eventually by set aside is a law that will deter too much that is in fact protected.

115. In *Hockey* v. *Hockey*, *supra*, note 29 an order restricted access of a father to his children to prevent him from instructing them in his religion (which differed from that of their mother). The Ontario Divisional Court held at p. 106:

> In our view there was no evidence before the court to show that exposure to two religions would be harmful to five year old twins. In the absence of compelling evidence that the sharing of religious beliefs and practices by the access parent with the child or that the exposure to two religions is contrary

administrator's authority to transfer inmates to higher security institutions.[116] A statute or regulation setting guidelines for the exercise of such a discretion would either have to risk interfering with the discretion in an unnecessary and potentially harmful manner by trying to limit proper considerations, or would simply repeat the language of the *Charter* by stating that the discretion must not be exercised in a way that unreasonably interferes with guaranteed rights and freedoms. This is the effect of the *Slaight Communications* as applied approach and including similar language within a statute would not provide any better protection of rights.

The degree of conflict with the *Charter* should be considered. If the discretionary authority has only an occasional or minimal impact on *Charter* rights and freedoms, the benefit in terms of protecting rights is clearly less, and thus will be more likely outweighed by the difficulties or costs of requiring detailed legal standards.

The practical availability of judicial review or appeal is an important factor.[117] This includes consideration of both the time and expense of obtaining review, and determining whether either or both in the circumstances of a case are likely to preclude the enforcement of constitutional rights or freedoms. If judicial review is not practically available, an as applied approach provides essentially no protection of rights. Facial review and the requirement of strict standards are thus essential, and warrant a significant cost. Facial review of the underlying statute can be accomplished in a single test case, eliminating the need for ongoing *Charter* review. While statutory standards are also optimally maintained through judicial review, the fact that they are more precise and more easily applied should mean that less frequent review will not be as harmful as it would be to the maintenance of constitutional standards.

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> to the best interest of the child, the Divorce Act must be interpreted in a way compatible with the fulfilment of constitutional rights including the freedom of religion of the access parent.

While this language suggests that the Court was engaged in a facial review of the Divorce Act, and is reading down the Act, the fact that the conclusion depends so much on the circumstances of the case and the evidence called in the case suggests that in reality the Court was applying *Charter* principles to the access order itself.

116. *Gallant* v. *Correctional Service Canada*, *supra*, note 58.

117. Practical, and not legal, availability is the only concern. As applied review will always be legally available as it could not be excluded or limited by privative clauses in the statute granting the discretionary authority. This arises from the supremacy of the *Charter* and is implicit in *Slaight Communications Inc.* v. *Davidson*, *supra*, note 1. The Canada Labour Code, *supra*, note 7, contains a privative clause pertaining to the adjudicator's decisions (s. 61.5(10) which provides: "every order of an adjudicator appointed under subsection (6) is final and shall not be questioned or reviewed in any court"), but the Court did not even refer to the clause. Further, the majority in *Douglas/Kwantlen Faculty Assn.* v. *Douglas College*, *supra*, note 81 at 678 stated in dicta that "constitutional determinations by arbitrators or other administrative tribunals or agencies should, of course, receive no curial deference."

In *Slaight Communications* both of the latter two factors supported the adequacy of as applied review for the protection of rights. Adjudicators' compensatory orders will only occasionally or minimally conflict with freedom of expression, and constitutional review is readily available in that the parties are already involved in adversarial proceedings, and may well be seeking judicial review on other grounds or pertaining to other aspects of an order. Further, the time involved in seeking review is unlikely to present significant difficulties and, if it does, it may be that these could be resolved by obtaining a stay of the adjudicator's order pending review.

For these reasons, in the circumstances of the *Slaight Communications* case, having constitutional standards apply directly to the discretionary decision, rather than requiring legislative standards, provides an adequate protection of rights. There would be no significant benefits achieved by requiring legislative standards and there could be a loss in terms of the flexibility of the adjudicator to respond to the needs of a particular case.

If, on the other hand, the legitimate considerations of the discretionary decision-maker are reasonably limited, the discretionary power impacts significantly on *Charter* guarantees, or judicial review is not reasonably available within time or expense parameters, then the cost of requiring legislative standards is less or the benefit greater. All of these factors were arguably present in the *Board of Censors* case. Clearly the Board's powers had a significant impact on freedom of expression. The Board's legitimate concerns would appear to be reasonably limited and capable of stipulation; the Board itself undertook such a stipulation as did subsequently enacted regulations.[118] Finally, and importantly, the fact that a prior restraint was involved meant that the delay involved in obtaining judicial review could be a significant concern.[119]

This listing of factors contributing to the cost of or benefit obtained by requiring legislative standards is not intended to be exclusive. However, the fact that there are a number of relevant considerations does indicate that an invariable requirement of precise legislative standards for discretionary action is not necessary or desirable. Thus, rather than incorporating such a requirement into the prescribed by law aspect of s. 1, which would have the effect of creating an invariable rule, a better approach would be to employ the *R.* v. *Oakes*[120] test to determine whether, in the circumstances, a broad grant of

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118. R.R.O. 1980, Reg. 931, s. 21 (enacted O. Reg. 56/85, s. 2); considered in *Re Ontario Film & Video Appreciation Society and Ontario Film Review Board* (1986), 57 O.R. 339 (Div. Ct.). The specificity of these standards was not, however, considered.

119. American jurisprudence permits prior restraints in the context of film censorship, but only with built-in procedures to ensure prompt judicial review: *Freedman* v. *Maryland*, 380 U.S. 51; Tribe, *supra*, note 32 at 1058-1061. Further, any discretionary power involved in the licensing process must be limited by "narrow, objective and definite standards": *Shuttlesworth* v. *Birmingham*, *supra*, note 32 at 151; Tribe, *supra*, note 32 at 1055-1057.

120. *Supra*, note 56.

discretionary authority is reasonable or a more limited grant pursuant to stipulated guidelines is all that can be justified.[121] Alternatively, flexibility could be provided at the remedial stage, with statutory grants of authority being struck down or modified only where this is important to the proper control of the discretion, and as applied relief only being granted where this is a sufficient control. Whichever of these techniques is employed, the result is a more sensitive assessment of the issues.

## VII. CONCLUSION

*Slaight Communications* may be a somewhat problematic beginning to an as applied approach to the *Charter*, but it is a beginning. Further development along these lines is warranted by the advantages of an as applied approach. These advantages are generally described from the point of view of the government or others attempting to preserve legislation in the face of a *Charter* challenge. From this perspective, the approach has the practical benefit that it leaves in place a statutory power found by the court to be useful and reasonable in its usual applications. This is not insignificant in terms of social utility. Further, the approach has the theoretical benefit of minimizing interference with legislative objectives and in this way minimizing conflict between the legislatures and the courts.

But the as applied approach also has advantages for advocates of *Charter* rights. It is an individualistic approach that ensures that rights are protected against abuse in atypical circumstances. Without an as applied approach such protection may be irretrievably lost. Exclusively facial review of laws is by its nature more community oriented. Atypical cases may be adverted to as a basis for establishing that a grant of discretionary authority

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121. In *Canada (Human Rights Commission)* v. *Taylor*, *supra*, note 111, McLachlin J. for the dissent held that a prohibition of telephonic messages likely to expose a person or a group to hatred or contempt provided an intelligible standard and was prescribed by law (the majority agreed on this point). McLachlin J. noted, however, that the vagueness of the standard still contributed to the s. 1 analysis of whether the law was demonstrably justified, but that she would be "reluctant to circumvent the entire balancing analysis of the s. 1 test by finding that the words used were so vague as not to constitute a "limit prescribed by law", unless the provision could truly be described as failing to offer an intelligible standard. That is not the case here." She then went on to find the provision could not be justified, largely due to overbreadth caused by its vagueness.

Further, recall that *Re Luscher and Deputy Minister, Revenue Canada, Customs and Excise*, *supra*, note 54, considered vagueness in the context of the reasonableness component of s. 1, but was not dealing with the form of delegation of discretion under discussion here, and held that vagueness was *per se* unreasonable. *MacPhee* v. *Nova Scotia Pulpwood Marketing Board*, *supra*, note 31 is closer to the point, holding that the Board's power to register associations as bargaining agents, which was not limited by statutory, regulatory or other standards to determine whether a sufficient level of support for the association existed, failed the proportionality test in *R.* v. *Oakes*, because the lack of "accessible and ascertainable standards" made the power "discretionary and inherently arbitrary" and "subject to an inherent risk that the powers...may be exercised from case to case in a manner that entails a greater impairment of the rights under consideration than is necessary to meet the otherwise justifiable objectives of the legislation" (*ibid.* at 244). However, the court did not consider the availability or suitability of as applied review, holding that it was for the Board, under its statutory authority, to adopt specific standards.

is disproportionate to its purpose and thus fails the s. 1 reasonableness test. However, courts may be reluctant to strike down such authority on the basis of possible but unusual applications and may simply sacrifice atypical cases to the greater good, holding that overall the grant of discretion is reasonable. This would, of course, leave open the possibility of dealing with unusual circumstances by techniques of statutory interpretation, or common law doctrines such as that precluding patent unreasonableness in the exercise of discretion. But those tools would not protect against abuses of discretion as well as *Charter* review.[122] The as applied approach brings the full force of the *Charter* to bear directly upon discretionary decisions.

122. See the quotation from the judgment of Dickson C.J. in *Slaight Communications Inc.* v. *Davidson*, *supra*, note 1, that accompanies note 113.