C A N A D A
PROVINCE OF NOVA SCOTIA
COUNTY OF HALIFAX **C.R. NO.: 12562**

IN THE COUNTY COURT JUDGE'S CRIMINAL COURT OF DISTRICT NUMBER ONE

BETWEEN;

HER MAJESTY THE QUEEN

RESPONDENT

- AND -

CEZAR LALO

APPLICANT

Denise C. Smith, Counsel for the Respondent,
Brian Smith, Counsel for the Applicant.

1993, January 22nd, Bateman, J.C.C.: (Orally)

At the commencement of this trial the Defence requested an adjournment to advance a motion to quash the indictment on the basis that the section of the **Criminal Code** under which Mr. Lalo was charged contravened the **Canadian Charter of Rights and Freedoms**. The Defence had given no notice to the Crown of its intention to make such a motion.

I reserved my decision on whether to entertain the motion and as to the merits of it, should I determine to hear it. As the Crown witnesses were present, indeed one from out of province, I determined to proceed with the trial. I reserved my decision as to guilt or innocence to first consider the Constitutional challenge.

The Charter case for the Defence and the Crown was presented by written briefs. There was no request to call evidence on the motion.

Only recently has there been guidance as to the required timing of such a Charter challenge. Courts have generally accepted that such motions should be made on notice. On September 19,1989, the Chief Justice of the Trial Division of the Supreme Court issued a practice directive requiring 14 days notice to the Attorney General of Canada where a party seeks to challenge the constitutional validity of an Act of Parliament. The timeliness of Charter challenges to evidentiary matters was considered in **R. v. Kutynec** (1991), 7 O.R. (3d) 277 (Ont.C.A.), which was approved by our Appeal Division in **R. v. Yorke** (1992) S.C.C. 02698, Roscoe J.A., November 23, 1992.

It would seem that a challenge to the constitutional validity of a section of a statute could and should in most circumstances be made at the earliest opportunity and before trial. It is in no way dependent upon the disclosure process. There will, of course, be exceptional circumstances in which such a motion can't be anticipated, such as the rendering of a decision in another matter which brings the validity into question late in the day. Such was not the case here.

Both the accused and the public have a very real interest in criminal proceedings moving along with minimum delay. Our system is memory based. With the passage of time the likelihood that recollections will be complete and accurate decreases in direct proportion. The goal of the process is to get relevant and reliable information before the court in a timely manner. The justice system has received much scrutiny and criticism of late for its failure to process criminal trials in a timely fashion. Motions such as this, made at the opening of trial and without notice, can result in significant delays.

In **R. v. Loveman**, (1992), 71 C.C.C.(3d) 123 (Ont.C.A.) the Court held that a trial judge does have the inherent power to "decline to entertain a motion where no notice, or inadequate notice, of the motion has been given" (p.125). The exercise of discretion involves a balancing of interests including "the effective use of court resources and the expeditious determination of criminal matters" (p.127). On a balancing of the interests, however, I feel compelled to entertain the challenge. In this instance it was possible to deal with the motion without occasioning significant delay.

The Defence says the Indictment should be quashed on the basis that s. 156 of the **Criminal Code**, R.S.C. 1970, c.34 as amended, " is discriminatory in the enumerated ground of sex, and on the analogous ground of sexual orientation in violation of the

s.15 guarantees of equality before and under the law and equal protection of the law without discrimination".

The threshold question is whether the Charter is applicable to these circumstances. The majority of Courts have taken the position that s.15 is not to be given retrospective or retroactive effect in the sense of allowing its application to change the substantive law prior to the date of April 17, 1985 - which was the date of proclamation. I have reviewed the following cases to this effect: **R. v. Dickson and Corman** (1982), 40 O.R. (2d) 366 (Ont. Dist. Ct.); **R. v. Clark** (1986), 74 N.S.R. (2d) 17 (N.S.S.C.A.D.); **R. v. Lucas and Neely** (1986), 27 C.C.C.(3d) 229 (Ont.C.A.); **R. v. Thorburn** (1986), 26 C.C.C.(3d) 154 (B.C.C.A.); **R. v. Grosse** (1983), 61 N.S.R.(2d) 54 (N.S.S.C.A.D.). The ratio of all of these cases is straightforward and as set out in the headnote of **Lucas and Neely**: "The Charter cannot be applied retrospectively so as to reach back and reverse the liability which clearly existed in the basis of the facts and the law in existence at the time the offence was committed." Coincidentally this case involved a similar challenge but to s.146(1) of the **Code**, as it then was.

The Defence cited, in support of its submission, **R. v. Chapman** (1984), 12 C.C.C. (3d) 1 (Ont.C.A.). **Chapman**, however, involved procedural rights extended by the Charter and not the validity of legislation. A recognized exception to the general rule that a statute shall not have retrospective effect is those

statutes or parts of statutes which effect evidence or procedure - which are permitted to apply to pending cases. The Defence cited, as well, **Re MacDonald and The Queen** (1984), 21 C.C.C.(3d) 330 (Ont.C.A.). In both **Thorburn**, supra, and **Lucas and Neely**, supra, the courts found that in **MacDonald** the court proceeded on the basis that McDonald was seeking a prospective application of the Charter.

The Defence refers as well to **R. v. Stymiest** (unreported, April 9, 1991, B.C.C.A.) and **R. v. Harold** (unreported, November 9, 1989, Alta. Q.B.). With all respect to the Learned Trial Judges in those cases, it appears their attention was not directed to the issue of retrospectivity. Their comments are directed only to the constitutionality of the legislation without first considering the applicability of the Charter in the particular fact situation.

Mr. Lalo cannot rely on s.15 of the Charter in relation to liability for this offence where the alleged criminal behavior was complete before proclamation.

It is therefore unnecessary to consider the arguments as to the constitutionality of section 156.

Accordingly, I dismiss the Motion to quash the Indictment.

A Judge of the County Court of
District Number One