

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

B E T W E E N:

JESSICA ERNST

Appellant

-and-

ALBERTA ENERGY REGULATOR

Respondent

-and-

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essential to defining the purpose of the sections which they limit.

(b) *The Purpose of the Mobility Guarantee*

We turn now to the first principles of the *Charter* of which s. 6 forms a part. In *Skapinker, supra*, which also happens to be one of the earliest *Charter* cases, Estey J. articulated in passing what he perceived as the animating purpose of the *Charter* (at pp. 366-67):

With the *Constitution Act, 1982* comes a new dimension, a new yardstick of reconciliation between the individual and the community and their respective rights, a dimension which, like the balance of the Constitution, remains to be interpreted and applied by the Court. [Emphasis added.]

In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 156, Dickson J. saw a similar role:

The *Canadian Charter of Rights and Freedoms* is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action. [Emphasis added.]

The analysis to be followed in determining the precise content of any particular *Charter* obligation is discussed in *Big M Drug Mart, supra*, at p. 344, in the course of which the function of the *Charter* as a whole is described:

In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, [etc.]. . . . The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter's* protection. [Emphasis added.]

In a recent article, former Chief Justice Dickson identifies the development of international human

encore l'article premier de la *Charte*, étant donné qu'aucune de ces dispositions n'est indispensable pour définir l'objet des articles dont elles limitent la portée.

b) *L'objet de la garantie de liberté de circulation et d'établissement*

Nous abordons maintenant les principes premiers de la *Charte*, dont l'art. 6 fait partie. Dans l'arrêt *Skapinker*, précité, qui se trouve à être l'un des premiers arrêts relatifs à l'application de la *Charte*, le juge Estey a expliqué, en passant, ce qu'il percevait comme l'objet sous-jacent de la *Charte* (aux pp. 366 et 367):

La *Loi constitutionnelle de 1982* apporte une nouvelle dimension, un nouveau critère d'équilibre entre les individus et la société et leurs droits respectifs, une dimension qui, comme l'équilibre de la Constitution, devra être interprétée et appliquée par la Cour. [Nous soulignons.]

Dans *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, à la p. 156, le juge Dickson a perçu un rôle similaire:

La *Charte canadienne des droits et libertés* est un document qui vise un but. Ce but est de garantir et de protéger, dans des limites raisonnables, la jouissance des droits et libertés qu'elle enchâsse. Elle vise à empêcher le gouvernement d'agir à l'encontre de ces droits et libertés; elle n'autorise pas en soi le gouvernement à agir. [Nous soulignons.]

L'analyse qu'il faut faire pour déterminer la nature précise de toute obligation découlant de la *Charte* est décrite dans l'arrêt *Big M Drug Mart*, précité, à la p. 344, où l'on décrit également le rôle de la *Charte* dans son ensemble:

À mon avis, il faut faire cette analyse et l'objet du droit ou de la liberté en question doit être déterminé en fonction de la nature et des objectifs plus larges de la *Charte* elle-même, [etc.]. [. . .] Comme on le souligne dans l'arrêt *Southam*, l'interprétation doit être libérale plutôt que formaliste et viser à réaliser l'objet de la garantie et à assurer que les citoyens bénéficient pleinement de la protection accordée par la *Charte*. [Nous soulignons.]

Dans un article récent, l'ancien juge en chef Dickson estime que l'essor des droits de la per-

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rights as an important influence leading to an entrenched guarantee of rights and freedoms in this country. He observes:

The Universal Declaration of Human Rights marked the worldwide abhorrence of human rights violations that had occurred in many countries during the Second World War. The Universal Declaration signalled, however, more than mere abhorrence. It also vividly underlined a commitment, forged through events leading up to and including the Second World War, to usher in a new period of human history, one characterized by a profound respect for human rights.

. . .

The Charter reflects an agreement by the federal and provincial governments to limit their legislative sovereignty so as not to infringe on certain rights and freedoms. [Emphasis added.]

(“The Canadian Charter of Rights and Freedoms: Context and Evolution”, in G.-A. Beaudoin and E. Mendes, eds., *The Canadian Charter of Rights and Freedoms* (3rd ed. 1996), at pp. 1-5 and 1-15.)

These statements affirm what may appear obvious to some, that the primary purpose of the Charter is to constrain government action in conformity with certain individual rights and freedoms, the preservation of which are essential to the continuation of a democratic, functioning society in which the basic dignity of all is recognized.

sonne sur le plan international est un facteur important qui a contribué à l’adoption, au Canada, d’un document garantissant des droits et libertés. Il fait remarquer:

[TRADUCTION] La Déclaration universelle des droits de l’homme témoigne de l’horreur inspirée dans le monde entier par les violations des droits de la personne qui ont été commises dans de nombreux pays au cours de la Deuxième Guerre mondiale. La Déclaration universelle représentait cependant plus qu’une simple expression d’horreur. Elle soulignait également de façon éclatante la volonté, issue de la Deuxième Guerre mondiale et des événements qui y ont conduit, de marquer le début d’une ère nouvelle pour l’humanité, une ère empreinte d’un profond respect des droits de la personne.

. . .

La Charte est l’expression de la volonté commune des gouvernements fédéral et provinciaux de limiter leur souveraineté législative de manière à ne pas violer certains droits et certaines libertés. [Nous soulignons.]

(«The Canadian Charter of Rights and Freedoms: Context and Evolution», dans G.-A. Beaudoin et E. Mendes, dir., *Charte canadienne des droits et libertés* (3^e éd. 1996), aux pp. 8 et 19.)

Ces déclarations confirment ce qui peut paraître évident à certains, c’est-à-dire que l’objet principal de la Charte est de veiller à ce que toute action gouvernementale soit conforme à certains droits et libertés individuels dont la protection est essentielle au maintien d’une société démocratique et fonctionnelle dans laquelle la dignité fondamentale de tous les individus est reconnue.

Section 6 is a part of these essential human rights not only by virtue of its inclusion in the *Charter*, but also as evidenced by international human rights instruments which recognize mobility rights. Indeed, s. 6 closely mirrors the provisions of several human rights instruments to which Canada is a party:

L’article 6 fait partie de ces droits essentiels de la personne non seulement parce qu’il est inclus dans la *Charte*, mais également en raison des instruments internationaux de défense des droits de la personne qui reconnaissent la liberté de circulation et d’établissement. En effet, l’art. 6 reflète de près les dispositions de plusieurs instruments de défense de droits de la personne, que le Canada a ratifiés:

Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (affirmative vote, including Canada, December 10, 1948)

Article 13

1. Everyone has the right to freedom of movement and residence within the borders of each State.

Article 23

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

International Covenant on Economic, Social and Cultural Rights, Can. T.S. 1976 No. 46 (date of accession: May 19, 1976)

Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

Article 2 of the *Universal Declaration of Human Rights* also provides that a person is entitled to the enjoyment of those rights “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. As the words of s. 6(3)(a) make clear, the *Charter* right to mobility is largely predicated on the right to equal treatment. In principle, then, s. 6 may be understood as giving effect to the fundamental human right of mobility, which is defined according to the obligation that individuals be treated without discrimination based on their residence.

Prior to the advent of the *Charter*, the right of Canadian citizens to move about, reside, and work in the province of their choice had been affirmed. This entitlement had been enunciated not out of a concern with fundamental human rights, however, but as a consequence of the exclusive federal jurisdiction over citizenship conferred by s. 91 of the *Constitution Act, 1867* (see *Winner v. S.M.T.*

Déclaration universelle des droits de l’homme, A.G. Rés. 217 A (III), Doc. A/810 N.U., à la p. 71 (vote affirmatif, comprenant le Canada, 10 décembre 1948)

Article 13

1. Toute personne a le droit de circuler librement et de choisir sa résidence à l’intérieur d’un État.

Article 23

1. Toute personne a droit au travail, au libre choix de son travail, à des conditions équitables et satisfaisantes de travail et à la protection contre le chômage.

Pacte international relatif aux droits économiques, sociaux et culturels, R.T. Can. 1976 n° 46 (date d’adhésion: le 19 mai 1976)

Article 6

1. Les États parties au présent Pacte reconnaissent le droit au travail, qui comprend le droit qu’a toute personne d’obtenir la possibilité de gagner sa vie par un travail librement choisi ou accepté, et prendront des mesures appropriées pour sauvegarder ce droit.

L’article 2 de la *Déclaration universelle des droits de l’homme* prévoit également qu’une personne peut se prévaloir de ces droits «sans distinction aucune, notamment de race, de couleur, de sexe, de langue, de religion, d’opinion politique ou de toute autre opinion, d’origine nationale ou sociale, de fortune, de naissance ou de toute autre situation». Comme il ressort clairement du libellé de l’al. 6(3)a), la liberté de circulation et d’établissement garantie par la *Charte* repose en grande partie sur le droit à l’égalité de traitement. En principe, l’art. 6 peut donc être interprété comme rendant applicable la liberté fondamentale de circulation et d’établissement qui est définie en fonction de l’obligation de traiter les gens sans distinction fondée sur leur lieu de résidence.

Avant l’avènement de la *Charte*, le droit des citoyens canadiens de se déplacer, de résider et de travailler dans la province de leur choix avait déjà été confirmé. Cependant, ce droit avait été énoncé non pas parce qu’il avait un lien avec les droits fondamentaux de la personne, mais parce qu’il découlait de la compétence fédérale exclusive en matière de citoyenneté, conférée par l’art. 91 de la

(*Eastern*) Ltd., [1951] S.C.R. 887, at pp. 919-20). The right to move about the country and settle where one wished was considered an essential attribute of citizenship with which the provinces were not permitted to interfere. According to this reasoning, of course, the federal government could always regulate the attributes of citizenship; it could interfere with the right of mobility, even if the provinces could not. Thus, although the right described in *Winner*, *supra*, may appear similar to that contained in s. 6, they have fundamentally different origins. The mobility right, grounded in a concern with fundamental human rights, is conceptually distinct from a mobility right which is essentially concerned with interjurisdictional immunity. It may demand a different scope in order to satisfy a different purpose. Section 6 is rooted in a concern with human rights, not the conditions or operation of the federal structure of Canada.

Loi constitutionnelle de 1867 (voir *Winner c. S.M.T. (Eastern) Ltd.*, [1951] R.C.S. 887, aux pp. 919 et 920). Le droit de se déplacer partout au pays et de s'établir à l'endroit de son choix était considéré comme un attribut essentiel de la citoyenneté auquel les provinces ne pouvaient pas toucher. Suivant ce raisonnement, il allait de soi que le gouvernement fédéral pouvait toujours réglementer les attributs de la citoyenneté; il pouvait entraver la liberté de circulation et d'établissement, même si les provinces ne le pouvaient pas. En conséquence, bien que le droit décrit dans *Winner*, précité, puisse paraître semblable à celui prévu à l'art. 6, les deux ont des origines totalement différentes. La liberté de circulation et d'établissement qui émane d'un intérêt pour les droits fondamentaux de la personne se distingue, sur le plan conceptuel, de la liberté de circulation et d'établissement qui a trait essentiellement à l'exclusivité des compétences. Elle peut nécessiter une portée différente afin d'atteindre un objectif différent. L'article 6 émane d'un intérêt pour les droits de la personne et non des conditions ou du fonctionnement de la structure fédérale canadienne.

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Situated in the *Charter*, and closely mirroring the language of international human rights treaties, it seems clear then that s. 6 responds to a concern to ensure one of the conditions for the preservation of the basic dignity of the person. The specific guarantee described in s. 6(2)(b) and s. 6(3)(a) is mobility in the gaining of a livelihood subject to those laws which do not discriminate on the basis of residence. The mobility guarantee is defined and supported by the notion of equality of treatment, and absence of discrimination on the ground normally related to mobility in the pursuit of a livelihood (i.e. residence). La Forest J. articulated the correlative significance of these two concepts in *Black*, *supra*, at pp. 617-18 and 620-21:

Section 6(2)(b), in my view, guarantees not simply the right to pursue a livelihood, but more specifically, the right to pursue the livelihood of choice to the extent and subject to the same conditions as residents.

. . .

Vu que l'art. 6 fait partie de la *Charte* et qu'il reflète de près le libellé de traités internationaux en matière de droits de la personne, il semble clair qu'il répond à un souci d'assurer l'une des conditions nécessaires à la protection de la dignité fondamentale de la personne. Ce qui est garanti aux al. 6(2)b) et 6(3)a), c'est la liberté de choisir l'endroit où gagner sa vie, sous réserve des lois qui n'établissent aucune distinction fondée sur le lieu de résidence. Cette garantie de libre circulation est définie et étayée par la notion d'égalité de traitement et l'absence de distinction fondée sur le motif normalement lié au choix de l'endroit où gagner sa vie (c.-à-d. le lieu de résidence). Le juge La Forest a parlé de l'importance correlative de ces deux concepts dans *Black*, précité, aux pp. 617 et 618, de même que 620 et 621:

À mon sens, l'al. 6(2)b) garantit non seulement le droit de gagner sa vie mais, plus précisément, le droit de gagner sa vie selon la profession ou le métier de son choix tout en étant assujetti aux mêmes conditions que les résidents.

. . .

In truth, a purposive approach to the *Charter* dictates a more comprehensive approach to mobility. What section 6(2) was intended to do was to protect the right of a citizen (and by extension a permanent resident) to move about the country, to reside where he or she wishes and to pursue his or her livelihood without regard to provincial boundaries. The provinces may, of course, regulate these rights (as *Skapinker* holds). But subject to the exceptions in ss. 1 and 6 of the *Charter*, they cannot do so in terms of provincial boundaries. That would derogate from the inherent rights of the citizen to be treated equally in his capacity as a citizen throughout Canada. [Emphasis added.]

The freedom guaranteed in s. 6 embodies a concern for the dignity of the individual. Sections 6(2)(b) and 6(3)(a) advance this purpose by guaranteeing a measure of autonomy in terms of personal mobility, and by forbidding the state from undermining this mobility and autonomy through discriminatory treatment based on place of residence, past or present. The freedom to pursue a livelihood is essential to self-fulfilment as well as survival. Section 6 is meant to give effect to the basic human right, closely related to equality, that individuals should be able to participate in the economy without being subject to legislation which discriminates primarily on the basis of attributes related to mobility in pursuit of their livelihood.

The terms of s. 6 suggest that this right is not violated by legislation regulating any particular type of economic activity, but rather by the effect of such legislation on the fundamental right to pursue a livelihood on an equal basis with others. Indeed, the provinces and federal government are authorized by virtue of ss. 91 and 92 of the *Constitution Act, 1867* to regulate all manner of economic activity, as defined by type of activity. For example, s. 92(13) authorizes provincial legislation with respect to property and civil rights, s. 92(9) authorizes the imposition of retail licences, and s. 91(12) authorizes legislation over the sea coast and inland fisheries. As a result of the federal design of our Constitution, and the grant of property and civil rights to the jurisdiction of the provinces, a vast array of legislation in force in the

En réalité, une interprétation de la *Charte* fondée sur l'objet visé nous oblige à aborder de manière plus globale la liberté de circulation. Le paragraphe 6(2) était destiné à protéger le droit d'un citoyen (et par extension celui d'un résident permanent) de se déplacer à l'intérieur du pays, d'établir sa résidence à l'endroit de son choix et de gagner sa vie sans égard aux frontières provinciales. Les provinces peuvent évidemment réglementer ces droits (selon l'arrêt *Skapinker*). Cependant, sous réserve des exceptions contenues à l'article premier et à l'art. 6 de la *Charte*, elles ne peuvent le faire en fonction des frontières provinciales. Ce serait déroger aux droits que possède le citoyen, en sa qualité même de citoyen, d'être traité également partout au Canada. [Nous soulignons.]

La liberté garantie à l'art. 6 traduit un intérêt pour la dignité de l'individu. Les alinéas 6(2)b) et 6(3)a) favorisent la réalisation de cet objet en garantissant une certaine autonomie sur le plan de la liberté personnelle de circulation et d'établissement, et en interdisant à l'État de miner cette liberté et cette autonomie au moyen d'un traitement discriminatoire fondé sur le lieu de résidence antérieur ou actuel. La liberté de gagner sa vie est une question d'accomplissement de soi et de survie. L'article 6 vise à rendre applicable un droit fondamental de la personne qui est étroitement lié à l'égalité, celui d'être en mesure de participer à l'économie sans être assujéti à des lois qui établissent une distinction fondée principalement sur des attributs liés au choix de l'endroit où gagner sa vie.

Le libellé de l'art. 6 laisse entendre que ce droit est violé non pas par une mesure législative qui réglemente un type particulier d'activité économique, mais plutôt par l'effet d'une telle mesure législative sur le droit fondamental de gagner sa vie au même titre que tout autre individu. En fait, les art. 91 et 92 de la *Loi constitutionnelle de 1867* autorisent les gouvernements fédéral et provinciaux à réglementer tout genre d'activité économique défini par type d'activité. Par exemple, le par. 92(13) autorise les provinces à légiférer en matière de propriété et de droits civils, le par. 92(9) autorise l'imposition de permis de vente au détail et le par. 91(12) permet de légiférer relativement aux pêcheries des côtes de la mer et de l'intérieur. Vu le caractère fédéral de notre Constitution, et vu que la propriété et les droits civils

provinces affecting the terms of commercial activity applies only within the province in which it is enacted. The federal structure of our Constitution authorizes the growth of distinct systems of commercial regulation whose application is inevitably defined “in terms of provincial boundaries”. Provincial legislation validly enacted under s. 92 of the Constitution is applicable only within a single province and may have an effect on the conditions according to which a livelihood may be pursued. Federal legislation, or cooperative federal-provincial legislative schemes, may also apply only in some provinces and, thus, create variable conditions for the pursuit of a livelihood in different provinces (*Prince Edward Island Potato Marketing Board v. H. B. Willis Inc.*, [1952] 2 S.C.R. 392). This type of economic legislation, and the growth of divergent regulatory regimes in the provinces, is undoubtedly authorized by the Constitution.

relèvent de la compétence des provinces, une large gamme de lois en vigueur dans les provinces, qui influent sur les conditions d’activité commerciale, ne s’appliquent que dans la province où elles ont été adoptées. La structure fédérale de notre Constitution permet l’établissement de régimes distincts de réglementation du commerce dont l’application est inévitablement définie «en fonction des frontières provinciales». Les lois provinciales valablement adoptées en vertu de l’art. 92 de la Constitution ne s’appliquent que dans une seule province et peuvent influencer sur les conditions auxquelles on peut y gagner sa vie. Des lois fédérales, ou des régimes législatifs établis de concert par les gouvernements fédéral et provinciaux, peuvent s’appliquer dans certaines provinces seulement et ainsi créer des conditions variables en matière de gagne-pain dans différentes provinces (*Prince Edward Island Potato Marketing Board c. H. B. Willis Inc.*, [1952] 2 R.C.S. 392). Ce type de législation économique, de même que l’établissement de régimes de réglementation divergents dans les provinces, est indubitablement autorisé par la Constitution.

⁶² There is, thus, a tension in the purposes and text of ss. 91 and 92 of the *Constitution Act, 1867*, and s. 6 of the *Charter*. The former sections authorize the development of distinct legal regimes in the provinces, and define the matters, including many integral to the functioning of the economy, under their exclusive jurisdiction; the latter section, however, says that the individual has a right to pursue a livelihood throughout Canada, without discrimination “primarily on the basis of province of present or previous residence”.

Il existe donc une tension entre les objets et le texte des art. 91 et 92 de la *Loi constitutionnelle de 1867*, et l’art. 6 de la *Charte*. Les articles 91 et 92 autorisent l’établissement de régimes juridiques distincts dans les provinces et définissent les matières, dont plusieurs font partie intégrante du fonctionnement de l’économie, qui relèvent de leur compétence exclusive. Toutefois, l’art. 6 de la *Charte* dit que les gens ont le droit de gagner leur vie partout au Canada, sans faire l’objet d’une distinction «fondée principalement sur la province de résidence antérieure ou actuelle».

⁶³ This tension is heightened when one takes into account the judicial interpretation and legislative history of s. 121 of the *Constitution Act, 1867*. That section reads:

121. All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

These words appear to place a limit on the competence of either the provinces or the federal government to pass legislation which interferes with the

Cette tension s’accroît lorsque l’on tient compte de l’interprétation judiciaire et de l’histoire de l’art. 121 de la *Loi constitutionnelle de 1867*, qui se lit ainsi:

121. Tous articles du crû, en provenance d’une province ou qui y sont produits ou fabriqués, seront, à dater de l’Union, admis en franchise dans chacune des autres provinces.

Ces mots semblent limiter la compétence des provinces ou du gouvernement fédéral d’adopter des lois qui nuisent à l’entrée de marchandises dans

entry of goods into a province. In the early cases, s. 121 was found to prohibit only customs duties on the transit of goods across a provincial boundary (*Gold Seal Ltd. v. Attorney-General for Alberta* (1921), 62 S.C.R. 424, *per* Anglin J., at p. 466; and *per* Duff J., at p. 456). More recent cases, however, have defined the scope of s. 121 somewhat more broadly. Rand J., concurring in *Murphy v. Canadian Pacific Railway Co.*, [1958] S.C.R. 626, stated, at p. 642:

I take s. 121, apart from customs duties, to be aimed against trade regulation which is designed to place fetters upon or raise impediments to or otherwise restrict or limit the free flow of commerce across the Dominion as if provincial boundaries did not exist. That it does not create a level of trade activity divested of all regulation I have no doubt; what is preserved is a free flow of trade regulated in subsidiary features which are or have come to be looked upon as incidents of trade. What is forbidden is a trade regulation that in its essence and purpose is related to a provincial boundary. [Emphasis added.]

This approach was adopted by the four Justices of this Court who addressed the issue in *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198. In that case, the federal-provincial egg marketing scheme which is also the subject of this appeal was challenged by egg producers residing in Ontario, who participated in the scheme. The producers argued that the marketing scheme, by limiting the number and price of eggs in inter-provincial trade, effectively prevented the establishment of the single economic market envisaged by s. 121. Laskin C.J. found no violation of s. 121, and suggested that whether market regulation may be perceived as having an impermissible purpose may vary depending on whether the legislation is federal or provincial in origin. After quoting the passage from Rand J. in *Murphy*, *supra*, the Chief Justice stated, at p. 1268:

une province. Dans la jurisprudence ancienne, il a été conclu que l'art. 121 n'interdit que l'imposition de droits de douane sur les marchandises en transit qui franchissent des frontières provinciales (*Gold Seal Ltd. c. Attorney-General for Alberta* (1921), 62 R.C.S. 424, le juge Anglin, à la p. 466, et le juge Duff, à la p. 456). Dans la jurisprudence plus récente, cependant, la portée de l'art. 121 a été définie un peu plus largement. Le juge Rand, dans les motifs concordants qu'il a rédigés dans l'arrêt *Murphy c. Canadian Pacific Railway Co.*, [1958] R.C.S. 626, a dit, à la p. 642:

[TRADUCTION] Je considère que l'art. 121, en plus d'être dirigé contre les droits de douane, vise à interdire qu'une réglementation du commerce ne vienne entraver, ou restreindre de quelque façon que ce soit, la libre circulation des marchandises dans tout le Dominion comme s'il n'y avait pas de frontières provinciales. Je suis bien d'accord qu'il ne fait pas disparaître pour autant toute réglementation des activités commerciales. Il vise à assurer la liberté du commerce, tout en permettant la réglementation dans ses aspects secondaires, qui sont les à-côtés du commerce. Ce qui est interdit, c'est une réglementation du commerce qui serait reliée, en droit et en fait, à l'existence des frontières provinciales. [Nous soulignons.]

Cette interprétation a été adoptée par les quatre juges de notre Cour qui ont abordé la question dans le *Renvoi relatif à la Loi sur l'organisation du marché des produits agricoles*, [1978] 2 R.C.S. 1198. Dans cette affaire, le régime fédéral-provincial de commercialisation des œufs, qui est également en cause dans le présent pourvoi, était contesté par des producteurs d'œufs qui résidaient en Ontario et participaient au régime. Les producteurs soutenaient que, du fait qu'il limitait le nombre et le prix des œufs pouvant être commercialisés sur le plan interprovincial, le régime de commercialisation empêchait effectivement l'établissement du marché économique unique prévu par l'art. 121. Le juge en chef Laskin a conclu que l'art. 121 n'avait pas été violé, et a indiqué que la question de savoir si la réglementation du marché peut être perçue comme visant un objectif inacceptable peut varier selon que la mesure législative en cause est d'origine fédérale ou provinciale. Après avoir cité un extrait des motifs du juge Rand dans *Murphy*, précité, le Juge en chef affirme, à la p. 1268:

Accepting this view of s. 121, I find nothing in the marketing scheme here that, as a trade regulation, is in its essence and purpose related to a provincial boundary. To hold otherwise would mean that a federal marketing statute, referable to interprovincial trade, could not validly take into account patterns of production in the various Provinces in attempting to establish an equitable basis for the flow of trade. I find here no design of punitive regulation directed against or in favour of any Province. [Underlining added.]

Adoptant cette conception de l'art. 121, je ne trouve rien dans le présent régime de commercialisation qui, en tant que réglementation du commerce, soit relié *en droit et en fait* à l'existence de frontières provinciales. En décider autrement signifierait qu'une loi fédérale de commercialisation, rattachable au commerce interprovincial, ne pourrait valablement prendre en considération le mode de production des diverses provinces pour tenter d'instaurer l'équité dans les échanges commerciaux. Je ne trouve ici aucune idée de réglementation punitive au détriment ou en faveur de l'une des provinces. [En italique dans l'original; nous soulignons.]

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Dissatisfaction in the federal government with the scope of s. 121 and a perceived tendency in the provinces to erect interprovincial trade barriers led to a proposal for a more robust version of the section in the constitutional negotiations leading up to the 1982 amendments; see generally T. Lee and M. J. Trebilcock, "Economic Mobility and Constitutional Reform" (1987), 37 *U.T.L.J.* 268; and D. A. Schmeiser and K. J. Young, "Mobility Rights in Canada" (1983), 13 *Man. L.J.* 615, at p. 626. The revised s. 121 would have read:

121. (1) Neither Canada nor a province shall by law or practice discriminate in a manner that unduly impedes the operation of the Canadian economic union, directly or indirectly, on the basis of the province or territory of residence or former residence of a person, on the basis of the province or territory of origin or destination of goods, services or capital or on the basis of the province or territory into which or from which goods, services or capital are imported or exported.

(2) Nothing in subsection (1) renders invalid a law of Parliament or of a legislature enacted in the interests of public safety, order, health or morals.

(3) Nothing in subsection (1) renders invalid a law of Parliament enacted pursuant to the principles of equalization and regional development to which Parliament and the legislatures are committed or declared by Parliament to be in an overriding national interest or enacted pursuant to an international obligation undertaken by Canada.

Le mécontentement au sein du gouvernement fédéral à l'égard de la portée de l'art. 121, et l'impression que les provinces avaient tendance à faire obstacle au commerce interprovincial ont donné lieu à un projet de version plus musclée de l'article lors des négociations constitutionnelles qui ont abouti à l'adoption des modifications de 1982; voir, de façon générale, T. Lee et M. J. Trebilcock, «Economic Mobility and Constitutional Reform» (1987), 37 *U.T.L.J.* 268, et D. A. Schmeiser et K. J. Young, «Mobility Rights in Canada» (1983), 13 *Man. L.J.* 615, à la p. 626. Voici comment se serait lu le nouvel art. 121:

121. (1) Les lois et usages du Canada et des provinces ne peuvent établir aucune discrimination susceptible d'entraver d'une manière abusive, directement ou indirectement, le fonctionnement de l'union économique canadienne, et fondée, soit sur la province ou le territoire de résidence ou de résidence antérieure d'une personne, soit sur la province ou le territoire d'origine ou de destination de biens, de services ou de capitaux, soit sur la province ou le territoire de provenance ou de destination de biens, services ou capitaux qui sont importés ou exportés.

(2) Le paragraphe (1) n'invalide pas les lois du Parlement ou des corps législatifs des provinces qui visent à sauvegarder la santé, la sécurité, l'ordre et la moralité publics.

(3) Le paragraphe (1) n'invalide ni les lois du Parlement qui découlent des principes de péréquation ou de développement régional consacrés par le Parlement et les corps législatifs des provinces, ni celles où le Parlement déclare que des raisons d'intérêt national sont prépondérantes, ni celles qui découlent d'un engagement international du Canada.

(4) Nothing in subsection (2) or (3) renders valid a law of Parliament or a legislature that impedes the admission free into any province of goods, services or capital originating in or imported into any other province or territory. [Emphasis added.]

In addition to the free movement of persons, this new version of s. 121 would also have expressly protected the mobility of specified factors of economic production which are often integrally related to the gaining of a livelihood by a person: goods, services, and capital. This proposed s. 121 did not purport to confer rights on individuals or groups; rather, it sought to ensure mobility in the pursuit of a livelihood by dramatically limiting any government's right to legislate with respect to the interprovincial mobility of certain factors of economic production. As it turned out, nine of ten provinces rejected this amendment, leaving s. 121 as it is worded today.

Although the parties were subsequently asked to consider the possible effect of s. 121 on the issues in this appeal, that section is not directly in issue in this case. The courts and parties below appear to have assumed that the territories are not captured by the word "Provinces" used in the section. However, the jurisprudence and history of s. 121 suggest what s. 6 was not intended to accomplish. The objective of s. 6 should not be interpreted in terms of a right to engage in any specific type of economic activity. Entrenching mobility with regard to specified factors of economic production was proposed and roundly rejected. By contrast, the inclusion of s. 6 in the *Charter* reflects a human rights objective: to ensure mobility of persons, and to that end, the pursuit of a livelihood on an equal footing with others regardless of residence. It guarantees the mobility of persons, not as a feature of the economic unity of the country, but in order to further a human rights purpose. It is centred on the individual. Section 6 neither categorically guarantees nor excludes the right of an individual to move goods, services, or capital into a province without regulation operating to interfere with that movement. Rather, s. 6 relates to an essential attribute of personhood, and guarantees that mobility in the pursuit of a livelihood will not be prevented

(4) Les paragraphes (2) ou (3) ne valident pas les lois du Parlement ou des corps législatifs des provinces qui entravent la circulation en franchise, d'une province à l'autre, de biens, de services ou de capitaux d'origine provinciale ou importés. [Nous soulignons.]

Outre la libre circulation des personnes, cette nouvelle version de l'art. 121 aurait expressément protégé la libre circulation de facteurs déterminés de production économique qui sont souvent intégralement liés au gagne-pain d'une personne: les biens, services et capitaux. Ce projet d'art. 121 n'était pas censé conférer des droits à des individus ou à des groupes; il visait plutôt à garantir le choix de l'endroit où gagner sa vie en limitant radicalement le droit de tout gouvernement d'adopter des lois touchant à la libre circulation d'une province à l'autre de certains facteurs de production économique. En fin de compte, neuf des dix provinces ont rejeté cette modification, et l'art. 121 est demeuré inchangé.

Quoique les parties aient ultérieurement été invitées à examiner l'incidence possible de l'art. 121 sur les questions en litige dans le présent pourvoi, cet article n'est pas directement en cause en l'espèce. Les tribunaux d'instance inférieure et les parties qui y ont comparu semblent avoir présumé que les territoires ne sont pas visés par le mot «provinces» utilisé dans l'article. Cependant, la jurisprudence relative à l'art. 121 et l'historique de cette disposition indiquent ce que l'art. 6 n'était pas destiné à réaliser. L'objectif de l'art. 6 ne devrait pas être interprété comme étant de conférer un droit de se livrer à un type particulier d'activité économique. La consécration, dans la *Charte*, de la libre circulation relative à des facteurs particuliers de production économique a été proposée et carrément rejetée. Par contre, l'inclusion de l'art. 6 dans la *Charte* reflète un objectif en matière de droits de la personne: celui d'assurer que la libre circulation des gens et, à cette fin, leur capacité de gagner leur vie sur un pied d'égalité avec autrui, peu importe leur lieu de résidence. Cet article garantit la libre circulation des gens, non en tant que caractéristique de l'unité économique du pays, mais plutôt en vue d'atteindre un objectif en matière de droits de la personne. Il est axé sur l'individu. L'article 6 ne garantit pas et n'exclut pas catégoriquement le

by means of unequal treatment based on residence by the laws in force in the jurisdiction in which that livelihood is pursued.

droit d'un individu d'introduire des biens, services ou capitaux dans une province sans être entravé par une réglementation quelconque. L'article 6 se rapporte plutôt à un attribut essentiel de la personnalité et garantit que le choix de l'endroit où gagner sa vie ne sera pas entravé au moyen d'un traitement inégal, fondé sur le lieu de résidence, par les lois en vigueur dans le ressort où la personne visée gagne sa vie.

⁶⁷ Given these purposes, the focus of the analysis in s. 6 is not the type of economic activity involved, but rather the purpose and effect of the particular regulation, and whether that purpose and effect infringes the right to be free from discrimination on the basis of residence in the pursuit of a livelihood.

Vu ces objets, l'analyse en jeu à l'art. 6 est axée non pas sur le type d'activité économique en cause, mais plutôt sur l'objet et l'effet de la réglementation particulière et sur la question de savoir si cet objet et cet effet portent atteinte au droit de gagner sa vie sans être assujéti à une distinction fondée sur le lieu de résidence.

(c) *Discrimination as Between Who and Whom?*

c) *Une distinction entre qui?*

⁶⁸ The first step in this analysis is to determine who is being compared with whom for the purposes of establishing discrimination. This presents a difficult problem as there are many different ways in which a livelihood may be pursued in a particular province. In simpler cases, the pursuit of a livelihood in a province may be accompanied by residency in that province, as guaranteed by s. 6(2)(a). Whether legislation interferes with an individual's right to be treated without discrimination on the basis of residence will then usually be readily apparent since the individual could only be distinguished from others based on their previous residence, or his or her relatively short period of residence (as was the case in *Re Mia and Medical Services Commission of British Columbia* (1985), 17 D.L.R. (4th) 385 (B.C.S.C.); see also H. Brun and G. Tremblay, *Droit constitutionnel* (3rd ed. 1997), at p. 180). Section 6(3)(a) specifically foresees discrimination under these circumstances, prohibiting laws "that discriminate among persons primarily on the basis of . . . previous residence" (emphasis added). In such cases, the new resident

La première étape de cette analyse consiste à déterminer entre qui la comparaison est faite dans le but d'établir une distinction. Cela pose un problème épineux, car il existe de nombreux moyens différents de gagner sa vie dans une province particulière. Les cas plus simples sont ceux où la personne peut gagner sa vie dans la province où elle réside, ce que garantit l'al. 6(2)a). Il sera alors normalement facile de voir si une mesure législative porte atteinte au droit d'une personne d'être traitée sans faire l'objet d'une distinction fondée sur le lieu de résidence, étant donné qu'une distinction ne pourra être faite entre cette dernière et d'autres personnes qu'en fonction de leur lieu de résidence antérieur, ou encore du fait qu'elle réside depuis relativement peu de temps dans la province (comme c'était le cas dans *Re Mia and Medical Services Commission of British Columbia* (1985), 17 D.L.R. (4th) 385 (C.S.C.-B.); voir également H. Brun et G. Tremblay, *Droit constitutionnel* (3^e éd. 1997), à la p. 180). L'alinéa 6(3)a) envisage expressément cette situation puisqu'il interdit les lois qui «établissent entre les personnes [une] distinction fondée principalement sur [le lieu] de résidence antérieu[r]» (nous soulignons). Dans de tels cas, le nouveau résident d'une province sera comparé aux personnes qui y résident depuis plus

Tab 2

parties to this action, and others in similar circumstances, in their ongoing relationships.

B. *The Retention of Jurisdiction*

(1) The Importance of Context: Sections 23 and 24 of the Charter

It is well accepted that the *Charter* should be given a generous and expansive interpretation and not a narrow, technical, or legalistic one (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158; *Vriend v. Alberta*, [1998] 1 S.C.R. 493). The need for a generous interpretation flows from the principle that the *Charter* ought to be interpreted purposively. While courts must be careful not to overshoot the actual purposes of the *Charter*'s guarantees, they must avoid a narrow, technical approach to *Charter* interpretation which could subvert the goal of ensuring that right holders enjoy the full benefit and protection of the *Charter*. In our view, the approach taken by our colleagues LeBel and Deschamps JJ. which appears to contemplate that special remedies might be available in some circumstances, but not in this case, severely undervalues the importance and the urgency of the language rights in the context facing LeBlanc J.

The requirement of a generous and expansive interpretive approach holds equally true for *Charter* remedies as for *Charter* rights (*R. v. Gamble*, [1988] 2 S.C.R. 595; *R. v. Sarson*, [1996] 2 S.C.R. 223; *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, 2001 SCC 81 ("*Dunedin*")). In *Dunedin*, McLachlin C.J., writing for the Court, explained why this is so. She stated, at para. 18:

[Section] 24(1), like all *Charter* provisions, commands a broad and purposive interpretation. This section forms a vital part of the *Charter*, and must be construed generously, in a manner that best ensures

supérieure. Même s'il est maintenant satisfait aux revendications immédiates des appelants, une décision en l'espèce contribuera à faciliter les rapports entre les parties à la présente affaire et ceux d'autres parties se trouvant dans une situation similaire.

B. *La déclaration de compétence*

(1) L'importance du contexte : les art. 23 et 24 de la Charte

Il est bien reconnu qu'il faut donner à la *Charte* une interprétation large et libérale et non étroite ou formaliste (*Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295; *Renvoi : Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486; *Renvoi : Circ. électorales provinciales (Sask.)*, [1991] 2 R.C.S. 158; *Vriend c. Alberta*, [1998] 1 R.C.S. 493). La nécessité de l'interprétation libérale découle du principe d'interprétation téléologique de la *Charte*. Bien qu'ils doivent prendre soin de ne pas outrepasser les objets véritables des garanties qu'elle accorde, les tribunaux n'en doivent pas moins éviter de donner à la *Charte* une interprétation étroite et formaliste susceptible de contrecarrer l'objectif qui est d'assurer aux titulaires de droits l'entier bénéfice et la pleine protection de la *Charte*. À notre avis, l'approche adoptée par nos collègues les juges LeBel et Deschamps, qui paraît reconnaître la possibilité d'obtenir des réparations particulières dans certaines circonstances, mais non en l'espèce, sous-estime grandement l'importance des droits linguistiques et la nécessité pressante d'en assurer le respect dans le contexte de l'affaire dont le juge LeBlanc était saisi.

L'exigence d'une interprétation large et libérale vaut autant pour les réparations fondées sur la *Charte* que pour les droits qui y sont garantis (*R. c. Gamble*, [1988] 2 R.C.S. 595; *R. c. Sarson*, [1996] 2 R.C.S. 223; *R. c. 974649 Ontario Inc.*, [2001] 3 R.C.S. 575, 2001 CSC 81 ("*Dunedin*")). Dans l'arrêt *Dunedin*, précité, par. 18, la juge en chef McLachlin en explique la raison, au nom de la Cour :

... comme toutes les autres dispositions de la *Charte*, le par. 24(1) commande une interprétation large et téléologique. Il constitue une partie essentielle de la *Charte* et doit être interprété de la manière la plus généreuse qui

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the attainment of its objects Moreover, it is remedial, and hence benefits from the general rule of statutory interpretation that accords remedial statutes a “large and liberal” interpretation Finally, and most importantly, the language of this provision appears to confer the widest possible discretion on a court to craft remedies for violations of Charter rights. In Mills, McIntyre J. observed at p. 965 that “[i]t is difficult to imagine language which could give the court a wider and less fettered discretion”. This broad remedial mandate for s. 24(1) should not be frustrated by a “(n)arrow and technical” reading of the provision [Reference omitted.]

soit compatible avec la réalisation de son objet [. . .] Il s’agit en outre d’une disposition réparatrice qui, de ce fait, bénéficie de la règle générale d’interprétation législative selon laquelle les lois réparatrices reçoivent une interprétation « large et libérale » [. . .] Dernière considération et élément le plus important : le texte de cette disposition paraît accorder au tribunal le plus vaste pouvoir discrétionnaire possible aux fins d’élaboration des réparations applicables en cas de violations des droits garantis par la Charte. Dans l’arrêt *Mills*, précité, le juge McIntyre a fait remarquer qu’« [i]l est difficile de concevoir comment on pourrait donner au tribunal un pouvoir discrétionnaire plus large et plus absolu » (p. 965). Il ne faut pas que ce large mandat réparateur du par. 24(1) soit mis en échec par une interprétation « étroite et formaliste » de la disposition . . . [Renvoi omis.]

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Purposive interpretation means that remedies provisions must be interpreted in a way that provides “a full, effective and meaningful remedy for Charter violations” since “a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach” (*Dunedin, supra*, at paras. 19-20). A purposive approach to remedies in a Charter context gives modern vitality to the ancient maxim ubi jus, ibi remedium: where there is a right, there must be a remedy. More specifically, a purposive approach to remedies requires at least two things. First, the purpose of the right being protected must be promoted: courts must craft responsive remedies. Second, the purpose of the remedies provision must be promoted: courts must craft effective remedies.

Selon le principe de l’interprétation téléologique, les dispositions réparatrices doivent être interprétées de manière à assurer « une réparation complète, efficace et utile à l’égard des violations de la Charte », « puisqu’un droit, aussi étendu soit-il en théorie, est aussi efficace que la réparation prévue en cas de violation, sans plus » (*Dunedin*, précité, par. 19-20). L’interprétation téléologique des réparations dans le contexte de la Charte actualise l’ancienne maxime ubi jus, ibi remedium, là où il y a un droit, il y a un recours. Plus particulièrement, cette interprétation comporte au moins deux exigences, à savoir, premièrement, favoriser la réalisation de l’objet du droit garanti (les tribunaux sont tenus d’accorder des réparations adaptées à la situation), et deuxièmement, favoriser la réalisation de l’objet des dispositions réparatrices (les tribunaux sont tenus d’accorder des réparations efficaces).

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The purpose of s. 23 of the *Charter* is “to preserve and promote the two official languages of Canada, and their respective cultures, by ensuring that each language flourishes, as far as possible, in provinces where it is not spoken by the majority of the population” (*Mahe v. Alberta*, [1990] 1 S.C.R. 342, at p. 362). Minority language education rights are the means by which the goals of linguistic and cultural preservation are achieved (see *Reference re Public Schools Act (Man.)*, s. 79(3), (4) and (7), [1993] 1 S.C.R. 839, at p. 849-50 (“*Schools Reference*”)). This Court has, on a number of occasions, observed the close link between

L’article 23 de la *Charte* a pour objet de « maintenir les deux langues officielles du Canada ainsi que les cultures qu’elles représentent et [de] favoriser l’épanouissement de chacune de ces langues, dans la mesure du possible, dans les provinces où elle n’est pas parlée par la majorité » (*Mahe c. Alberta*, [1990] 1 R.C.S. 342, p. 362). Les droits à l’instruction dans la langue de la minorité permettent d’atteindre les objectifs de préservation de la langue et de la culture (voir *Renvoi relatif à la Loi sur les écoles publiques (Man.)*, art. 79(3), (4) et (7), [1993] 1 R.C.S. 839, p. 849-850 (« *Renvoi sur les écoles* »)). La Cour a affirmé, à maintes

language and culture. In *Mahe*, at p. 362, Dickson C.J. stated:

... any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it. It is the means by which individuals understand themselves and the world around them.

A further aspect of s. 23 of the *Charter* is its remedial nature (see, for example, *Mahe*, *supra*, at p. 363; *Schools Reference*, *supra*, at p. 850; *Arsenault-Cameron v. Prince Edward Island*, [2000] 1 S.C.R. 3, 2000 SCC 1, at para. 26). The section is designed to correct past injustices not only by halting the progressive erosion of minority official language cultures across Canada, but also by actively promoting their flourishing (*Mahe*, *supra*, at p. 363; *Schools Reference*, *supra*, at p. 850). Section 23 must therefore be construed “in recognition of previous injustices that have gone unredressed and which have required the entrenchment of protection of minority language rights” (*Schools Reference*, at p. 850; see also *Arsenault-Cameron*, *supra*, at para. 27). This Court has made it clear that the fact that language rights arose from political compromise does not alter their nature and importance; consequently, s. 23 must be given the same large and liberal interpretation as all *Charter* rights (*R. v. Beaulac*, [1999] 1 S.C.R. 768, at para. 25; *Arsenault-Cameron*, *supra*, at para. 27).

The minority language education rights protected under s. 23 of the *Charter* are unique. They are distinctively Canadian, representing “a linchpin in this nation’s commitment to the values of bilingualism and biculturalism” (*Mahe*, *supra*, at p. 350). Section 23 places positive obligations on governments to mobilize resources and enact legislation for the development of major institutional structures (*Mahe*, at p. 389). While the rights are granted to individuals (*Schools Reference*, at p. 865), they apply only if the “numbers warrant”, and the specific programs or facilities that the government is

reprises, qu’il existait un lien étroit entre la langue et la culture. Dans l’arrêt *Mahe*, précité, p. 362, le juge en chef Dickson écrit :

... toute garantie générale de droits linguistiques, surtout dans le domaine de l’éducation, est indissociable d’une préoccupation à l’égard de la culture véhiculée par la langue en question. Une langue est plus qu’un simple moyen de communication; elle fait partie intégrante de l’identité et de la culture du peuple qui la parle. C’est le moyen par lequel les individus se comprennent eux-mêmes et comprennent le milieu dans lequel ils vivent.

L’article 23 de la *Charte* a également un caractère réparateur (voir, par exemple, *Mahe*, précité, p. 363; *Renvoi sur les écoles*, précité, p. 850; *Arsenault-Cameron c. Île-du-Prince-Édouard*, [2000] 1 R.C.S. 3, 2000 CSC 1, par. 26). Il vise à réparer des injustices passées non seulement en mettant fin à l’érosion progressive des cultures des minorités de langue officielle au pays, mais aussi en favorisant activement leur épanouissement (*Mahe*, précité, p. 363; *Renvoi sur les écoles*, précité, p. 850). C’est pourquoi il faut l’interpréter « compte tenu des injustices passées qui n’ont pas été redressées et qui ont nécessité l’enchâssement de la protection des droits linguistiques de la minorité » (*Renvoi sur les écoles*, p. 850-851; voir aussi *Arsenault-Cameron*, précité, par. 27). La Cour a mentionné clairement que le fait que les droits linguistiques découlent d’un compromis politique n’a aucune incidence sur leur nature ou leur importance; l’art. 23 doit donc recevoir la même interprétation large et libérale que les autres droits garantis par la *Charte* (*R. c. Beaulac*, [1999] 1 R.C.S. 768, par. 25; *Arsenault-Cameron*, précité, par. 27).

Les droits à l’instruction dans la langue de la minorité, que garantit l’art. 23, ont un caractère unique. Ils sont typiquement canadiens en ce qu’ils constituent « la clef de voûte de l’engagement du Canada envers le bilinguisme et le biculturalisme » (*Mahe*, précité, p. 350). L’article 23 impose aux gouvernements l’obligation absolue de mobiliser des ressources et d’édicter des lois pour l’établissement de structures institutionnelles capitales (*Mahe*, p. 389). Bien que les droits soient conférés aux individus (*Renvoi sur les écoles*, p. 865), ils ne peuvent être exercés que si « le nombre le justifie », et la

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required to provide varies depending on the number of students who can potentially be expected to participate (*Mahe, supra*, at p. 366; *Schools Reference, supra*, at p. 850; *Arsenault-Cameron, supra*, at para. 38). This requirement gives the exercise of minority language education rights a unique collective aspect even though the rights are granted to individuals.

nature de l'obligation des gouvernements de fournir des établissements et des programmes varie en fonction du nombre d'élèves susceptibles de se prévaloir des services (*Mahe, précité*, p. 366; *Renvoi sur les écoles, précité*, p. 850; *Arsenault-Cameron, précité*, par. 38). Cette exigence donne à l'exercice de ces droits individuels une dimension collective particulière.

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Another distinctive feature of the right in s. 23 is that the “numbers warrant” requirement leaves minority language education rights particularly vulnerable to government delay or inaction. For every school year that governments do not meet their obligations under s. 23, there is an increased likelihood of assimilation which carries the risk that numbers might cease to “warrant”. Thus, particular entitlements afforded under s. 23 can be suspended, for so long as the numbers cease to warrant, by the very cultural erosion against which s. 23 was designed to guard. In practical, though not legal, terms, such suspensions may well be permanent. If delay is tolerated, governments could potentially avoid the duties imposed upon them by s. 23 through their own failure to implement the rights vigilantly. The affirmative promise contained in s. 23 of the *Charter* and the critical need for timely compliance will sometimes require courts to order affirmative remedies to guarantee that language rights are meaningfully, and therefore necessarily promptly, protected (see, for example, *Marchand v. Simcoe County Board of Education* (1986), 29 D.L.R. (4th) 596 (Ont. H.C.); *Marchand v. Simcoe County Board of Education (No. 2)* (1987), 44 D.L.R. (4th) 171 (Ont. H.C.); *Lavoie v. Nova Scotia (Attorney-General)* (1988), 47 D.L.R. (4th) 586 (N.S.S.C.T.D.); *Conseil des Écoles Séparées Catholiques Romaines de Dufferin et Peel v. Ontario (Ministre de l'Éducation et de la Formation)* (1996), 136 D.L.R. (4th) 704 (Ont. Ct. (Gen. Div.)), aff'd (1996), 30 O.R. (3d) 681 (C.A.); *Conseil Scolaire Fransaskois de Zenon Park v. Saskatchewan*, [1999] 3 W.W.R. 743 (Sask. Q.B.), aff'd [1999] 12 W.W.R. 742 (Sask. C.A.); *Assoc. Française des Conseils Scolaires de l'Ontario v. Ontario* (1988), 66 O.R. (2d) 599 (C.A.); *Assn. des parents francophones de*

Les droits garantis par l'art. 23 présentent une autre caractéristique : en raison de l'exigence du « nombre justificatif », ils sont particulièrement vulnérables à l'inaction ou aux attermolements des gouvernements. Le risque d'assimilation et, par conséquent, le risque que le nombre cesse de « justifier » la prestation des services augmentent avec les années scolaires qui s'écoulent sans que les gouvernements exécutent les obligations que leur impose l'art. 23. Ainsi, l'érosion culturelle que l'art. 23 visait justement à enrayer peut provoquer la suspension des services fournis en application de cette disposition tant que le nombre cessera de justifier la prestation de ces services. De telles suspensions peuvent fort bien devenir permanentes en pratique, mais non du point de vue juridique. Si les attermolements sont tolérés, l'omission des gouvernements d'appliquer avec vigilance les droits garantis par l'art. 23 leur permettra éventuellement de se soustraire aux obligations que leur impose cet article. La promesse concrète contenue à l'art. 23 de la *Charte* et la nécessité cruciale qu'elle soit tenue à temps obligent parfois les tribunaux à ordonner des mesures réparatrices concrètes destinées à garantir aux droits linguistiques une protection réelle et donc nécessairement diligente (voir, par exemple, *Marchand c. Simcoe County Board of Education* (1986), 29 D.L.R. (4th) 596 (H.C. Ont.); *Marchand c. Simcoe County Board of Education (No. 2)* (1987), 44 D.L.R. (4th) 171 (H.C. Ont.); *Lavoie c. Nova Scotia (Attorney-General)* (1988), 47 D.L.R. (4th) 586 (C.S.N.-É. 1^{re} inst.); *Conseil des Écoles Séparées Catholiques Romaines de Dufferin et Peel c. Ontario (Ministre de l'Éducation et de la Formation)* (1996), 136 D.L.R. (4th) 704 (C. Ont. (Div. gén.)), conf. par (1996), 30 O.R. (3d) 681 (C.A.); *Conseil Scolaire Fransaskois de Zenon Park c. Saskatchewan*, [1999] 3 W.W.R. 743 (B.R. Sask.), conf. par [1999] 12 W.W.R. 742 (C.A. Sask.); *Assoc.*

la Colombie-Britannique v. British Columbia (1998), 167 D.L.R. (4th) 534 (B.C.S.C.)).

To put the matter of judicial remedies in greater context, it is useful to reflect briefly on the role of courts in the enforcement of our laws.

Canada has evolved into a country that is noted and admired for its adherence to the rule of law as a major feature of its democracy. But the rule of law can be shallow without proper mechanisms for its enforcement. In this respect, courts play an essential role since they are the central institutions to deal with legal disputes through the rendering of judgments and decisions. But courts have no physical or economic means to enforce their judgments. Ultimately, courts depend on both the executive and the citizenry to recognize and abide by their judgments.

Fortunately, Canada has had a remarkable history of compliance with court decisions by private parties and by all institutions of government. That history of compliance has become a fundamentally cherished value of our constitutional democracy; we must never take it for granted but always be careful to respect and protect its importance, otherwise the seeds of tyranny can take root.

This tradition of compliance takes on a particular significance in the constitutional law context, where courts must ensure that government behaviour conforms with constitutional norms but in doing so must also be sensitive to the separation of function among the legislative, judicial and executive branches. While our Constitution does not expressly provide for the separation of powers (see *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714, at p. 728; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, at p. 601; *Reference re Secession of Quebec*, [1998]

Française des Conseils Scolaires de l'Ontario c. Ontario (1988), 66 O.R. (2d) 599 (C.A.); *Assn. des parents francophones de la Colombie-Britannique c. British Columbia* (1998), 167 D.L.R. (4th) 534 (C.S.C.-B.)).

Afin de situer la question des réparations judiciaires dans un contexte plus général, il est utile d'examiner brièvement le rôle que les tribunaux jouent en matière d'application des lois.

Le Canada s'est gagné reconnaissance et admiration en faisant de la primauté du droit une caractéristique majeure de sa démocratie. Toutefois, la primauté du droit non assortie des mécanismes propres à en assurer le respect risque de demeurer un principe superficiel. Les tribunaux jouent un rôle essentiel à cet égard puisque c'est à eux, en tant qu'institutions centrales, qu'il revient de résoudre les différends juridiques en rendant des jugements et des décisions. Cependant, ils ne disposent pas des ressources matérielles ou financières requises pour assurer l'exécution de leurs jugements. En fin de compte, ils s'en remettent à l'exécutif et aux citoyens pour ce qui est de reconnaître et de respecter leurs jugements.

Heureusement, au Canada, il existe une tradition de respect remarquable des décisions judiciaires de la part des parties privées et des institutions gouvernementales. Cette tradition s'est transformée en une précieuse valeur fondamentale de notre démocratie constitutionnelle. Il faut se garder de la tenir pour acquise, et toujours prendre soin d'en honorer et d'en protéger l'importance, afin d'éviter que les germes de la tyrannie s'enracinent.

Cette tradition de respect prend une dimension particulière dans le contexte du droit constitutionnel, où les tribunaux doivent veiller à ce que l'action du gouvernement soit conforme aux normes constitutionnelles tout en ne perdant pas de vue la séparation des fonctions entre les pouvoirs législatif, judiciaire et exécutif. Bien que la Constitution ne prévoie pas expressément la séparation des pouvoirs (voir *Renvoi relatif à la Loi de 1979 sur la location résidentielle*, [1981] 1 R.C.S. 714, p. 728; *Douglas/Kwantlen Faculty Assn. c. Douglas College*, [1990] 3 R.C.S. 570, p. 601; *Renvoi relatif à la sécession du*

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2 S.C.R. 217, at para. 15), the functional separation among the executive, legislative and judicial branches of governance has frequently been noted. (See, for example, *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, at pp. 469-70.) In *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, McLachlin J. (as she then was) stated, at p. 389:

Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.

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In other words, in the context of constitutional remedies, courts must be sensitive to their role as judicial arbiters and not fashion remedies which usurp the role of the other branches of governance by taking on tasks to which other persons or bodies are better suited. Concern for the limits of the judicial role is interwoven throughout the law. The development of the doctrines of justiciability, and to a great extent mootness, standing, and ripeness resulted from concerns about the courts overstepping the bounds of the judicial function and their role *vis-à-vis* other branches of government.

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In addition, it is unsurprising, given how the *Charter* changed the nature of our constitutional structure by requiring that all laws and government action conform to the *Charter*, that concerns about the limits of the judicial role have animated much of the *Charter* jurisprudence and commentary surrounding it (see, for example, K. Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (2001); C. P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (1993); F. L. Morton and R. Knopff, *The Charter Revolution and the Court Party* (2000); A. Petter, “The Politics of

Québec, [1998] 2 R.C.S. 217, par. 15), les tribunaux ont fréquemment signalé l’existence d’une séparation fonctionnelle entre les branches exécutive, législative et judiciaire de l’État. (Voir, par exemple, *Fraser c. Commission des relations de travail dans la Fonction publique*, [1985] 2 R.C.S. 455, p. 469-470.) Dans l’arrêt *New Brunswick Broadcasting Co. c. Nouvelle-Écosse (Président de l’Assemblée législative)*, [1993] 1 R.C.S. 319, la juge McLachlin (maintenant Juge en chef) affirme à la p. 389 :

Notre gouvernement démocratique comporte plusieurs branches : la Couronne représentée par le gouverneur général et ses homologues provinciaux, l’organisme législatif, l’exécutif et les tribunaux. Pour assurer le fonctionnement de l’ensemble du gouvernement, il est essentiel que toutes ces composantes jouent le rôle qui leur est propre. Il est également essentiel qu’aucune de ces branches n’outrepasse ses limites et que chacune respecte de façon appropriée le domaine légitime de compétence de l’autre.

Autrement dit, lorsqu’ils accordent des réparations constitutionnelles, les tribunaux doivent être conscients de leur rôle d’arbitre judiciaire et s’abstenir d’usurper les fonctions des autres branches du gouvernement en s’arrogeant des tâches pour lesquelles d’autres personnes ou organismes sont mieux qualifiés. Le souci des limites du rôle judiciaire est omniprésent en droit. L’établissement de la règle de la justiciabilité et, dans une large mesure, de celles du caractère théorique, de la qualité pour agir et de la question mûre pour décision découle de la crainte que les tribunaux outrepassent leur fonction judiciaire et empiètent sur le rôle des autres branches du gouvernement.

En outre, compte tenu des changements que la *Charte* a apportés à la nature de notre structure constitutionnelle en exigeant la conformité de toute loi et de toute action gouvernementale à ses dispositions, il n’est pas étonnant que la jurisprudence relative à la *Charte* et les commentaires des auteurs à son sujet aient fait tant de cas de la question des limites du rôle judiciaire (voir, par exemple, K. Roach, *The Supreme Court on Trial : Judicial Activism or Democratic Dialogue* (2001); C. P. Manfredi, *Judicial Power and the Charter : Canada and the Paradox of Liberal Constitutionalism* (1993); F. L. Morton et R. Knopff, *The Charter Revolution and*

the Charter” (1986), 8 *Supreme Court L.R.* 473). Thus, in *Vriend*, *supra*, this Court stated, at para. 136:

In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. Rather, the courts are to uphold the Constitution and have been expressly invited to perform that role by the Constitution itself. But respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each others’ role and the role of the courts.

Deference ends, however, where the constitutional rights that the courts are charged with protecting begin. As McLachlin J. stated in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 136:

Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament’s choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament.

Determining the boundaries of the courts’ proper role, however, cannot be reduced to a simple test or formula; it will vary according to the right at issue and the context of each case.

Returning to this appeal, we believe that LeBlanc J. was duly guided by historical and contextual factors in crafting a remedy that would meaningfully protect, indeed implement, the applicants’ rights to minority official language education for their children while maintaining appropriate respect for the proper roles of the executive and legislative branches.

As indicated earlier, the history of French-language education in Nova Scotia has been disappointing, resulting in high rates of assimilation

the Court Party (2000); A. Petter, « The Politics of the Charter » (1986), 8 *Supreme Court L.R.* 473). Ainsi, la Cour a statué dans *Vriend*, précité, par. 136 :

Les tribunaux n’ont pas, pour accomplir leurs fonctions, à se substituer après coup aux législatures ou aux gouvernements; ils ne doivent pas passer de jugement de valeur sur ce qu’ils considèrent comme les politiques à adopter; cette tâche appartient aux autres organes de gouvernement. Il incombe plutôt aux tribunaux de faire respecter la Constitution, et c’est la Constitution elle-même qui leur confère expressément ce rôle. Toutefois, il est tout aussi important, pour les tribunaux, de respecter eux-mêmes les fonctions du pouvoir législatif et de l’exécutif que de veiller au respect, par ces pouvoirs, de leur rôle respectif et de celui des tribunaux.

Cependant, la déférence s’arrête là où commencent les droits constitutionnels que les tribunaux sont chargés de protéger. Comme le déclare la juge McLachlin dans *RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199, par. 136 :

Le Parlement a son rôle : choisir la réponse qui convient aux problèmes sociaux dans les limites prévues par la Constitution. Cependant, les tribunaux ont aussi un rôle : déterminer de façon objective et impartiale si le choix du Parlement s’inscrit dans les limites prévues par la Constitution. Les tribunaux n’ont pas plus le droit que le Parlement d’abdiquer leur responsabilité.

La délimitation du rôle que les tribunaux ont à jouer ne saurait toutefois se réduire à un simple critère ou une simple formule; leur rôle varie en fonction du droit en cause et du contexte de chaque affaire.

En ce qui concerne le présent pourvoi, nous croyons que le juge LeBlanc s’est à bon droit appuyé sur des facteurs historiques et contextuels pour concevoir une réparation qui protégerait utilement et, en fait, mettrait en application les droits des appelants de faire instruire leurs enfants dans la langue officielle parlée par la minorité, tout en respectant comme il se doit les rôles respectifs de l’exécutif et du législatif.

Là encore, l’histoire de l’instruction en français en Nouvelle-Écosse est décevante; on a abouti à un taux d’assimilation élevé qui se poursuivait toujours

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that have continued well into the period when this litigation began. While the situation is not what it was in the eighteenth and nineteenth centuries when French-language education in Acadia was for the most part either expressly prohibited or unavailable, the promise of s. 23 had yet to be fulfilled in the five school districts at issue in this appeal when the appellants brought their application demanding homogeneous French-language facilities before the Supreme Court of Nova Scotia in 1998. Through the mid-1990s, s. 23 parents had pressured the government to provide homogeneous French-language facilities in presentations to Legislative Committees and in written and oral submissions to Ministers of Education. They had submitted petitions, letters, and expert analyses on assimilation to the Province. In 1996, amendments to the *Education Act* provided for a French-language school board, the Conseil scolaire acadien provincial, geared toward the fulfilment of the Province's s. 23 obligations. The school board then decided to provide the facilities at issue in this appeal. From 1997 to 1999, the provincial government announced the construction of homogeneous French-language schools in Petit-de-Grat, Clare, and Argyle. The schools were never built, and the construction projects were officially put on hold in September 1999.

au moment où a commencé le présent litige. La situation n'est certes plus ce qu'elle était aux XVIII^e et XIX^e siècles, alors que l'instruction en français en Acadie était le plus souvent inexistante ou expressément interdite, mais dans les cinq districts scolaires en cause, la promesse contenue à l'art. 23 n'était toujours pas réalisée, en 1998, au moment où les appelants ont présenté à la Cour suprême de la province une demande visant à obtenir des établissements d'enseignement francophones homogènes. Jusqu'au milieu des années 90, les parents visés par l'art. 23 avaient exercé des pressions sur le gouvernement pour qu'il fournisse des établissements francophones homogènes, en comparaissant devant des comités législatifs et en présentant des mémoires ou des observations orales au ministre de l'Éducation. Ils avaient soumis des pétitions, envoyé des lettres et présenté des analyses d'experts sur l'assimilation dans la province. En 1996, l'*Education Act* a été modifiée de manière à créer un conseil scolaire francophone, le Conseil scolaire acadien provincial, qui serait chargé de remplir les obligations imposées à la province par l'art. 23. Le Conseil a alors décidé de fournir les établissements en cause dans le présent pourvoi. De 1997 à 1999, le gouvernement provincial a annoncé la construction d'écoles francophones homogènes à Petit-de-Grat, Clare et Argyle. La mise en chantier des écoles n'a jamais eu lieu et les projets de construction ont été officiellement suspendus en septembre 1999.

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The reason for the delay, broadly speaking, was the government's failure to give due priority to s. 23 rights in educational policy setting. Indeed, LeBlanc J. observed that the real issue between the parties by the time of trial was the date on which the programs ought to be implemented, rather than any question as to whether they were required in the first place. The government cited a lack of consensus in the community, a consequent fear that enrollment would drop, and lack of funds as reasons for its decision to place the previously announced school construction projects on hold pending cost-benefit reviews. LeBlanc J. rightly concluded that none of these reasons justified the government's failure to fulfill its obligations under s. 23. He found that the government had been treating the provision of s. 23 schools no differently from programs or facilities

De façon générale, ces attermoissements s'expliquent par le défaut du gouvernement d'accorder aux droits protégés par l'art. 23 la priorité qui leur revient en matière de politique d'enseignement. En fait, le juge LeBlanc a souligné qu'au moment de l'instruction de l'affaire la véritable question en litige entre les parties était la date de mise en œuvre des programmes plutôt que leur nécessité au départ. Pour justifier sa décision de suspendre les projets de construction déjà annoncés en attendant les conclusions d'analyses coûts-avantages, le gouvernement a mentionné l'absence de consensus dans la collectivité — d'où la crainte d'une baisse des inscriptions — et le manque de fonds. Le juge LeBlanc a eu raison de conclure qu'aucun de ces motifs ne justifiait le défaut du gouvernement de s'acquitter des obligations que lui impose l'art. 23. Selon lui,

generally, without attention to purposes of s. 23 of the *Charter* and the role that homogeneous schools play in French linguistic and cultural preservation and flourishing (para. 205). Meanwhile, assimilation continued (para. 210) and enrollment in the Conseil's schools was dropping. Programs were in jeopardy (paras. 229-30).

It is in this urgent context of ongoing cultural erosion that LeBlanc J. crafted his remedy. He was sensitive to the need for timely execution, the limits of the judicial role, and the desirability of allowing the government flexibility in the manner of fulfilling its constitutional obligations when he ordered the government to make best efforts to provide facilities by particular dates and retained jurisdiction to hear progress reports. However, the urgency of the context does not by itself create jurisdiction in a superior court to issue a remedy of unlimited scope under s. 24(1) of the *Charter*. We now turn to the question of whether LeBlanc J.'s order was within the jurisdiction of a superior court.

(2) The Jurisdiction of a Superior Court to Issue a Remedy Under Section 24(1) of the *Charter*

Section 24(1) entrenches in the Constitution a remedial jurisdiction for infringements or denials of *Charter* rights and freedoms. The respondent makes various arguments suggesting that LeBlanc J. exceeded his jurisdiction by violating constitutional norms, statutory provisions, and common law rules. We will first deal with the extent of the remedial jurisdiction in s. 24(1) and the constitutional limits to that jurisdiction proposed by the respondent. Later we will discuss how statutes and common law rules might be relevant to the choice of remedy under s. 24(1).

le gouvernement avait traité les écoles requises en vertu de l'art. 23 de la *Charte* de la même manière que les autres établissements ou programmes en général, sans s'attarder à l'objet de cet article et au rôle des écoles homogènes en ce qui concerne la préservation et l'épanouissement de la langue et de la culture françaises (par. 205). Pendant ce temps, l'assimilation se poursuivait (par. 210) et les inscriptions aux écoles du Conseil chutaient. Les programmes étaient en péril (par. 229-230).

C'est dans ce contexte urgent d'érosion culturelle que le juge LeBlanc a conçu la réparation en cause. En ordonnant au gouvernement de faire de son mieux pour fournir des établissements dans des délais déterminés et en se déclarant compétent pour entendre les comptes rendus sur les efforts déployés à cet égard, le juge a tenu compte de la nécessité d'une exécution diligente, des limites du rôle des tribunaux et de l'opportunité de laisser au gouvernement une certaine latitude dans la façon de remplir les obligations que lui impose la Constitution. Toutefois l'urgence du contexte n'habilite pas en soi une cour supérieure à accorder une réparation d'une portée illimitée sous le régime du par. 24(1) de la *Charte*. Nous abordons maintenant la question de savoir si l'ordonnance du juge LeBlanc ressortissait à la compétence d'une cour supérieure.

(2) La compétence des cours supérieures en matière de réparation fondée sur le par. 24(1) de la *Charte*

Le paragraphe 24(1) constitutionnalise le pouvoir des tribunaux de réparer des négations ou violations de droits et libertés garantis par la *Charte*. L'intimé avance divers arguments selon lesquels le juge LeBlanc aurait outrepassé sa compétence en contrevenant à des normes constitutionnelles, à des dispositions législatives et à des règles de common law. Nous examinerons d'abord la portée de la compétence que le par. 24(1) confère en matière de réparation, ainsi que les limites auxquelles la Constitution assujettit cette compétence selon l'intimé. Nous analyserons ensuite l'utilité des textes de loi et des règles de common law dans le choix des réparations visées au par. 24(1).

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Clearly, if there is some constitutional limit to the remedial power either in s. 24(1) or in some other part of the Constitution, the judge ordering a remedy must respect this boundary. As a basic rule, no part of the Constitution can abrogate or diminish another part of the Constitution (*New Brunswick Broadcasting*, *supra*, at p. 373, McLachlin J. citing *Reference re Bill 30, An Act to amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148). For example, a court could not compel a provincial government to do something pursuant to s. 24(1) which would exceed the jurisdiction of the province under s. 92 of the *Constitution Act, 1867*.

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A remedy under s. 24(1) is available where there is some government action, beyond the enactment of an unconstitutional statute or provision, that infringes a person's *Charter* rights (see *Schachter v. Canada*, [1992] 2 S.C.R. 679, at pp. 719-20). In the present appeal, the difficulty does not lie with the legislation: no provision or omission in the *Education Act* prevented the government from providing minority language education as required by the *Constitution Act, 1982*. On the contrary, the *Education Act*, as amended in 1996, establishes a French-language school board to provide homogeneous French-language education to children of s. 23 entitled parents. Neither is the problem rooted in any particular government action; rather, the problem was inaction on the part of the provincial government, particularly its failure to mobilize resources to provide school facilities in a timely fashion, as required by s. 23 of the *Charter*. Section 24(1) is available to remedy this failure.

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To repeat its text, s. 24(1) of the *Charter* provides:

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

Il est incontestable que, si le pouvoir de réparation comporte certaines limites en vertu du par. 24(1) ou d'autres parties de la Constitution, le juge doit agir en conséquence au moment d'accorder une réparation. Selon une règle fondamentale, une partie de la Constitution ne peut être abrogée ou atténuée par une autre partie de la Constitution (*New Brunswick Broadcasting*, précité, p. 373, la juge McLachlin, citant le *Renvoi relatif au projet de loi 30, An Act to amend the Education Act (Ont.)*, [1987] 1 R.C.S. 1148). Par exemple, un tribunal ne saurait forcer un gouvernement provincial à prendre, en vertu du par. 24(1), une mesure qui excéderait la compétence conférée à la province par l'art. 92 de la *Loi constitutionnelle de 1867*.

Il peut y avoir lieu à réparation sous le régime du par. 24(1) lorsqu'une action du gouvernement, autre que l'adoption d'une loi ou d'une disposition législative inconstitutionnelle, porte atteinte aux droits que la *Charte* garantit à une personne (voir *Schachter c. Canada*, [1992] 2 R.C.S. 679, p. 719-720). En l'espèce, ce n'est pas la loi qui fait problème : l'*Education Act* ne comporte ni disposition ni omission empêchant le gouvernement de dispenser l'instruction dans la langue de la minorité conformément à la *Loi constitutionnelle de 1982*. Au contraire, cette loi, dans sa version modifiée de 1996, établit un conseil scolaire francophone chargé d'offrir un enseignement homogène en français aux enfants des parents visés à l'art. 23. De même, le problème découle non pas d'une action gouvernementale quelconque, mais plutôt de l'inaction du gouvernement provincial et, en particulier, de son défaut de mobiliser des ressources pour fournir sans délai des établissements d'enseignement, conformément à l'art. 23 de la *Charte*. On peut se prévaloir du par. 24(1) pour remédier à ce défaut.

Voici, encore une fois, le texte du par. 24(1) de la *Charte* :

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

The purposive reading of s. 24(1) and also the ordinary meaning of the drafter's language make it clear that s. 24(1) guarantees that there must always be a court of competent jurisdiction to hear anyone whose rights or freedoms have been infringed or denied (see *Nelles v. Ontario*, [1989] 2 S.C.R. 170, at p. 196, and *Mills*, *supra*, at p. 881). The default court of competent jurisdiction is a superior court established under s. 96 of the Constitution Act, 1867. It is also plainly contemplated in s. 24(1) that a court of competent jurisdiction will have the authority to grant a remedy that it considers appropriate and just in the circumstances.

The respondent Attorney General of Nova Scotia suggested that *Re Residential Tenancies Act, 1979*, *supra*, and other cases which describe the functions of courts in the context of s. 96 should be read as setting limits on superior courts' remedial power. With respect, that submission must fail. It is true that in *Re Residential Tenancies Act, 1979*, at pp. 734-35, Dickson J. (as he then was) discussed the nature of the "judicial function" of s. 96 courts. But this discussion occurred in the context of a s. 96 challenge to the validity of a statute conferring jurisdiction on an administrative tribunal. Section 96 protects a "core" of superior courts' jurisdiction from being transferred exclusively to provincial inferior courts or administrative tribunals (*MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, at para. 15, *per* Lamer C.J.). These cases safeguarding a core do not trace the limits of superior courts' jurisdiction. There is nothing in s. 96 to limit the inherent jurisdiction of the superior courts or the jurisdiction that can be conferred on them by statute (*Reference re Young Offenders Act (P.E.I.)*, [1991] 1 S.C.R. 252, at p. 274) and, *a fortiori*, nothing to limit the jurisdiction of a superior court under s. 24(1) of the *Charter*.

In a similar vein, the respondent Attorney General suggests that this Court's decisions in *Mills* and *Dunedin*, both *supra*, which set out a

L'interprétation téléologique de ce texte et le sens ordinaire des mots utilisés par son rédacteur montrent clairement qu'il garantit qu'il y aura toujours un tribunal compétent pour entendre les personnes victimes de violation ou de négation de leurs droits ou libertés (voir *Nelles c. Ontario*, [1989] 2 R.C.S. 170, p. 196, et *Mills*, précité, p. 881). Les tribunaux compétents sont ipso facto les cours supérieures établies en vertu de l'art. 96 de la Loi constitutionnelle de 1867. Le paragraphe 24(1) prévoit, en outre, clairement que les tribunaux compétents peuvent accorder la réparation qu'ils estiment convenable et juste eu égard aux circonstances.

L'intimé, le procureur général de la Nouvelle-Écosse, laisse entendre que le *Renvoi relatif à la Loi de 1979 sur la location résidentielle*, précité, et d'autres décisions décrivant les fonctions judiciaires dans le contexte de l'art. 96 doivent être interprétés comme fixant des limites au pouvoir de réparation des cours supérieures. Cet argument ne peut être retenu. Certes, dans le *Renvoi relatif à la Loi de 1979 sur la location résidentielle*, le juge Dickson (plus tard Juge en chef) a examiné la nature de la « fonction judiciaire » des tribunaux visés à l'art. 96 (p. 734-735). Cependant, il l'a fait dans le cadre d'une contestation, fondée sur l'art. 96, de la validité d'une loi attribuant compétence à un tribunal administratif. L'article 96 empêche qu'un « élément fondamental » de la compétence des cours supérieures soit transféré exclusivement à des tribunaux de juridiction inférieure ou à des tribunaux administratifs provinciaux (*MacMillan Bloedel Ltd. c. Simpson*, [1995] 4 R.C.S. 725, par. 15, le juge en chef Lamer). Cette jurisprudence qui préserve un élément fondamental de la compétence des cours supérieures ne fixe pas les limites de cette compétence. Rien dans l'art. 96 n'a pour effet de limiter la compétence inhérente des cours supérieures ou les pouvoirs qui peuvent leur être conférés par voie législative (*Renvoi relatif à la Loi sur les jeunes contrevenants (Î.-P.-É.)*, [1991] 1 R.C.S. 252, p. 274) et, encore moins, la compétence dont le par. 24(1) de la *Charte* investit les cours supérieures.

Dans la même veine, l'intimé le procureur général laisse entendre que les arrêts *Mills* et *Dunedin*, précités, de la Cour, qui établissent un système

framework for determining when a court or tribunal is competent to grant remedies under s. 24(1) of the *Charter*, deny the availability of the remedy ordered in this case. In our opinion, this submission rests on a mistaken view of the source of superior courts' power to grant *Charter* remedies.

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In *Mills*, the Court considered whether a preliminary hearing magistrate given jurisdiction by particular provisions of the *Criminal Code* was a court of competent jurisdiction for the purposes of entering a stay of proceedings under s. 24(1) of the *Charter*. The unanimous conclusion of the Court was that a magistrate sitting at preliminary hearing was not competent to provide that remedy. McIntyre J., speaking for the majority on this point, emphasized the limited function of a court sitting in preliminary inquiry, which is to commit the accused to trial where there is sufficient evidence, or discharge the accused where there is not. The role does not include entering acquittals or convictions, imposing penalties, or giving remedies. As such, remedies under s. 24(1) could not be granted by that tribunal. Subsequent cases applying *Mills*, including *Dunedin*, *supra*, *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75, and *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, considered whether administrative tribunals or judges acting under statutory authority had the power to issue particular *Charter* remedies under s. 24(1). In each case, the analysis was directed at discerning what kinds of powers the legislator intended the tribunal to exercise in light of the purposes of the *Charter* as well as the tribunal's function and the practical limits imposed by its structure. This analysis has no application to s. 96 courts which are, of course, not creatures of statute but courts of general inherent jurisdiction.

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Thus, when McIntyre J. wrote in *Mills*, *supra*, at p. 953, that "the *Charter* was not intended to turn the Canadian legal system upside down", he meant that s. 24(1) did not confer new jurisdiction on statutory and inferior tribunals beyond that which

permettant de déterminer quand un tribunal judiciaire ou administratif a compétence pour accorder une réparation fondée sur le par. 24(1) de la *Charte*, empêchent d'accorder le type de réparation en cause dans la présente affaire. À notre avis, cet argument procède d'une conception erronée de la source du pouvoir des cours supérieures d'accorder des réparations fondées sur la *Charte*.

Dans l'arrêt *Mills*, la Cour s'est demandé si le magistrat habilité par des dispositions du *Code criminel* à présider une enquête préliminaire était un tribunal compétent pour ordonner la suspension de procédures au sens du par. 24(1) de la *Charte*. Elle a conclu à l'unanimité que le magistrat n'avait pas cette compétence. S'exprimant au nom des juges majoritaires sur ce point, le juge McIntyre a insisté sur la fonction limitée du magistrat à l'enquête préliminaire, qui consiste à renvoyer l'accusé à procès lorsque la preuve est suffisante ou à le libérer si elle ne l'est pas. Il n'entre pas dans ses attributions de prononcer un verdict d'acquiescement ou de culpabilité, d'imposer une peine ou encore d'accorder une réparation. Cela explique pourquoi il ne peut donc accorder une réparation fondée sur le par. 24(1). Dans la jurisprudence subséquente où elle a appliqué l'arrêt *Mills*, notamment *Dunedin*, précité, *Mooring c. Canada (Commission nationale des libérations conditionnelles)*, [1996] 1 R.C.S. 75, et *Weber c. Ontario Hydro*, [1995] 2 R.C.S. 929, la Cour s'est demandé si les tribunaux administratifs ou les juges habilités par la loi avaient le pouvoir d'accorder certaines réparations fondées sur le par. 24(1) de la *Charte*. Dans chaque cas, l'analyse avait pour but de déterminer le genre de pouvoirs que le législateur avait voulu que le tribunal en cause exerce à la lumière des objets de la *Charte*, ainsi que la fonction du tribunal et les limites pratiques imposées par sa structure. Cette analyse ne s'applique pas aux tribunaux visés par l'art. 96, qui, bien sûr, ne doivent pas leur existence à une loi et qui possèdent une compétence générale inhérente.

Ainsi, lorsqu'il écrit, dans l'arrêt *Mills*, précité, p. 953, que la *Charte* « n'était pas censée provoquer le bouleversement du système judiciaire canadien », le juge McIntyre veut dire que le par. 24(1) ne confère pas aux tribunaux d'origine législative et

was intended by the legislator as reflected in the tribunal's function and the practical limits imposed by its structure. The test set out in *Mills* does not apply to superior courts since, as McIntyre J. pointed out, a superior court will always be a court of competent jurisdiction under s. 24(1) of the *Charter* (*Mills*, *supra*, at p. 956). Superior courts retain “constant, complete and concurrent jurisdiction” to issue remedies under s. 24(1) (see *R. v. Rahey*, [1987] 1 S.C.R. 588, at pp. 603-4, citing *Mills*, *supra*, at p. 892, and *R. v. Smith*, [1989] 2 S.C.R. 1120, at pp. 1129-30).

The foregoing analysis does not preclude review on appeal of a superior court's choice of remedy under s. 24(1). Rather, it simply forecloses the argument that a given remedy under s. 24 is unavailable in a superior court because of the constitutional limitations on its jurisdiction as proposed by the respondent. The nature and extent of remedies available under s. 24(1) remain limited by the words of the section itself and must be read in harmony with the rest of our Constitution. As McIntyre J. wrote in *Mills*, *supra*, at p. 965:

What remedies are available when an application under s. 24(1) of the *Charter* succeeds? Section 24(1) again is silent on the question. It merely provides that the appellant may obtain such remedy as the court considers “appropriate and just in the circumstances”. It is difficult to imagine language which could give the court a wider and less fettered discretion. It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion.

McLachlin C.J. recently endorsed this passage in *Dunedin*, *supra*, at para. 18. Consequently, a party seeking to challenge a *Charter* remedy ordered by a s. 96 court must show that the order is not “appropriate and just in the circumstances”.

aux tribunaux inférieurs une nouvelle compétence s'ajoutant à celle que le législateur a voulu leur conférer, comme en témoignent leur fonction et les limites pratiques imposées par leur structure. Le critère de l'arrêt *Mills* ne s'applique pas aux cours supérieures, puisque elles sont toujours des tribunaux compétents au sens du par. 24(1) de la Charte, comme l'a fait remarquer le juge McIntyre (*Mills*, précité, p. 956). Les cours supérieures possèdent une « compétence concurrente, permanente et complète » pour accorder des réparations fondées sur le par. 24(1) (voir *R. c. Rahey*, [1987] 1 R.C.S. 588, p. 603-604, citant *Mills*, précité, p. 892, et voir aussi *R. c. Smith*, [1989] 2 R.C.S. 1120, p. 1129-1130).

L'analyse qui précède n'interdit pas l'examen en appel de la réparation qu'une cour supérieure a choisi d'accorder en vertu du par. 24(1). Elle empêche simplement de prétendre, comme le fait l'intimé, qu'une cour supérieure ne peut pas accorder une certaine mesure réparatrice fondée sur l'art. 24 en raison des limites que la Constitution impose à sa compétence. C'est le texte même du par. 24(1) qui limite la nature et la portée des réparations pouvant être accordées, et ce texte doit recevoir une interprétation qui s'accorde avec le reste de notre Constitution. Comme le juge McIntyre l'écrit dans *Mills*, précité, p. 965-966 :

Quelle réparation peut-on obtenir lorsqu'il est fait droit à une demande fondée sur le par. 24(1) de la *Charte*? Là encore le par. 24(1) n'apporte pas de réponse. Il ne fait que prévoir que l'appelant peut obtenir la réparation que le tribunal estime « convenable et juste eu égard aux circonstances ». Il est difficile de concevoir comment on pourrait donner au tribunal un pouvoir discrétionnaire plus large et plus absolu. Ce large pouvoir discrétionnaire n'est tout simplement pas réductible à une espèce de formule obligatoire d'application générale à tous les cas, et les tribunaux d'appel ne sont nullement autorisés à s'approprier ce large pouvoir discrétionnaire ni à en restreindre la portée.

La juge en chef McLachlin a récemment souscrit à ce passage dans l'arrêt *Dunedin*, précité, par. 18. Par conséquent, la partie qui veut contester une réparation accordée en vertu de la *Charte* par un tribunal visé à l'art. 96 doit démontrer que cette réparation n'est pas « convenable et juste eu égard aux circonstances ».

51 | The power of the superior courts under s. 24(1) to make appropriate and just orders to remedy infringements or denials of *Charter* rights is part of the supreme law of Canada. It follows that this remedial power cannot be strictly limited by statutes or rules of the common law. We note, however, that statutes and common law rules may be helpful to a court choosing a remedy under s. 24(1) insofar as the statutory provisions or common law rules express principles that are relevant to determining what is “appropriate and just in the circumstances”.

(3) The Meaning of “Appropriate and Just in the Circumstances”

52 | What, then, is meant in s. 24(1) by the words “appropriate and just in the circumstances”? Clearly, the task of giving these words meaning in particular cases will fall to the courts ordering the remedies since s. 24(1) specifies that the remedy should be such as the court considers appropriate and just. Deciding on an appropriate and just remedy in particular circumstances calls on the judge to exercise a discretion based on his or her careful perception of the nature of the right and of the infringement, the facts of the case, and the application of the relevant legal principles. Once again, we emphasize McIntyre J.’s words in *Mills*, *supra*, at p. 965:

It is difficult to imagine language which could give the court a wider and less fettered discretion. It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion.

53 | With respect, the approach to s. 24 reflected in the reasons of LeBel and Deschamps JJ. would tend to pre-empt and reduce this wide discretion. Their approach would also, in this case, pre-empt and devalue the constitutional promise respecting language rights in s. 23. In our view, judicial restraint and metaphors such as “dialogue” must not be elevated to the level of strict constitutional rules to which the words of s. 24 can be subordinated. The

Le pouvoir que le par. 24(1) confère aux cours supérieures de rendre des ordonnances convenables et justes afin de remédier à des violations ou négations de droits garantis par la *Charte* fait partie de la loi suprême du Canada. Il s’ensuit qu’il ne peut être strictement limité par des dispositions législatives ou des règles de common law. Toutefois, nous constatons que les lois ou les règles de common law peuvent aider les tribunaux à choisir les réparations à accorder sous le régime du par. 24(1) dans la mesure où elles énoncent des principes utiles pour déterminer ce qui est « convenable et juste eu égard aux circonstances ».

(3) La signification de « convenable et juste eu égard aux circonstances »

Que signifie alors l’expression « convenable et juste eu égard aux circonstances » utilisée au par. 24(1)? Dans certains cas, il appartient nettement au tribunal qui accorde la réparation de donner un sens à cette expression, étant donné que le par. 24(1) précise que la réparation accordée doit être celle que le tribunal estime convenable et juste. Pour décider quelle réparation est convenable et juste dans une situation donnée, le juge doit exercer son pouvoir discrétionnaire en se fondant sur son appréciation prudente de la nature du droit et de la violation en cause, sur les faits et sur l’application des principes juridiques pertinents. Il y a lieu de répéter le passage suivant des motifs du juge McIntyre dans *Mills*, précité, p. 965-966 :

Il est difficile de concevoir comment on pourrait donner au tribunal un pouvoir discrétionnaire plus large et plus absolu. Ce large pouvoir discrétionnaire n’est tout simplement pas réductible à une espèce de formule obligatoire d’application générale à tous les cas, et les tribunaux d’appel ne sont nullement autorisés à s’approprier ce large pouvoir discrétionnaire ni à en restreindre la portée.

En toute déférence, l’interprétation de l’art. 24 qui se dégage des motifs des juges LeBel et Deschamps tendrait à court-circuiter et à réduire ce large pouvoir discrétionnaire. Elle tendrait également, en l’espèce, à court-circuiter et à dévaloriser la promesse constitutionnelle relative aux droits linguistiques contenue à l’art. 23. À notre avis, la retenue judiciaire et les métaphores comme celle du « dialogue » ne doivent pas être érigées en règles constitutionnelles strictes

same may be said of common law procedural principles such as *functus officio* which may to some extent be incorporated in statutes. Rather, as LeBel and Deschamps JJ. appear to recognize at paras. 135 and following, there are situations in which our Constitution requires special remedies to secure the very order it envisages.

While it would be unwise at this point to attempt to define, in detail, the words “appropriate and just” or to draw a rigid distinction between the two terms, there are some broad considerations that judges should bear in mind when evaluating the appropriateness and justice of a potential remedy. These general principles may be informed by jurisprudence relating to remedies outside the *Charter* context, such as cases discussing the doctrine of *functus* and overly vague remedies, although, as we have said, that jurisprudence does not apply strictly to orders made under s. 24(1).

First, an appropriate and just remedy in the circumstances of a *Charter* claim is one that meaningfully vindicates the rights and freedoms of the claimants. Naturally, this will take account of the nature of the right that has been violated and the situation of the claimant. A meaningful remedy must be relevant to the experience of the claimant and must address the circumstances in which the right was infringed or denied. An ineffective remedy, or one which was “smothered in procedural delays and difficulties”, is not a meaningful vindication of the right and therefore not appropriate and just (see *Dunedin*, *supra*, at para. 20, McLachlin C.J. citing *Mills*, *supra*, at p. 882, *per* Lamer J. (as he then was)).

Second, an appropriate and just remedy must employ means that are legitimate within the framework of our constitutional democracy. As discussed above, a court ordering a *Charter* remedy must strive to respect the relationships with and separation of functions among the legislature, the

auxquelles peuvent être assujettis les termes de l’art. 24. Le même raisonnement s’applique aux règles procédurales de common law, comme celle du *functus officio*, qui, dans une certaine mesure, peuvent être incorporées dans des lois. Comme les juges LeBel et Deschamps semblent le reconnaître aux par. 135 et suivants, il faut plutôt considérer qu’il existe des situations où notre Constitution requiert des réparations particulières afin d’assurer le maintien de l’ordre qu’elle vise à établir.

Bien qu’il ne soit pas sage, à ce stade, de tenter de donner une définition détaillée de l’expression « convenable et juste » ou d’établir une distinction rigoureuse entre les deux mots, il existe néanmoins des facteurs généraux dont les juges devraient tenir compte en évaluant le caractère convenable et juste d’une réparation potentielle. Ces principes généraux peuvent s’inspirer de la jurisprudence relative aux réparations accordées hors du contexte de la *Charte*, notamment celle où la règle du *functus officio* et les réparations trop vagues sont analysées, même si, comme nous l’avons dit, cette jurisprudence est strictement inapplicable aux ordonnances fondées sur le par. 24(1).

Premièrement, la réparation convenable et juste eu égard aux circonstances d’une demande fondée sur la *Charte* est celle qui permet de défendre utilement les droits et libertés du demandeur. Il va sans dire qu’elle tient compte de la nature du droit violé et de la situation du demandeur. Une réparation utile doit être adaptée à l’expérience vécue par le demandeur et tenir compte des circonstances de la violation ou de la négation du droit en cause. Une réparation inefficace ou « étouffé[e] dans les délais et les difficultés de procédure » ne permet pas de défendre utilement le droit violé, et ne saurait donc être convenable et juste (voir *Dunedin*, précité, par. 20, la juge en chef McLachlin, citant *Mills*, précité, p. 882, le juge Lamer (plus tard Juge en chef)).

Deuxièmement, la réparation convenable et juste fait appel à des moyens légitimes dans le cadre de notre démocratie constitutionnelle. Comme nous l’avons vu, le tribunal qui accorde une réparation fondée sur la *Charte* doit s’efforcer de respecter la séparation des fonctions entre le législatif, l’exécutif

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executive and the judiciary. This is not to say that there is a bright line separating these functions in all cases. A remedy may be appropriate and just notwithstanding that it might touch on functions that are principally assigned to the executive. The essential point is that the courts must not, in making orders under s. 24(1), depart unduly or unnecessarily from their role of adjudicating disputes and granting remedies that address the matter of those disputes.

et le judiciaire et les rapports qui existent entre ces trois pouvoirs. Cela ne signifie pas que la ligne de démarcation entre ces fonctions est très nette dans tous les cas. Une réparation peut être convenable et juste même si elle peut toucher à des fonctions ressortissant principalement au pouvoir exécutif. L'essentiel est que, lorsqu'ils rendent des ordonnances fondées sur le par. 24(1), les tribunaux ne s'écartent pas indûment ou inutilement de leur rôle consistant à trancher des différends et à accorder des réparations qui règlent la question sur laquelle portent ces différends.

57 Third, an appropriate and just remedy is a judicial one which vindicates the right while invoking the function and powers of a court. It will not be appropriate for a court to leap into the kinds of decisions and functions for which its design and expertise are manifestly unsuited. The capacities and competence of courts can be inferred, in part, from the tasks with which they are normally charged and for which they have developed procedures and precedent.

Troisièmement, la réparation convenable et juste est une réparation judiciaire qui défend le droit en cause tout en mettant à contribution le rôle et les pouvoirs d'un tribunal. Il ne convient pas qu'un tribunal se lance dans des types de décision ou de fonction pour lesquels il n'est manifestement pas conçu ou n'a pas l'expertise requise. Les capacités et la compétence des tribunaux peuvent s'inférer, en partie, de leurs tâches normales pour lesquelles ils ont établi des règles de procédure et des précédents.

58 Fourth, an appropriate and just remedy is one that, after ensuring that the right of the claimant is fully vindicated, is also fair to the party against whom the order is made. The remedy should not impose substantial hardships that are unrelated to securing the right.

Quatrièmement, la réparation convenable et juste est celle qui, en plus d'assurer pleinement la défense du droit du demandeur, est équitable pour la partie visée par l'ordonnance. La réparation ne doit pas causer de grandes difficultés sans rapport avec la défense du droit.

59 Finally, it must be remembered that s. 24 is part of a constitutional scheme for the vindication of fundamental rights and freedoms enshrined in the *Charter*. As such, s. 24, because of its broad language and the myriad of roles it may play in cases, should be allowed to evolve to meet the challenges and circumstances of those cases. That evolution may require novel and creative features when compared to traditional and historical remedial practice because tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand. In short, the judicial approach to remedies must remain flexible and responsive to the needs of a given case.

Enfin, il faut se rappeler que l'art. 24 fait partie d'un régime constitutionnel de défense des droits et libertés fondamentaux consacrés dans la *Charte*. C'est ce qui explique pourquoi, en raison de son libellé large et de la multitude de rôles qu'il peut jouer dans différentes affaires, l'art. 24 doit pouvoir évoluer de manière à relever les défis et à tenir compte des circonstances de chaque cas. Cette évolution peut forcer à innover et à créer au lieu de s'en tenir à la pratique traditionnelle et historique en matière de réparation, étant donné que la tradition et l'histoire ne peuvent faire obstacle aux exigences d'une notion réfléchie et péremptoire de réparation convenable et juste. Bref, l'approche judiciaire en matière de réparation doit être souple et tenir compte des besoins en cause.

Tab 3

sense. In all such cases, the payment of the charge should not be viewed as voluntary in a sense that would prejudice the taxpayer. Rather, the plaintiff is entitled to rely on the presumption of validity of the legislation, and on the representation as to its applicability by the public authority in charge of administering it.

In cases not involving payments made to public authorities pursuant to unconstitutional legislation or the misapplication of an otherwise valid law, my view is that courts should insist on proof of compulsion in fact. The mere fact that the payment was made in protest should be neither necessary nor sufficient to establish compulsion. Protest may accompany a voluntary payment (in order to protect a hypothetical restitutionary entitlement), and compulsion may occur without any evidence of formal protest. Insisting on compulsion in fact is more principled and ensures that all similarly situated persons will be treated equally, regardless of protest.

simplement *ultra vires* au sens du droit administratif. Dans tous ces cas, le paiement ne devrait pas être considéré comme volontaire dans un sens qui porterait préjudice au contribuable. Au contraire, le demandeur a le droit de se fonder sur la présomption de validité des dispositions en cause et sur le fait que l'autorité publique chargée de les administrer les a présentées comme applicables.

Dans les affaires ne portant pas sur des paiements faits à des autorités publiques en vertu d'une loi inconstitutionnelle ou par suite de l'application erronée d'une loi par ailleurs valide, j'estime que les tribunaux devraient exiger la preuve d'une contrainte véritable. Le simple fait que le paiement a été fait sous toutes réserves ne devrait être ni suffisant ni nécessaire pour établir la contrainte. Car d'une part un paiement volontaire peut être fait sous réserve (afin de protéger un droit hypothétique à la restitution), et d'autre part il peut y avoir contrainte sans aucune indication que des réserves ont été officiellement exprimées. En exigeant l'existence d'une contrainte véritable, on fait en sorte que la question soit davantage jugée en fonction de principes, et que toutes les personnes se trouvant dans une situation analogue soient traitées également, peu importe que le paiement ait été ou non fait sous toutes réserves.

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7. Application of Limitations Law

My view is that claims such as the present may be subject to an applicable limitation period. The New Brunswick *Limitation of Actions Act* provides that:

9 No other action shall be commenced but within six years after the cause of action arose.

Section 9 was clearly intended to cover all other actions not specifically provided for in the legislation. There is no reason why modern restitutionary claims ought not to be subject to s. 9. I agree with Robertson J.A. that such a result does not run afoul of the principles developed by this Court in *Amax Potash*:

7. L'application du droit de la prescription des actions

Je suis d'avis que les actions comme celle qui fait l'objet du présent pourvoi peuvent être soumises à un délai de prescription. La *Loi sur la prescription* du Nouveau-Brunswick prévoit ce qui suit :

9 Toute autre action se prescrit par six ans à compter de la naissance de la cause d'action.

Il est clair que l'art. 9 de la *Loi sur la prescription* vise toutes les actions à l'égard desquelles rien n'est expressément prévu par cette loi. Rien ne justifierait que les actions en restitution intentées de nos jours ne soient pas régies par l'art. 9. À l'instar du juge d'appel Robertson, j'estime qu'un tel résultat ne contrevient pas aux principes élaborés par notre Cour dans *Amax Potash* :

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In my view, the reasoning adopted in *Amax Potash* has no application to cases in which the provinces are relying on a pre-existing statutory prescription period. There is a substantive difference between existing legislation that bars potential claims, unless brought within a fixed period, and legislation enacted for the specific purpose of barring restitutionary claims based on an invalid or unconstitutional tax. A prescription statute is adopted for purposes of providing a defendant with “peace of mind”; to be secure in the knowledge that he or she is no longer at risk from a stale claim accompanied by stale testimony. It is not adopted for the purpose of barring claims outright. A *Limitation of Actions Act* is valid legislation adopted for a valid purpose. It does not seek to achieve indirectly what cannot be achieved directly. [para. 42]

À mon avis, le raisonnement adopté dans l’arrêt *Amax Potash* ne s’applique pas dans les cas où les provinces invoquent un délai de prescription préexistant. Il y a une différence substantielle entre une loi existante qui interdit les demandes éventuelles, sauf si elles sont introduites dans un délai précis, et une loi adoptée à seule fin de faire obstacle aux demandes de restitution fondée[s] sur une taxe invalide ou inconstitutionnelle. L’adoption d’une loi sur la prescription a pour but d’apporter la « tranquillité d’esprit » à la partie défenderesse; afin qu’elle ait la certitude qu’elle n’est plus exposée à une demande tardive accompagnée de témoignages qui ne sont plus très frais. Son adoption n’a pas pour but de faire complètement obstacle aux demandes. La *Loi sur la prescription* est une loi valide adoptée à des fins valables. Elle ne cherche pas à accomplir indirectement ce qui ne peut l’être directement. [par. 42]

61 Finally, the point at which time will begin to run must be determined. The cause of action was complete at the moment the Province illegally received the payment. For this reason, the appellants can only recover the user charges paid during the six years preceding the filing date of their Notice of Application (May 25, 2001).

Enfin, il faut déterminer le point de départ de la prescription. La cause d’action était complète à partir du moment où la Province a illégalement reçu le paiement. Pour ce motif, les appelantes ne peuvent recouvrer que les redevances d’exploitation payées au cours des six années qui ont précédé le dépôt de leur avis de requête (25 mai 2001).

8. Conclusion

8. Conclusion

62 For the above reasons, I would allow the appeal in part and dismiss the cross-appeal. The appellants are entitled to recover all user charges paid on or after May 25, 1995, with interest. However, I conclude that this is not an appropriate case for the awarding of compound interest as the appellants did not allege any wrongful conduct on behalf of the Province that might warrant moral sanction (see *Bank of America Canada v. Mutual Trust Co.*, [2002] 2 S.C.R. 601, 2002 SCC 43). The appellants are entitled to their costs in this Court and in the courts below.

Pour les motifs qui précèdent, je suis d’avis d’accueillir le pourvoi en partie et de rejeter le pourvoi incident. Les appelantes ont le droit de recouvrer toutes les redevances d’exploitation payées depuis le 25 mai 1995, avec les intérêts. Toutefois, je conclus qu’il n’est pas opportun en l’espèce d’attribuer des intérêts composés, puisque les appelantes n’ont allégué aucun comportement fautif de la Province susceptible de justifier une sanction exprimant la réprobation morale (voir *Banque d’Amérique du Canada c. Société de Fiducie Mutuelle*, [2002] 2 R.C.S. 601, 2002 CSC 43). Les appelantes ont droit aux dépens devant notre Cour et devant les juridictions inférieures.

Appeal allowed in part and cross-appeal dismissed, with costs.

Pourvoi accueilli en partie et pourvoi incident rejeté, avec dépens.

Solicitors for the appellants/respondents on cross-appeal: Mockler Peters Oley Rouse, Fredericton.

Procureurs des appelantes/intimées au pourvoi incident: Mockler Peters Oley Rouse, Fredericton.

Tab 4

E. *Is the Claim for a Declaration Barred by Limitations?*

[133] We have concluded that Canada did not act diligently to fulfill the specific obligation to the Métis contained in s. 31 of the *Manitoba Act*, as required by the honour of the Crown. For the reasons below, we conclude that the law of limitations does not preclude a declaration to this effect.

[134] This Court has held that although claims for personal remedies flowing from the striking down of an unconstitutional statute are barred by the running of a limitation period, courts retain the power to rule on the constitutionality of the underlying statute: *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3; *Ravndahl v. Saskatchewan*, 2009 SCC 7, [2009] 1 S.C.R. 181. The constitutionality of legislation has always been a justiciable question: *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, at p. 151. The “right of the citizenry to constitutional behaviour by Parliament” can be vindicated by a declaration that legislation is invalid, or that a public act is *ultra vires*: *Canadian Bar Assn. v. British Columbia*, 2006 BCSC 1342, 59 B.C.L.R. (4th) 38, at paras. 23 and 91, citing *Thorson*, at p. 163 (emphasis added). An “issue [that is] constitutional is always justiciable”: *Waddell v. Schreyer* (1981), 126 D.L.R. (3d) 431 (B.C.S.C.), at p. 437, aff’d (1982), 142 D.L.R. (3d) 177 (B.C.C.A.), leave to appeal refused, [1982] 2 S.C.R. vii (*sub nom. Foothills Pipe Lines (Yukon) Ltd. v. Waddell*).

[135] Thus, this Court has found that limitations of actions statutes cannot prevent the courts, as guardians of the Constitution, from issuing declarations on the constitutionality of legislation. By extension, limitations acts cannot prevent the courts from issuing a declaration on the constitutionality of the Crown’s conduct.

E. *La demande de jugement déclaratoire est-elle irrecevable par application des règles de la prescription?*

[133] Nous avons conclu que le Canada n’a pas agi avec diligence pour s’acquitter de l’obligation particulière que l’art. 31 de la *Loi sur le Manitoba* lui imposait envers les Métis, comme l’exigeait l’honneur de la Couronne. Pour les motifs qui suivent, nous sommes d’avis que les règles de la prescription n’empêchent pas la Cour de le confirmer dans un jugement déclaratoire.

[134] Notre Cour a statué que, bien que les délais de prescription s’appliquent aux demandes de réparations personnelles découlant de l’annulation d’une loi inconstitutionnelle, les tribunaux conservent le pouvoir de statuer sur la constitutionnalité de la loi sous-jacente (*Kingstreet Investments Ltd. c. Nouveau-Brunswick (Finances)*, 2007 CSC 1, [2007] 1 R.C.S. 3; *Ravndahl c. Saskatchewan*, 2009 CSC 7, [2009] 1 R.C.S. 181). La constitutionnalité d’une loi a toujours été une question justiciable (*Thorson c. Procureur général du Canada*, [1975] 1 R.C.S. 138, p. 151). Une atteinte au « droit des citoyens au respect de la constitution par le Parlement » peut être réprimée par un jugement déclarant qu’une loi est invalide ou qu’un acte public est *ultra vires* (*Canadian Bar Assn. c. British Columbia*, 2006 BCSC 1342, 59 B.C.L.R. (4th) 38, par. 23 et 91, citant *Thorson*, p. 163 (italiques ajoutées)). « Une question [. . .] constitutionnelle est toujours justiciable » (*Waddell c. Schreyer* (1981), 126 D.L.R. (3d) 431 (C.S.C.-B.), p. 437, conf. par (1982), 142 D.L.R. (3d) 177 (C.A.C.-B.), autorisation d’appel refusée, [1982] 2 R.C.S. vii (*sub nom. Foothills Pipe Lines (Yukon) Ltd. c. Waddell*)).

[135] Par conséquent, notre Cour a conclu que les lois sur la prescription des actions ne peuvent empêcher les tribunaux, à titre de gardiens de la Constitution, de rendre des jugements déclaratoires sur la constitutionnalité d’une loi. Par extension, les lois sur la prescription des actions ne peuvent empêcher les tribunaux de rendre un jugement déclaratoire sur la constitutionnalité de la conduite de la Couronne.

[136] In this case, the Métis seek a declaration that a provision of the *Manitoba Act* — given constitutional authority by the *Constitution Act, 1871* — was not implemented in accordance with the honour of the Crown, itself a “constitutional principle”: *Little Salmon*, at para. 42.

[137] Furthermore, the Métis seek no personal relief and make no claim for damages or for land. Nor do they seek restoration of the title their descendants might have inherited had the Crown acted honourably. Rather, they seek a declaration that a specific obligation set out in the Constitution was not fulfilled in the manner demanded by the Crown’s honour. They seek this declaratory relief in order to assist them in extra-judicial negotiations with the Crown in pursuit of the overarching constitutional goal of reconciliation that is reflected in s. 35 of the *Constitution Act, 1982*.

[138] The respondents argue that this claim is statute-barred by virtue of Manitoba’s limitations legislation, which, in all its iterations, has contained provisions similar to the current one barring “actions grounded on accident, mistake or other equitable ground of relief” six years after the discovery of the cause of action: *The Limitation of Actions Act*, C.C.S.M. c. L150, s. 2(1)(k). Breach of fiduciary duty is an “equitable ground of relief”. We agree, as the Court of Appeal held, that the limitation applies to Aboriginal claims for breach of fiduciary duty with respect to the administration of Aboriginal property: *Wewaykum*, at para. 121, and *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372, at para. 13.

[139] However, at this point we are not concerned with an action for breach of fiduciary duty, but with a claim for a declaration that the Crown did not

[136] En l’espèce, les Métis sollicitent un jugement déclarant qu’une disposition de la *Loi sur le Manitoba* — à laquelle la *Loi constitutionnelle de 1871* confère un statut constitutionnel — n’a pas été mise en œuvre conformément au principe de l’honneur de la Couronne, ayant lui aussi le statut de « principe constitutionnel » (*Little Salmon*, par. 42).

[137] En outre, les Métis ne sollicitent pas de réparation personnelle, ne réclament pas de dommages-intérêts et ne font aucune revendication territoriale. Ils ne demandent pas non plus le rétablissement du titre dont leurs descendants auraient pu hériter si la Couronne avait agi honorablement. Ils demandent plutôt que soit rendu un jugement déclarant qu’une obligation constitutionnelle précise n’a pas été remplie comme l’exigeait l’honneur de la Couronne. Ils sollicitent ce jugement déclaratoire pour faciliter leurs négociations extrajudiciaires avec la Couronne en vue de réaliser l’objectif constitutionnel global de réconciliation inscrit dans l’art. 35 de la *Loi constitutionnelle de 1982*.

[138] Les défendeurs prétendent que cette demande est irrecevable en vertu des lois manitobaines sur la prescription dont toutes les versions contenaient des dispositions semblables à la disposition actuelle prévoyant qu’une « action fondée sur un accident, une erreur ou un autre motif de recours reconnu en Équité » se prescrit par six ans à compter de la découverte de la cause d’action (*Loi sur la prescription*, C.P.L.M. ch. L150, al. 2(1)k)). Le manquement à une obligation fiduciaire constitue « un motif de recours reconnu en Équité ». Nous sommes d’accord avec la Cour d’appel que ce délai de prescription s’applique aux demandes des Autochtones pour manquement à une obligation fiduciaire relative à la gestion de leurs biens (*Wewaykum*, par. 121, et *Canada (Procureur général) c. Lameman*, 2008 CSC 14, [2008] 1 R.C.S. 372, par. 13).

[139] Toutefois, à ce stade, nous ne statuons pas sur une action pour manquement à une obligation fiduciaire, mais sur une demande de jugement

act honourably in implementing the constitutional obligation in s. 31 of the *Manitoba Act*. Limitations acts cannot bar claims of this nature.

[140] What is at issue is a constitutional grievance going back almost a century and a half. So long as the issue remains outstanding, the goal of reconciliation and constitutional harmony, recognized in s. 35 of the *Constitution Act, 1982* and underlying s. 31 of the *Manitoba Act*, remains unachieved. The ongoing rift in the national fabric that s. 31 was adopted to cure remains unremedied. The unfinished business of reconciliation of the Métis people with Canadian sovereignty is a matter of national and constitutional import. The courts are the guardians of the Constitution and, as in *Ravndahl* and *Kingstreet*, cannot be barred by mere statutes from issuing a declaration on a fundamental constitutional matter. The principles of legality, constitutionality and the rule of law demand no less: see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 72.

[141] Furthermore, many of the policy rationales underlying limitations statutes simply do not apply in an Aboriginal context such as this. Contemporary limitations statutes seek to balance protection of the defendant with fairness to the plaintiffs: *Novak v. Bond*, [1999] 1 S.C.R. 808, at para. 66, *per* McLachlin J. In the Aboriginal context, reconciliation must weigh heavily in the balance. As noted by Harley Schachter:

The various rationales for limitations are still clearly relevant, but it is the writer's view that the goal of reconciliation is a far more important consideration and ought to be given more weight in the analysis. Arguments that provincial limitations apply of their own force, or can be incorporated as valid federal law, miss the point when aboriginal and treaty rights are at issue. They ignore the

déclarant que la Couronne n'a pas agi honorablement dans la mise en œuvre de l'obligation constitutionnelle imposée à l'art. 31 de la *Loi sur le Manitoba*. Les lois sur la prescription ne peuvent faire obstacle à une demande de cette nature.

[140] Nous sommes saisis d'un grief constitutionnel qui a pris naissance il y a près d'un siècle et demi. Aussi longtemps que la question ne sera pas tranchée, l'objectif de réconciliation et d'harmonie constitutionnelle, reconnu à l'art. 35 de la *Loi constitutionnelle de 1982* et qui sous-tend l'art. 31 de la *Loi sur le Manitoba*, n'aura pas été atteint. Le clivage persistant dans notre tissu national auquel l'adoption de l'art. 31 devait remédier demeure entier. La tâche inachevée de réconciliation des Métis avec la souveraineté du Canada est une question d'importance nationale et constitutionnelle. Les tribunaux sont les gardiens de la Constitution et, comme le précisent les arrêts *Ravndahl* et *Kingstreet*, ils ne peuvent être empêchés par une simple loi de rendre un jugement déclaratoire sur une question constitutionnelle fondamentale. Les principes fondamentaux de légalité, de constitutionnalité et de primauté du droit n'exigent rien de moins : voir *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217, par. 72.

[141] De plus, bon nombre des considérations de politique générale qui sous-tendent les lois en matière de prescription ne s'appliquent tout simplement pas dans un contexte autochtone comme celui-ci. Les lois contemporaines sur la prescription des actions visent à établir un équilibre entre la protection du défendeur et l'équité envers le demandeur (*Novak c. Bond*, [1999] 1 R.C.S. 808, par. 66, la juge McLachlin). Dans le contexte autochtone, la réconciliation doit peser lourd dans la balance. Comme l'a souligné Harley Schachter :

[TRADUCTION] Les diverses justifications des délais de prescription sont toujours manifestement pertinentes, mais l'auteur est d'avis que l'objectif de la réconciliation est un facteur beaucoup plus important, auquel il faut accorder plus de poids dans l'analyse. L'argument qu'une loi provinciale sur la prescription s'applique *ex proprio vigore* ou peut être incorporée à titre de loi fédérale ne

real analysis that ought to be undertaken, which is one of reconciliation and justification.

(“Selected Current Issues in Aboriginal Rights Cases: Evidence, Limitations and Fiduciary Obligations”, in *The 2001 Isaac Pitblado Lectures: Practising Law In An Aboriginal Reality* (2001), 203, at pp. 232-33)

Schachter was writing in the context of Aboriginal rights, but the argument applies with equal force here. Leonard I. Rotman goes even farther, pointing out that to allow the Crown to shield its unconstitutional actions with the effects of its own legislation appears fundamentally unjust: “*Wewaykum: A New Spin on the Crown’s Fiduciary Obligations to Aboriginal Peoples?*” (2004), *U.B.C. L. Rev.* 219, at pp. 241-42. The point is that despite the legitimate policy rationales in favour of statutory limitations periods, in the Aboriginal context, there are unique rationales that must sometimes prevail.

[142] In this case, the claim is not stale — it is largely based on contemporaneous documentary evidence — and no third party legal interests are at stake. As noted by Canada, the evidence provided the trial judge with “an unparalleled opportunity to examine the context surrounding the enactment and implementation of ss. 31 and 32 of the *Manitoba Act*”: R.F., at para. 7.

[143] Furthermore, the remedy available under this analysis is of a limited nature. A declaration is a narrow remedy. It is available without a cause of action, and courts make declarations whether or not any consequential relief is available. As argued by the intervener the Assembly of First Nations, it is not awarded against the defendant in the same sense as coercive relief: factum, at para. 29, citing *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539, 193 D.L.R. (4th) 344, at paras. 11-16. In some cases, declaratory relief may be the only way to give effect to the honour of the Crown: Assembly of First Nations’ factum, at para. 31. Were the Métis in this action seeking personal remedies, the

vaut pas lorsque les droits ancestraux et issus de traités sont en cause. Il ne tient pas compte de la véritable analyse qui doit être effectuée et qui vise la réconciliation et la justification.

(« Selected Current Issues in Aboriginal Rights Cases : Evidence, Limitations and Fiduciary Obligations », dans *The 2001 Isaac Pitblado Lectures : Practising Law In An Aboriginal Reality* (2001), 203, p. 232-233)

Schachter écrivait dans le contexte des droits ancestraux, mais ses propos s’appliquent avec autant de force en l’espèce. Leonard I. Rotman va encore plus loin lorsqu’il affirme que permettre à la Couronne de protéger ses actes inconstitutionnels par le pouvoir de ses propres lois semble fondamentalement injuste (« *Wewaykum : A New Spin on the Crown’s Fiduciary Obligations to Aboriginal Peoples?* » (2004), *U.B.C. L. Rev.* 219, p. 241-242). En fait, malgré les considérations de politique générale légitimes favorables aux délais de prescription fixés par la loi, dans le contexte autochtone, il existe des principes uniques qui doivent parfois prévaloir.

[142] En l’espèce, la demande n’est pas tardive : elle est en grande partie fondée sur des éléments de preuve documentaire contemporains et aucun intérêt juridique d’un tiers n’est en jeu. Comme l’a indiqué le Canada, la preuve a fourni au juge du procès [TRADUCTION] « une occasion inégalée d’examiner le contexte entourant l’édiction et la mise en œuvre des art. 31 et 32 de la *Loi sur le Manitoba* » (m.i., par. 7).

[143] De plus, la réparation pouvant être accordée suivant cette analyse est limitée. Un jugement déclaratoire est une réparation d’une portée restreinte. Il peut être obtenu sans cause d’action, et les tribunaux rendent des jugements déclaratoires, peu importe si une mesure de redressement consécutive peut être accordée. Comme l’a fait valoir l’Assemblée des Premières Nations, intervenante, il n’est pas obtenu contre le défendeur au même sens qu’une mesure de redressement coercitive (mémoire, par. 29, citant *Cheslatta Carrier Nation c. British Columbia*, 2000 BCCA 539, 193 D.L.R. (4th) 344, par. 11-16). Dans certains cas, le jugement déclaratoire peut être le seul

reasoning set out here would not be available. However, as acknowledged by Canada, the remedy sought here is clearly not a personal one: R.F., at para. 82. The principle of reconciliation demands that such declarations not be barred.

[144] We conclude that the claim in this case is a claim for a declaration of the constitutionality of the Crown's conduct toward the Métis people under s. 31 of the *Manitoba Act*. It follows that *The Limitation of Actions Act* does not apply and the claim is not statute-barred.

F. *Is the Claim for a Declaration Barred by Laches?*

[145] The equitable doctrine of laches requires a claimant in equity to prosecute his claim without undue delay. It does not fix a specific limit, but considers the circumstances of each case. In determining whether there has been delay amounting to laches, the main considerations are (1) acquiescence on the claimant's part; and (2) any change of position that has occurred on the defendant's part that arose from reasonable reliance on the claimant's acceptance of the *status quo*: *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, at pp. 76-80.

[146] As La Forest J. put it in *M. (K.)*, at pp. 76-77, citing *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221, at pp. 239-40:

Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

moyen de donner effet au principe de l'honneur de la Couronne : mémoire de l'Assemblée des Premières Nations, par. 31. Dans la présente action, si les Métis avaient sollicité des réparations personnelles, le raisonnement adopté en l'espèce ne pourrait s'appliquer. Toutefois, comme l'a reconnu le Canada, la mesure de redressement sollicitée en l'espèce n'est manifestement pas de nature personnelle (m.i., par. 82). Le principe de la réconciliation commande que ce type de déclaration puisse être accordé.

[144] Nous concluons que la demande qui nous est soumise en l'espèce est une demande de déclaration sur la constitutionnalité de la conduite de la Couronne envers les Métis dans l'application de l'art. 31 de la *Loi sur le Manitoba*. Il s'ensuit que la *Loi sur la prescription* ne s'applique pas et que la demande n'est pas prescrite.

F. *La demande de jugement déclaratoire est-elle irrecevable par application de la doctrine des « laches »?*

[145] La doctrine des *laches* reconnue en equity exige qu'une procédure judiciaire fondée sur l'equity soit engagée sans retard injustifié. Elle ne fixe aucune limite précise, mais prend en compte les circonstances de chaque affaire. Pour déterminer si un retard peut être considéré comme donnant application à la doctrine des *laches*, il faut principalement considérer s'il y a eu : (1) acquiescement de la part du demandeur; et (2) changement de position de la part du défendeur parce qu'il croyait raisonnablement que le demandeur acceptait le statu quo (*M. (K.) c. M. (H.)*, [1992] 3 R.C.S. 6, p. 76-80).

[146] Comme l'a dit le juge La Forest dans l'arrêt *M. (K.)*, p. 76 et 77, citant l'arrêt *Lindsay Petroleum Co. c. Hurd* (1874), L.R. 5 P.C. 221, p. 239-240 :

Deux circonstances, toujours importantes en pareils cas, sont la longueur du retard et la nature des actes accomplis dans l'intervalle, éléments qui peuvent avoir des conséquences pour l'une ou l'autre partie et faire pencher la balance du côté de la justice ou de l'injustice selon qu'on adopte une solution ou l'autre, ce qui a trait au redressement.

Tab 5

Dennis Manuge *Appellant*

v.

Her Majesty The Queen *Respondent*

INDEXED AS: MANUGE v. CANADA

2010 SCC 67

File No.: 33103.

2010: January 20, 21; 2010: December 23.

Present: Binnie, LeBel, Deschamps, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Courts — Federal Court — Procedure — Plaintiff bringing action in Federal Court against federal Crown for constitutional remedies, declaratory relief and damages arising from establishment, modification and application of long-term disability benefits plan — Whether plaintiff entitled to proceed by way of action without first proceeding by way of judicial review — Federal Courts Act, R.S.C. 1985, c. F-7, ss. 17, 18.

In 2002, M was injured and was awarded a monthly disability pension under the *Pension Act* in addition to his salary as a member of the Canadian Forces. In 2003, he was given an involuntary, medically required release and was approved to receive long-term disability benefits under the Canadian Forces' disability plan. For 24 months following his release, M received both a disability pension and long-term disability benefits, but, pursuant to s. 24(a)(iv) of the plan, the amount he received from his disability pension was deducted monthly from the amount he received for long-term disability. M brought an action in the Federal Court seeking, among other relief, constitutional remedies, declaratory relief and damages in relation to these deductions. The Federal Court certified the proceeding as a class action. The Federal Court of Appeal allowed the Crown's appeal based on *Canada v. Grenier*, 2005 FCA 348, [2006] 2 F.C.R. 287, concluding that the lawfulness of a decision or administrative activity like s. 24(a)(iv) of the plan can only be challenged by judicial review.

Held: The appeal should be allowed.

Dennis Manuge *Appelant*

c.

Sa Majesté la Reine *Intimée*

RÉPERTORIÉ : MANUGE c. CANADA

2010 CSC 67

Nº du greffe : 33103.

2010 : 20, 21 janvier; 2010 : 23 décembre.

Présents : Les juges Binnie, LeBel, Deschamps, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Tribunaux — Cour fédérale — Procédure — Action intentée en Cour fédérale contre la Couronne fédérale pour obtenir des réparations constitutionnelles, des jugements déclaratoires et des dommages-intérêts par suite de la constitution, de la modification et de l'application d'un régime de prestations d'invalidité de longue durée — Le demandeur peut-il engager une action sans procéder d'abord par voie de contrôle judiciaire? — Loi sur les Cours fédérales, L.R.C. 1985, ch. F-7, art. 17, 18.

En 2002, M a subi une blessure et s'est vu accorder une pension mensuelle d'invalidité au titre de la *Loi sur les pensions* en plus de son salaire de membre des Forces canadiennes. En 2003, il a été libéré contre son gré pour des raisons médicales et il est devenu admissible à des prestations d'invalidité de longue durée dans le cadre du régime de prestations d'invalidité des Forces canadiennes. M a touché à la fois une pension d'invalidité et des prestations d'invalidité de longue durée pendant 24 mois après sa libération, mais, conformément à l'al. 24a)(iv) du régime, le montant de sa pension d'invalidité était déduit chaque mois de ses prestations d'invalidité de longue durée. M a intenté une action en Cour fédérale pour obtenir notamment des réparations constitutionnelles, des jugements déclaratoires et des dommages-intérêts relativement à ces déductions. La Cour fédérale a autorisé l'action comme recours collectif. La Cour d'appel fédérale a accueilli l'appel de la Couronne sur le fondement de *Canada c. Grenier*, 2005 CAF 348, [2006] 2 R.C.F. 287, concluant que la légalité d'une décision ou d'une activité administrative telle que celle prévue à l'al. 24a)(iv) du régime ne peut être contestée que par voie de contrôle judiciaire.

Arrêt : Le pourvoi est accueilli.

In accordance with *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585, the Federal Court has jurisdiction to entertain the action. At their core, the pleadings represent a claim for alleged breaches of s. 15(1) of the *Canadian Charter of Rights and Freedoms* and the action need not, therefore, be stayed in favour of an application for judicial review.

Cases Cited

Applied: *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585; **overruled:** *Canada v. Grenier*, 2005 FCA 348, [2006] 2 F.C.R. 287; **referred to:** *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; *Canada (Attorney General) v. McArthur*, 2010 SCC 63, [2010] 3 S.C.R. 626; *Nu-Pharm Inc. v. Canada (Attorney General)*, 2010 SCC 65, [2010] 3 S.C.R. 648.

Statutes and Regulations Cited

Act to amend the statute law in relation to veterans' benefits, S.C. 2000, c. 34.
Canadian Charter of Rights and Freedoms, ss. 15(1), 24.
Canadian Forces Members and Veterans Re-establishment and Compensation Act, S.C. 2005, c. 21.
Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, s. 21.
Federal Courts Act, R.S.C. 1985, c. F-7, ss. 2, 17(1), 18, 18.1, 18.4(2).
Federal Courts Rules, SOR/98-106, rr. 334.1, 334.12, 334.16.
National Defence Act, R.S.C. 1985, c. N-5, s. 39(1).
Pension Act, R.S.C. 1985, c. P-6.

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Canada. Department of National Defence and Canadian Forces. Ombudsman. *Unfair Deductions From SISIP Payments to Former CF Members*. Ottawa: The Department, 2003 (online: www.ombudsman.forces.gc.ca/rep-rap/sr-rs/sis-rar/doc/sis-rar-eng.pdf).

APPEAL from a judgment of the Federal Court of Appeal (Létourneau, Noël and Blais J.J.A.), 2009 FCA 29, [2009] 4 F.C.R. 478, 384 N.R. 313, 73 C.C.P.B. 1, [2009] F.C.J. No. 73 (QL), 2009 CarswellNat 160, setting aside a decision of Barnes J., 2008 FC 624, [2009] 1 F.C.R. 416, 329 F.T.R. 167, 71 C.C.P.B. 112, [2008] F.C.J. No. 787 (QL), 2008 CarswellNat 1495. Appeal allowed.

Selon *Canada (Procureur général) c. TeleZone Inc.*, 2010 CSC 62, [2010] 3 R.C.S. 585, la Cour fédérale est compétente pour connaître de l'action. Au fond, les actes de procédure correspondent à un recours fondé sur de prétendues violations du par. 15(1) de la *Charte canadienne des droits et libertés*, et il n'est pas nécessaire de suspendre l'action en faveur d'une demande de contrôle judiciaire.

Jurisprudence

Arrêt appliqué : *Canada (Procureur général) c. TeleZone Inc.*, 2010 CSC 62, [2010] 3 R.C.S. 585; **arrêt renversé :** *Canada c. Grenier*, 2005 CAF 348, [2006] 2 R.C.F. 287; **arrêts mentionnés :** *Hunt c. Carey Canada Inc.*, [1990] 2 R.C.S. 959; *Canada (Procureur général) c. McArthur*, 2010 CSC 63, [2010] 3 R.C.S. 626; *Nu-Pharm Inc. c. Canada (Procureur général)*, 2010 CSC 65, [2010] 3 R.C.S. 648.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 15(1), 24.
Loi portant modification de la législation concernant les avantages pour les anciens combattants, L.C. 2000, ch. 34.
Loi sur la défense nationale, L.R.C. 1985, ch. N-5, art. 39(1).
Loi sur la responsabilité civile de l'État et le contentieux administratif, L.R.C. 1985, ch. C-50, art. 21.
Loi sur les Cours fédérales, L.R.C. 1985, ch. F-7, art. 2, 17(1), 18, 18.1, 18.4(2).
Loi sur les mesures de réinsertion et d'indemnisation des militaires et vétérans des Forces canadiennes, L.C. 2005, ch. 21.
Loi sur les pensions, L.R.C. 1985, ch. P-6.
Règles des Cours fédérales, DORS/98-106, règles 334.1, 334.12, 334.16.

Doctrine citée

Canada. Ministère de la Défense nationale et des Forces canadiennes. Ombudsman. *Déductions injustes des paiements du RARM effectués à d'ex-membres des FC*. Ottawa : Le ministère, 2003 (en ligne : www.ombudsman.forces.gc.ca/rep-rap/sr-rs/sis-rar/doc/sis-rar-fra.pdf).

POURVOI contre un arrêt de la Cour d'appel fédérale (les juges Létourneau, Noël et Blais), 2009 CAF 29, [2009] 4 R.C.F. 478, 384 N.R. 313, 73 C.C.P.B. 1, [2009] A.C.F. n° 73 (QL), 2009 CarswellNat 161, qui a annulé une décision du juge Barnes, 2008 CF 624, [2009] 1 R.C.F. 416, 329 F.T.R. 167, 71 C.C.P.B. 112, [2008] A.C.F. n° 787 (QL), 2008 CarswellNat 2779. Pourvoi accueilli.

Peter J. Driscoll, Michael Sobkin, Ward K. Branch and Daniel F. Wallace, for the appellant.

Christopher M. Rupar, Alain Préfontaine and Bernard Letarte, for the respondent.

The judgment of the Court was delivered by

[1] ABELLA J. — For 24 months following his involuntary, medically required release from the Canadian Forces, Dennis Manuge received both a disability pension and long-term disability benefits. Pursuant to the terms of the relevant policies, the amount Mr. Manuge received for his disability pension was deducted monthly from the amount he received for long-term disability. Mr. Manuge brought proceedings in the Federal Court seeking constitutional remedies, damages, declarations and restitution in relation to these deductions. His complaint is not with the deductions *per se*, but with the fact that they have not been universally applied to everyone who received Canadian Forces disability benefits.

[2] The question in this appeal is whether Mr. Manuge, before commencing the action, must first seek judicial review of the provision of the disability benefit plan that authorized the deductions. Following *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585, heard with this appeal, it is clear that the Federal Court has jurisdiction to entertain the action. However, *TeleZone* also states that there is a residual discretion to stay an action that is essentially a veiled application for judicial review. The Crown suggests that the claim in this case is such an application. With respect, given what I see as the essential character of that claim, the discretion to grant a stay should not be exercised.

Background

[3] Dennis Manuge is a former member of the Canadian Forces. He served from 1994 until 2003.

Peter J. Driscoll, Michael Sobkin, Ward K. Branch et Daniel F. Wallace, pour l'appellant.

Christopher M. Rupar, Alain Préfontaine et Bernard Letarte, pour l'intimée.

Version française du jugement de la Cour rendu par

[1] LA JUGE ABELLA — Dennis Manuge a touché à la fois une pension d'invalidité et des prestations d'invalidité de longue durée pendant 24 mois après avoir été libéré contre son gré des Forces canadiennes pour des raisons médicales. Conformément aux polices applicables, le montant de la pension d'invalidité de M. Manuge était déduit chaque mois de ses prestations d'invalidité de longue durée. Il a intenté une action en Cour fédérale pour obtenir des réparations constitutionnelles, des dommages-intérêts, des jugements déclaratoires et la restitution des sommes d'argent ainsi déduites. Il ne se plaint pas des déductions comme telles, mais du fait qu'elles n'ont pas été imposées à toutes les personnes qui touchaient des prestations d'invalidité des Forces canadiennes.

[2] La question qui se pose en l'espèce est de savoir si M. Manuge doit solliciter le contrôle judiciaire de la disposition du régime de prestations d'invalidité autorisant les déductions avant d'intenter son action. Selon la décision rendue dans l'affaire *Canada (Procureur général) c. TeleZone Inc.*, 2010 CSC 62, [2010] 3 R.C.S. 585, instruite en même temps que le présent appel, la Cour fédérale est manifestement compétente pour connaître de l'action. L'arrêt *TeleZone* reconnaît toutefois aussi l'existence d'un pouvoir discrétionnaire résiduel de suspendre une action qui constitue essentiellement une demande voilée de contrôle judiciaire. La Couronne soutient que c'est précisément le cas de l'action intentée en l'espèce. Étant donné l'essence de la demande, telle que je la perçois, j'estime, avec égards, que le pouvoir discrétionnaire de suspendre l'action ne devrait pas être exercé.

Le contexte

[3] Dennis Manuge a servi dans les Forces canadiennes de 1994 à 2003. En 2002, il a subi

In 2002, he was injured to such an extent that he was unable to continue with his regular duties. Pursuant to the *Pension Act*, R.S.C. 1985, c. P-6, Mr. Manuge was awarded a monthly disability pension known as a “VAC benefit” — calculated in relation to his injury, not his pre-disability earnings — in the amount of \$386.28. He was awarded this benefit in addition to his monthly Canadian Forces salary of \$3,942. Mr. Manuge tried to continue his work, but in December 2003 was given an involuntary, medically required release. For 24 months following his release, Mr. Manuge received benefits under both the *Pension Act* and the Canadian Forces’ Service Income Security Insurance Plan Long Term Disability Plan (“SISIP LTD Plan”). Under s. 24(a)(iv) of the SISIP LTD Plan, however, each of the 24 monthly LTD benefit payments he received was reduced, from an amount equal to 75 percent of his pre-release monthly income, by the amount of the *Pension Act* benefit he also received.

[4] The SISIP LTD Plan was issued in 1969, as part of a document entitled SISIP Policy 901102, pursuant to s. 39(1) of the *National Defence Act*, R.S.C. 1985, c. N-5. Section 39(1) grants the Chief of the Defence Staff discretion to dispose of “[n]on-public property acquired by contribution” for the benefit of members of the Canadian Forces or their dependants.

[5] In 1976, Part III(B) of the SISIP Policy was amended to include s. 24(a)(iv), which reduces monthly benefits payable under the SISIP LTD Plan by the value of any monthly benefits received under the *Pension Act* (like the VAC benefit that Mr. Manuge received):

24. Other Relevant Sources of Income

a. The monthly benefit payable at Section 23 shall be reduced by the sum of:

. . .

une blessure grave à un point tel qu’il n’était plus en mesure d’exercer ses fonctions habituelles. Conformément à la *Loi sur les pensions*, L.R.C. 1985, ch. P-6, on a accordé à M. Manuge une pension mensuelle d’invalidité (« prestation d’ACC ») de 386,28 \$, dont le montant a été établi en fonction de sa blessure, et non du revenu qu’il gagnait avant de devenir invalide. Il touchait cette pension en plus de son salaire mensuel des Forces canadiennes de 3 942 \$. M. Manuge a essayé de continuer à travailler, mais il a été libéré contre son gré des Forces canadiennes pour des raisons médicales en décembre 2003. Dans les 24 mois suivant sa libération, M. Manuge a touché à la fois des prestations en application de la *Loi sur les pensions* et des prestations du Régime d’assurance-revenu militaire pour invalidité de longue durée (le « RARM IP »). Conformément à l’al. 24a)(iv) du RARM IP, les 24 prestations mensuelles qu’il a reçues en vertu de ce régime — qui devaient à l’origine correspondre à 75 p. 100 de son revenu mensuel antérieur à sa libération — ont été réduites du montant de la prestation qu’il recevait en même temps au titre de la *Loi sur les pensions*.

[4] Le RARM IP a été constitué en 1969, dans le cadre de la Police du RARM n° 901102, en application du par. 39(1) de la *Loi sur la défense nationale*, L.R.C. 1985, ch. N-5. Ce paragraphe confère au chef d’état-major de la défense le pouvoir discrétionnaire de disposer des « biens non publics reçus en don » au profit des membres des Forces canadiennes ou des personnes à leur charge.

[5] En 1976, la partie III(B) de la Police du RARM a été modifiée par l’ajout de l’al. 24a)(iv), qui réduit les prestations payables chaque mois dans le cadre du RARM IP d’un montant correspondant à toute prestation mensuelle reçue au titre de la *Loi sur les pensions* (comme la prestation d’ACC versée à M. Manuge) :

24. Autres sources de revenu

a. Le montant de la prestation mensuelle versée selon l’article 23 doit être réduit du total des montants suivants :

. . .

(iv) the total monthly income benefits payable to the member under the Pension Act

[6] In 2000, the *Act to amend the statute law in relation to veterans' benefits*, S.C. 2000, c. 34, came into force. This Act allows members who have suffered a disability during service, but who can still work, to collect a *Pension Act* disability benefit while also receiving their salaries. Mr. Manuge claims that because s. 24(a)(iv) reduces only those payments made pursuant to the SISIP LTD Plan, those members who were able to continue their service — and thus were not receiving SISIP LTD benefits — did not have their primary source of income reduced by the value of the *Pension Act* benefits they also received.

[7] The *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, S.C. 2005, c. 21 (the “New Veterans Charter”), came into force on April 1, 2006. That Act replaced monthly benefits under the *Pension Act* with a one-time, lump sum payment. The lump sum payment is not a “monthly benefit” within the meaning of s. 24(a)(iv) of the SISIP LTD Plan, and is therefore not deducted from SISIP LTD benefits. The effect of the enactment of the New Veterans Charter is that members injured on or after April 1, 2006, and entitled to both a SISIP LTD benefit and a lump sum payment, are not subject to a reduction of their SISIP LTD benefits. Those, like Mr. Manuge, who were subject to a reduction before the enactment of the New Veterans Charter, are not entitled to compensation for amounts previously deducted. Nor are those injured before April 1, 2006, entitled to a lump sum payment. Instead, they continue to receive monthly *Pension Act* benefits which, pursuant to s. 24(a)(iv), result in a reduction of their SISIP LTD benefits.

(iv) de la prestation de revenu mensuelle totale versée au membre en vertu de la *Loi sur les pensions* . . .

[6] La *Loi portant modification de la législation concernant les avantages pour les anciens combattants*, L.C. 2000, ch. 34, est entrée en vigueur en 2000. Cette loi permet aux membres des Forces canadiennes ayant été frappés d'une invalidité durant le service, mais qui peuvent néanmoins continuer à travailler, de toucher une prestation d'invalidité sous le régime de la *Loi sur les pensions* tout en recevant leur solde. Selon M. Manuge, puisque l'al. 24a)(iv) ne prévoit que la réduction des paiements versés au titre du RARM IP, les membres aptes à poursuivre leur service — qui ne touchaient donc pas de prestations au titre du RARM IP — n'ont pas vu leur source principale de revenu réduite du montant des prestations qu'ils recevaient en même temps sous le régime de la *Loi sur les pensions*.

[7] La *Loi sur les mesures de réinsertion et d'indemnisation des militaires et vétérans des Forces canadiennes*, L.C. 2005, ch. 21 (la « nouvelle Charte des anciens combattants »), entrée en vigueur le 1^{er} avril 2006, a remplacé les prestations mensuelles au titre de la *Loi sur les pensions* par un paiement forfaitaire. Le paiement en question ne constitue pas une « prestation de revenu mensuelle » au sens de l'al. 24a)(iv) du RARM IP et n'entraîne donc pas de réduction des prestations versées en vertu du RARM IP. L'adoption de la nouvelle Charte des anciens combattants a pour effet de mettre les membres blessés le 1^{er} avril 2006 ou après cette date, qui ont droit à la fois à des prestations du RARM IP et à un paiement forfaitaire, à l'abri d'une réduction de leurs prestations mensuelles du RARM IP. Ceux, comme M. Manuge, dont les prestations ont été réduites avant l'entrée en vigueur de la nouvelle Charte des anciens combattants, n'ont droit à aucune indemnisation relativement à ces réductions antérieures. De plus, les membres blessés avant le 1^{er} avril 2006 n'ont pas droit à un paiement forfaitaire. Ils reçoivent encore, au titre de la *Loi sur les pensions*, des prestations mensuelles entraînant une réduction de leurs prestations du RARM IP en application de l'al. 24a)(iv).

[8] On March 15, 2007, Mr. Manuge filed a statement of claim with the Federal Court, challenging the reduction to his SISIP LTD benefits on a variety of grounds and seeking constitutional remedies, damages, restitution and declarations. He later applied to the Federal Court for the certification of his action as a class action pursuant to rule 334.16 of the *Federal Courts Rules*, SOR/98-106. He purports to represent approximately 4000 other former Canadian Forces members similarly affected by s. 24(a)(iv).

[9] In his statement of claim, Mr. Manuge alleges that

- (i) section 24(a)(iv) is unlawful, *ultra vires* and contrary to the *Pension Act*;
- (ii) the Crown has breached the public law obligations owed to Mr. Manuge and the class under the *Pension Act*;
- (iii) section 24(a)(iv) infringes s. 15(1) of the *Canadian Charter of Rights and Freedoms* and is not saved by s. 1;
- (iv) the Crown has been unjustly enriched;
- (v) the Crown is a fiduciary and has breached the fiduciary duties owed to Mr. Manuge and the class; and that
- (vi) the Crown has acted in bad faith.

[10] Mr. Manuge seeks declaratory relief and, pursuant to s. 24 of the *Charter*, damages equal to the amount “unlawfully and wrongfully deducted” pursuant to s. 24(a)(iv) from the SISIP LTD benefits paid to the class. In the alternative, he seeks damages in that amount. In the further alternative, he seeks an order for restitution. Finally, Mr. Manuge claims “liability and general damages” for

[8] Le 15 mars 2007, M. Manuge a déposé à la Cour fédérale une déclaration dans laquelle il invoquait plusieurs moyens pour contester la réduction de ses prestations du RARM IP et demandait des réparations constitutionnelles, des dommages-intérêts, la restitution de sommes d’argent et des jugements déclaratoires. Il a par la suite demandé à la Cour fédérale d’autoriser son action comme recours collectif en vertu de la règle 334.16 des *Règles des Cours fédérales*, DORS/98-106. Il dit représenter environ 4 000 autres anciens membres des Forces canadiennes pour lesquels l’al. 24a)(iv) a eu des conséquences semblables.

[9] Dans sa déclaration, M. Manuge soutient que

- (i) l’alinéa 24a)(iv) est illégal, *ultra vires* et contraire à la *Loi sur les pensions*;
- (ii) la Couronne a manqué aux obligations de droit public que lui impose la *Loi sur les pensions* envers M. Manuge et le groupe;
- (iii) l’alinéa 24a)(iv) enfreint le par. 15(1) de la *Charte canadienne des droits et libertés* et n’est pas justifié au regard de l’article premier;
- (iv) la Couronne a bénéficié d’un enrichissement injustifié;
- (v) la Couronne agissait à titre fiducial et a manqué à ses obligations fiduciaires envers M. Manuge et le groupe;
- (vi) la Couronne a agi de mauvaise foi.

[10] M. Manuge sollicite des jugements déclaratoires et des dommages-intérêts fondés sur l’art. 24 de la *Charte* équivalant au montant [TRADUCTION] « déduit illégalement et injustement » en application de l’al. 24a)(iv) des prestations versées au groupe au titre du RARM IP. Subsidiairement, il réclame des dommages-intérêts de ce montant ou, à défaut, une ordonnance de restitution. Enfin, M. Manuge

discrimination, breach of fiduciary duties and bad faith, and seeks punitive, exemplary and aggravated damages, interest, and costs of the action.

[11] Mr. Manuge relies on various government documents to support his contention that the scheme as a whole operates unfairly and that the amendments to the SISIP LTD Plan were made in bad faith. Among those documents is a special report prepared by the Ombudsman for the Department of National Defence and Canadian Forces in October 2003 entitled *Unfair Deductions From SISIP Payments to Former CF Members*. In that report, the Ombudsman highlighted the disparate treatment experienced by serving Canadian Forces members and those released for medical reasons as follows:

Serving CF members receiving disability pensions through VAC under the *Pension Act* do not have their income reduced because of the pension they receive to compensate them for their disability. It simply does not seem fair that injured and ill members who are released from the CF for medical reasons should have their disability insurance benefit paid, which is intended to replace their income as CF members, reduced because of the same pension benefits. [p. 14]

The Ombudsman sent follow-up letters to the Minister of National Defence in 2005 and 2007, stating that the deduction of benefits under the *Pension Act* from SISIP LTD Plan benefits was unfair to former members like Mr. Manuge.

[12] The Crown opposed certification of Mr. Manuge's claim as a class action. Relying on *Canada v. Grenier*, 2005 FCA 348, [2006] 2 F.C.R. 287, the Crown argued that an action was not the appropriate procedure for attacking the validity or lawfulness of a federal administrative decision, which can only be done by way of an application for judicial review. In the Crown's view, in establishing and modifying the SISIP LTD Plan, the Chief of

réclame une [TRADUCTION] « déclaration de responsabilité et des dommages-intérêts généraux » pour discrimination, manquement à des obligations fiduciaires et mauvaise foi, ainsi que des dommages-intérêts punitifs, exemplaires et majorés, les intérêts et les dépens de l'action.

[11] M. Manuge se fonde sur différents documents de l'administration publique pour appuyer sa prétention que le régime dans son ensemble est inéquitable et que le RARM IP a été modifié de mauvaise foi. Au nombre de ces documents figure un rapport spécial achevé par l'ombudsman du ministère de la Défense nationale et des Forces canadiennes en octobre 2003 qui a pour titre *Déductions injustes des paiements du RARM effectués à d'ex-membres des FC*. L'ombudsman souligne comme suit dans ce rapport la différence de traitement entre les membres actifs des Forces canadiennes et ceux qui ont été libérés pour raisons médicales :

Les membres actifs des FC qui touchent une pension d'invalidité par l'entremise d'ACC aux termes de la *Loi sur les pensions* ne voient pas leur revenu réduit en raison de la pension qu'ils reçoivent en guise d'indemnisation pour leur invalidité. Que les membres des FC blessés ou malades libérés pour des raisons médicales voient leur prestation d'assurance invalidité, laquelle vise à remplacer leur revenu à titre de membres des FC, réduite en raison des mêmes prestations de retraite n'apparaît tout simplement pas juste. [p. 17]

Dans des lettres de suivi envoyées au ministre de la Défense nationale respectivement en 2005 et en 2007, l'ombudsman affirmait que la réduction des prestations du RARM IP d'un montant correspondant aux prestations reçues en vertu de la *Loi sur les pensions* était inéquitable envers les anciens membres des Forces canadiennes comme M. Manuge.

[12] La Couronne s'est opposée à l'autorisation de l'action de M. Manuge comme recours collectif. Se fondant sur *Canada c. Grenier*, 2005 CAF 348, [2006] 2 R.C.F. 287, la Couronne a fait valoir que la validité ou la légalité d'une décision administrative fédérale ne pouvait pas être attaquée par voie d'action, mais uniquement par voie de contrôle judiciaire. La Couronne affirme que le chef d'état-major de la défense agissait à titre d'« office fédéral » au

the Defence Staff was acting as a “federal board, commission or other tribunal” within the meaning of s. 2 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. The Crown took the position that each of the claims pleaded in the statement of claim would have to be determined based on the validity of the decision to include *Pension Act* benefits in the list of SISIP LTD Plan deductions in s. 24(a)(iv).

[13] On Mr. Manuge’s motion for certification in the Federal Court, Barnes J. noted that the decision to include s. 24(a)(iv) in the SISIP LTD Plan was made years ago by the Chief of the Defence Staff, and that what Mr. Manuge was challenging was the lawfulness of the policy as reflected in s. 24(a)(iv) and the corresponding action to reduce his monthly income under the Plan (2008 FC 624, [2009] 1 F.C.R. 416). Barnes J. accepted that, “on its face” (para. 15), Mr. Manuge’s claim falls within s. 18(3) of the *Federal Courts Act*, and that “each and every occasion that Mr. Manuge and the other proposed class members are subject to the offset of VAC benefits from their SISIP income, they have a fresh claim to relief and a corresponding right to judicially attack the lawfulness of the policy giving rise to the reduction in benefits” (para. 18). However, he found that this case is unlike *Grenier* for two reasons: the decision at issue is not discrete in a temporal sense; and the action cannot be seen as a true collateral attack aimed at avoiding the short time bar on judicial review (paras. 15 and 18). As such, he concluded that the concerns about collateral attack, finality, and deference to the administrative decision maker animating *Grenier* did not “obviously apply” in this case (para. 21).

[14] He went on to hold that “the strictness of the *ratio* in *Grenier* can be mitigated in appropriate cases by the authority to convert an application for judicial review into an action” pursuant to s. 18.4(2) of the *Federal Courts Act* (para. 21). He concluded, applying the test in *Hunt v. Carey Canada Inc.*,

sens de l’art. 2 de la *Loi sur les Cours fédérales*, L.R.C. 1985, ch. F-7, lorsqu’il a établi et modifié le RARM IP. Selon la Couronne, le sort de chacune des allégations faites dans la déclaration dépend de la validité de la décision d’inclure les prestations reçues en vertu de la *Loi sur les pensions* dans la liste des déductions aux prestations du RARM IP prévues à l’al. 24a)(iv).

[13] Lors de l’examen de la demande d’autorisation du recours collectif présentée par M. Manuge à la Cour fédérale, le juge Barnes a signalé que la décision d’ajouter l’al. 24a)(iv) au RARM IP avait été prise de nombreuses années auparavant par le chef d’état-major de la défense, et que M. Manuge contestait en fait la légalité de la politique sous-jacente à l’al. 24a)(iv) et la réduction correspondante de son revenu mensuel dans le cadre du régime (2008 CF 624, [2009] 1 R.C.F. 416). Le juge Barnes a admis que le recours de M. Manuge relève « à première vue » (par. 15) du par. 18(3) de la *Loi sur les Cours fédérales* et que « chaque fois que les prestations d’ACC de M. Manuge et des autres membres du groupe proposé sont déduites de leur revenu du RARM, lui et les autres membres du groupe disposent d’un nouveau recours et du droit correspondant de contester en justice la légalité de la politique donnant lieu à la diminution de leurs prestations » (par. 18). Il a cependant conclu que la présente affaire se distingue de l’affaire *Grenier* pour deux raisons : en l’espèce, la décision en litige n’est pas figée dans le temps et l’action ne peut être perçue comme une véritable contestation indirecte visant à éluder le court délai fixé pour le dépôt d’une demande de contrôle judiciaire (par. 15 et 18). Il est donc arrivé à la conclusion que les préoccupations relatives aux contestations indirectes, au caractère définitif des décisions administratives et à la déférence dont il faut faire preuve envers les décideurs administratifs, sur lesquelles repose *Grenier*, « n’interviennent pas naturellement » dans la présente affaire (par. 21).

[14] Il a ajouté que « la rigueur du *ratio decidendi* de l’arrêt *Grenier* peut être atténuée, dans les cas qui s’y prêtent, par le pouvoir de convertir en action une demande de contrôle judiciaire » en vertu du par. 18.4(2) de la *Loi sur les Cours fédérales* (par. 21). Appliquant le critère établi dans *Hunt c. Carey*

[1990] 2 S.C.R. 959, that the pleadings disclosed a reasonable cause of action, and certified the action as a class action.

[15] The Federal Court of Appeal, applying *Grenier*, allowed the Crown's appeal. It concluded that the lawfulness of a decision or administrative activity like s. 24(a)(iv) of the SISIP LTD Plan could only be challenged in judicial review proceedings (2009 FCA 29, [2009] 4 F.C.R. 478). In such proceedings, the monthly decision to reduce the benefits could be declared invalid or unlawful. Liability stemming from an unlawful decision could be assessed separately in a legal action for damages. The court further held that Barnes J. could not notionally use s. 18.4(2) of the *Federal Courts Act* to convert the proceedings into an action.

[16] The Federal Court of Appeal gave Mr. Manuge 30 days to serve and file an application for judicial review and suspended his action until a final decision had been made on that application. The court noted that Mr. Manuge could apply, should he wish to do so, for certification of his application for judicial review as a class proceeding (see rules 334.1 and 334.12 of the *Federal Courts Rules*). Mr. Manuge applied for judicial review on March 4, 2009. He also appealed the decision of the Federal Court of Appeal to this Court.

Analysis

[17] Following *TeleZone*, there is no question that the Federal Court has jurisdiction to entertain Mr. Manuge's claim as an action for damages: *Federal Courts Act*, s. 17(1); *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, s. 21; *TeleZone*, at paras. 19-23 and 43-46; *Canada (Attorney General) v. McArthur*, 2010 SCC 63, [2010] 3 S.C.R. 626, at para. 17; *Nu-Pharm Inc. v. Canada (Attorney General)*, 2010 SCC 65, [2010] 3 S.C.R. 648, at para. 16. Mr. Manuge's pleadings

Canada Inc., [1990] 2 R.C.S. 959, le juge Barnes a conclu que les actes de procédure révélaient une cause d'action valable et a autorisé l'action comme recours collectif.

[15] Applicant *Grenier*, la Cour d'appel fédérale a accueilli l'appel de la Couronne. Elle a conclu que la légalité d'une décision ou d'une activité administrative telle celle prévue à l'al. 24a)(iv) du RARM IP ne peut être contestée que par voie de contrôle judiciaire (2009 CAF 29, [2009] 4 R.C.F. 478). La décision mensuelle de diminuer les prestations pouvait être déclarée nulle ou illégale dans une instance de contrôle judiciaire. La responsabilité découlant d'une décision illégale pouvait être examinée séparément, dans le cadre d'une action en dommages-intérêts. La Cour d'appel a aussi décidé que le juge Barnes ne pouvait pas utiliser le par. 18.4(2) de la *Loi sur les Cours fédérales* pour jouer avec les notions de façon à transformer le recours en action.

[16] La Cour d'appel fédérale a donné 30 jours à M. Manuge pour signifier et déposer une demande de contrôle judiciaire et elle a suspendu l'action de M. Manuge jusqu'à ce qu'une décision définitive soit rendue sur cette demande. Elle a fait remarquer que M. Manuge pouvait demander, s'il le voulait, que sa demande de contrôle judiciaire soit autorisée comme recours collectif (voir les règles 334.1 et 334.12 des *Règles des Cours fédérales*). M. Manuge a présenté une demande de contrôle judiciaire le 4 mars 2009. Il a aussi interjeté appel devant notre Cour de l'arrêt de la Cour d'appel fédérale.

Analyse

[17] Suivant l'arrêt *TeleZone*, il ne fait aucun doute que la Cour fédérale a compétence pour instruire le recours de M. Manuge sous forme d'action en dommages-intérêts : *Loi sur les Cours fédérales*, par. 17(1); *Loi sur la responsabilité civile de l'État et le contentieux administratif*, L.R.C. 1985, ch. C-50, art. 21; *TeleZone*, par. 19-23 et 43-46; *Canada (Procureur général) c. McArthur*, 2010 CSC 63, [2010] 3 R.C.S. 626, par. 17; *Nu-Pharm Inc. c. Canada (Procureur général)*, 2010 CSC 65,

disclose claims against the Crown seeking remedies that the Federal Court has authority to grant in an action.

[18] But under *TeleZone*, there is a residual discretion to stay an action if it is premised on public law considerations to such a degree that, in Binnie J.'s words, "in its essential character, it is a claim for judicial review with only a thin pretence to a private wrong" (para. 78). The Crown's argument, in essence, is that Mr. Manuge's action should be stayed on that basis.

[19] The exercise of the discretion to stay an action in this context is dependent on an identification of the essential character of the claim as an assertion of either private law or public law rights. I agree with the Crown that some of Mr. Manuge's claims raise issues that are amenable to judicial review. However, the question is not just whether some aspects of Mr. Manuge's pleadings could be addressed under ss. 18 and 18.1 of the *Federal Courts Act*, but what, in their essential character, his claims are for.

[20] In my view, with respect, the discretion to grant a stay should not be exercised in this case. In the context of deciding the certification motion, Barnes J. has already addressed the question of whether the claims alleged reasonable causes of action (paras. 39-41). He concluded that the "allegations of unlawfulness, *ultra vires* and a breach of subsection 15(1) of the Charter easily meet the legal threshold of a reasonable cause of action" (para. 39). Further, he was not prepared to find that it was plain and obvious that Mr. Manuge could not succeed in his "rather sparse" allegations of breach of fiduciary duty and unjust enrichment (paras. 40-41). The Crown does not ask us to interfere with these findings. Assuming that such reasonable causes of action exist, their presence rebuts the Crown's suggestion that Mr. Manuge's claims for

[2010] 3 R.C.S. 648, par. 16. Les actes de procédure de M. Manuge révèlent des causes d'action contre la Couronne, et la Cour fédérale a le pouvoir d'accorder les réparations demandées dans le cadre d'une action.

[18] *TeleZone* reconnaît toutefois l'existence du pouvoir discrétionnaire résiduel de suspendre une action qui repose sur des considérations de droit public à un point tel que, pour reprendre les propos du juge Binnie, « il s'agit essentiellement d'une demande de contrôle judiciaire qui n'a que superficiellement l'apparence d'un recours délictuel de droit privé » (par. 78). La Couronne soutient essentiellement qu'il y a lieu de suspendre l'action de M. Manuge pour cette raison.

[19] La décision du tribunal d'exercer ou non son pouvoir discrétionnaire de suspendre une action dans ce contexte dépend de l'essence du recours selon qu'il s'agit de la revendication de droits relevant du droit privé ou du droit public. Je suis d'accord avec la Couronne que certaines des prétentions de M. Manuge soulèvent des questions qui se prêtent au contrôle judiciaire. Cependant, il ne s'agit pas seulement d'établir si certains éléments plaidés par M. Manuge peuvent être examinés sous le régime des art. 18 et 18.1 de la *Loi sur les Cours fédérales*, mais de déterminer quelle est l'essence de ses demandes.

[20] Je suis d'avis, avec égards, que le pouvoir discrétionnaire de suspendre l'action ne doit pas être exercé en l'espèce. Lors de l'examen de la requête en autorisation du recours collectif, le juge Barnes a traité la question de savoir si les demandes révélaient des causes d'action valables (par. 39-41). Il a conclu que les « allégations d'illégalité, d'invalidité et de violation du paragraphe 15(1) de la Charte satisfont facilement au seuil juridique d'une cause d'action valable » (par. 39). En outre, le juge Barnes n'était pas disposé à conclure qu'il était manifeste et évident que M. Manuge ne parviendrait pas à établir ses allégations « plutôt clairsemées » de manquement aux obligations fiduciaires et d'enrichissement injustifié (par. 40-41). La Couronne ne nous demande pas de modifier ces conclusions. Si l'on tient pour acquis que de telles causes d'action

damages disclose “only a thin pretence to a private wrong” (*TeleZone*, at para. 78).

[21] At their core, Mr. Manuge’s claims are less about assessing the exercise of delegated statutory authority or the decision-making process that led to the promulgation or “monthly application” of s. 24(a)(iv), and more about s. 15(1) of the *Charter*. He pleads that the scheme violates s. 15(1) of the *Charter* because it draws a distinction, based on the degree and extent of disability, between the claimants who are allegedly adversely affected because they are unable to continue to serve and are thus subject to the s. 24(a)(iv) deduction — and those who are able to continue to serve and who are not subject to the deduction. He also alleges that the scheme violates s. 15(1) by subjecting those injured prior to April 1, 2006, to less advantageous treatment than those injured on or after April 1, 2006. It is essentially for these alleged breaches that Mr. Manuge seeks constitutional remedies and damages. As *TeleZone* states, “[i]f the plaintiff has a valid cause of action for damages, he or she is normally entitled to pursue it” (para. 76).

[22] In my view, therefore, the residual discretion should not be exercised to stay Mr. Manuge’s class action in the Federal Court.

[23] It is worth noting that the pleadings are far from models of legal clarity. I would, accordingly, emphasize that nothing in these reasons should be read as precluding the Crown from challenging any of them in the usual manner by seeking, for example, particulars or other clarifications.

[24] I would allow the appeal and reinstate the order of Barnes J. certifying Mr. Manuge’s class action.

valables existent, leur présence réfute la prétention de la Couronne que les demandes de dommages-intérêts de M. Manuge n’ont « que superficiellement l’apparence d’un recours délictuel de droit privé » (*TeleZone*, par. 78).

[21] Au fond, les prétentions de M. Manuge ne concernent pas tant l’appréciation de l’exercice d’un pouvoir délégué d’origine législative ou du processus décisionnel ayant mené à l’adoption ou à « l’application mensuelle » de l’al. 24a)(iv) qu’une prétendue violation du par. 15(1) de la *Charte*. M. Manuge fait valoir que le régime enfreint ce paragraphe en établissant une distinction, fondée sur la gravité et l’étendue de l’invalidité, entre les membres du groupe demandeur — qui seraient lésés parce qu’ils ne sont plus en mesure de servir et qu’ils subissent de ce fait la déduction prévue à l’al. 24a)(iv) — et ceux qui sont toujours aptes au service et ne sont pas assujettis à la déduction. Il allègue aussi que le régime viole le par. 15(1) en réservant aux militaires blessés avant le 1^{er} avril 2006 un traitement moins avantageux qu’à ceux blessés le 1^{er} avril 2006 ou après cette date. C’est essentiellement en raison de ces prétendues violations que M. Manuge sollicite des réparations constitutionnelles et des dommages-intérêts. Comme l’indique *TeleZone*, « [s]i le demandeur a une cause d’action valide en dommages-intérêts, il est normalement admis à exercer son recours à ce titre » (par. 76).

[22] Je suis donc d’avis que le pouvoir discrétionnaire résiduel de suspendre le recours collectif intenté par M. Manuge en Cour fédérale ne devrait pas être exercé.

[23] Il faut souligner que les actes de procédure sont loin d’être des modèles de clarté juridique. Par conséquent, je tiens à préciser que les présents motifs ne sauraient être interprétés comme empêchant la Couronne de contester l’un ou l’autre de ces actes de procédure de la manière habituelle en demandant, notamment, des précisions ou d’autres éclaircissements.

[24] Je suis d’avis d’accueillir l’appel et de rétablir l’ordonnance du juge Barnes autorisant le recours collectif de M. Manuge.

Appeal allowed.

*Solicitors for the appellant: McInnes Cooper,
Halifax.*

*Solicitor for the respondent: Department of
Justice, Ottawa.*

Pourvoi accueilli.

*Procureurs de l'appelant : McInnes Cooper,
Halifax.*

*Procureur de l'intimée : Ministère de la Justice,
Ottawa.*

Tab 6

4. If the *Canadian Charter of Rights and Freedoms* does apply to the respondent universities, do the mandatory retirement provisions enacted by each of them infringe s. 15(1) of the *Charter*?
5. If the *Canadian Charter of Rights and Freedoms* does apply to the respondent universities, are the mandatory retirement provisions enacted by each of them demonstrably justified by s. 1 of the *Charter* as a reasonable limit on the rights guaranteed by s. 15(1) of the *Charter*?

The Attorneys General of Canada, Nova Scotia and Saskatchewan intervened.

As the constitutional questions indicate, the issues may be divided into two broad groups. The first concerns the possible effect of the *Charter* on the universities' mandatory retirement policies, the second concerns its possible effect on s. 9(a) of the *Human Rights Code, 1981*. For convenience, I shall deal with the universities' policies first, beginning with the question whether the *Charter* applies to these policies at all.

The Application of the *Charter*

The application of the *Charter* is set forth in s. 32(1), which reads:

32. (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

These words give a strong message that the *Charter* is confined to government action. This Court has repeatedly drawn attention to the fact that the *Charter* is essentially an instrument for checking the powers of government over the individual. In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 156, Dickson J. (as he then was) observed: "It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action." In *Operation Dismantle Inc. v. The*

4. Si la *Charte canadienne des droits et libertés* s'applique effectivement aux universités intimées, les dispositions sur la retraite obligatoire adoptées par chacune d'elles portent-elles atteinte au par. 15(1) de la *Charte*?

5. Si la *Charte canadienne des droits et libertés* s'applique effectivement aux universités intimées, les dispositions sur la retraite obligatoire adoptées par chacune d'elles sont-elles justifiables en vertu de l'article premier de la *Charte* en tant que limite raisonnable imposée aux droits garantis par le par. 15(1) de la *Charte*?

Les procureurs généraux du Canada, de la Nouvelle-Écosse et de la Saskatchewan sont intervenus.

Comme l'indiquent les questions constitutionnelles, les questions peuvent être divisées en deux grandes catégories. La première concerne l'effet possible de la *Charte* sur les politiques des universités en matière de retraite obligatoire, la seconde concerne son effet possible sur l'al. 9a) du *Code des droits de la personne, 1981*. Par souci de commodité, je vais d'abord traiter des politiques des universités en me demandant premièrement si la *Charte* s'applique à ces politiques.

L'application de la *Charte*

L'application de la *Charte* est énoncée au par. 32(1), qui se lit ainsi:

32. (1) La présente charte s'applique:

a) au Parlement et au gouvernement du Canada, pour tous les domaines relevant du Parlement, y compris ceux qui concernent le territoire du Yukon et les territoires du Nord-Ouest;

b) à la législature et au gouvernement de chaque province, pour tous les domaines relevant de cette législature.

Ces mots indiquent clairement que l'application de la *Charte* se restreint à l'action gouvernementale. Notre Cour a souligné à maintes reprises que la *Charte* est essentiellement un instrument de contrôle des pouvoirs du gouvernement sur le particulier. Dans l'arrêt *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, à la p. 156, le juge Dickson (tel était alors son titre) fait remarquer: «Elle vise à empêcher le gouvernement d'agir à l'encontre de ces droits et libertés; elle n'autorise pas en soi le gouvernement à agir». Dans l'arrêt *Operation Dis-*

Queen, [1985] 1 S.C.R. 441, at p. 490, Wilson J. noted that "the central concern of [s. 7 of the *Charter*] is direct impingement by government upon the life, liberty and personal security of individual citizens" (emphasis added). See also *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 347, *per* Dickson J.; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, especially at pp. 593-98; and *Tremblay v. Daigle*, [1989] 2 S.C.R. 530.

The exclusion of private activity from the *Charter* was not a result of happenstance. It was a deliberate choice which must be respected. We do not really know why this approach was taken, but several reasons suggest themselves. Historically, bills of rights, of which that of the United States is the great constitutional exemplar, have been directed at government. Government is the body that can enact and enforce rules and authoritatively impinge on individual freedom. Only government requires to be constitutionally shackled to preserve the rights of the individual. Others, it is true, may offend against the rights of individuals. This is especially true in a world in which economic life is largely left to the private sector where powerful private institutions are not directly affected by democratic forces. But government can either regulate these or create distinct bodies for the protection of human rights and the advancement of human dignity.

To open up all private and public action to judicial review could strangle the operation of society and, as put by counsel for the universities, "diminish the area of freedom within which individuals can act". In *Re Bhindi and British Columbia Projectionists* (1986), 29 D.L.R. (4th) 47, Nemetz C.J., speaking for the majority of the British Columbia Court of Appeal, made it clear that such an approach could seriously interfere with freedom of contract. It would mean reopening whole areas of settled law in several domains. For example, as has been stated: "In cases involving arrests, detentions, searches and the like, to apply the *Charter* to purely private action would be

mantle Inc. c. La Reine, [1985] 1 R.C.S. 441, à la p. 490, le juge Wilson a souligné que l'art. 7 de la *Charte* «a pour objet central [l'art. 7 de la *Charte*] l'ingérence directe du gouvernement dans la vie, la liberté et la sécurité personnelle des citoyens» (je souligne). Voir également les arrêts *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, à la p. 347, le juge en chef Dickson; *SDGMR c. Dolphin Delivery Ltd.*, [1986] 2 R.C.S. 573, particulièrement aux pp. 593 à 598; et *Tremblay c. Daigle*, [1989] 2 R.C.S. 530.

L'exclusion des activités privées de l'application de la *Charte* n'est le fruit du hasard. C'est un choix délibéré qu'il faut respecter. Nous ne savons pas vraiment pourquoi ce point de vue a été retenu, mais plusieurs raisons semblent s'imposer. Historiquement, les déclarations des droits, dont celle des États-Unis constitue l'exemple constitutionnel par excellence, visaient le gouvernement. C'est le gouvernement qui peut adopter et appliquer des règles et qui peut porter atteinte péremptoirement à la liberté individuelle. Seul le gouvernement a besoin de se voir imposer des contraintes dans la Constitution afin de préserver les droits des particuliers. Il est vrai que les atteintes aux droits des particuliers peuvent provenir d'autres sources. Cela est particulièrement vrai dans un monde où la vie économique est largement dominée par le secteur privé dont les institutions puissantes ne sont pas directement touchées par les forces démocratiques. Mais le gouvernement peut soit les réglementer soit créer des organismes distincts afin de protéger les droits de la personne et de promouvoir la dignité humaine.

Soumettre au contrôle judiciaire toutes les actions de nature privée et publique pourrait paralyser le fonctionnement de la société et, comme le disent les avocats des universités, [TRADUCTION] «restreindre la liberté d'action des particuliers». Dans l'arrêt *Re Bhindi and British Columbia Projectionists* (1986), 29 D.L.R. (4th) 47, le juge en chef Nemetz, s'exprimant au nom de la majorité de la Cour d'appel de la Colombie-Britannique, a dit clairement que cette conception pourrait porter sérieusement atteinte à la liberté contractuelle. Cela signifierait qu'il faudrait reconsidérer en entier plusieurs domaines où le droit est bien établi. Par exemple, comme on l'a déjà affirmé,

Tab 7

“tice”. In my view this burden on the plaintiff amounts to a requirement that the Attorney General or Crown Attorney perpetrated a fraud on the process of criminal justice and in doing so has perverted or abused his office and the process of criminal justice. In fact, in some cases this would seem to amount to criminal conduct. (See for example breach of trust, s. 122, conspiracy re: false prosecution s. 465(1)(b), obstructing justice s. 139(2) and (3) of the *Criminal Code*, R.S.C., 1985, c. C-46.)

Further, it should be noted that in many, if not all cases of malicious prosecution by an Attorney General or Crown Attorney, there will have been an infringement of an accused's rights as guaranteed by ss. 7 and 11 of the *Canadian Charter of Rights and Freedoms*.

By way of summary then, a plaintiff bringing a claim for malicious prosecution has no easy task. Not only does the plaintiff have the notoriously difficult task of establishing a negative, that is the absence of reasonable and probable cause, but he is held to a very high standard of proof to avoid a non-suit or directed verdict (see Fleming, *op. cit.*, at p. 606, and *Mitchell v. John Heine and Son Ltd.* (1938), 38 S.R. (N.S.W.) 466, at pp. 469-71). Professor Fleming has gone so far as to conclude that there are built-in devices particular to the tort of malicious prosecution to dissuade civil suits (at p. 606):

The disfavour with which the law has traditionally viewed the action for malicious prosecution is most clearly revealed by the hedging devices with which it has been surrounded in order to deter this kind of litigation and protect private citizens who discharge their public duty of prosecuting those reasonably suspected of crime.

3. Policy Considerations

In light of what I have said regarding the role of the prosecutor in Canada, and the tort of malicious

cureur général ou de procureur de la Couronne, et donc incompatible avec sa qualité de «représentant de la justice». À mon avis, ce fardeau incombant au demandeur revient à exiger que le procureur général ou le procureur de la Couronne ait commis une fraude dans le processus de justice criminelle et que, dans la perpétration de cette fraude, il ait abusé de ses pouvoirs et perverti le processus de justice criminelle. En fait il semble que, dans certains cas, cela équivaille à une conduite criminelle. (Voir, par exemple, l'abus de confiance, art. 122, le complot en vue d'engager des poursuites injustifiées, al. 465(1)b), l'entrave à la justice, par. 139(2) et (3) du *Code criminel*, L.R.C. (1985), chap. C-46.)

Notons en outre que bien souvent, sinon toujours, les cas de poursuites abusives exercées par un procureur général ou un procureur de la Couronne, comporteront une atteinte aux droits garantis à l'accusé par les art. 7 et 11 de la *Charte canadienne des droits et libertés*.

Pour résumer donc, un demandeur qui intente une action pour poursuites abusives ne se lance pas dans une entreprise facile. Il doit non seulement s'acquitter de la tâche notoirement difficile de prouver un fait négatif, c'est-à-dire l'absence de motif raisonnable et probable, mais il doit également satisfaire à une norme très élevée en matière de preuve s'il veut éviter le non-lieu ou le verdict imposé (voir Fleming, *op. cit.*, à la p. 606, et *Mitchell v. John Heine and Son Ltd.* (1938), 38 S.R. (N.S.W.) 466, aux pp. 469 à 471). Le professeur Fleming va même jusqu'à conclure que le délit civil de poursuites abusives comporte certaines particularités destinées à décourager les actions civiles (à la p. 606):

[TRADUCTION] La désapprobation que le droit a traditionnellement manifestée à l'égard de l'action pour poursuites abusives ressort le plus nettement des restrictions qui lui ont été apportées afin de faire obstacle à ce type d'actions et de protéger les particuliers qui s'acquittent de leur devoir public de poursuivre les personnes raisonnablement soupçonnées d'avoir commis des crimes.

3. Les considérations d'intérêt public

Compte tenu de ce que j'ai dit concernant le rôle du poursuivant au Canada et le délit civil de

prosecution, it now is necessary to assess the policy rationales. I would begin by noting that even those decisions that have come out firmly in favour of absolute immunity have described the rule as "troubling", a "startling proposition", "strained and difficult to sustain" (see *Nelles v. The Queen in right of Ontario* (1985), 51 O.R. (2d) 513 (Ont. C.A.), at p. 531, and *Bosada v. Pinos* (1984), 44 O.R. (2d) 789 (H.C.), at p. 794).

It is said by those in favour of absolute immunity that the rule encourages public trust and confidence in the impartiality of prosecutors. However, it seems to me that public confidence in the office of a public prosecutor suffers greatly when the person who is in a position of knowledge in respect of the constitutional and legal impact of his conduct is shielded from civil liability when he abuses the process through a malicious prosecution. The existence of an absolute immunity strikes at the very principle of equality under the law and is especially alarming when the wrong has been committed by a person who should be held to the highest standards of conduct in exercising a public trust. (See *Filosa*, loc. cit., at p. 982, and Marilyn L. Pilkington, "Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms" (1984), 62 *Can. Bar. Rev.* 517, at pp. 560-61.)

Regard must also be had for the victim of the malicious prosecution. The fundamental flaw with an absolute immunity for prosecutors is that the wrongdoer cannot be held accountable by the victim through the legal process. As I have stated earlier, the plaintiff in a malicious prosecution suit bears a formidable burden of proof and in those cases where a case can be made out, the plaintiff's *Charter* rights may have been infringed as well. Granting an absolute immunity to prosecutors is akin to granting a license to subvert individual rights. Not only does absolute immunity negate a private right of action, but in addition, it seems to me, it may be that it would effectively bar the seeking of a remedy pursuant to s. 24(1) of the *Charter*. It seems clear that in using his office to maliciously prosecute an accused, the prosecutor would be depriving an individual of the right to

poursuites abusives, nous devons examiner maintenant les considérations d'intérêt public. Je commence par souligner que même les décisions prenant fermement position en faveur de l'immunité absolue ont qualifié cette règle de [TRADUCTION] «inquiétante», «alarmante», et «forcée et difficilement justifiable» (voir *Nelles v. The Queen in right of Ontario* (1985), 51 O.R. (2d) 513 (C.A. Ont.), à la p. 531, et *Bosada v. Pinos* (1984), 44 O.R. (2d) 789 (H.C.), à la p. 794).

Les partisans de la règle de l'immunité absolue soutiennent qu'elle favorise la confiance du public dans l'impartialité des poursuivants. Il me semble toutefois que la confiance du public dans l'institution du poursuivant public diminue beaucoup lorsque la personne qui est en mesure de connaître l'impact constitutionnel et juridique de sa conduite est mise à l'abri de la responsabilité civile quand elle abuse du processus en engageant des poursuites abusives. L'immunité absolue va à l'encontre du principe même de l'égalité devant la loi et elle est particulièrement inquiétante lorsqu'il s'agit d'une faute commise par une personne qui devrait être tenue à une conduite exemplaire dans l'exercice de sa charge publique. (Voir *Filosa*, loc. cit., à la p. 982, et Marilyn L. Pilkington, «Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms» (1984), 62 *R. du B. can.* 517, aux pp. 560 et 561.)

On doit penser également à la victime des poursuites abusives. La notion d'immunité absolue des poursuivants présente cette faille fondamentale que l'auteur du délit civil ne peut être obligé par la victime d'en répondre devant les tribunaux. Comme je l'ai déjà dit, la charge de la preuve incombant au demandeur dans une action pour poursuites abusives est extrêmement lourde et, dans les cas où il est en mesure d'établir sa cause, il est possible qu'il ait aussi été victime d'une atteinte aux droits que lui garantit la *Charte*. Accorder aux poursuivants une immunité absolue revient à leur donner toute latitude pour léser les droits individuels. Non seulement l'immunité absolue réduit à néant le droit des particuliers d'interester des actions, mais en outre, me semble-t-il, il se peut qu'elle rende impossible l'exercice d'un recours en vertu du par. 24(1) de la *Charte*. Il

liberty and security of the person in a manner that does not accord with the principles of fundamental justice. Such an individual would normally have the right under s. 24(1) of the *Charter* to apply to a court of competent jurisdiction to obtain a remedy that the court considers appropriate and just if he can establish that one of his *Charter* rights has been infringed. The question arises then, whether s. 24(1) of the *Charter* confers a right to an individual to seek a remedy from a competent court. In my view it does. When a person can demonstrate that one of his *Charter* rights has been infringed, access to a court of competent jurisdiction to seek a remedy is essential for the vindication of a constitutional wrong. To create a right without a remedy is antithetical to one of the purposes of the *Charter* which surely is to allow courts to fashion remedies when constitutional infringements occur. Whether or not a common law or statutory rule can constitutionally have the effect of excluding the courts from granting the just and appropriate remedy, their most meaningful function under the *Charter*, does not have to be decided in this appeal. It is, in any case, clear that such a result is undesirable and provides a compelling underlying reason for finding that the common law itself does not mandate absolute immunity.

It is also said in favour of absolute immunity that anything less would act as a "chilling effect" on the Crown Attorney's exercise of discretion. It should be noted that what is at issue here is not the exercise of a prosecutor's discretion within the proper sphere of prosecutorial activity as defined by his role as a "minister of justice". Rather, in cases of malicious prosecution we are dealing with allegations of misuse and abuse of the criminal process and of the office of the Crown Attorney. We are not dealing with merely second-guessing a Crown Attorney's judgment in the prosecution of a case but rather with the deliberate and malicious

semble évident qu'en se prévalant de son poste pour engager des poursuites abusives contre un accusé, le poursuivant porte atteinte au droit d'un individu à la liberté et à la sécurité de sa personne, et ce, d'une manière non conforme aux principes de justice fondamentale. À condition de prouver la violation d'un de ses droits garantis par la *Charte*, cet individu jouirait normalement aux termes du par. 24(1) de la *Charte* du droit de s'adresser à un tribunal compétent pour obtenir la réparation que ce tribunal estime convenable et juste. La question qui se pose est donc de savoir si le par. 24(1) de la *Charte* confère aux particuliers le droit de demander une réparation au tribunal compétent. Personnellement, je crois que oui. Quand une personne peut démontrer qu'elle a été victime d'une atteinte à un droit garanti par la *Charte*, il est indispensable pour assurer la sanction de cette violation de la Constitution que la personne en question puisse s'adresser au tribunal compétent afin d'obtenir réparation. Créer un droit sans prévoir de redressement heurte de front l'un des objets de la *Charte* qui permet assurément aux tribunaux d'accorder une réparation en cas de violation de la Constitution. Nous n'avons pas à trancher dans ce pourvoi la question de savoir si une règle de droit découlant de la *common law* ou d'un texte législatif peut constitutionnellement empêcher les tribunaux d'accorder une réparation juste et convenable, ce qui est leur fonction la plus importante sous le régime de la *Charte*. De toute façon, il est évident qu'un tel résultat n'est pas souhaitable et constitue une raison puissante et fondamentale de conclure que la *common law* elle-même ne prévoit pas d'immunité absolue.

On soutient en outre que reconnaître moins que l'immunité absolue aurait un «effet paralysant» sur l'exercice du pouvoir discrétionnaire du procureur de la Couronne. Notons que ce dont il s'agit ici n'est pas l'exercice d'un pouvoir discrétionnaire par un poursuivant dans sa sphère légitime d'activité, telle que définie par son rôle de «représentant de la justice». En effet, dans des cas de poursuites abusives il s'agit plutôt d'allégations d'abus du processus criminel et des pouvoirs du procureur de la Couronne. Il ne s'agit pas d'une simple évaluation rétrospective de la sagesse de la décision du procureur de la Couronne d'engager des poursui-

use of the office for ends that are improper and inconsistent with the traditional prosecutorial function.

Therefore it seems to me that the "chilling effect" argument is largely speculative and assumes that many suits for malicious prosecution will arise from disgruntled persons who have been prosecuted but not convicted of an offence. I am of the view that this "flood-gates" argument ignores the fact that one element of the tort of malicious prosecution requires a demonstration of improper motive or purpose; errors in the exercise of discretion and judgment are not actionable. Furthermore, there exist built-in deterrents on bringing a claim for malicious prosecution. As I have noted, the burden on the plaintiff is onerous and strict. The fact that the absence of reasonable cause is a matter of law to be decided by a judge means that an action for malicious prosecution can be struck before trial as a matter of substantive inadequacy (see Rule 21.01 of the Ontario Rules of Civil Procedure for example). In fact this was the approach adopted by Kerans J.A. in *German v. Major*, *supra*. I agree with Kerans J.A. that "[i]t would indeed be a curious thing if we chose a stern immunity rule in preference to an effective striking-out rule" (p. 276). In addition most jurisdictions, including Ontario, have provisions that allow a defendant to move for summary judgment before a full-fledged trial takes place (see for example Rule 20 in Ontario). Finally, the potential that costs will be awarded to the defendant if an unmeritorious claim is brought acts as financial deterrent to meritless claims. Therefore, ample mechanisms exist within the system to ensure that frivolous claims are not brought. In fact, the difficulty in proving a claim for malicious prosecution itself acts as a deterrent. This high threshold of liability is evidenced by the small number of malicious prosecution suits brought against police officers each year. In addition, since 1966, the province of Quebec permits suits against the Attorney General and Crown prosecutors without any evi-

tes; mais plutôt l'exercice délibéré et malveillant de ses pouvoirs pour des fins illégitimes et incompatibles avec le rôle traditionnel du poursuivant.

a Il me semble en conséquence que l'argument fondé sur «l'effet paralysant» est largement spéculatif et suppose que de nombreuses actions pour poursuites abusives seront intentées par des personnes dépitées qui, ayant été poursuivies, n'ont b été reconnues coupables d'aucune infraction. Je suis d'avis que cet argument qui agite le spectre d'une «avalanche» d'actions ne tient pas compte du fait que le délit civil de poursuites abusives exige la c preuve d'un motif ou d'un but illégitimes; les erreurs commises dans l'exercice du pouvoir discrétionnaire et les erreurs de jugement ne donnent pas lieu à des actions en justice. D'autre part, l'action pour poursuites abusives comporte ses propres moyens de dissuasion. Comme je l'ai déjà dit, d la charge de la preuve incombant au demandeur est lourde et stricte. Puisque l'absence de motif e raisonnable est une question de droit à décider par le juge, une action pour poursuites abusives peut être radiée pour absence de fondement suffisant (voir la règle 21.01 des Règles de procédure civile de l'Ontario, par exemple). C'est précisément cette démarche qu'a adoptée le juge Kerans de la Cour d'appel dans l'arrêt *German v. Major*, précité. Je f suis d'accord avec le juge Kerans que [TRADUCTION] «[i]l paraîtrait étrange de choisir une stricte règle d'immunité de préférence à une règle efficace permettant la radiation» (p. 276). En outre, g dans la plupart des ressorts, y compris l'Ontario, il existe des dispositions autorisant un défendeur à présenter une requête en jugement sommaire avant la tenue d'une instruction complète (voir, par exemple, la règle 20 en Ontario). Finalement, la h possibilité de l'adjudication de dépens au défendeur aura un effet préventif contre les poursuites frivoles. Il existe donc à l'intérieur du système tous les mécanismes voulus pour prévenir les actions i frivoles. En fait, la difficulté de prouver une allégation de poursuites abusives constitue elle-même un empêchement. Que le seuil de responsabilité en matière de poursuites abusives soit très élevé est confirmé par le peu d'actions de ce genre intentées chaque année contre des policiers. Par ailleurs, la j province de Québec permet les actions contre le procureur général et les procureurs de la Couronne

dence of a flood of claims. Therefore, I find unpersuasive the claim that absolute immunity is necessary to prevent a flood of litigation.

As for alternative remedies available to persons who have been maliciously prosecuted, none seem to adequately redress the wrong done to the plaintiff. The use of the criminal process against a prosecutor who in the course of a malicious prosecution has committed an offence under the *Criminal Code*, addresses itself mainly to the vindication of a public wrong not the affirmation of a private right of action. Of special interest in this regard is s. 737 of the *Criminal Code* which deals with the making of a probation order. Section 737(2) stipulates that certain conditions may be prescribed in a probation order, one of them being that the convicted person "make restitution or reparation to any person aggrieved or injured by the commission of the offence for the actual loss or damage sustained by that person as a result thereof" (s. 737(2)(e)). This section would seem to be an indirect method of at least partially remedying a wrong done to an individual as a result of a malicious prosecution. However the section is only operative when an accused has been convicted of an offence and when a probation order is made. In addition, the Court's power to award compensation to a victim is limited to damages that are relatively concrete and ascertainable. (See *R. v. Groves* (1977), 37 C.C.C. (2d) 429 (Ont. H.C.)) As such it would seem a rather inadequate substitute for a private right of action. I do however pause to note that many cases of genuine malicious prosecution will also be offences under the *Criminal Code*, and it seems rather odd if not incongruous for reparation to be possible through a probation order but not through a private right of action.

Further, the use of professional disciplinary proceedings, while serving to some extent as punishment and deterrence, do not address the central issue of making the victim whole again. And as has already been noted, it is quite discomfoting to realize that the existence of absolute immunity may bar a person whose *Charter* rights have been

depuis 1966 sans que cela ait provoqué une avalanche d'actions. En conséquence, je tiens pour peu convaincant l'argument selon lequel l'immunité absolue s'impose pour éviter une avalanche de litiges.

Des autres recours qui s'offrent aux personnes visées par des poursuites abusives, aucun ne semble adéquat pour réparer le préjudice subi. L'exercice de poursuites criminelles contre un poursuivant qui, dans le cadre de poursuites abusives, commet une infraction au *Code criminel*, vise surtout le redressement d'un tort public et n'a rien à voir avec un droit privé d'action. L'article 737 du *Code criminel*, portant sur le prononcé d'une ordonnance de probation, est particulièrement intéressant à cet égard. Aux termes du par. 737(2), une ordonnance de probation peut prescrire certaines conditions, dont l'obligation de la part du coupable de «faire restitution ou réparation, à toute personne lésée ou blessée du fait de l'infraction, de la perte ou du dommage véritables soufferts de ce fait par cette personne» (al. 737(2)e)). Cette disposition semble constituer un moyen indirect de réparer, du moins partiellement, le préjudice occasionné à un individu par des poursuites abusives. L'alinéa en question ne joue cependant que lorsqu'un accusé est déclaré coupable d'une infraction et qu'une ordonnance de probation est rendue. De plus, le pouvoir du tribunal d'accorder une indemnisation à une victime se limite aux dommages qui sont relativement concrets et déterminables (voir *R. v. Groves* (1977), 37 C.C.C. (2d) 429 (H.C. Ont.)) Ce pouvoir paraît donc se substituer assez mal à un droit privé d'action. Je fais remarquer toutefois que bien des cas de poursuites abusives véritables constitueront également des infractions au *Code criminel* et il semble plutôt curieux, voire absurde, qu'une réparation puisse être obtenue par le biais d'une ordonnance de probation, mais non par l'exercice d'un droit privé d'action.

En outre, les procédures disciplinaires professionnelles, quoique possédant un certain caractère punitif et dissuasif, n'atteignent pas le but principal qui est de remettre la victime dans son état antérieur et, ainsi que je l'ai déjà indiqué, il serait inquiétant que l'existence d'une immunité absolue puisse empêcher la victime d'une violation des

infringed from applying to a competent court for a just and appropriate remedy in the form of damages.

III. Conclusion

A review of the authorities on the issue of prosecutorial immunity reveals that the matter ultimately boils down to a question of policy. For the reasons I have stated above I am of the view that absolute immunity for the Attorney General and his agents, the Crown Attorneys, is not justified in the interests of public policy. We must be mindful that an absolute immunity has the effect of negating a private right of action and in some cases may bar a remedy under the *Charter*. As such, the existence of absolute immunity is a threat to the individual rights of citizens who have been wrongly and maliciously prosecuted. Further, it is important to note that what we are dealing with here is an immunity from suit for malicious prosecution; we are not dealing with errors in judgment or discretion or even professional negligence. By contrast the tort of malicious prosecution requires proof of an improper purpose or motive, a motive that involves an abuse or perversion of the system of criminal justice for ends it was not designed to serve and as such incorporates an abuse of the office of the Attorney General and his agents the Crown Attorneys.

There is no doubt that the policy considerations in favour of absolute immunity have some merit. But in my view those considerations must give way to the right of a private citizen to seek a remedy when the prosecutor acts maliciously in fraud of his duties with the result that he causes damage to the victim. In my view the inherent difficulty in proving a case of malicious prosecution combined with the mechanisms available within the system of civil procedure to weed out meritless claims is sufficient to ensure that the Attorney General and Crown Attorneys will not be hindered in the proper execution of their important public duties. Attempts to qualify prosecutorial immunity in the United States by the so-called functional approach and its many variations have proven to be unsuccessful and unprincipled as I have previously

droits garantis par la *Charte* de s'adresser à un tribunal compétent pour obtenir une réparation juste et convenable sous la forme de dommages-intérêts.

^a III. Conclusion

Il ressort de l'examen de la jurisprudence sur la question de l'immunité du poursuivant qu'il s'agit en définitive d'une question d'intérêt public. Pour les raisons déjà exposées, j'estime qu'une immunité absolue pour le procureur général et ses mandataires, les procureurs de la Couronne, n'est pas justifiée par l'intérêt public. Il ne faut pas oublier que l'immunité absolue entraîne la négation d'un droit privé d'action et, dans certains cas, pourrait rendre impossible un recours fondé sur la *Charte*. L'existence d'une immunité absolue menace donc les droits individuels de citoyens poursuivis à tort et abusivement. De plus, il importe de souligner qu'il s'agit ici d'une immunité contre des actions pour poursuites abusives; il n'est question ni d'erreurs de jugement, ni d'erreurs dans l'exercice d'un pouvoir discrétionnaire, ni même de négligence professionnelle. Dans le cas du délit civil de poursuites abusives, par contre, on doit prouver l'existence d'un but ou d'un motif illégitime, motif qui constitue un abus ou une perversion du système de justice criminelle à des fins auxquelles il n'est pas destiné et qui, en tant que tel, comporte un abus des pouvoirs du procureur général et des procureurs de la Couronne qui agissent en son nom.

Il ne fait pas de doute que les considérations d'intérêt public invoquées en faveur de l'immunité absolue ont une certaine légitimité. J'estime toutefois que ces considérations doivent céder le pas au droit d'un particulier de chercher à obtenir une réparation quand il subit un préjudice du fait que le poursuivant a agi avec malveillance dans l'exercice abusif de ses fonctions. À mon avis, la difficulté à faire la preuve de poursuites abusives ainsi que les mécanismes qui permettent, dans le système de procédure civile, d'écarter les actions non fondées suffisent pour que le procureur général et les procureurs de la Couronne ne soient pas entravés dans l'exécution efficace de leurs importantes charges publiques. Ainsi que je l'ai déjà fait remarquer, les tentatives américaines de limiter l'immunité du poursuivant par le recours à ce

noted. As a result I conclude that the Attorney General and Crown Attorneys do not enjoy an absolute immunity in respect of suits for malicious prosecution. I would therefore dismiss the appeal as against the Crown, there being no order as to costs. I would allow the appeal as against the Attorney General with costs and direct that the matter be returned to the Supreme Court of Ontario for trial of the claim against the Attorney General.

The following are the reasons delivered by

MCINTYRE J.—This appeal concerns the question of the liability of the Crown and the Attorney General of the province in a suit for malicious prosecution arising out of the institution of criminal proceedings, charges of murder, brought against the appellant.

In March, 1981, the appellant, then a nurse at the Toronto Hospital for Sick Children, was charged with the murder of four infant patients. At the conclusion of her preliminary hearing, the Provincial Court Judge who conducted the proceedings discharged the appellant upon a finding of an absence of evidence: (1982), 16 C.C.C. (3d) 97. The appellant later commenced an action against the Crown in right of Ontario, the Attorney General for Ontario, and several police officers, alleging that the Attorney General and his agents, the Crown Attorneys, counselled, aided and abetted the police in charging and prosecuting the plaintiff, and that in so doing the Attorney General, the Crown Attorneys, and police were acting as agents for the Crown in right of Ontario. It was also alleged that in the prosecution the Attorney General and the Crown Attorneys were actuated by malice while acting as agents for the Crown. Proceedings were later discontinued against the police officers and the Crown Attorneys were not named as defendants. The Crown and the Attorney General remained the only defendants and are the respondents in this Court.

qu'on appelle l'approche fonctionnelle et aux nombreuses variantes de cette approche ont échoué et n'ont aucun fondement dans les principes. Je conclus en conséquence que le procureur général et les procureurs de la Couronne ne jouissent pas d'une immunité absolue relativement aux actions pour poursuites abusives. Je suis donc d'avis de rejeter le pourvoi en ce qui concerne la Couronne, sans adjudication de dépens. Je suis par ailleurs d'avis d'accueillir le pourvoi en ce qui concerne le procureur général, avec dépens, et d'ordonner que l'affaire soit renvoyée à la Cour suprême de l'Ontario pour qu'elle instruisse l'action intentée contre le procureur général.

Version française des motifs rendus par

LE JUGE MCINTYRE—Le présent pourvoi pose la question de la responsabilité de la Couronne et du procureur général de la province dans une action pour poursuites abusives résultant des procédures criminelles engagées contre l'appelante relativement à des accusations de meurtre.

L'appelante était infirmière au Hospital for Sick Children de Toronto lorsqu'au mois de mars 1981, elle a été accusée du meurtre de quatre patients en bas âge. À l'issue de son enquête préliminaire, le juge de la Cour provinciale qui présidait l'audience l'a acquittée faute de preuve: (1982), 16 C.C.C. (3d) 97. L'appelante a par la suite intenté une action contre la Couronne du chef de l'Ontario, le procureur général de l'Ontario ainsi que plusieurs policiers, alléguant que le procureur général et ses représentants, les procureurs de la Couronne, avaient conseillé à la police de porter des accusations contre la demanderesse et l'avaient aidée et encouragée à le faire et à engager contre elle des poursuites, et que, ce faisant, le procureur général, les procureurs de la Couronne et la police agissaient au nom de la Couronne du chef de l'Ontario. Elle a également allégué que, dans la conduite des poursuites, le procureur général et les procureurs de la Couronne avaient agi avec malveillance en leur qualité de représentants de la Couronne. Il y a eu par la suite désistement de l'action contre les policiers, et les procureurs de la Couronne n'ont pas été désignés défendeurs. La Couronne et le procureur général sont donc restés les seuls défendeurs à l'instance: ce sont les intimés devant cette Cour.

Tab 8

cardinal principle of statutory interpretation is that a legislative provision should be construed in a way that best furthers its objects: see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paras. 21-22, *per* Iacobucci J., and *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 8. Subsidiary rules of statutory interpretation provide that each part of an enactment must be given meaning, and that statutes must be construed in such a way that absurdities are avoided: see *Rizzo Shoes*, *supra*, at para. 27, *per* Iacobucci J. The task faced by the Court on this appeal is therefore to first identify the scheme and purpose of the *Limitation Act* and then identify the interpretation of s. 6(4)(b) that best furthers its goals.

(2) *Scheme and Purpose of the Limitation Act*

In *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549, this Court affirmed its earlier identification of the traditional rationales of limitations statutes in *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, at pp. 29-30. Limitations statutes were held, at p. 29, to rest on “certainty, evidentiary, and diligence rationales”. In *M. (K.)*, *supra*, this Court noted at pp. 29-30:

Statutes of limitations have long been said to be statutes of repose. . . . The reasoning is straightforward enough. There comes a time, it is said, when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations. . . .

The second rationale is evidentiary and concerns the desire to foreclose claims based on stale evidence. Once the limitation period has lapsed, the potential defendant should no longer be concerned about the preservation of evidence relevant to the claim. . . .

Finally, plaintiffs are expected to act diligently and not “sleep on their rights”; statutes of limitation are an incentive for plaintiffs to bring suit in a timely fashion.

It is apparent that these rationales generally reflect the interests of the potential defendant: *Murphy v. Welsh*, [1993] 2 S.C.R. 1069, at pp. 1079-80, *per* Major J. They rest on the view that a potential

d’interprétation des lois. Le principe cardinal en la matière est qu’une disposition législative doit être interprétée de la manière qui assure le mieux la réalisation de son objet: voir *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, aux par. 21 et 22, le juge Iacobucci et *Interpretation Act*, R.S.B.C. 1996, ch. 238, art. 8. Suivant les règles subsidiaires d’interprétation des lois, chacune des parties d’un texte législatif doit avoir un sens et les lois doivent être interprétées de façon à ne pas avoir de conséquences absurdes: voir *Rizzo Shoes*, précité, au par. 27, le juge Iacobucci. Il incombe donc à notre Cour en l’espèce de déterminer l’esprit et l’objet de la *Limitation Act* pour ensuite établir l’interprétation de l’al. 6(4)(b) la plus compatible avec la réalisation de cet objet.

2) *Esprit et objet de la Limitation Act*

Dans l’arrêt *Peixeiro c. Haberman*, [1997] 3 R.C.S. 549, notre Cour a confirmé les justifications traditionnelles des lois sur la prescription des actions qu’elle avait exposées dans *M. (K.) c. M. (H.)*, [1992] 3 R.C.S. 6, aux pp. 29 et 30. Notre Cour a conclu, à la p. 29, que ces textes législatifs s’appuient sur «la certitude, la preuve et la diligence». Dans *M. (K.)*, précité, elle a signalé ce qui suit aux pp. 29 et 30:

On affirme depuis longtemps que les lois sur la prescription des actions sont des lois destinées à assurer la tranquillité d’esprit. [. . .] Le raisonnement est assez simple. Il arrive un moment, dit-on, où un éventuel défendeur devrait être raisonnablement certain qu’il ne sera plus redevable de ses anciennes obligations. . . .

La deuxième justification se rattache à la preuve et concerne la volonté d’empêcher les réclamations fondées sur des éléments de preuve périmés. Une fois écoulé le délai de prescription, le défendeur éventuel ne devrait plus avoir à conserver des éléments de preuve se rapportant à la réclamation. . . .

Enfin, on s’attend à ce que les demandeurs agissent avec diligence et ne «tardent pas à faire valoir leurs droits»; la prescription incite les demandeurs à intenter leurs poursuites en temps opportun.

Il appert que ces justifications reflètent généralement les intérêts de la personne susceptible d’être poursuivie: *Murphy c. Welsh*, [1993] 2 R.C.S. 1069, aux pp. 1079 et 1080, le juge Major. Elles

defendant should not have to defend a stale claim brought by a plaintiff who has chosen not to assert his or her rights diligently. Indeed, although there have traditionally been doctrines or statutory provisions that recognized the plaintiff's interests, such as the exceptions applicable to persons under a disability or victims of concealed frauds, limitations statutes have generally been oriented towards the interests of the potential defendant.

reposent sur l'idée qu'un éventuel défendeur ne devrait pas faire l'objet d'une action tardive intentée par un demandeur qui a choisi de ne pas agir avec célérité pour faire valoir ses droits. En effet, même si des principes juridiques ou des dispositions législatives ont traditionnellement reconnu les intérêts du demandeur, comme l'exception dont bénéficie la personne frappée d'incapacité ou la victime d'une fraude par dissimulation, les lois sur la prescription des actions ont généralement été conçues en fonction des intérêts de l'éventuel défendeur.

65 Over the last several decades, however, many legislatures have moved to modernize their limitations statutes, most of which were formerly based on diverse collections of centuries-old English statutes: see Law Reform Commission of British Columbia, *Report on Limitations, Part 2: General* (1974), at pp. 9-16; Alberta Law Reform Institute, Report No. 55, *Limitations* (1989), at pp. 15-16 and Appendix A. As part of this process, renewed attention has been given to ensuring that the limitations statutes are framed in a manner that addresses more consistently the plaintiff's interests, not just those of the defendant. This trend has also been reflected in the more balanced way that courts have sought to interpret these statutes. Arbitrary limitation dates have been discouraged in favour of a more contextual view of the parties' actual circumstances. To take just one example, it has been well-recognized that it is unfair for the limitation period to begin running until the plaintiff could reasonably have discovered that he or she had a cause of action: see *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2; *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147; *M. (K.)*, *supra*; *Peixeiro*, *supra*. Even on this new approach, however, limitation periods are not postponed on the plaintiff's whim. There is a burden on the plaintiff to act reasonably.

Au cours des dernières décennies, toutefois, de nombreux législateurs ont entrepris de moderniser ces textes législatifs qui, pour la plupart, s'inspiraient de lois anglaises datant de plusieurs centaines d'années: voir Law Reform Commission of British Columbia, *Report on Limitations, Part 2: General* (1974), aux pp. 9 à 16; Alberta Law Reform Institute, Report No. 55, *Limitations* (1989), aux pp. 15 et 16, et à l'annexe A. Dans le cadre de cette démarche, on a cherché à faire en sorte que les lois sur la prescription des actions tiennent compte plus systématiquement des intérêts du demandeur, et non seulement de ceux du défendeur. Ce mouvement s'est également traduit par une interprétation judiciaire plus nuancée de ces lois. La fixation arbitraire d'une date de prescription a été découragée au bénéfice d'un examen plus contextuel de la situation réelle des parties. Par exemple, il est établi qu'il est injuste que le délai de prescription commence à courir avant que le demandeur ait pu raisonnablement découvrir l'existence d'une cause d'action: voir *Kamloops (Ville de) c. Nielsen*, [1984] 2 R.C.S. 2; *Central Trust Co. c. Rafuse*, [1986] 2 R.C.S. 147; *M. (K.)*, précité; *Peixeiro*, précité. Cependant même avec cette nouvelle approche, les délais de prescription ne sont pas reportés au gré du demandeur. Ce dernier est tenu d'agir raisonnablement.

66 Contemporary limitations statutes thus seek to balance conventional rationales oriented towards the protection of the defendant — certainty, evidentiary, and diligence — with the need to treat plaintiffs fairly, having regard to their specific circumstances. As Major J. put it in *Murphy*, *supra*,

Les lois contemporaines sur la prescription des actions visent donc à établir un équilibre entre les justifications traditionnelles axées sur la protection du défendeur — la certitude, la preuve et la diligence — et la nécessité de faire preuve d'équité envers le demandeur compte tenu des circons-

“[a] limitations scheme must attempt to balance the interests of both sides” (p. 1080). See also *Peixeiro, supra*, at para. 39, per Major J.

tances qui lui sont propres. Comme l’a dit le juge Major dans l’arrêt *Murphy*, précité, «[u]n régime de prescription doit tenter d’établir un équilibre entre les intérêts des deux parties» (p. 1080). Voir également *Peixeiro*, précité, au par. 39, le juge Major.

The result of this legislative and interpretive evolution is that most limitations statutes may now be said to possess four characteristics. They are intended to: (1) define a time at which potential defendants may be free of ancient obligations, (2) prevent the bringing of claims where the evidence may have been lost to the passage of time, (3) provide an incentive for plaintiffs to bring suits in a timely fashion, and (4) account for the plaintiff’s own circumstances, as assessed through a subjective/objective lens, when assessing whether a claim should be barred by the passage of time. To the extent they are reflected in the particular words and structure of the statute in question, the best interpretation of a limitations statute seeks to give effect to each of these characteristics.

En raison de l’évolution de la législation et de son interprétation on peut désormais dire que la plupart des lois sur la prescription présentent quatre caractéristiques. Elles visent à 1) fixer un délai à l’expiration duquel le défendeur éventuel est libéré de ses obligations anciennes, 2) empêcher qu’une action ne soit intentée lorsque des éléments de preuve ont pu disparaître en raison de l’écoulement du temps, 3) inciter le demandeur à intenter une poursuite en temps opportun et 4) tenir compte des circonstances propres au demandeur, en recourant à une évaluation à la fois subjective et objective, lorsqu’il s’agit de déterminer si une action est prescrite. Dans la mesure où ces éléments se retrouvent dans le libellé et la structure de la loi considérée, la meilleure façon d’interpréter une loi sur la prescription des actions est de s’efforcer de donner effet à chacune de ces caractéristiques.

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The general scheme of the British Columbia *Limitation Act* reflects this evolution. Section 3 provides concrete limitation periods for most actions. Depending on the cause of action, an action must be commenced within two, six, or ten years after the date on which the right to bring it arose, i.e., the date on which all the elements of the cause of action came into existence: see s. 3(2), (3), (5) and (6); *Bera v. Marr* (1986), 1 B.C.L.R. (2d) 1 (C.A.).

L’économie générale de la *Limitation Act* de la Colombie-Britannique reflète cette évolution. L’article 3 prévoit des délais de prescription précis à l’égard de la plupart des actions. Suivant la cause d’action, le délai d’exercice de l’action est de deux, six ou dix ans, à compter de la naissance du droit d’action, c.-à-d. la date à laquelle tous les éléments de la cause d’action sont réunis: voir les par. 3(2), (3), (5) et (6); *Bera c. Marr* (1986), 1 B.C.L.R. (2d) 1 (C.A.).

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At the same time, the Act contains provisions aimed at treating plaintiffs fairly. For example, s. 6(3) to (5) reflect the common law view that it is unfair to the plaintiff if the running of time commences before the existence of the cause of action is reasonably discoverable. To determine when the running of time should commence for the enumerated actions, the court is generally directed to consider the actions of a reasonable person in the particular plaintiff’s circumstances. Except where certain claims are made against a trustee, the plain-

Par ailleurs, la Loi renferme des dispositions visant à assurer un traitement équitable au demandeur. Par exemple, les par. 6(3) et (5) reprennent le principe de common law selon lequel il est injuste pour le demandeur que le délai de prescription commence à courir avant que l’existence de la cause d’action ne puisse raisonnablement être découverte. Pour déterminer le point de départ du délai à l’égard des actions énumérées, le tribunal doit généralement examiner le comportement d’une personne raisonnable placée dans la situation

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tiff bears the burden of proving that, on the basis of these tests, the running of time has been postponed in a particular case: see s. 6(2), (6), and *Zeidan v. British Columbia*, [1989] B.C.J. No. 598 (QL) (S.C.). Section 7 of the Act allows the running of time to be postponed if the plaintiff is under a legal disability, a provision that is also directed to ensuring fairness to plaintiffs.

du demandeur. Sauf dans le cas de certaines actions dirigées contre un fiduciaire, il incombe au demandeur de prouver, en fonction de ces critères, que le point de départ du délai a été reporté dans un cas donné: voir les par. 6(2) et 6(6); *Zeidan c. British Columbia*, [1989] B.C.J. No. 598 (QL) (C.S.). L'article 7 de la Loi, qui vise également à assurer le traitement équitable du demandeur, permet le report du délai lorsque ce dernier est frappé d'incapacité juridique.

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Certainty and diligence, however, remain important goals. The running of time cannot be postponed indefinitely. Therefore, s. 8 of the Act sets forth a series of ultimate limitation periods, the length of which depends on the particular type of action in issue. Generally, regardless of whether the running of time has been postponed or the cause of action confirmed by the defendant, no action can be brought after the expiration of — depending on the classification of the action — six or thirty years after the date on which the right to bring the action arose. Where the plaintiff is a minor, the running of time for the purposes of the ultimate limitation period is postponed until he or she reaches the age of majority: see s. 8(2). Only upon the expiration of the relevant ultimate limitation period can the potential defendant truly be assured that no plaintiff may bring an action against him or her. At that time, any cause of action that was once available to the plaintiff is extinguished: see s. 9(1). See generally Law Reform Commission of British Columbia, *Report on the Ultimate Limitation Period: Limitation Act, Section 8* (1990), especially at pp. 21-23. With respect to the case on appeal, the appellant is protected by a six-year ultimate limitation period: see s. 8(1)(b).

La certitude et la diligence demeurent toutefois des objectifs importants. Le délai de prescription ne peut être reporté indéfiniment. C'est pourquoi l'art. 8 de la Loi établit une série de délais de prescription maximums dont la durée dépend du type d'action en cause. En général, peu importe qu'il y ait eu report ou que la cause d'action ait été confirmée par le défendeur, aucune action ne peut être intentée après que six ou trente ans — selon le type d'action — se sont écoulés depuis la date à laquelle le droit d'action a pris naissance. Lorsque le demandeur est mineur, le point de départ du délai de prescription maximum est reporté jusqu'à la date de la majorité: voir le par. 8(2). Ce n'est qu'à l'expiration du délai de prescription maximum applicable que le défendeur éventuel peut véritablement être assuré que personne ne pourra intenter une poursuite contre lui. Toute cause d'action ayant pris naissance au bénéfice du demandeur est alors éteinte: voir le par. 9(1). Voir généralement le document de la Commission de réforme de la Colombie-Britannique intitulé *Report on the Ultimate Limitation Period: Limitation Act, Section 8* (1990), en particulier les pp. 21 à 23. Dans la présente affaire, l'appelant bénéficie d'un délai de prescription maximum de six ans: voir l'al. 8(1)b).

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Viewed in this context, s. 6(4)(b) may be seen as operating to adjust the position of the limited window of time within which a plaintiff may bring an action. This section is constrained at one end by the specific date on which the cause of action actually arose in fact and, at the other end, by the ultimate limitation period of six or thirty years. Within that longer time period, and regardless of when it is considered to begin running, time may generally

Dans ce contexte, on peut considérer que l'al. 6(4)b) permet le déplacement dans le temps du délai dont dispose le demandeur pour agir. L'effet de cette disposition est limité à une extrémité par la date à laquelle prend naissance la cause d'action dans les faits et, à l'autre extrémité, par le délai de prescription maximum de six ou de trente ans. À l'intérieur de ce laps de temps plus long, et indépendamment de son point de départ, le délai

only be permitted to run for two, six, or ten years. The debate in this case is over the type of circumstances in which, within that larger period of time, the commencement of the limitation period for the initiation of an action that has a reasonable prospect of success should be postponed. The answer to this question must be resolved in a manner that maintains the traditional defendant-oriented rationales of limitations statutes, while also reflecting the modern need to balance those rationales against the plaintiff's circumstances and his or her interest in bringing an action to redress a wrong.

(3) Meaning of the Troublesome Phrase in Section 6(4)(b)

After stipulating that the identity of the defendant must be known to the plaintiff, s. 6(4) sets out the parameters of knowledge and advice that determine whether the commencement of the running of time will be postponed beyond the date on which the right to bring the action arose in fact. The question is whether a reasonable person, knowing the facts within the plaintiff's means of knowledge and having taken the appropriate advice a reasonable person would take on those facts, would regard those facts as showing both that the action would have a reasonable prospect of success (s. 6(4)(a)), and that the plaintiff "ought . . . to be able to bring an action", given the person's "own interests" and "circumstances" (s. 6(4)(b)). Time does not begin to run until both s. 6(4)(a) and s. 6(4)(b) are satisfied. The question before this Court is the meaning to be ascribed to the opaque phrase, "ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action". The word "ought" suggests an objective "reasonable person" standard. On the other hand, the reference to the plaintiff's "own interests" and "circumstances" introduces subjective considerations. How are the two to be reconciled?

The interpretation given to s. 6(4)(b) must give proper weight to: (1) the Legislature's inclusion of

ne peut généralement pas excéder deux, six ou dix ans. Le litige porte en l'espèce sur le genre de circonstances dans lesquelles, dans les limites de ce laps de temps plus long, il y a lieu de reporter le point de départ du délai dont dispose le demandeur pour intenter une action ayant une chance raisonnable d'être accueillie. Le litige doit être résolu de façon à préserver les justifications traditionnelles des lois sur la prescription des actions qui mettent le défendeur éventuel au premier plan, tout en reflétant la nécessité de la société moderne d'établir en équilibre entre ces justifications et la situation du demandeur et son intérêt à intenter une action pour obtenir réparation.

3) Sens énigmatique de la formule employée à l'alinéa 6(4)b)

Après avoir précisé que l'identité du défendeur doit être connue du demandeur, le par. 6(4) énonce les paramètres en matière de connaissance et d'avis qui permettent de déterminer si le point de départ du délai de prescription est reporté à une date ultérieure, autre que celle à laquelle le droit d'action a effectivement pris naissance. La question qu'il convient de poser est de savoir si une personne raisonnable, informée des faits à la portée des moyens de connaissance du demandeur et armée de l'avis approprié qu'une personne raisonnable obtiendrait relativement à ces faits, estimerait que les faits établissent à la fois que l'action a une chance raisonnable d'être accueillie (al. 6(4)a) et que le demandeur, «devrait, [. . .] être en mesure d'intenter une action» (al. 6(4)b)). Le délai ne court que si les conditions établies aux al. 6(4)a) et b) sont remplies. Notre Cour doit se prononcer sur le sens de l'énoncé obscur suivant: «devrait, dans son intérêt et compte tenu des circonstances qui lui sont propres, être en mesure d'intenter une action». Le mot «devrait» suggère l'application d'une norme objective fondée sur le comportement d'une «personne raisonnable». En revanche, les mots «dans son intérêt [celui du demandeur] et compte tenu des circonstances qui lui sont propres» introduisent un élément subjectif. Comment les concilier?

L'interprétation de l'al. 6(4)b) doit dûment tenir compte 1) du choix, par le législateur, d'une norme

Tab 9

A. *The Constitutional Framework*(1) The Inherent Jurisdiction of Superior Courts

[17] Canada's provincial superior courts are the descendants of the Royal Courts of Justice and inherited the powers and jurisdiction exercised by superior, district or county courts at the time of Confederation (*Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, at pp. 326-27, *per* Estey J.). As such, superior courts play a central role in maintaining the rule of law, uniformity in our judicial system and the constitutional balance in our country.

[18] The essential nature and powers of the superior courts are constitutionally protected by s. 96 of the *Constitution Act, 1867*. Accordingly, the "core or inherent jurisdiction which is integral to their operations . . . cannot be removed from the superior courts by either level of government, without amending the Constitution" (*MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, at para. 15). The rationale for s. 96 has evolved to ensure "the maintenance of the rule of law through the protection of the judicial role" (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 ("Provincial Judges Reference"), at para. 88).

[19] In *MacMillan Bloedel*, a majority of this Court described the powers at the core of a superior court's jurisdiction as comprising "those powers which are essential to the administration of justice and the maintenance of the rule of law" (para. 38), which define the court's "essential character" or "immanent attribute" (para. 30). The core is "a very narrow one which includes only critically important jurisdictions which are essential to the existence of a superior court of inherent jurisdiction and to the preservation of its foundational role within our legal system" (*Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 S.C.R. 186, at para. 56, *per* Lamer C.J.).

A. *Le cadre constitutionnel*(1) La compétence inhérente d'une cour supérieure

[17] Au Canada, les cours supérieures des provinces sont les descendantes des cours royales de justice et elles ont hérité des pouvoirs et de la compétence des cours supérieures, de district ou de comté qui existaient au moment de la Confédération (*Procureur général du Canada c. Law Society of British Columbia*, [1982] 2 R.C.S. 307, p. 326-327, le juge Estey). Elles jouent donc un rôle central dans le maintien de la primauté du droit, de l'uniformité du système judiciaire et de l'équilibre constitutionnel canadien.

[18] La nature essentielle et les pouvoirs des cours supérieures sont protégés par l'art. 96 de la *Loi constitutionnelle de 1867*. Par conséquent, « [a]ucun des ordres de gouvernement ne peut retirer à une cour supérieure cette compétence fondamentale [. . .] sans que ne soit modifiée la Constitution » (*MacMillan Bloedel Ltd. c. Simpson*, [1995] 4 R.C.S. 725, par. 15). La raison d'être de l'art. 96 a évolué de manière à garantir « [le] maintien de la primauté du droit par la protection du rôle des tribunaux » (*Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3 (« *Renvoi relatif aux juges de la Cour provinciale* »), par. 88).

[19] Dans l'arrêt *MacMillan Bloedel*, les juges majoritaires de la Cour considèrent que la compétence fondamentale d'une cour supérieure englobe « les pouvoirs qui sont essentiels à l'administration de la justice et au maintien de la primauté du droit » (par. 38), ce qui confère à la cour son « caractère essentiel » ou « attribut immanent » (par. 30). La compétence fondamentale « est très limitée et ne comprend que les pouvoirs qui ont une importance cruciale et qui sont essentiels à l'existence d'une cour supérieure dotée de pouvoirs inhérents et au maintien de son rôle vital au sein de notre système juridique » (*Renvoi relatif à certaines modifications à la Residential Tenancies Act (N.-É.)*, [1996] 1 R.C.S. 186, par. 56, le juge en chef Lamer).

[20] In his 1970 article, “The Inherent Jurisdiction of the Court”, 23 *Curr. Legal Probs.* 23, which has been cited by this Court on eight separate occasions,¹ I. H. Jacob provided the following definition of inherent jurisdiction:

. . . the inherent jurisdiction of the court may be defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them. [p. 51]

[21] As noted by this Court in *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78, at para. 24:

These powers are derived “not from any statute or rule of law, but from the very nature of the court as a superior court of law” (Jacob, at p. 27) to enable “the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner” (p. 28).

[22] In spite of its amorphous nature, providing the foundation for powers as diverse as contempt of court, the stay of proceedings and judicial review,

[20] Dans un article paru en 1970 intitulé « The Inherent Jurisdiction of the Court », 23 *Curr. Legal Probs.* 23, que notre Cour cite dans huit arrêts¹, I. H. Jacob propose de définir comme suit la compétence inhérente :

[TRADUCTION] . . . la compétence inhérente de la cour peut être définie comme étant la réserve ou le fonds de pouvoirs, une source résiduelle de pouvoirs à laquelle la cour peut puiser au besoin lorsqu’il est juste ou équitable de le faire et, en particulier, pour veiller à l’application régulière de la loi, empêcher les abus, garantir un procès équitable aux parties et rendre justice. [p. 51]

[21] Comme le fait observer la Cour dans *R. c. Caron*, 2011 CSC 5, [2011] 1 R.C.S. 78, par. 24 :

Ces pouvoirs émanent « non pas d’une loi ou d’une règle de droit, mais de la nature même de la cour en tant que cour supérieure de justice » (Jacob, p. 27) pour permettre « de maintenir, protéger et remplir leur fonction qui est de rendre justice, dans le respect de la loi, d’une manière régulière, ordonnée et efficace » (p. 28).

[22] Malgré ses contours flous, la théorie de la compétence inhérente, qui fonde des pouvoirs aussi divers que la déclaration d’outrage au tribunal,

¹ *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] 1 S.C.R. 549, at pp. 591-92, *per* Wilson J. (granting leave to appeal to a non-party); *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, at p. 240 (issuing injunction on the court’s own motion to guarantee access to court facilities); *R. v. Morales*, [1992] 3 S.C.R. 711, at pp. 754-55, *per* Gonthier J. (discretion regarding bail); *R. v. Hinse*, [1995] 4 S.C.R. 597, at para. 21, *per* Lamer C.J. (stay of criminal proceedings for abuse of process); *MacMillan Bloedel*, at paras. 29-31, *per* Lamer C.J. (punishing for contempt out of court); *R. v. Rose*, [1998] 3 S.C.R. 262, at para. 64, *per* L’Heureux-Dubé J., and at para. 131, *per* Cory, Iacobucci and Bastarache JJ. (discretion to grant a right of reply in a criminal trial); *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 18 (authority to refuse defence counsel’s request to withdraw); *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78, at paras. 24-34, *per* Binnie J. (granting interim costs).

¹ *Société des Acadiens du Nouveau-Brunswick Inc. c. Association of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] 1 R.C.S. 549, p. 591-592, la juge Wilson (autorisation d’appel accordée à une personne non partie à l’instance); *B.C.G.E.U. c. Colombie-Britannique (Procureur général)*, [1988] 2 R.C.S. 214, p. 240 (injonction décernée de la propre initiative de la cour pour garantir l’accès aux palais de justice); *R. c. Morales*, [1992] 3 R.C.S. 711, p. 754-755, le juge Gonthier (pouvoir discrétionnaire en matière de mise en liberté sous caution); *R. c. Hinse*, [1995] 4 R.C.S. 597, par. 21, le juge en chef Lamer (arrêt des procédures criminelles pour cause d’abus de procédures); *MacMillan Bloedel*, par. 29-31, le juge en chef Lamer (condamnation pour outrage au tribunal); *R. c. Rose*, [1998] 3 R.C.S. 262, par. 64, la juge L’Heureux-Dubé, et par. 131, les juges Cory, Iacobucci et Bastarache (pouvoir discrétionnaire d’accorder un droit de réplique dans un procès criminel); *R. c. Cunningham*, 2010 CSC 10, [2010] 1 R.C.S. 331, par. 18 (pouvoir de rejeter la requête pour cesser d’occuper présentée par l’avocat de la défense); *R. c. Caron*, 2011 CSC 5, [2011] 1 R.C.S. 78, par. 24-34, le juge Binnie (octroi d’une provision pour frais).

the doctrine of inherent jurisdiction does not operate without limits.²

[23] It has long been settled that the way in which superior courts exercise their powers may be structured by Parliament and the legislatures (see *MacMillan Bloedel*, at para. 78, *per* McLachlin J., dissenting on other grounds). As Jacob notes (at p. 24): “. . . the court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or by rule of court, so long as it can do so without contravening any statutory provision” (emphasis added) (see also *Caron*, at para. 32).

[24] Further, even where there are no legislative limits, the inherent jurisdiction of the court is limited by the institutional roles and capacities that emerge out of our constitutional framework and values (see *Provincial Judges Reference*, at para. 108).

[25] These limits were recognized in a thoughtful thesis on inherent jurisdiction written by Jonathan Desjardins Mallette:

[TRANSLATION] As for the unwritten [constitutional] structural principles, they are particularly relevant to determining the limits of the exercise of the inherent jurisdiction of the courts. They require the courts to take into account the structure of our Constitution, which includes other fundamental principles, such as the rule of law and parliamentary supremacy.

(La constitutionnalisation de la juridiction inhérente au Canada: origines et fondements, unpublished LL.M. thesis, Université de Montréal (2007), reproduced in the Attorney General of Quebec's book of authorities, vol. II, at p. 375.)

[26] With the advent of the *Charter*, the superior courts' inherent jurisdiction must also support

l'arrêt des procédures et le contrôle judiciaire, ne s'applique pas sans réserves².

[23] Il est établi depuis longtemps que la manière dont les cours supérieures exercent leurs pouvoirs peut être structurée par le Parlement et les législatures (voir *MacMillan Bloedel*, par. 78, la juge McLachlin, dissidente sur d'autres points). Comme le fait observer Jacob (p. 24), [TRADUCTION] « la cour peut exercer sa compétence inhérente même à l'égard de questions qui sont régies par une loi ou par une règle de la cour, à condition qu'elle puisse le faire sans enfreindre une disposition législative » (je souligne) (voir aussi *Caron*, par. 32).

[24] Qui plus est, même lorsqu'il n'y a pas de restrictions législatives, la compétence inhérente de la cour est limitée par les fonctions et les compétences institutionnelles qui se dégagent du cadre et des valeurs constitutionnels (voir *Renvoi relatif aux juges de la Cour provinciale*, par. 108).

[25] Dans sa thèse réfléchie sur la compétence inhérente, Jonathan Desjardins Mallette reconnaît ces limites :

Pour leur part, les principes structurels non écrits sont particulièrement pertinents pour déterminer les limites de l'exercice de la [compétence] inhérente par les tribunaux. Ils obligent les tribunaux à tenir compte de la structure de notre Constitution qui comprend d'autres principes fondamentaux tels que la primauté du droit et la suprématie parlementaire.

(La constitutionnalisation de la juridiction inhérente au Canada : origines et fondements, mémoire de maîtrise non-publié, Université de Montréal (2007), reproduite dans le recueil de sources du procureur général du Québec, vol. II, p. 375.)

[26] Depuis l'adoption de la *Charte*, la compétence inhérente doit aussi permettre à une

² These limits are a topic that has also been considered by the highest courts in the United Kingdom and Australia, see *Al Rawi v. Security Service*, [2011] UKSC 34, [2012] 1 A.C. 531, at paras. 18-22, *per* Lord Dyson J.S.C.; *Batistatos v. Roads and Traffic Authority of New South Wales*, [2006] HCA 27, 227 A.L.R. 425, at paras. 121-36, *per* Kirby J.

² Ces réserves ont également été examinées par les plus hauts tribunaux du Royaume-Uni et d'Australie : voir *Al Rawi c. Security Service*, [2011] UKSC 34, [2012] 1 A.C. 531, par. 18-22, le lord juge Dyson; *Batistatos c. Roads and Traffic Authority of New South Wales*, [2006] HCA 27, 227 A.L.R. 425, par. 121-136, le juge Kirby.

their independence in safeguarding the values and principles the *Charter* has entrenched in our constitutional order. Thus, the inherent jurisdiction of superior courts provides powers that are essential to the administration of justice and the maintenance of the rule of law and the Constitution. It includes those residual powers required to permit the courts to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner — subject to any statutory provisions. I would add, however, that the powers recognized as part of the courts' inherent jurisdiction are limited by the separation of powers that exists among the various players in our constitutional order and by the particular institutional capacities that have evolved from that separation.

(2) Separation of Powers

[27] This Court has long recognized that our constitutional framework prescribes different roles for the executive, legislative and judicial branches (see *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, at pp. 469-70). The content of these various constitutional roles has been shaped by the history and evolution of our constitutional order (see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 49-52).

[28] Over several centuries of transformation and conflict, the English system evolved from one in which power was centralized in the Crown to one in which the powers of the state were exercised by way of distinct organs with separate functions. The development of separate executive, legislative and judicial functions has allowed for the evolution of certain core competencies in the various institutions vested with these functions. The legislative branch makes policy choices, adopts laws and holds the purse strings of government, as only it can authorize the spending of public funds. The executive implements and administers those policy choices and laws with the assistance of a professional public service. The judiciary maintains the rule of law, by interpreting and applying these laws through the independent

cour supérieure de préserver avec indépendance les valeurs et les principes consacrés par la *Charte* dans notre régime constitutionnel. Cette compétence confère donc les pouvoirs essentiels à l'administration de la justice et au respect de la primauté du droit et de la Constitution. Elle englobe le pouvoir résiduel dont la cour a besoin pour s'acquitter de sa fonction judiciaire qui consiste à administrer la justice d'une manière régulière, ordonnée et efficace, sous réserve de toute disposition législative. J'ajoute cependant que les pouvoirs dont on reconnaît qu'ils font partie de la compétence inhérente sont balisés par la séparation des pouvoirs entre les différents acteurs dans l'ordre constitutionnel et par les attributions institutionnelles particulières qui ont résulté de cette séparation.

(2) La séparation des pouvoirs

[27] La Cour reconnaît depuis longtemps que notre cadre constitutionnel attribue des fonctions différentes à l'exécutif, au législatif et au judiciaire (voir *Fraser c. Commission des relations de travail dans la Fonction publique*, [1985] 2 R.C.S. 455, p. 469-470). La teneur de ces rôles différents a été façonnée par l'histoire et l'évolution de notre ordre constitutionnel (voir *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217, par. 49-52).

[28] Au fil de plusieurs siècles de transformation et de conflits, le système anglais est passé d'un régime où la Couronne détenait tous les pouvoirs à un régime où des organes indépendants aux fonctions distinctes les exercent. L'évolution de fonctions exécutive, législative et judiciaire distinctes a permis l'acquisition de certaines compétences essentielles par les diverses institutions appelées à exercer ces fonctions. Le pouvoir législatif fait des choix politiques, adopte des lois et tient les cordons de la bourse de l'État, car lui seul peut autoriser l'affectation de fonds publics. L'exécutif met en œuvre et administre ces choix politiques et ces lois par le recours à une fonction publique compétente. Le judiciaire assure la primauté du droit en interprétant et en appliquant ces lois dans le cadre de renvois et de litiges sur lesquels il statue

and impartial adjudication of references and disputes, and protects the fundamental liberties and freedoms guaranteed under the *Charter*.

[29] All three branches have distinct institutional capacities and play critical and complementary roles in our constitutional democracy. However, each branch will be unable to fulfill its role if it is unduly interfered with by the others. In *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, McLachlin J. affirmed the importance of respecting the separate roles and institutional capacities of Canada's branches of government for our constitutional order, holding that "[i]t is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other" (p. 389).³

[30] Accordingly, the limits of the court's inherent jurisdiction must be responsive to the proper function of the separate branches of government, lest it upset the balance of roles, responsibilities and capacities that has evolved in our system of governance over the course of centuries.

[31] Indeed, even where courts have the jurisdiction to address matters that fall within the constitutional role of the other branches of government, they must give sufficient weight to the constitutional responsibilities of the legislative and executive branches, as in certain cases the other branch will be "better placed to make such decisions within a range of constitutional options" (*Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 37).

³ The normative force of the separation of powers has been recognized by this Court on multiple occasions since *New Brunswick Broadcasting*. See *R. v. Power*, [1994] 1 S.C.R. 601, at pp. 620-21; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at paras. 33-34 and 106-11; *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, [2004] 3 S.C.R. 381, at paras. 104-5; *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667, at para. 21; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at paras. 39-41.

de manière indépendante et impartiale, et il défend les libertés fondamentales garanties par la *Charte*.

[29] Les trois pouvoirs ont des attributions institutionnelles distinctes et jouent des rôles à la fois cruciaux et complémentaires dans notre démocratie constitutionnelle. Toutefois, un pouvoir ne peut jouer son rôle lorsqu'un autre empiète indûment sur lui. Dans *New Brunswick Broadcasting Co. c. Nouvelle-Écosse (Président de l'Assemblée législative)*, [1993] 1 R.C.S. 319, la juge McLachlin confirme l'importance de respecter les fonctions et les attributions distinctes des pouvoirs de l'État canadien pour ce qui est de notre ordre constitutionnel et elle conclut qu'« il est essentiel que toutes ces composantes jouent le rôle qui leur est propre. Il est également essentiel qu'aucune [. . .] n'outrepasse ses limites et que chacune respecte de façon appropriée le domaine légitime de compétence de l'autre » (p. 389)³.

[30] Par conséquent, la compétence inhérente de la cour doit être limitée au regard de la fonction propre à chacun des pouvoirs distincts, sous peine de rupture de l'équilibre des fonctions et des attributions issu de l'évolution de notre système de gouvernement au fil des siècles.

[31] En effet, même le tribunal doté du pouvoir de connaître de questions qui relèvent constitutionnellement des autres composantes de l'État doit accorder suffisamment d'importance aux attributions constitutionnelles des pouvoirs législatif et exécutif car, dans certains cas, l'autre pouvoir « est mieux placé pour prendre ces décisions dans le cadre des choix constitutionnels possibles » (*Canada (Premier ministre) c. Khadr*, 2010 CSC 3, [2010] 1 R.C.S. 44, par. 37).

³ Depuis cet arrêt, notre Cour a maintes fois reconnu la force normative de la séparation des pouvoirs. Voir *R. c. Power*, [1994] 1 R.C.S. 601, p. 620-621; *Doucet-Boudreau c. Nouvelle-Écosse (Ministre de l'Éducation)*, 2003 CSC 62, [2003] 3 R.C.S. 3, par. 33-34 et 106-111; *Terre-Neuve (Conseil du Trésor) c. N.A.P.E.*, 2004 CSC 66, [2004] 3 R.C.S. 381, par. 104-105; *Canada (Chambre des communes) c. Vaid*, 2005 CSC 30, [2005] 1 R.C.S. 667, par. 21; *Canada (Premier ministre) c. Khadr*, 2010 CSC 3, [2010] 1 R.C.S. 44, par. 39-41.

Tab 10

by the principles set out in previous decisions, and the approach these decisions mandate to interpreting s. 24 of the *Charter*.

A. *Section 24: Principles of Interpretation*

17 In interpreting the phrase “court of competent jurisdiction”, we must keep in mind four related propositions. These propositions have informed the Court’s approach to s. 24 since it first considered this provision in *Mills*.

18 First, s. 24(1), like all *Charter* provisions, commands a broad and purposive interpretation. This section forms a vital part of the *Charter*, and must be construed generously, in a manner that best ensures the attainment of its objects: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 155; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, at p. 1134. Moreover, it is remedial, and hence benefits from the general rule of statutory interpretation that accords remedial statutes a “large and liberal” interpretation: *British Columbia Development Corp. v. Friedmann*, [1984] 2 S.C.R. 447, at p. 458; *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 S.C.R. 32, at para. 21. Finally, and most importantly, the language of this provision appears to confer the widest possible discretion on a court to craft remedies for violations of *Charter* rights. In *Mills*, McIntyre J. observed at p. 965 that “[i]t is difficult to imagine language which could give the court a wider and less fettered discretion”. This broad remedial mandate for s. 24(1) should not be frustrated by a “[n]arrow and technical” reading of the provision (see *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, at p. 366).

19 The second proposition flows from the first: s. 24 must be interpreted in a way that achieves its

nous suivons les principes énoncés dans les arrêts antérieurs et l’approche prescrite par ceux-ci aux fins d’interprétation de l’art. 24 de la *Charte*.

A. *L’article 24 : principes d’interprétation*

Dans l’interprétation de l’expression « tribunal compétent », nous devons garder à l’esprit quatre propositions connexes, qui inspirent l’approche appliquée par notre Cour pour l’interprétation de l’art. 24 depuis qu’elle a examiné cette disposition pour la première fois dans l’arrêt *Mills*.

Premièrement, comme toutes les autres dispositions de la *Charte*, le par. 24(1) commande une interprétation large et téléologique. Il constitue une partie essentielle de la *Charte* et doit être interprété de la manière la plus généreuse qui soit compatible avec la réalisation de son objet : *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, p. 344; *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, p. 155; *Compagnie des chemins de fer nationaux du Canada c. Canada (Commission canadienne des droits de la personne)*, [1987] 1 R.C.S. 1114, p. 1134. Il s’agit en outre d’une disposition réparatrice qui, de ce fait, bénéficie de la règle générale d’interprétation législative selon laquelle les lois réparatrices reçoivent une interprétation « large et libérale » : *British Columbia Development Corp. c. Friedmann*, [1984] 2 R.C.S. 447, p. 458; *Régie des transports en commun de la région de Toronto c. Dell Holdings Ltd.*, [1997] 1 R.C.S. 32, par. 21. Dernière considération et élément le plus important : le texte de cette disposition paraît accorder au tribunal le plus vaste pouvoir discrétionnaire possible aux fins d’élaboration des réparations applicables en cas de violations des droits garantis par la *Charte*. Dans l’arrêt *Mills*, précité, le juge McIntyre a fait remarquer qu’« [i]l est difficile de concevoir comment on pourrait donner au tribunal un pouvoir discrétionnaire plus large et plus absolu » (p. 965). Il ne faut pas que ce large mandat réparateur du par. 24(1) soit mis en échec par une interprétation « étroite et formaliste » de la disposition (voir *Law Society of Upper Canada c. Skapinker*, [1984] 1 R.C.S. 357, p. 366).

La deuxième proposition découle de la première : il faut interpréter l’art. 24 de façon à permettre la

purpose of upholding *Charter* rights by providing effective remedies for their breach. If the Court's past decisions concerning s. 24(1) can be reduced to a single theme, it is that s. 24(1) must be interpreted in a manner that provides a full, effective and meaningful remedy for *Charter* violations: *Mills, supra*, at pp. 881-82 (*per* Lamer J.), p. 953 (*per* McIntyre J.); *Mooring, supra*, at paras. 50-52 (*per* Major J.). As Lamer J. observed in *Mills*, s. 24(1) “establishes the right to a remedy as the foundation stone for the effective enforcement of *Charter* rights” (p. 881). Through the provision of an enforcement mechanism, s. 24(1) “above all else ensures that the *Charter* will be a vibrant and vigorous instrument for the protection of the rights and freedoms of Canadians” (p. 881).

Section 24(1)'s interpretation necessarily resonates across all *Charter* rights, since a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach. From the outset, this Court has characterized the purpose of s. 24(1) as the provision of a “direct remedy” (*Mills, supra*, p. 953, *per* McIntyre J.). As Lamer J. stated in *Mills*, “[a] remedy must be easily available and constitutional rights should not be ‘smothered in procedural delays and difficulties’” (p. 882). Anything less would undermine the role of s. 24(1) as a cornerstone upon which the rights and freedoms guaranteed by the *Charter* are founded, and a critical means by which they are realized and preserved.

The third proposition guiding the interpretation of s. 24 is that subs. (1) and (2) must be read together to create a harmonious interpretation. The conjunction of the two subsections, one dealing with remedies in general and the other dealing with exclusion of evidence that would bring the administration of justice into disrepute, suggests that both are concerned with providing remedies for *Charter* breaches. Moreover, the remedies under each of the two subsections are confined to “court[s] of competent jurisdiction”. Thus this phrase must be

réalisation de son objet, qui est de protéger les droits garantis par la *Charte* en assurant des réparations efficaces en cas d'atteintes à ceux-ci. Si la jurisprudence de notre Cour concernant le par. 24(1) peut être réduite à un thème, on peut dire que le par. 24(1) doit être interprété de manière à assurer une réparation complète, efficace et utile à l'égard des violations de la *Charte* : *Mills*, précité, p. 881-882 (le juge Lamer), p. 953 (le juge McIntyre); *Mooring*, précité, par. 50-52 (le juge Major). Comme l'a indiqué le juge Lamer dans l'arrêt *Mills*, le par. 24(1) « fait du droit à une réparation la pierre angulaire de la mise en œuvre effective des droits accordés par la *Charte* » (p. 881). C'est l'établissement d'une voie de recours par le par. 24(1) qui « avant tout fera de la *Charte* un instrument éloquent et vigoureux de protection des droits et des libertés des Canadiens » (p. 881).

L'effet de l'interprétation du par. 24(1) se répercute nécessairement sur tous les droits garantis par la *Charte*, puisqu'un droit, aussi étendu soit-il en théorie, est aussi efficace que la réparation prévue en cas de violation, sans plus. Dès le départ, notre Cour a jugé que le par. 24(1) avait pour objet de fournir une « réparation directe » (*Mills*, précité, p. 953, le juge McIntyre). Pour reprendre les propos du juge Lamer dans l'arrêt *Mills*, « [l]a réparation doit pouvoir s'obtenir facilement et les droits constitutionnels ne devraient pas être [TRADUCTION] “étouffés dans les délais et les difficultés de procédure” » (p. 882). Exiger moins minerait le rôle que joue le par. 24(1) en tant que pierre angulaire sur laquelle reposent les droits et libertés garantis par la *Charte* et que mécanisme essentiel à leur concrétisation et à leur protection.

Selon la troisième proposition guidant l'interprétation de l'art. 24, les par. 24(1) et (2) doivent être lus en corrélation pour créer une interprétation harmonieuse. La combinaison des deux paragraphes, l'un portant sur les réparations en général et l'autre sur l'exclusion des éléments de preuve susceptibles de déconsidérer l'administration de la justice, tend à indiquer qu'ils visent tous deux à fournir des réparations à l'égard des violations de la *Charte*. De plus, seuls les « tribunaux compétents » peuvent accorder les réparations

interpreted in a way that produces just and workable results for both the grant of general remedies and the exclusion of evidence in particular.

22 The final proposition is that s. 24 should not be read so broadly that it endows courts and tribunals with powers that they were never intended to exercise. The jurisdictions of Canada's various courts and tribunals are fixed by Parliament and the legislatures, not by judges: *Mills, supra*, at p. 952 (*per* McIntyre J.). It is Parliament or the legislature that determines if a court or tribunal is a "court of competent jurisdiction": *Weber, supra*, at para. 65. Legislative intention is the guiding light in identifying courts of competent jurisdiction.

23 As McIntyre J. cautioned in *Mills, supra*, at p. 953, the *Charter* was not intended to "turn the Canadian legal system upside down". The task facing the court is to interpret s. 24(1) in a manner that provides direct access to *Charter* remedies while respecting, so far as possible, "the existing jurisdictional scheme of the courts": *Mills*, at p. 953 (*per* McIntyre J.); see also the comments of La Forest J. (at p. 971) and Lamer J. (at p. 882) in the same case; and *Weber, supra*, at para. 63. The framers of the *Charter* did not intend to erase the constitutional distinctions between different types of courts, nor to intrude on legislative powers more than necessary to achieve the aims of the *Charter*.

24 In summary, the task of the court in interpreting s. 24 of the *Charter* is to achieve a broad, purposive interpretation that facilitates direct access to appropriate and just *Charter* remedies under ss. 24(1) and (2), while respecting the structure and practice of the existing court system and the exclusive role of Parliament and the legislatures in prescribing the jurisdiction of courts and tribunals. With these

prévues par ces deux paragraphes. Par conséquent, il faut interpréter cette expression de façon à produire des résultats justes et applicables en ce qui concerne l'octroi de réparations en général et l'exclusion d'éléments de preuve en particulier.

Conformément à la dernière proposition, l'art. 24 ne doit pas être interprété de façon si large qu'il aurait pour effet d'investir les tribunaux judiciaires et administratifs de pouvoirs qu'ils n'ont jamais été censés exercer. Ce sont le Parlement et les législatures, et non pas les juges, qui définissent la compétence des différents tribunaux judiciaires et administratifs canadiens : *Mills*, précité, p. 952 (le juge McIntyre). C'est le Parlement ou la législature concernée qui décide si un tribunal judiciaire ou administratif est un « tribunal compétent » : *Weber*, précité, par. 65. L'intention du législateur est le phare qui permet d'identifier les tribunaux compétents.

Conformément à la mise en garde faite par le juge McIntyre dans l'arrêt *Mills*, précité, p. 953, la *Charte* n'est pas censée « provoquer le bouleversement du système judiciaire canadien ». Les tribunaux ont pour tâche d'interpréter le par. 24(1) de manière à permettre aux justiciables d'avoir accès directement aux réparations prévues par la *Charte*, tout en respectant, dans la mesure du possible, « le régime existant de compétence des tribunaux » : *Mills*, p. 953 (le juge McIntyre); voir aussi les commentaires des juges La Forest (à la p. 971) et Lamer (à la p. 882) dans le même arrêt; et *Weber*, précité, par. 63. Les rédacteurs de la *Charte* ne voulaient pas supprimer les distinctions que fait la Constitution entre les différents types de tribunaux ni empiéter plus que de besoin sur les pouvoirs législatifs pour réaliser les objectifs de la *Charte*.

En résumé, le tribunal appelé à interpréter l'art. 24 de la *Charte* doit faire une interprétation large et téléologique, propre à faciliter l'accès direct aux réparations convenables et justes prévues par les par. 24(1) et (2) de la *Charte*, tout en respectant la structure et les pratiques du système judiciaire existant ainsi que le rôle qui appartient en exclusivité au Parlement et aux législatures, savoir celui de fixer

guiding principles in mind, I return to the question at the heart of this appeal: when does a court or tribunal possess “power to grant the remedy sought”, such that it satisfies the final branch of the *Mills* test of a court of competent jurisdiction?

B. *When Does a Court or Tribunal Have the “Power to Grant the Remedy Sought”?*

Whether a court or tribunal enjoys the “power to grant the remedy sought” is, first and foremost, a matter of discerning the intention of Parliament or the Legislature. The governing question in every case is whether the legislator endowed the court or tribunal with the power to pronounce on *Charter* rights and to grant the remedy sought for the breach of these rights.

Section 24 does not confer jurisdiction on any court or tribunal; rather, the power of the tribunal to grant the remedy sought must emanate from a source other than the *Charter* itself: *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at p. 222. Where, as here, the tribunal in question is a creature of statute, this power must derive from its enabling legislation. It is a fundamental principle that statutory bodies may perform only those tasks assigned to them by Parliament or one of the provincial legislatures, and in performing those tasks they have at their disposal only those powers granted to them expressly or impliedly: *Doyle v. The Queen*, [1977] 1 S.C.R. 597, at p. 602; R. W. Macaulay and J. L. H. Sprague, *Practice and Procedure Before Administrative Tribunals* (loose-leaf), vol. 3, at pp. 23-17 *et seq.* The enactment of the *Charter* did not alter this fundamental tenet: it remains the role of Parliament and the legislatures, and not the judiciary, to assign jurisdiction to the various courts and tribunals comprising our legal system.

la compétence des tribunaux judiciaires et administratifs. Gardant ces principes directeurs à l’esprit, je reviens à la question qui est au cœur du présent pourvoi : Dans quels cas un tribunal judiciaire ou administratif possède-t-il le « pouvoir d’accorder la réparation demandée », respectant ainsi le dernier volet du critère établi dans *Mills* pour déterminer si un organisme donné est un tribunal compétent?

B. *Quand un tribunal judiciaire ou administratif a-t-il le « pouvoir d’accorder la réparation demandée »?*

Pour déterminer si un tribunal judiciaire ou administratif possède le « pouvoir d’accorder la réparation demandée », il faut d’abord et avant tout dégager l’intention du Parlement ou de la législature. La question déterminante dans chaque cas est de savoir si le législateur a investi le tribunal en question du pouvoir de statuer sur les droits garantis par la *Charte* et d’accorder la réparation demandée en cas de violation de ces droits.

L’article 24 n’a pas pour effet de conférer compétence à quelque tribunal judiciaire ou administratif que ce soit; le pouvoir du tribunal d’accorder la réparation demandée doit émaner d’une autre source que la *Charte* elle-même : *Singh c. Ministre de l’Emploi et de l’Immigration*, [1985] 1 R.C.S. 177, p. 222. Lorsque, comme en l’espèce, le tribunal a été créé par une loi, ce pouvoir doit découler de la loi habilitante. Selon un principe fondamental, les organismes créés par une loi ne peuvent accomplir que les tâches qui leur ont été confiées par le Parlement ou la législature provinciale concernée et, dans l’exécution de ces tâches, ils ne disposent que des pouvoirs qui leur ont été accordés explicitement ou implicitement : *Doyle c. La Reine*, [1977] 1 R.C.S. 597, p. 602; R. W. Macaulay et J. L. H. Sprague, *Practice and Procedure Before Administrative Tribunals* (éd. feuilles mobiles), vol. 3, p. 23-17 et suiv. L’édiction de la *Charte* n’a pas modifié ce précepte fondamental : il appartient toujours au Parlement et aux législatures, et non pas aux tribunaux, d’attribuer compétence aux tribunaux judiciaires et administratifs qui composent notre système judiciaire.

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Tab 11

2. *If the imposition of the four-year mandatory minimum sentence violated s. 12 of the Charter in the circumstances of this case, was the trial judge entitled to grant a constitutional exemption from the four-year minimum and to impose a lesser sentence?*

[33] Having found that the four-year minimum sentence of imprisonment required by s. 236(a) does not violate Constable Ferguson's right not to suffer cruel and unusual punishment contrary to s. 12 of the *Charter*, it is not necessary to consider whether a constitutional exemption would have been available had we found a violation of s. 12. As the Court of Appeal recognized, however, there has been considerable debate and disagreement in the lower courts as to whether the remedy of a constitutional exemption is available. The matter having been fully argued, it is appropriate to settle the question of whether a constitutional exemption would have been available to Constable Ferguson, had the minimum sentence violated s. 12 of the *Charter*.

[34] I note at the outset that the issue is not *whether* a remedy lies to prevent the imposition of cruel and unusual punishment contrary to the *Charter*, but *which* remedies are available. The imposition of cruel and unusual punishment contrary to ss. 12 and 1 of the *Charter* cannot be countenanced. A court which has found a violation of a *Charter* right has a duty to provide an effective remedy. The only issue is whether a law imposing such punishment can be permitted to stand subject to constitutional exemptions in particular cases, or whether the only remedy is a declaration that the law is inconsistent with the *Charter* and hence falls under s. 52 of the *Constitution Act, 1982*.

[35] Two remedial provisions govern remedies for *Charter* violations: s. 24(1) of the *Charter* and

2. *Si, dans les circonstances de l'espèce, infliger la peine minimale obligatoire de quatre ans d'emprisonnement allait à l'encontre de l'art. 12 de la Charte, le juge du procès pouvait-il accorder une exemption constitutionnelle écartant l'application de la peine minimale de quatre ans et infliger une peine moins lourde?*

[33] Comme nous avons conclu que la peine minimale de quatre ans d'emprisonnement prescrite par l'al. 236a) ne porte pas atteinte à la protection contre les peines cruelles et inusitées garantie au gendarme Ferguson par l'art. 12 de la *Charte*, il n'est pas nécessaire de déterminer si une exemption constitutionnelle aurait pu être accordée si nous avions conclu à une violation de l'art. 12. Cependant, ainsi que la Cour d'appel l'a reconnu, on note une vive controverse dans les juridictions inférieures quant à savoir s'il est possible d'accorder une exemption constitutionnelle à titre de réparation. Ce point ayant été pleinement débattu, il convient de trancher la question de savoir si une exemption constitutionnelle aurait pu être accordée au gendarme Ferguson s'il avait été jugé que la peine minimale contrevenait à l'art. 12 de la *Charte*.

[34] D'entrée de jeu, je souligne que la question n'est pas de savoir *s'il* existe un recours empêchant l'infliction d'une peine cruelle et inusitée interdite par la *Charte*, mais plutôt de savoir *quelles* réparations peuvent être accordées. On ne saurait tolérer qu'une peine cruelle et inusitée soit infligée en violation de l'art. 12 et de l'article premier de la *Charte*. Le tribunal qui conclut à la violation d'un droit garanti par la *Charte* a l'obligation d'accorder une réparation efficace. La seule question qui se pose est celle de savoir si une disposition qui prescrit une telle peine peut être maintenue quitte à ce qu'une exemption constitutionnelle soit accordée dans certains cas, ou si la seule réparation possible consiste en un jugement déclarant que la loi est incompatible avec la *Charte* et tombe donc sous le coup de l'art. 52 de la *Loi constitutionnelle de 1982*.

[35] Deux dispositions régissent les réparations pouvant être accordées en cas de violation de la

s. 52(1) of the *Constitution Act, 1982*. Section 24(1) confers on judges a wide discretion to grant appropriate remedies in response to *Charter* violations:

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

Section 24(1) has generally been seen — at least until now — as providing a case-by-case remedy for unconstitutional acts of government agents operating under lawful schemes whose constitutionality is not challenged. The other remedy section, s. 52(1) of the *Constitution Act, 1982*, confers no discretion on judges. It simply provides that laws that are inconsistent with the *Charter* are of no force and effect to the extent of the inconsistency:

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

When a litigant claims that a law violates the *Charter*, and a court rules or “declares” that it does, the effect of s. 52(1) is to render the law null and void. It is common to describe this as the court “striking down” the law. In fact, when a court “strikes down” a law, the law has failed by operation of s. 52 of the *Constitution Act, 1982*.

[36] The usual remedy for a mandatory sentencing provision that imposes cruel and unusual punishment contrary to s. 12 of the *Charter* is a declaration that the law is of no force and effect under s. 52 of the *Constitution Act, 1982*. This was the remedy sought in *Goltz, Morrissey*, and *R. v. Luxton*, [1990] 2 S.C.R. 711. The mandatory minimum sentence provisions in these cases were held to be constitutional. But it was argued that had the provisions been held to be unconstitutional, the appropriate remedy was the s. 52 remedy of striking down.

Charte : les par. 24(1) de la *Charte* et 52(1) de la *Loi constitutionnelle de 1982*. Le paragraphe 24(1) confère aux juges un vaste pouvoir discrétionnaire leur permettant d'accorder une réparation convenable en cas de violation de la *Charte* :

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

On considère généralement — du moins l'a-t-on fait jusqu'à maintenant — que le par. 24(1) prévoit l'octroi d'une réparation au cas par cas pour les actes inconstitutionnels des mandataires du gouvernement agissant en vertu de régimes licites dont la constitutionnalité n'est pas contestée. L'autre disposition réparatrice, le par. 52(1) de la *Loi constitutionnelle de 1982*, ne confère aucun pouvoir discrétionnaire aux juges. Elle prévoit simplement que les dispositions qui sont incompatibles avec la *Charte* sont inopérantes :

52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

Lorsqu'une partie prétend qu'une disposition contrevient à la *Charte* et qu'un tribunal juge ou « déclare » que tel est bien le cas, le par. 52(1) a pour effet de rendre cette disposition inopérante. On dit généralement alors que le tribunal « invalide » la disposition. En fait, lorsqu'un tribunal « invalide » une disposition, celle-ci est inopérante par application de l'art. 52 de la *Loi constitutionnelle de 1982*.

[36] Lorsqu'une disposition prévoit une peine obligatoire cruelle et inusitée au sens de l'art. 12 de la *Charte*, la réparation consiste habituellement en un jugement déclarant cette disposition inopérante par application de l'art. 52 de la *Loi constitutionnelle de 1982*. C'est la réparation qui était sollicitée dans *Goltz, Morrissey* et *R. c. Luxton*, [1990] 2 R.C.S. 711. Dans ces arrêts, les dispositions prévoyant une peine minimale obligatoire ont été jugées constitutionnelles. Toutefois, on a plaidé que, si ces dispositions avaient été jugées inconstitutionnelles, la réparation appropriée aurait été leur invalidation en vertu de l'art. 52.

[37] In this case, despite the allegation of a constitutional violation, Constable Ferguson does not request that the law that caused the alleged violation, s. 236(a) of the *Criminal Code*, be struck down. Instead, Constable Ferguson argues that if the four-year mandatory sentence is found to violate the *Charter*, a constitutional exemption under s. 24(1) should be granted. The argument for a constitutional exemption proposes that the law remain in force, but that it not be applied in cases where its application results in a *Charter* violation. The judge would thus be free to impose a sentence below the minimum set by law, which would nevertheless continue to stand.

[38] The argument in favour of recognizing constitutional exemptions is simply put. The first prong of the argument is that where a mandatory minimum sentence that is constitutional in most of its applications generates an unconstitutional result in a small number of cases, it is better to grant a constitutional exemption in these cases than to strike down the law as a whole. The s. 52(1) remedy of declaring invalid a law that produces a result inconsistent with the *Charter* is a blunt tool. A law that may be constitutional in many of its applications — and indeed ruled constitutional on a reasonable hypotheticals analysis — is struck down because in one particular case, or in a few cases, it produces an unconstitutional result. Would it not be better, the argument goes, to allow the law to stand, while providing an individual remedy in those cases — arguably rare — where its application offends the *Charter*?

[39] The second and complementary prong of the argument asserts that the remedy is available on the wording of the *Charter* and the jurisprudence. Section 24(1), it is argued, grants courts a wide discretion to grant such constitutional remedies as are “appropriate and just”. Granting a constitutional exemption and substituting a constitutional sentence removes the law’s inconsistency

[37] En l’espèce, même s’il allègue une violation de la Constitution, le gendarme Ferguson ne demande pas à la Cour d’invalider la disposition législative à l’origine de la violation alléguée, soit l’al. 236a) du *Code criminel*. Il soutient plutôt que, si la peine obligatoire de quatre ans est jugée contraire à la *Charte*, une exemption constitutionnelle devrait lui être accordée en application du par. 24(1). L’argument en faveur d’une telle exemption veut que la disposition soit maintenue, mais qu’elle ne soit pas appliquée dans les cas où il en découle une violation de la *Charte*. Le juge pourrait donc infliger une peine inférieure à la peine minimale prescrite par la disposition en cause, mais cette disposition resterait en vigueur.

[38] L’argumentation en faveur de la reconnaissance des exemptions constitutionnelles est simple. Selon le premier volet de cette argumentation, lorsqu’une peine minimale obligatoire est constitutionnelle dans la plupart des cas où elle est appliquée, mais produit un résultat inconstitutionnel dans un nombre limité de cas, il est préférable d’accorder une exemption constitutionnelle dans ces cas limités plutôt que d’invalider globalement la disposition. L’invalidation, en vertu du par. 52(1), d’une disposition qui produit un résultat incompatible avec la *Charte* est une solution radicale. Une disposition qui peut être constitutionnelle dans de nombreux cas — et qui a effectivement été jugée constitutionnelle au terme d’une analyse des situations hypothétiques raisonnables — serait invalidée parce que, dans un cas donné ou dans quelques cas, elle produit un résultat inconstitutionnel. Ne serait-il pas préférable, fait-on valoir, de permettre le maintien de cette disposition tout en prévoyant une réparation individuelle dans les cas — peut-être rares — où son application est contraire à la *Charte*?

[39] Selon le deuxième volet complétant cette argumentation, le libellé de la *Charte* et la jurisprudence permettent cette réparation. En effet, on fait valoir que le par. 24(1) confère aux tribunaux un large pouvoir discrétionnaire leur permettant d’accorder la réparation constitutionnelle qu’ils estiment « convenable et juste ». Si une exemption constitutionnelle est accordée et une peine

with the *Charter*, making s. 52(1) inapplicable. The cases that have considered the matter, while inconclusive, do not rule constitutional exemptions out as a remedy for unconstitutional sentences flowing from mandatory minimum sentence laws. More generally, granting constitutional exemptions for unconstitutional effects of mandatory minimum sentence laws fits well with the Court's practices of severance, reading in and reading out in order to preserve the law to the maximum extent possible: see *Schachter v. Canada*, [1992] 2 S.C.R. 679.

[40] Attractive as they are, the arguments for constitutional exemptions in a case such as this are, on consideration, outweighed and undermined by counter-considerations. I reach this conclusion on the basis of four considerations: (1) the jurisprudence; (2) the need to avoid intruding on the role of Parliament; (3) the remedial scheme of the *Charter*; and (4) the impact of granting constitutional exemptions in mandatory sentence cases on the values underlying the rule of law.

(1) The Jurisprudence

[41] This Court has not definitively ruled whether constitutional exemptions are available as a remedy for mandatory minimum sentences that produce unconstitutional sentences. In concurring opinions, judges of this Court have expressed both positive and negative evaluations of constitutional exemptions as remedies for unconstitutional minimum sentences.

[42] In his concurring opinion in *Smith*, at pp. 1111-12, Le Dain J. considered and rejected the constitutional exemption as a means of upholding minimum sentences that could generate unconstitutional

constitutionnelle substituée à celle prévue par la disposition législative, celle-ci n'est plus incompatible avec la *Charte*, ce qui rend le par. 52(1) inapplicable. Bien qu'elle ne soit pas concluante, la jurisprudence portant sur cette question n'a pas écarté le recours à l'exemption constitutionnelle comme réparation lorsqu'une peine inconstitutionnelle est infligée en application d'une disposition prescrivant une peine minimale obligatoire. De façon plus générale, l'octroi d'une exemption constitutionnelle écartant les effets inconstitutionnels d'une disposition prescrivant une peine minimale obligatoire cadre bien avec les pratiques de la dissociation, de l'interprétation large et de l'interprétation atténuée auxquelles la Cour fait appel pour préserver la loi dans la plus large mesure possible : voir *Schachter c. Canada*, [1992] 2 R.C.S. 679.

[40] Aussi attrayants que soient les arguments en faveur de l'octroi d'une exemption constitutionnelle dans un cas comme celui qui nous occupe, nous constatons, après réflexion, qu'ils sont affaiblis et supplantés par des considérations contraires. Je tire cette conclusion en me fondant sur quatre facteurs : (1) la jurisprudence; (2) la nécessité d'éviter toute usurpation du rôle du législateur; (3) le régime de réparation prévu par la *Charte* et (4) l'effet de l'octroi d'une exemption constitutionnelle, dans un cas où une peine obligatoire est prévue, sur les valeurs qui sous-tendent le principe de la primauté du droit.

(1) La jurisprudence

[41] Notre Cour n'a pas tranché de manière définitive la question de savoir si une exemption constitutionnelle peut servir de réparation lorsqu'une peine minimale obligatoire produit des effets inconstitutionnels. Dans des opinions concordantes, des juges de notre Cour ont considéré tant favorablement que défavorablement le recours à l'exemption constitutionnelle à titre de réparation dans le cas d'une peine minimale inconstitutionnelle.

[42] Dans son opinion concordante dans *Smith*, aux p. 1111-1112, le juge Le Dain a examiné et rejeté l'exemption constitutionnelle comme moyen de maintenir les peines minimales susceptibles de

results in some circumstances. He stated that allowing such exemptions would create uncertainty, and the assumed validity or application of the provision could have prejudicial effects in particular cases. On the other hand, Arbour J. commented favourably on the possibility of exemptions from mandatory minimum sentence laws in a concurring opinion in *Morrissey*. Arbour J. expressed the concern that the mandatory minimum sentences for certain offences would inevitably be declared unconstitutional if judges had no discretion to grant exemptions to avoid unconstitutional results in unusual cases.

produire des résultats inconstitutionnels dans certaines circonstances. Il a affirmé qu'accorder de telles exemptions créerait de l'incertitude et que, dans certains cas, la présomption de la validité ou de l'applicabilité de la disposition en cause pourrait avoir des effets préjudiciables. En revanche, dans son opinion concordante dans *Morrissey*, la juge Arbour a émis des commentaires favorables quant à la possibilité que des exemptions soient accordées pour écarter l'application de dispositions législatives prescrivant une peine minimale obligatoire. La juge Arbour a dit craindre que les peines minimales prescrites pour certaines infractions soient inévitablement déclarées inconstitutionnelles si les juges ne disposent pas du pouvoir discrétionnaire d'accorder des exemptions pour éviter des résultats inconstitutionnels dans des cas inhabituels.

[43] Lower courts have taken contradictory positions on the availability of constitutional exemptions from mandatory minimum sentences. The Ontario and New Brunswick courts of appeal have held against the availability of constitutional exemptions from mandatory sentence laws: *R. v. Kelly* (1990), 59 C.C.C. (3d) 497 (Ont. C.A.); *R. v. Madeley* (2002), 160 O.A.C. 346; *R. v. Desjardins* (1996), 182 N.B.R. (2d) 321. By contrast, such exemptions have been granted in Saskatchewan and the Northwest and Yukon Territories and have been recognized in *obiter* in British Columbia: *R. v. McGillivray* (1991), 62 C.C.C. (3d) 407 (Sask. C.A.); *R. v. Netser* (1992), 70 C.C.C. (3d) 477 (N.W.T.C.A.); *R. v. Chief* (1989), 51 C.C.C. (3d) 265 (Y.T.C.A.); *R. v. Kumar* (1993), 85 C.C.C. (3d) 417 (B.C.C.A.). The Quebec Court of Appeal has expressed both positive and negative views on the question in *obiter*: *R. v. Lapierre* (1998), 123 C.C.C. (3d) 332; *R. v. Chabot* (1992), 77 C.C.C. (3d) 371.

[43] Les juridictions inférieures ont adopté des positions contradictoires quant à la possibilité d'accorder des exemptions constitutionnelles relativement à l'application de peines minimales obligatoires. Les cours d'appel de l'Ontario et du Nouveau-Brunswick se sont prononcées contre la possibilité d'accorder de telles exemptions : *R. c. Kelly* (1990), 59 C.C.C. (3d) 497 (C.A. Ont.); *R. c. Madeley* (2002), 160 O.A.C. 346; *R. c. Desjardins* (1996), 182 R.N.-B. (2d) 321. Par contre, de telles exemptions ont été accordées en Saskatchewan, dans les Territoires du Nord-Ouest et au Yukon, et elles ont été reconnues dans des remarques incidentes en Colombie-Britannique : *R. c. McGillivray* (1991), 62 C.C.C. (3d) 407 (C.A. Sask.); *R. c. Netser* (1992), 70 C.C.C. (3d) 477 (C.A.T.N.-O.); *R. c. Chief* (1989), 51 C.C.C. (3d) 265 (C.A.Y.); *R. c. Kumar* (1993), 85 C.C.C. (3d) 417 (C.A.C.-B.). La Cour d'appel du Québec a formulé des opinions tant favorables que défavorables sur cette question dans des remarques incidentes : *R. c. Lapierre*, [1998] R.J.Q. 677; *R. c. Chabot*, [1992] R.J.Q. 2102.

[44] Constitutional exemptions have been recognized and discussed in other contexts. In *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, Wilson J. suggested that once a court finds a legislative provision to violate the *Charter*, it has no alternative but to strike it down under s. 52 of the *Constitution Act, 1982*. To do otherwise would

[44] Les exemptions constitutionnelles ont été examinées et reconnues dans d'autres contextes. De l'avis de la juge Wilson dans *Osborne c. Canada (Conseil du Trésor)*, [1991] 2 R.C.S. 69, après avoir conclu qu'une disposition législative est contraire à la *Charte*, le tribunal ne peut qu'invalider la disposition en cause, en application de l'art. 52 de la *Loi*

be to leave “the legislation in its pristine over-inclusive form outstanding on the books” (p. 77). On the other hand, in *R. v. Rose*, [1998] 3 S.C.R. 262, L’Heureux-Dubé J. opined that s. 24(1) of the *Charter* enables a court to grant a constitutional exemption from legislation that is “constitutional in its general application” if an unconstitutional result would otherwise occur in a particular case (para. 66).

[45] In *R. v. Seaboyer*, [1991] 2 S.C.R. 577, the majority, *per* McLachlin J., suggested that a constitutional exemption cannot be used to remedy a constitutional defect in a provision that Parliament intended to be mandatory, because allowing an exemption would “import into the provision an element which the legislature specifically chose to exclude — the discretion of the trial judge” (p. 628). It was also noted that constitutional exemptions could in principle remove all recourse to s. 52(1), rendering it redundant.

[46] However, in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, this Court recognized the availability of a constitutional exemption granted as an interim remedial measure alongside a suspended declaration of invalidity under s. 52(1). Although the Court declined to grant a constitutional exemption, it recognized that a court may grant such an exemption in order to relieve the claimant of the continued burden of the unconstitutional law during the period that the striking out remedy is suspended. The majority emphasized the ancillary nature of this remedial exemption and refused to consider expanding the remedy to a stand-alone constitutional exemption.

[47] In summary, the majority of this Court in *Seaboyer* has commented critically on the use of constitutional exemptions as a stand-alone remedy in the case of mandatory laws generally, a view supported by Wilson J. in *Osborne* and consistent

constitutionnelle de 1982, sans quoi « la loi reste en vigueur dans sa version primitive de portée excessive » (p. 77). Par contre, dans *R. c. Rose*, [1998] 3 R.C.S. 262, la juge L’Heureux-Dubé s’est dite d’avis que le par. 24(1) de la *Charte* autorise un tribunal à accorder une exemption constitutionnelle écartant l’application d’une disposition législative « constitutionnelle dans son application générale » lorsque son résultat, dans une affaire particulière, se révélerait inconstitutionnel (par. 66).

[45] Dans *R. c. Seaboyer*, [1991] 2 R.C.S. 577, la juge McLachlin, s’exprimant au nom des juges majoritaires, a indiqué qu’on ne peut recourir à l’exemption constitutionnelle pour corriger l’inconstitutionnalité d’une disposition que le législateur a voulu rendre obligatoire parce que, ce faisant, on « incorporerait dans la disposition un élément que le législateur a spécifiquement choisi d’exclure, le pouvoir discrétionnaire du juge du procès » (p. 628). Il a également été souligné que les exemptions constitutionnelles pourraient, en principe, faire disparaître tout recours au par. 52(1), le rendant ainsi superflu.

[46] Toutefois, dans *Corbiere c. Canada (Ministre des Affaires indiennes et du Nord canadien)*, [1999] 2 R.C.S. 203, notre Cour a reconnu qu’une exemption constitutionnelle peut être accordée à titre de mesure corrective intérimaire s’ajoutant à une déclaration d’invalidité prononcée en application du par. 52(1) et dont la prise d’effet est suspendue. Même si elle a refusé d’accorder une exemption constitutionnelle, la Cour a reconnu qu’un tribunal peut accorder une telle exemption pour éviter de continuer à faire supporter au demandeur le fardeau de la loi inconstitutionnelle pendant la durée de la suspension de la prise d’effet de la déclaration d’invalidité. Les juges majoritaires ont insisté sur la nature accessoire de cette exemption et ont refusé d’envisager la possibilité d’ériger cette réparation en exemption constitutionnelle autonome.

[47] En résumé, les juges majoritaires de notre Cour ont critiqué dans *Seaboyer* le recours à l’exemption constitutionnelle comme réparation autonome dans le cas des dispositions obligatoires en général, un point de vue adopté par la juge

with the majority's reasoning in *Corbiere*. In *Smith*, Le Dain J. rejected their use in the context here at issue, mandatory minimum sentence laws. On the other side of the issue are the remarks of L'Heureux-Dubé and Arbour JJ. in their respective concurring opinions in *Rose* and *Morrisey*.

[48] I conclude that while the availability of constitutional exemptions for mandatory minimum sentencing laws has not been conclusively decided, the weight of authority thus far is against them and sounds a cautionary note.

(2) Intrusion on the Role of Parliament

[49] Section 52(1) grants courts the jurisdiction to declare laws of no force and effect only "to the extent of the inconsistency" with the Constitution. It follows that if the constitutional defect of a law can be remedied without striking down the law as a whole, then a court must consider alternatives to striking down. Examples of alternative remedies under s. 52 include severance, reading in and reading down. Constable Ferguson is proposing a constitutional exemption under s. 24(1) as an additional tool for minimizing interference with Parliament's legislative role when a court must grant a remedy for a constitutionally defective provision.

[50] On the other hand, it has long been recognized that in applying alternative remedies such as severance and reading in, courts are at risk of making inappropriate intrusions into the legislative sphere. An alternative to striking down that initially appears to be less intrusive on the legislative role may in fact represent an inappropriate intrusion on the legislature's role. This Court has thus emphasized that in considering alternatives to striking down, courts must carefully consider

Wilson dans *Osborne* et qui concorde avec le raisonnement des juges majoritaires dans *Corbiere*. Dans *Smith*, le juge Le Dain a rejeté ce type de réparation dans le contexte dont il est question en l'espèce, soit celui des dispositions législatives prévoyant une peine minimale obligatoire. Le point de vue opposé a été exprimé par les juges L'Heureux-Dubé et Arbour dans leurs opinions concordantes respectives dans *Rose* et *Morrisey*.

[48] Je conclus que, même si la question de la possibilité de recourir à des exemptions constitutionnelles pour écarter l'application de dispositions prescrivant une peine minimale obligatoire n'a pas encore été résolue de façon définitive, la jurisprudence prépondérante ne tend pas, pour l'heure, à l'octroi de telles exemptions et incite à la prudence.

(2) Usurpation du rôle du législateur

[49] Le paragraphe 52(1) confère aux tribunaux le pouvoir de déclarer inopérantes les « dispositions incompatibles » avec la Constitution. Par conséquent, s'il est possible de corriger l'inconstitutionnalité d'une disposition sans l'invalidier complètement, le tribunal doit examiner les solutions de rechange à l'invalidation. Parmi les solutions auxquelles l'art. 52 donne ouverture, on trouve la dissociation, l'interprétation large et l'interprétation atténuée. Le gendarme Ferguson propose une exemption constitutionnelle en application du par. 24(1) à titre de mesure additionnelle permettant de réduire l'empiétement sur le rôle législatif du Parlement lorsqu'un tribunal doit accorder une réparation à l'égard d'une disposition inconstitutionnelle.

[50] Par ailleurs, il est reconnu depuis longtemps que les tribunaux, en accordant d'autres réparations telles la dissociation et l'interprétation large, risquent d'empiéter à tort sur le domaine législatif. Une réparation autre que l'invalidation peut sembler à première vue usurper à un moindre degré le rôle du législateur, mais constituer en réalité un empiétement injustifié. Notre Cour a ainsi souligné que, lorsqu'ils examinent les solutions de rechange à l'invalidation, les tribunaux doivent vérifier

whether the alternative being considered represents a lesser intrusion on Parliament's legislative role than striking down. Courts must thus be guided by respect for the role of Parliament, as well as respect for the purposes of the *Charter*: *Schachter*; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2. These principles apply with equal force to the proposed alternative remedy of the constitutional exemption. In this case, the effect of granting a constitutional exemption would be to so change the legislation as to create something different in nature from what Parliament intended. It follows that a constitutional exemption should not be granted.

[51] When a court opts for severance or reading in as an alternative to striking down a provision, it does so on the assumption that had Parliament been aware of the provision's constitutional defect, it would likely have passed it with the alterations now being made by the court by means of severance or reading in. For instance, as this Court noted in *Schachter*, the test for severance "recognizes that the seemingly laudable purpose of retaining the parts of the legislative scheme which do not offend the Constitution rests on an assumption that the legislature would have passed the constitutionally sound part of the scheme without the unsound part" (p. 697). If it is not clear that Parliament would have passed the scheme with the modifications being considered by the court — or if it is probable that Parliament would *not* have passed the scheme with these modifications — then for the court to make these modifications would represent an inappropriate intrusion into the legislative sphere. In such cases, the least intrusive remedy is to strike down the constitutionally defective legislation under s. 52. It is then left up to Parliament to decide what legislative response, if any, is appropriate.

[52] It follows that we must ask whether granting a constitutional exemption for a mandatory minimum sentence would represent a lesser intrusion on Parliament's legislative role than striking it down. In my view, the answer to this question is no, because allowing courts to grant constitutional

attentivement si elles représentent un empiètement moins grave que l'invalidation sur les fonctions du législateur. Dans le choix de la réparation, les tribunaux seront donc guidés par le respect du rôle du législateur et des objectifs de la *Charte* : *Schachter*; *Vriend c. Alberta*, [1998] 1 R.C.S. 493; *R. c. Sharpe*, [2001] 1 R.C.S. 45, 2001 CSC 2. Ces principes s'appliquent de la même façon à l'exemption constitutionnelle, la réparation proposée comme solution de rechange. En l'espèce, l'octroi d'une exemption constitutionnelle aurait pour effet de modifier la loi à tel point qu'elle serait d'une tout autre nature que celle voulue par le législateur. Il s'ensuit qu'une exemption constitutionnelle ne devrait pas être accordée.

[51] Lorsqu'un tribunal choisit la dissociation ou l'interprétation large plutôt que l'invalidation, il part du principe que, si le législateur avait su que la disposition était entachée d'un vice sur le plan constitutionnel, il l'aurait probablement édictée sous la forme modifiée que lui donne maintenant le tribunal en ayant recours à la dissociation ou à l'interprétation large. Par exemple, ainsi que notre Cour l'a fait remarquer dans *Schachter*, le critère applicable en cas de dissociation reconnaît que « l'objet apparemment louable du maintien des parties constitutionnelles de la loi repose sur la supposition que le législateur aurait adopté la partie constitutionnelle de la loi en question sans la partie inconstitutionnelle » (p. 697). S'il n'est pas clair que le législateur aurait édicté la disposition avec les modifications envisagées par le tribunal — ou s'il est probable qu'il *ne* l'aurait *pas* fait —, le tribunal empiéterait de façon injustifiée sur le domaine législatif en les introduisant. En pareil cas, la réparation qui constitue l'empiètement le moins grave consiste à invalider la disposition législative inconstitutionnelle, en application de l'art. 52. Il revient alors au législateur de décider quelle doit être la solution législative appropriée, le cas échéant.

[52] Il faut donc se demander si l'octroi d'une exemption constitutionnelle écartant l'application d'une peine minimale obligatoire constituerait un empiètement moins grave sur les fonctions du législateur que l'invalidation. À mon avis, tel n'est pas le cas, parce que permettre aux tribunaux d'accorder

exemptions for mandatory minimum sentences directly contradicts Parliament's intent in passing mandatory minimum sentence legislation.

[53] A constitutional exemption has the effect of conferring on judges a discretion to reject the mandatory minimum sentence prescribed by Parliament. The mandatory minimum applies, unless the judge concludes that its application constitutes unjustifiable cruel and unusual punishment and that it therefore should not apply.

[54] The intention of Parliament in passing mandatory minimum sentence laws, on the other hand, is to remove judicial discretion to impose a sentence below the stipulated minimum. Parliament must be taken to have specifically chosen to exclude judicial discretion in imposing mandatory minimum sentences, just as it was taken to have done in enacting the rape shield provisions struck down in *Seaboyer*. Parliament made no provision for the exercise of judicial discretion in drafting s. 236(a), nor did it authorize any exceptions to the mandatory minimum. There is no provision permitting judges to depart from the mandatory minimum, even in exceptional cases where it would result in grossly disproportionate punishment. Parliament has cast the prescription for the minimum four-year prison sentence here at issue in clear unambiguous terms. Parliament must be taken to have intended what it stated: that all convictions for manslaughter with a firearm would be subject to a mandatory minimum sentence of four years' imprisonment. The law mandates a floor below which judges cannot go. To permit judges to go below this floor on a case-by-case basis runs counter to the clear wording of the section and the intent that it evinces.

[55] In granting a constitutional exemption, a judge would be undermining Parliament's purpose in passing the legislation: to remove judicial

une telle exemption constitutionnelles contrecarre directement l'intention qu'avait le législateur en adoptant une disposition législative prescrivant une peine minimale obligatoire.

[53] L'exemption constitutionnelle a pour effet de conférer aux juges le pouvoir discrétionnaire de rejeter une peine minimale obligatoire prescrite par le législateur. La peine minimale s'applique, sauf si le juge conclut qu'elle constitue une peine cruelle et inusitée et qu'elle ne devrait donc pas être infligée.

[54] Or, en adoptant une disposition législative qui prescrit une peine minimale obligatoire, le législateur veut précisément retirer aux juges le pouvoir discrétionnaire d'infliger une peine inférieure à la peine minimale prescrite. Il faut tenir pour acquis que le législateur a expressément choisi de ne pas accorder de pouvoir discrétionnaire aux juges lorsqu'il a décidé de prescrire une peine minimale obligatoire, comme on a supposé qu'il l'avait choisi en édictant les dispositions sur la protection des victimes de viol qui ont été invalidées dans *Seaboyer*. Lorsqu'il a rédigé l'al. 236(a), le législateur n'a pas fait place à l'exercice d'un pouvoir discrétionnaire judiciaire ni autorisé d'exception à la peine minimale prescrite. Aucune disposition n'autorise les juges à déroger à la peine minimale obligatoire, même dans les cas exceptionnels où elle entraînerait l'infliction d'une peine exagérément disproportionnée. Le législateur a prescrit la peine minimale de quatre ans d'emprisonnement dont il est question en l'espèce en termes clairs, non ambigus. Il faut présumer que le législateur voulait bel et bien ce qu'il a dit, à savoir que la peine minimale obligatoire soit de quatre ans d'emprisonnement dans tous les cas d'homicide involontaire coupable avec usage d'une arme à feu. La loi prescrit un seuil de sévérité minimale de la peine, que les juges ne peuvent pas franchir. Permettre aux juges d'infliger, en fonction de chaque cas, une peine moins sévère, irait à l'encontre du libellé clair de l'article et de l'intention qu'il traduit.

[55] En accordant une exemption constitutionnelle, le juge contrecarrerait l'objectif visé par le législateur lorsqu'il a adopté la disposition

discretion and to send a clear and unequivocal message to potential offenders that if they commit a certain offence, or commit it in a certain way, they will receive a sentence equal to or exceeding the mandatory minimum specified by Parliament. The discretion that a constitutional exemption would confer on judges would violate the letter of the law and undermine the message that animates it.

[56] It is thus clear that granting a constitutional exemption from a mandatory minimum sentence law that results in an unconstitutional sentence goes directly against Parliament's intention. To allow constitutional exemptions for mandatory minimum sentences is, in effect, to read in a discretion to a provision where Parliament clearly intended to exclude discretion. If it would be inappropriate to read in such a discretion under s. 52, then necessarily it would be inappropriate to allow judges to grant constitutional exemptions having the same effect under s. 24(1). It cannot be assumed that Parliament would have enacted the mandatory minimum sentencing scheme with the discretion that allowing constitutional exemptions would create. For the Court to introduce such a discretion would thus represent an inappropriate intrusion into the legislative sphere.

[57] I conclude that these considerations are sufficient to exclude constitutional exemptions as an appropriate remedy for unconstitutional mandatory minimum sentences. In the absence of any provision providing for discretion, a court that concludes that a mandatory minimum sentence imposes cruel and unusual punishment in an exceptional case before it is compelled to declare the provision invalid.

(3) The Remedial Scheme of the Charter

[58] As I noted at the outset, remedies for breaches of the *Charter* are governed by s. 24(1)

législative : retirer leur pouvoir discrétionnaire aux juges et faire comprendre de façon claire et non équivoque aux contrevenants éventuels que, s'ils commettent une certaine infraction ou s'ils la commettent d'une certaine manière, ils se verront infliger une peine égale ou supérieure à la peine minimale obligatoire prescrite par le législateur. Le pouvoir discrétionnaire qu'une exemption constitutionnelle conférerait aux juges violerait la lettre de la loi et affaiblirait le message qui la sous-tend.

[56] Il est donc clair que l'octroi d'une exemption constitutionnelle écartant l'application d'une disposition législative prescrivant une peine minimale obligatoire parce que la peine qui en résulte est inconstitutionnelle contrecarre directement l'intention du législateur. Permettre de telles exemptions constitutionnelles a effectivement pour effet d'incorporer un pouvoir discrétionnaire dans une disposition de laquelle le législateur voulait manifestement exclure un tel pouvoir. Au même titre qu'il serait inopportun d'interpréter largement l'art. 52 et d'en conclure qu'il confère un pouvoir discrétionnaire, il serait aussi inopportun de permettre aux juges d'accorder, en vertu du par. 24(1), des exemptions constitutionnelles ayant le même effet. On ne saurait présumer que le législateur aurait édicté le régime de peine minimale obligatoire en l'assortissant du pouvoir discrétionnaire créé par les exemptions constitutionnelles. En incorporant un tel pouvoir discrétionnaire, la Cour empiéterait de façon injustifiée sur le domaine législatif.

[57] Je conclus que ces considérations suffisent pour exclure les exemptions constitutionnelles des réparations qui peuvent être accordées en cas d'inconstitutionnalité d'une peine minimale obligatoire. À défaut d'une disposition qui lui confère un pouvoir discrétionnaire, le tribunal qui conclut qu'une peine minimale obligatoire entraîne l'infliction d'une peine cruelle et inusitée dans un cas exceptionnel est tenu de déclarer invalide la disposition qui la prescrit.

(3) Le régime de réparation prévu par la Charte

[58] Comme je l'ai indiqué d'entrée de jeu, les réparations qui peuvent être accordées en cas de

of the *Charter* and s. 52(1) of the *Constitution Act, 1982*.

[59] When a law produces an unconstitutional effect, the usual remedy lies under s. 52(1), which provides that the law is of no force or effect to the extent that it is inconsistent with the *Charter*. A law may be inconsistent with the *Charter* either because of its purpose or its effect: *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. Section 52 does not create a personal remedy. A claimant who otherwise has standing can generally seek a declaration of invalidity under s. 52 on the grounds that a law has unconstitutional effects either in his own case or on third parties: *Big M*; see also P. Sankoff, “Constitutional Exemptions: Myth or Reality?” (1999-2000), 11 *N.J.C.L.* 411, at pp. 432-34; M. Rosenberg and S. Perrault, “Ifs and Buts in Charter Adjudication: The Unruly Emergence of Constitutional Exemptions in Canada” (2002), 16 *S.C.L.R.* (2d) 375, at pp. 380-82. The jurisprudence affirming s. 52(1) as the appropriate remedy for laws that produce unconstitutional effects is based on the language chosen by the framers of the *Charter*: see Sankoff, at p. 438.

[60] Section 24(1), by contrast, is generally used as a remedy, not for unconstitutional laws, but for unconstitutional government acts committed under the authority of legal regimes which are accepted as fully constitutional: see *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6. The acts of government agents acting under such regimes are not the necessary result or “effect” of the law, but of the government agent’s applying a discretion conferred by the law in an unconstitutional manner. Section 52(1) is thus not applicable. The appropriate remedy lies under s. 24(1).

violation de la *Charte* sont régies par les par. 24(1) de la *Charte* et 52(1) de la *Loi constitutionnelle de 1982*.

[59] Lorsqu’une disposition produit un effet inconstitutionnel, la réparation relève habituellement du par. 52(1), qui prévoit que les dispositions incompatibles avec la *Charte* sont inopérantes. Une disposition peut être incompatible avec la *Charte* soit à cause de son objet soit à cause de son effet : *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295; *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713. L’article 52 ne crée pas un recours personnel. Un demandeur qui a par ailleurs qualité pour agir peut généralement solliciter une déclaration d’invalidité en application de l’art. 52 au motif qu’une disposition a des effets inconstitutionnels pour lui-même ou pour des tiers : *Big M*; voir également P. Sankoff, « Constitutional Exemptions : Myth or Reality? » (1999-2000), 11 *R.N.D.C.* 411, p. 432-434; M. Rosenberg et S. Perrault, « Ifs and Buts in *Charter* Adjudication : The Unruly Emergence of Constitutional Exemptions in Canada » (2002), 16 *S.C.L.R.* (2d) 375, p. 380-382. La jurisprudence selon laquelle le par. 52(1) est le recours approprié pour les dispositions qui ont des effets inconstitutionnels repose sur les termes choisis par les rédacteurs de la *Charte* : voir Sankoff, p. 438.

[60] Par contre, on a généralement recours au par. 24(1) pour accorder réparation non pas lorsque des dispositions législatives sont inconstitutionnelles, mais lorsque des actes gouvernementaux inconstitutionnels sont commis en vertu de régimes légaux reconnus comme parfaitement constitutionnels : voir *Eldridge c. Colombie-Britannique (Procureur général)*, [1997] 3 R.C.S. 624; *Multani c. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 R.C.S. 256, 2006 CSC 6. Les actes des mandataires du gouvernement qui agissent en vertu de ces régimes ne sont pas le résultat ou l’« effet » obligatoire de la loi, mais plutôt du fait que les mandataires du gouvernement ont exercé d’une manière inconstitutionnelle le pouvoir discrétionnaire que leur conférait la loi. Le paragraphe 52(1) ne s’applique donc pas. Le recours approprié est prévu au par. 24(1).

[61] It thus becomes apparent that ss. 52(1) and 24(1) serve different remedial purposes. Section 52(1) provides a remedy for *laws* that violate *Charter* rights either in purpose or in effect. Section 24(1), by contrast, provides a remedy for *government acts* that violate *Charter* rights. It provides a personal remedy against unconstitutional government action and so, unlike s. 52(1), can be invoked only by a party alleging a violation of that party's own constitutional rights: *Big M; R. v. Edwards*, [1996] 1 S.C.R. 128. Thus this Court has repeatedly affirmed that the validity of laws is determined by s. 52 of the *Constitution Act, 1982*, while the validity of government action falls to be determined under s. 24 of the *Charter*: *Schachter; R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, 2001 SCC 81. We are here concerned with a *law* that is alleged to violate a *Charter* right. This suggests that s. 52(1) provides the proper remedy.

[62] It is argued that s. 24(1), while normally applicable to government acts, can also be used to provide a stand-alone remedy for the unconstitutional effects of mandatory minimum sentence laws. The wording of s. 24(1) is generous enough to permit this, it is argued, conferring a discretion on judges to grant "such remedy as the court considers appropriate and just in the circumstances".

[63] The jurisprudence of this Court allows a s. 24(1) remedy in connection with a s. 52(1) declaration of invalidity in unusual cases where additional s. 24(1) relief is necessary to provide the claimant with an effective remedy: *R. v. Demers*, [2004] 2 S.C.R. 489, 2004 SCC 46. However, the argument that s. 24(1) can provide a stand-alone remedy for laws with unconstitutional effects depends on reading s. 24(1) in isolation, rather than in conjunction with the scheme of the *Charter* as a whole, as required by principles of statutory and constitutional interpretation. When s. 24(1) is read in context, it becomes apparent that the intent of the framers of the Constitution was that it function

[61] Il devient donc évident que les par. 52(1) et 24(1) visent des objets réparateurs différents. Le paragraphe 52(1) offre une réparation lorsque des *dispositions législatives* violent des droits garantis par la *Charte*, que ce soit par leur objet ou par leur effet, tandis que le par. 24(1) offre un recours pour les *actes gouvernementaux* qui violent des droits garantis par la *Charte*. Il permet un recours personnel contre les actes gouvernementaux inconstitutionnels et, contrairement au par. 52(1), seule peut s'en prévaloir la partie qui allègue une atteinte à ses propres droits constitutionnels : *Big M; R. c. Edwards*, [1996] 1 R.C.S. 128. Notre Cour a répété à maintes reprises que la validité des lois relève de l'art. 52 de la *Loi constitutionnelle de 1982*, tandis que la validité des actes du gouvernement relève de l'art. 24 de la *Charte* : *Schachter; R. c. 974649 Ontario Inc.*, [2001] 3 R.C.S. 575, 2001 CSC 81. En l'espèce, il s'agit d'une *disposition législative* qui violerait un droit garanti par la *Charte*. Cela indique que la réparation appropriée est celle prévue au par. 52(1).

[62] On fait valoir que, s'il s'applique normalement aux actes gouvernementaux, le par. 24(1) peut également permettre d'accorder une réparation autonome pour les effets inconstitutionnels des dispositions législatives prescrivant une peine minimale obligatoire. Le libellé du par. 24(1) est assez large, prétend-on, pour permettre une telle réparation, puisqu'il confère aux juges le pouvoir discrétionnaire d'accorder « la réparation que le tribunal estime convenable et juste eu égard aux circonstances ».

[63] La jurisprudence de notre Cour permet d'associer une réparation fondée sur le par. 24(1) à une déclaration d'invalidité prononcée en application du par. 52(1) dans les cas exceptionnels où la réparation additionnelle fondée sur le par. 24(1) est nécessaire pour accorder une réparation efficace au demandeur : *R. c. Demers*, [2004] 2 R.C.S. 489, 2004 CSC 46. Toutefois, pour soutenir que le par. 24(1) peut permettre une réparation autonome à l'égard d'une disposition législative ayant des effets inconstitutionnels, il faut interpréter ce paragraphe isolément plutôt que de le considérer au regard de l'ensemble de la *Charte*, ainsi que l'exigent les principes d'interprétation législative et constitutionnelle. Lorsque le

primarily as a remedy for unconstitutional government acts.

[64] The highly discretionary language in s. 24(1), “such remedy as the court considers appropriate and just in the circumstances”, is appropriate for control of unconstitutional acts. By contrast, s. 52(1) targets the unconstitutionality of laws in a direct non-discretionary way: laws are of no force or effect to the extent that they are unconstitutional.

[65] The presence of s. 52(1) with its mandatory wording suggests an intention of the framers of the *Charter* that unconstitutional laws are deprived of effect to the extent of their inconsistency, not left on the books subject to discretionary case-by-case remedies: see *Osborne, per Wilson J.* In cases where the requirements for severance or reading in are met, it may be possible to remedy the inconsistency judicially instead of striking down the impugned legislation as a whole: *Vriend; Sharpe*. Where this is not possible — as in the case of an unconstitutional mandatory minimum sentence — the unconstitutional provision must be struck down. The ball is thrown back into Parliament’s court, to revise the law, should it choose to do so, so that it no longer produces unconstitutional effects. In either case, the remedy is a s. 52 remedy that renders the unconstitutional provision of no force or effect to the extent of its inconsistency. To the extent that the law is unconstitutional, it is not merely inapplicable for the purposes of the case at hand. It is null and void, and is effectively removed from the statute books.

[66] As pointed out in *Seaboyer*, if the unconstitutional effects of laws are remediable on a case-by-case basis under s. 24(1), in theory all *Charter* violations could be addressed in this manner, leaving no role for s. 52(1). To meet this concern, it is suggested that s. 24(1) should only be used in the case of laws that usually produce constitutional

par. 24(1) est interprété dans son contexte, il devient manifeste que les rédacteurs de la Constitution voulaient qu’il constitue principalement un recours en cas d’actes gouvernementaux inconstitutionnels.

[64] Les termes du par. 24(1) qui confèrent un pouvoir discrétionnaire très étendu — « la réparation que le tribunal estime convenable et juste eu égard aux circonstances » — se prêtent au contrôle des actes inconstitutionnels. Par contre, le par. 52(1) cible l’inconstitutionnalité des dispositions législatives d’une manière directe et non discrétionnaire. Ces dispositions sont inopérantes dans la mesure où elles sont inconstitutionnelles.

[65] La présence du par. 52(1) et de son libellé obligatoire permet de croire que les rédacteurs de la *Charte* voulaient que les dispositions législatives inconstitutionnelles soient inopérantes dans la mesure de leur incompatibilité, et non qu’elles restent en vigueur sous réserve de l’octroi d’une réparation discrétionnaire accordée au cas par cas : voir *Osborne*, la juge Wilson. Lorsqu’il est satisfait aux conditions permettant la dissociation ou une interprétation large, les tribunaux peuvent corriger l’incompatibilité plutôt que d’invalider globalement la disposition contestée : *Vriend; Sharpe*. Lorsque cela n’est pas possible — comme c’est le cas pour une peine minimale obligatoire inconstitutionnelle —, la disposition inconstitutionnelle doit être invalidée. La question est renvoyée au législateur pour qu’il révise la loi, s’il décide de le faire, de sorte qu’elle n’ait plus d’effets inconstitutionnels. Dans les deux cas, la réparation accordée est celle prévue par l’art. 52 qui rend la disposition inconstitutionnelle inopérante dans la mesure de son incompatibilité. Dans la mesure où une disposition législative est inconstitutionnelle, elle n’est pas simplement inapplicable dans l’affaire en cause. Elle est inopérante et, de fait, retirée du corpus législatif.

[66] Comme la Cour l’a souligné dans *Seaboyer*, s’il est possible, en vertu du par. 24(1), de corriger au cas par cas les effets inconstitutionnels des dispositions législatives, on pourrait, en théorie, remédier ainsi à toutes les violations de la *Charte*, et le par. 52(1) n’aurait plus alors aucune raison d’être. Pour répondre à cette préoccupation, on suggère que le

results and only rarely produce an unconstitutional effect. The mandatory minimum sentence provision in s. 236(a) is said to be such a law. However one defines the “rare” case, discussed more fully below, the risk is that the role intended for s. 52(1) would be undermined and that laws that should be struck down — over-inclusive laws that pose a real risk of unconstitutional treatment of Canadians — would remain on the books, contrary to the intention of the framers of the *Charter*.

(4) The Rule of Law

[67] Constable Ferguson’s principal argument for constitutional exemptions, as we have seen, is an appeal to flexibility. Yet this flexibility comes at a cost: constitutional exemptions buy flexibility at the cost of undermining the rule of law.

[68] The principles of constitutionalism and the rule of law lie at the root of democratic governance: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217. It is fundamental to the rule of law that “the law must be accessible and so far as possible intelligible, clear and predictable”: Lord Bingham, “The Rule of Law” (2007), 66 *Cambridge L.J.* 67, at p. 69. Generality, promulgation, and clarity are among the essential elements of the “morality that makes law possible”: L. L. Fuller, *The Morality of Law* (2nd ed. 1969), at pp. 33-39.

[69] Constitutional exemptions for mandatory minimum sentence laws raise concerns related to the rule of law and the values that underpin it: certainty, accessibility, intelligibility, clarity and predictability.

[70] As noted in the last section, a constitutional exemption under s. 24(1) is a personal remedy. The remedy proposed by Constable Ferguson is thus distinct from a s. 52 remedy that reads in an

par. 24(1) ne soit utilisé que dans le cas des dispositions législatives qui produisent des résultats constitutionnels dans la plupart des cas, et n’ont que rarement un effet inconstitutionnel, ce qui serait censément le cas de l’al. 236a) qui prescrit une peine minimale obligatoire. Peu importe la définition que l’on donne du cas « rare », dont il sera traité davantage plus loin, il y a risque que le rôle que devait jouer le par. 52(1) se trouve affaibli et que des dispositions législatives qui devraient être invalidées — parce que leur portée excessive crée un véritable risque que des Canadiens reçoivent un traitement inconstitutionnel — demeurent en vigueur, contrairement à ce que voulaient les rédacteurs de la *Charte*.

(4) La primauté du droit

[67] Comme nous l’avons vu, le gendarme Ferguson invoque avant tout la souplesse pour justifier les exemptions constitutionnelles. Or, celle-ci a un prix. En effet, les exemptions constitutionnelles offrent la souplesse aux dépens de la primauté du droit.

[68] Les principes du constitutionnalisme et de la primauté du droit sont à la base du gouvernement démocratique : *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217. Un principe essentiel de la primauté de droit porte que [TRADUCTION] « le droit doit être accessible et, dans la mesure du possible, intelligible, clair et prévisible » : lord Bingham, « The Rule of Law » (2007), 66 *Cambridge L.J.* 67, p. 69. Le caractère général, la promulgation et la clarté font partie des éléments essentiels de la [TRADUCTION] « moralité qui rend le droit possible » : L. L. Fuller, *The Morality of Law* (2^e éd. 1969), p. 33-39.

[69] Les exemptions constitutionnelles à l’égard des dispositions qui prescrivent une peine minimale obligatoire suscitent des inquiétudes quant à la primauté du droit et aux valeurs qui la sous-tendent : la certitude, l’accessibilité, l’intelligibilité, la clarté et la prévisibilité.

[70] Comme nous l’avons vu dans la section précédente, l’exemption constitutionnelle accordée en vertu du par. 24(1) est un recours personnel. La réparation proposée par le gendarme Ferguson se

exception for a well-defined class of situations — as, for instance, the remedy in *Sharpe*. When a constitutional exemption is granted, the successful claimant receives a personal remedy under s. 24(1), but the law remains on the books, intact. As Wilson J. put it in *Osborne*, the legislation remains as enacted “in its pristine over-inclusive form” (p. 77). The mere possibility of such a remedy thus necessarily generates uncertainty: the law is on the books, but in practice, it may not apply. As constitutional exemptions are actually granted, the law in the statute books will in fact increasingly diverge from the law as applied.

[71] Constitutional exemptions from mandatory minimum sentences leave the law uncertain and unpredictable, as Le Dain J. pointed out in *Smith*. It is up to judges on a case-by-case basis to decide when to strike down a minimum sentence that is inconsistent with the *Charter*, and when to grant an individual exemption under s. 24(1). But the *Charter* is silent on how a judge should make this decision — the decision, literally, of whether the law stands or falls. In theory, all violations could be remedied under s. 24(1), leaving no role for s. 52(1). The only option would be to introduce a meta-rule as to when a s. 24(1) exemption is available and when a declaration of invalidity should be made under s. 52(1). How such a rule should be fashioned — where the line should be drawn — is far from clear. Constitutional exemptions, it is suggested, should be confined to laws that usually operate constitutionally and only occasionally result in constitutional violations. But how is the judge to decide whether the case before her is rare? The bright line required for constitutional certainty is elusive.

distingue donc d’une réparation accordée en application de l’art. 52 qui incorpore une exception pour une catégorie de situations bien définie — comme la réparation accordée dans *Sharpe*. Lorsqu’une exemption constitutionnelle est accordée, le demandeur obtient une réparation personnelle en vertu du par. 24(1), mais la disposition législative demeure intacte dans le corpus législatif. Ainsi que l’a dit la juge Wilson dans *Osborne*, la disposition législative reste en vigueur « dans sa version primitive de portée excessive » (p. 77). La simple possibilité qu’une telle réparation soit accordée crée forcément de l’incertitude : la disposition existe dans le corpus législatif, mais il se peut qu’elle ne s’applique pas, en pratique. À mesure que des exemptions constitutionnelles sont accordées, la disposition qui figure dans le corpus législatif divergera de plus en plus de la règle de droit appliquée.

[71] Les exemptions constitutionnelles en ce qui a trait aux peines minimales obligatoires créent de l’incertitude et de l’imprévisibilité ainsi que l’a souligné le juge Le Dain dans *Smith*. Il appartiendrait aux juges de décider, au cas par cas, quand invalider une peine minimale incompatible avec la *Charte* et quand accorder une exemption individuelle en application du par. 24(1). Or, la *Charte* ne précise pas comment un juge devrait prendre une telle décision — c’est-à-dire décider, littéralement, si la loi doit survivre ou non. En théorie, il serait possible de remédier à toutes les violations grâce au par. 24(1), ce qui ne laisserait aucune place pour l’application du par. 52(1). La seule option consisterait à mettre en application une règle prééminente précisant quand il est possible d’accorder une exemption en vertu du par. 24(1), et quand une déclaration d’invalidité devrait être prononcée en application du par. 52(1). La façon dont une telle règle devrait être formulée — la délimitation qui devrait être fixée — est loin d’être claire. On suggère que les exemptions constitutionnelles ne devraient être accordées qu’en ce qui a trait aux dispositions législatives qui s’appliquent de manière constitutionnelle dans la plupart des cas et qui n’entraînent que rarement une violation de la Constitution. Mais comment un juge peut-il décider si l’affaire dont il a été saisi est rare? La démarcation nette nécessaire pour qu’il y ait certitude constitutionnelle est difficile à tracer.

[72] The divergence between the law on the books and the law as applied — and the uncertainty and unpredictability that result — exacts a price paid in the coin of injustice. First, it impairs the right of citizens to know what the law is in advance and govern their conduct accordingly — a fundamental tenet of the rule of law. Second, it risks over-application of the law; as Le Dain J. noted in *Smith*, the assumed validity of the law may prejudice convicted persons when judges must decide whether to apply it in particular cases. Third, it invites duplication of effort. The matter of constitutionality would not be resolved once and for all as under s. 52(1); in every case where a violation is suspected, the accused would be obliged to seek a constitutional exemption. In so doing, it creates an unnecessary barrier to the effective exercise of the convicted offender's constitutional rights, thereby encouraging uneven and unequal application of the law.

[73] A final cost of constitutional exemptions from mandatory minimum sentence laws is to the institutional value of effective law making and the proper roles of Parliament and the courts. Allowing unconstitutional laws to remain on the books deprives Parliament of certainty as to the constitutionality of the law in question and thus of the opportunity to remedy it. Legislatures need clear guidance from the courts as to what is constitutionally permissible and what must be done to remedy legislation that is found to be constitutionally infirm. In granting constitutional exemptions, courts would be altering the state of the law on constitutional grounds without giving clear guidance to Parliament as to what the Constitution requires in the circumstances: Rosenberg and Perrault, at p. 391. Bad law, fixed up on a case-by-case basis by the courts, does not accord with the role and responsibility of Parliament to enact constitutional laws for the people of Canada.

[72] La divergence entre la disposition figurant dans le corpus législatif et la règle de droit appliquée — ainsi que l'incertitude et l'imprévisibilité qui en découlent — a pour conséquence de créer l'injustice. Premièrement, il y a atteinte au droit des citoyens de savoir d'avance ce que prévoit la loi et de se comporter en conséquence — un principe fondamental de la primauté du droit. Deuxièmement, une trop grande application de la loi risque de survenir. En effet, ainsi que l'a mentionné le juge Le Dain dans *Smith*, la présomption de validité de la loi peut avoir des effets préjudiciables sur les personnes déclarées coupables lorsque le juge doit décider s'il doit l'appliquer dans un cas particulier. Troisièmement, il y a ouverture à un dédoublement des efforts. La question de la constitutionnalité n'est pas tranchée une fois pour toute en application du par. 52(1); dans chaque cas où l'on soupçonne qu'il y a eu violation, l'accusé est obligé de demander une exemption constitutionnelle. Il en résulte un obstacle inutile à l'exercice efficace des droits constitutionnels d'un contrevenant déclaré coupable, ce qui encourage une application inégale de la loi.

[73] Enfin, les exemptions constitutionnelles à l'égard des dispositions prescrivant une peine minimale obligatoire porteraient atteinte à la valeur institutionnelle de l'action législative efficace et aux rôles véritables du législateur et des tribunaux. Permettre que des dispositions législatives inconstitutionnelles demeurent dans le corpus législatif empêche le législateur de savoir avec certitude si la disposition législative en cause est constitutionnelle et, partant, le prive de la possibilité de la corriger. Les assemblées législatives ont besoin que les cours de justice leur indiquent clairement ce qui est permis sur le plan constitutionnel et ce qui doit être fait pour corriger une loi jugée inconstitutionnelle. En accordant des exemptions constitutionnelles, les cours de justice modifieraient l'état du droit pour des motifs constitutionnels sans indiquer clairement au législateur ce que la Constitution exige dans les circonstances : Rosenberg et Perrault, p. 391. De mauvaises lois, auxquelles les cours de justice remédient au cas par cas, ne sont pas compatibles avec le rôle et la responsabilité du législateur d'édicter des règles législatives constitutionnelles pour le peuple canadien.

V. Conclusion

[74] I conclude that constitutional exemptions should not be recognized as a remedy for cruel and unusual punishment imposed by a law prescribing a minimum sentence. If a law providing for a mandatory minimum sentence is found to violate the *Charter*, it should be declared inconsistent with the *Charter* and hence of no force and effect under s. 52 of the *Constitution Act, 1982*.

[75] I would dismiss the appeal and answer the constitutional questions as follows:

1. Does the mandatory minimum sentence prescribed by s. 236(a) of the *Criminal Code*, R.S.C. 1985, c. C-46, constitute cruel and unusual punishment in the appellant's case, in violation of s. 12 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: It is not necessary to answer the question.

3. If the answer to Question 2 is "no", does Canadian law recognize the availability of a constitutional exemption on a case-by-case basis from the statutory mandatory minimum sentence set out in s. 236(a) of the *Criminal Code*, R.S.C. 1985, c. C-46?

Answer: No.

Appeal dismissed.

Solicitors for the appellant: O'Brien Devlin MacLeod, Calgary.

Solicitor for the respondent: Attorney General of Alberta, Calgary.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

V. Conclusion

[74] Je conclus que l'exemption constitutionnelle ne doit pas être reconnue comme un moyen de remédier à une peine cruelle et inusitée prévue par une disposition législative prescrivant une peine minimale. Une disposition législative prescrivant une peine minimale obligatoire jugée contraire à la *Charte* doit être déclarée incompatible avec la *Charte* et, de ce fait, inopérante en application de l'art. 52 de la *Loi constitutionnelle de 1982*.

[75] Je suis d'avis de rejeter le pourvoi et de répondre comme suit aux questions constitutionnelles :

1. Infliger à l'appelant la peine minimale prévue à l'al. 236a) du *Code criminel*, L.R.C. 1985, ch. C-46, équivaut-il à lui infliger une peine cruelle et inusitée interdite par l'art. 12 de la *Charte canadienne des droits et libertés*?

Réponse : Non.

2. Dans l'affirmative, cette atteinte constitue-t-elle une restriction raisonnable prescrite par une règle de droit dont la justification peut se démontrer dans une société libre et démocratique au regard de l'article premier de la *Charte canadienne des droits et libertés*?

Réponse : Il n'est pas nécessaire de répondre à cette question.

3. Si la réponse à la deuxième question est négative, le droit canadien permet-il d'écarter, dans un cas donné, sur le fondement de la Constitution, la peine minimale prévue à l'al. 236a) du *Code criminel*, L.R.C. 1985, ch. C-46?

Réponse : Non.

Pourvoi rejeté.

Procureurs de l'appelant : O'Brien Devlin MacLeod, Calgary.

Procureur de l'intimée : Procureur général de l'Alberta, Calgary.

Procureur de l'intervenant le procureur général du Canada : Procureur général du Canada, Ottawa.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Sainte-Foy.

Procureur de l'intervenant le procureur général du Québec : Procureur général du Québec, Sainte-Foy.

Solicitors for the intervener the Canadian Civil Liberties Association: Paliare, Roland, Rosenberg, Rothstein, Toronto.

Procureurs de l'intervenante l'Association canadienne des libertés civiles : Paliare, Roland, Rosenberg, Rothstein, Toronto.

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striking the claims seeking declarations of invalidity (set out in subparas. 30(a) to (c)), since applications for declarations of invalidity are not generally governed by limitations statutes. However, she found that the remaining claims (subparas. 30(d) to (h)) were for relief of a personal nature and, whether claimed under s. 24 of the *Charter* or flowing from a declaration of invalidity under s. 52 of the *Constitution Act, 1982*, were subject to the limitations statute and had been correctly struck out as they were statute-barred. Gerwing J.A. severed the portions of the appellant's claim seeking declarations of unconstitutionality from the claims seeking personal relief.

[15] Smith J.A. agreed that s. 3 of *The Limitation of Actions Act* could operate to limit the extent of the appellant's relief flowing from a s. 52 declaration. However, she disagreed with Gerwing J.A.'s conclusion that the appellant's claims were statute-barred. In her view, if the appellant could persuade the trial court that her case was one of ongoing discrimination, based on her continuing status and repeated each month she does not receive a monthly benefit, the claim was not out of time. Smith J.A. would have reinstated all of the appellant's claims.

III. Analysis

A. *Does Section 3 of The Limitation of Actions Act Apply to the Appellant's Claims for Personal Relief?*

[16] It was argued below that statutory limitation periods do not apply to personal claims for constitutional relief. Personal claims for constitutional relief are claims brought as an individual *qua* individual for a personal remedy. As will be discussed below, personal claims in this sense must be distinguished from claims which may enure to affected

radiation immédiate des demandes, énoncées aux al. 30a) à c), visant le prononcé de déclarations d'invalidité, puisque ce genre de demandes n'est habituellement pas assujéti aux lois qui établissent des délais de prescription. Toutefois, elle a conclu que les autres demandes, énoncées aux al. 30d) à h), visaient des réparations de nature personnelle et — qu'elles aient été sollicitées en application de l'art. 24 de la *Charte* ou qu'elles aient découlé d'une déclaration d'invalidité prononcée en vertu de l'art. 52 de la *Loi constitutionnelle de 1982* — étaient assujéties aux lois établissant des délais de prescription. La juge Gerwing a donc estimé que ces demandes avaient été radiées à juste titre puisqu'elles étaient prescrites. Elle a dissocié les demandes par lesquelles l'appelante cherchait à obtenir des déclarations d'inconstitutionnalité de celles visant des réparations personnelles.

[15] La juge Smith a convenu que l'art. 3 de la *Limitation of Actions Act* pouvait s'appliquer pour limiter la portée des réparations pouvant être accordées à l'appelante par suite de l'application de l'art. 52. Cependant, elle n'a pas souscrit à la conclusion de la juge Gerwing portant que les demandes de l'appelante étaient prescrites. Selon elle, si l'appelante pouvait persuader le tribunal de première instance qu'elle faisait l'objet de discrimination continue fondée sur son état continu et que cette discrimination était répétée chaque mois qu'elle ne recevait pas de prestation mensuelle, les demandes ne seraient pas jugées hors délai. La juge Smith aurait rétabli toutes les demandes de l'appelante.

III. Analyse

A. *L'article 3 de la Limitation of Actions Act s'applique-t-il aux demandes de réparations personnelles de l'appelante?*

[16] On a fait valoir devant les juridictions inférieures que les délais de prescription prévus par la loi ne s'appliquent pas aux demandes personnelles de réparation constitutionnelle. Il s'agit de demandes introduites par un individu, en tant qu'individu, en vue d'obtenir une réparation personnelle. Comme il en sera question plus loin, il y a lieu d'établir une

persons generally under an action for a declaration that a law is unconstitutional.

distinction entre les demandes de réparations personnelles de ce type et celles sollicitant la déclaration d'inconstitutionnalité d'une loi qui peuvent profiter aux personnes touchées en général.

[17] The argument that *The Limitation of Actions Act* does not apply to personal claims was abandoned before us, counsel for the appellant conceding that *The Limitations of Actions Act* applies to such claims. This is consistent with this Court's decision in *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3, which held that limitation periods apply to claims for personal remedies that flow from the striking down of an unconstitutional statute.

[17] Devant notre Cour, l'appelante a abandonné l'argument selon lequel la *Limitation of Actions Act* ne s'applique pas aux demandes de réparations personnelles, son avocat ayant reconnu que cette Loi s'applique à ce genre de demandes. Cette position est conforme à l'arrêt *Kingstreet Investments Ltd. c. Nouveau-Brunswick (Finances)*, 2007 CSC 1, [2007] 1 R.C.S. 3, dans lequel notre Cour a statué que les délais de prescription s'appliquent aux demandes de réparations personnelles qui découlent de l'annulation d'une loi inconstitutionnelle.

B. Are the Appellant's Personal Claims Statute-Barred?

B. Les demandes de réparations personnelles de l'appelante sont-elles prescrites?

[18] In order to determine whether the appellant's personal claims are statute-barred, it is necessary to pinpoint when her cause of action arose. In my view, her cause of action arose on April 17, 1985 when s. 15 of the *Charter* came into effect. The appellant was denied benefits pursuant to the operation of s. 68(1) of the 1978 Act. However, she had no cognizable legal right upon which to base her claim until s. 15 of the *Charter* came into force. On April 17, 1985 a claim that the non-receipt of benefits pursuant to s. 68(1) of the 1978 Act discriminated against her on the basis of marital status became actionable. Although the appellant does not directly challenge the constitutionality of the 1978 Act, it is the operation of the 1978 Act that ultimately forms the basis of her discrimination claim. (These reasons assume, without deciding, that a challenge to a pre-*Charter* denial of benefits would be a permissible application of the *Charter*.)

[18] Afin de déterminer si les demandes de réparations personnelles de l'appelante sont prescrites, il est nécessaire d'arrêter le moment où sa cause d'action a pris naissance. Selon moi, sa cause d'action a pris naissance le 17 avril 1985, lorsque l'art. 15 de la *Charte* est entré en vigueur. S'il est vrai que les prestations lui ont été refusées en application du par. 68(1) de la Loi de 1978, l'appelante ne disposait d'aucun droit reconnu pour étayer sa demande avant que l'art. 15 de la *Charte* n'entre en vigueur. Le 17 avril 1985, elle est devenue habilitée à réclamer en justice les prestations qu'elle ne touchait pas par suite de l'application du par. 68(1) de la Loi de 1978 en alléguant une discrimination à son égard fondée sur son état matrimonial. Bien que l'appelante ne conteste pas directement la constitutionnalité de la Loi de 1978, c'est l'application de cette dernière qui forme ultimement la base de sa réclamation fondée sur la discrimination. (Dans les présents motifs, il est tenu pour acquis, sans toutefois trancher la question, que la *Charte* pourrait être invoquée pour contester un refus de prestations survenu avant l'entrée en vigueur de celle-ci.)

[19] Before this Court, the appellant argued that a new cause of action arose when the government adopted remedial legislation reinstating the pensions of persons who had remarried on or after

[19] L'appelante a fait valoir devant notre Cour qu'une nouvelle cause d'action a pris naissance lorsque le gouvernement a adopté, d'abord, une loi et un règlement de nature réparatrice rétablissant les

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should parallel that of s. 133 of the *Constitution Act, 1867*. All types of subordinate legislation that in Quebec would be subject to s. 133 of the *Constitution Act, 1867*, are, in Manitoba, subject to s. 23 of the *Manitoba Act, 1870*.

In this judgment, all references to "Acts of the Legislature" are intended to encompass all statutes, regulations and delegated legislation of the Manitoba Legislature, enacted since 1890, that are covered by this Court's judgments in *Blaikie No. 1* and *Blaikie No. 2*.

B) *The Consequences of the Manitoba Legislature's Failure to Enact, Print and Publish in both Languages*

Section 23 of the *Manitoba Act, 1870* entrenches a mandatory requirement to enact, print, and publish all Acts of the Legislature in both official languages (see *Blaikie No. 1, supra*). It establishes a constitutional duty on the Manitoba Legislature with respect to the manner and form of enactment of its legislation. This duty protects the substantive rights of all Manitobans to equal access to the law in either the French or the English language.

Section 23 of the *Manitoba Act, 1870* is a specific manifestation of the general right of Franco-Manitobans to use their own language. The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society.

The constitutional entrenchment of a duty on the Manitoba Legislature to enact, print and publish in both French and English in s. 23 of the *Manitoba Act, 1870* confers upon the judiciary the responsibility of protecting the correlative language rights of all Manitobans including the Fran-

correspondre à celle de l'art. 133 de la *Loi constitutionnelle de 1867*. Toute législation déléguée qui, au Québec, serait assujettie à l'art. 133 de la *Loi constitutionnelle de 1867* est, au Manitoba, assujettie à l'art. 23 de la *Loi de 1870 sur le Manitoba*.

Dans les présents motifs, toute mention des «actes de la législature» est destinée à englober toutes les lois, tous les règlements et toute la législation déléguée adoptés par la législature du Manitoba depuis 1890, auxquels s'appliquent les arrêts *Blaikie n° 1* et *Blaikie n° 2* de cette Cour.

B) *Les conséquences de l'omission de la législature du Manitoba de procéder à l'adoption, à l'impression et à la publication dans les deux langues*

L'article 23 de la *Loi de 1870 sur le Manitoba* enchâsse une exigence impérative d'adopter, d'imprimer et de publier dans les deux langues officielles toutes les lois de la Législature (voir l'arrêt *Blaikie n° 1*, précité). Il impose à la législature du Manitoba une obligation constitutionnelle quant aux modalités et à la forme de l'adoption de ses lois. Cette obligation a pour effet de protéger les droits fondamentaux de tous les Manitobains à l'égalité de l'accès à la loi dans l'une ou l'autre des langues française ou anglaise.

L'article 23 de la *Loi de 1870 sur le Manitoba* est une manifestation spécifique du droit général qu'ont les Franco-manitobains de s'exprimer dans leur propre langue. L'importance des droits en matière linguistique est fondée sur le rôle essentiel que joue la langue dans l'existence, le développement et la dignité de l'être humain. C'est par le langage que nous pouvons former des concepts, structurer et ordonner le monde autour de nous. Le langage constitue le pont entre l'isolement et la collectivité, qui permet aux êtres humains de délimiter les droits et obligations qu'ils ont les uns envers les autres, et ainsi, de vivre en société.

L'enchâssement constitutionnel, à l'art. 23 de la *Loi de 1870 sur le Manitoba*, d'une obligation pour la législature du Manitoba de procéder à l'adoption, à l'impression et à la publication dans les langues française et anglaise a pour effet d'imposer au pouvoir judiciaire la responsabilité de

co-Manitoban minority. The judiciary is the institution charged with the duty of ensuring that the government complies with the Constitution. We must protect those whose constitutional rights have been violated, whomever they may be, and whatever the reasons for the violation.

The Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government. It is, as s. 52 of the *Constitution Act, 1982* declares, the "supreme law" of the nation, unalterable by the normal legislative process, and unsuffering of laws inconsistent with it. The duty of the judiciary is to interpret and apply the laws of Canada and each of the provinces, and it is thus our duty to ensure that the constitutional law prevails.

As this Court said in *Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576, at p. 590:

A state, it is said, is sovereign and it is not for the Courts to pass upon the policy or wisdom of legislative will. As a broad statement of principle that is undoubtedly correct, but the general principle must yield to the requisites of the constitution in a federal state. By it the bounds of sovereignty are defined and supremacy circumscribed. The Courts will not question the wisdom of enactments which, by the terms of the Canadian Constitution are within the competence of the Legislatures, but it is the high duty of this Court to insure that the legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power.

(Emphasis added.)

See also *Re: Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 (the *Patriation Reference*), at pp. 841, 848, 877.

Since April 17, 1982, the mandate of the judiciary to protect the Constitution has been embodied

protéger les droits corrélatifs que possèdent en matière linguistique tous les Manitobains, y compris la minorité franco-manitobaine. C'est au pouvoir judiciaire qu'il incombe d'assurer que le gouvernement observe la Constitution. Nous devons protéger les personnes dont les droits constitutionnels sont violés, quelles que soient ces personnes et quelles que soient les raisons de cette violation.

La Constitution d'un pays est l'expression de la volonté du peuple d'être gouverné conformément à certains principes considérés comme fondamentaux et à certaines prescriptions qui restreignent les pouvoirs du corps législatif et du gouvernement. Elle est, comme le déclare l'art. 52 de la *Loi constitutionnelle de 1982*, la «loi suprême» de notre pays, qui ne peut être modifiée par le processus législatif normal et qui ne tolère aucune loi incompatible avec elle. Il appartient au pouvoir judiciaire d'interpréter et d'appliquer les lois du Canada et de chacune des provinces et il est donc de notre devoir d'assurer que la loi constitutionnelle a préséance.

Comme l'affirme cette Cour dans l'arrêt *Amax Potash Ltd. c. Gouvernement de la Saskatchewan*, [1977] 2 R.C.S. 576, à la p. 590:

On dit qu'un État est souverain et qu'il n'appartient pas aux tribunaux de juger de la raison d'être ni de la sagesse de la volonté expresse du législateur. En tant que déclaration de principe, c'est indubitablement exact, mais dans un État fédéral, le principe général doit céder devant les exigences de la constitution qui définit les limites de la souveraineté et de la suprématie. Les tribunaux ne mettront pas en doute la sagesse des textes législatifs qui, aux termes de la Constitution canadienne, relèvent de la compétence des législatures, mais une des hautes fonctions de cette Cour est de s'assurer que les législatures n'outrepassent pas les limites de leur mandat constitutionnel et n'exercent pas illégalement certains pouvoirs.

(C'est nous qui soulignons.)

Voir également *Renvoi: Résolution pour modifier la Constitution*, [1981] 1 R.C.S. 753 (ci-après le *Renvoi sur le rapatriement*), aux pp. 841, 848 et 877.

Depuis le 17 avril 1982, le mandat du pouvoir judiciaire de protéger la Constitution est enchâssé

in s. 52 of the *Constitution Act, 1982*. This section reads:

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Prior to enactment of the *Constitution Act, 1982*, the governing provision was, pursuant to the *Statute of Westminster, 1931*, s. 2 of the *Colonial Laws Validity Act, 1865*, 1865 (U.K.), 28 & 29 Vict., c. 63, which provides:

2. Any Colonial Law which is or shall be in any respect repugnant to the Provisions of any Act of Parliament extending to the Colony to which such Law may relate, or repugnant to any Order or Regulation made under Authority of such Act of Parliament, or having in the Colony the Force and Effect of such Act, shall be read subject to such Act, Order, or Regulation, and shall, to the Extent of such Repugnancy, but not otherwise, be and remain absolutely void and inoperative.

(Emphasis added.)

The constitutional jurisprudence, developed under the *Colonial Laws Validity Act, 1865*, was based on the invalidity doctrine. If Parliament or a provincial legislature was *ultra vires* its constitutionally allocated powers in enacting a certain Act, then the repugnancy of that Act with the provisions of the *British North America Act, 1867* would mean that the Act was "absolutely void and inoperative".

Section 52 of the *Constitution Act, 1982* does not alter the principles which have provided the foundation for judicial review over the years. In a case where constitutional manner and form requirements have not been complied with, the consequence of such non-compliance continues to be invalidity. The words "of no force or effect" mean that a law thus inconsistent with the Constitution has no force or effect because it is invalid.

Canadian courts have been unanimous in finding that failure to respect mandatory requirements to enact, print and publish statutes and regulations in both official languages leads to inconsistency

à l'art. 52 de la *Loi constitutionnelle de 1982*, qui se lit ainsi:

52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

Avant l'adoption de la *Loi constitutionnelle de 1982*, la disposition applicable était, conformément au *Statut de Westminster, 1931*, l'art. 2 de la *Loi de 1865 relative à la validité des lois des colonies*, 1865 (R.-U.), 28 & 29 Vict., chap. 63, lequel dispose:

[TRADUCTION] 2. Toute loi coloniale qui est ou sera de quelque façon incompatible avec les dispositions d'une loi du Parlement applicable à la Colonie d'où provient cette loi, ou incompatible avec une ordonnance ou un règlement adopté en vertu de ladite loi du Parlement, ou ayant dans la Colonie l'effet de ladite loi, doit s'interpréter sous réserve desdits loi, ordonnance ou règlement et sera absolument nulle et inopérante, mais seulement dans la mesure de cette incompatibilité.

(C'est nous qui soulignons.)

La théorie juridique en matière constitutionnelle, établie sous le régime de la *Loi de 1865 relative à la validité des lois des colonies*, était fondée sur le principe de l'invalidité. Si le Parlement ou une législature provinciale outrepassait les pouvoirs que lui conférerait la Constitution en adoptant une loi donnée, alors l'incompatibilité de cette loi avec les dispositions de l'*Acte de l'Amérique du Nord britannique, 1867* faisait en sorte que la loi en question était «absolument nulle et inopérante».

L'article 52 de la *Loi constitutionnelle de 1982* ne modifie pas les principes qui, au cours des années, ont constitué le fondement du contrôle judiciaire. Dans un cas où on n'a pas respecté les modalités et la forme requises en matière constitutionnelle, l'invalidité continue d'être la conséquence de ce non-respect. Le mot «inopérantes» signifie qu'une règle de droit ainsi incompatible avec la Constitution est inopérante pour cause d'invalidité.

Les tribunaux canadiens sont unanimes à conclure que l'omission de se conformer aux exigences impératives de l'adoption, de l'impression et de la publication des lois et règlements dans les deux

and thus invalidity. See, *Société Asbestos Ltée v. Société nationale de l'amiante*, *supra*; *Procureur général du Québec v. Collier*, [1983] C.S. 366; *Procureur général du Québec v. Brunet*, J.E. 83-510, reversed on other grounds, J.E. 84-62 (S.C.) These cases accord with the general principle that failure to comply with constitutional provisions dealing with the manner and form of the enactment of legislation will result in inconsistency and thus invalidity. See *Bribery Commissioner v. Ranasinghe*, *supra*.

In the present case the unilingual enactments of the Manitoba Legislature are inconsistent with s. 23 of the *Manitoba Act, 1870* since the constitutionally required manner and form for their enactment has not been followed. Thus they are invalid and of no force or effect.

C) *The Rule of Law*

1. The Principle

The difficulty with the fact that the unilingual Acts of the Legislature of Manitoba must be declared invalid and of no force or effect is that, without going further, a legal vacuum will be created with consequent legal chaos in the Province of Manitoba. The Manitoba Legislature has, since 1890, enacted nearly all of its laws in English only. Thus, to find that the unilingual laws of Manitoba are invalid and of no force or effect would mean that only laws enacted in both French and English *before 1890*, would continue to be valid, and would still be in force even if the law had purportedly been repealed or amended by a post-1890 unilingual statute; matters that were not regulated by laws enacted before 1890 would now be unregulated by law, unless a pre-confederation law or the common law provided a rule.

The situation of the various institutions of provincial government would be as follows: the courts, administrative tribunals, public officials, municipal corporations, school boards, professional governing bodies, and all other bodies created by law, to the extent that they derive their existence from

langues officielles entraîne l'incompatibilité et ainsi l'invalidité. Voir *Société Asbestos Ltée. c. Société nationale de l'amiante*, précité; *Procureur général du Québec c. Collier*, [1983] C.S. 366; *Procureur général du Québec c. Brunet*, J.E. 83-510, infirmé pour d'autres motifs, J.E. 84-62 (C.S.) Ces affaires s'accordent avec le principe général portant que l'omission d'observer les dispositions constitutionnelles relatives aux modalités et à la forme de l'adoption des lois entraîne l'incompatibilité et ainsi l'invalidité. Voir l'arrêt *Bribery Commissioner v. Ranasinghe*, précité.

En l'espèce, les textes législatifs adoptés dans une seule langue par la législature du Manitoba sont incompatibles avec l'art. 23 de la *Loi de 1870 sur le Manitoba* étant donné que les exigences constitutionnelles quant aux modalités et à la forme de leur adoption n'ont pas été respectées. Ils sont donc invalides et inopérants.

C) *La primauté du droit*

1. Le principe

Le problème que pose le fait que les lois unilingues de la législature du Manitoba doivent être déclarées invalides et inopérantes est, sans plus, le vide juridique que cela engendrera et le chaos qui s'ensuivra en la matière dans la province du Manitoba. Depuis 1890, la législature du Manitoba a adopté presque toutes ses lois en anglais seulement. Donc, conclure que les lois unilingues du Manitoba sont invalides et inopérantes signifierait que seules les lois adoptées dans les langues française et anglaise *avant 1890* demeureraient valides et seraient toujours opérantes même si elles sont censées avoir été abrogées ou modifiées par une loi unilingue postérieure à 1890. Les matières qui n'ont pas été abordées par des lois adoptées avant 1890 ne seraient désormais régies par aucune loi à moins qu'une règle ne soit prévue par une loi antérieure à la Confédération ou par la *common law*.

La situation des diverses institutions du gouvernement provincial serait la suivante: les tribunaux administratifs ou judiciaires, les officiers publics, les municipalités, les commissions scolaires, les corps professionnels et tous les autres organismes créés par la loi, dans la mesure où ils doivent leur

Tab 14

City of Vancouver *Appellant*

v.

Alan Cameron Ward *Respondent*

- and -

**Her Majesty The Queen in Right of the
Province of British Columbia** *Appellant*

v.

Alan Cameron Ward *Respondent*

and

**Attorney General of Canada, Attorney
General of Ontario, Attorney General
of Quebec, Aboriginal Legal Services of
Toronto Inc., Association in Defence of the
Wrongly Convicted, Canadian Civil Liberties
Association, Canadian Association of Chiefs
of Police, Criminal Lawyers' Association
(Ontario), British Columbia Civil Liberties
Association and David Asper Centre for
Constitutional Rights** *Intervenors*

INDEXED AS: VANCOUVER (CITY) v. WARD

2010 SCC 27

File No.: 33089.

2010: January 18; 2010: July 23.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps,
Fish, Abella, Charron, Rothstein and Cromwell JJ.

**ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA**

Constitutional law — Charter of Rights — Enforcement — Damage award as remedy for breach of rights — Quantum — Claimant strip searched and his car seized in violation of his constitutional rights — Whether claimant entitled to damages as remedy under s. 24(1) of

Ville de Vancouver *Appelante*

c.

Alan Cameron Ward *Intimé*

- et -

**Sa Majesté la Reine du chef de la province de
la Colombie-Britannique** *Appelante*

c.

Alan Cameron Ward *Intimé*

et

**Procureur général du Canada, procureur
général de l'Ontario, procureur général
du Québec, Aboriginal Legal Services of
Toronto Inc., Association in Defence of the
Wrongly Convicted, Association canadienne
des libertés civiles, Association canadienne
des chefs de police, Criminal Lawyers'
Association (Ontario), Association des
libertés civiles de la Colombie-Britannique
et David Asper Centre for Constitutional
Rights** *Intervenants*

RÉPERTORIÉ : VANCOUVER (VILLE) c. WARD

2010 CSC 27

N° du greffe : 33089.

2010 : 18 janvier; 2010 : 23 juillet.

Présents : La juge en chef McLachlin et les juges Binnie,
LeBel, Deschamps, Fish, Abella, Charron, Rothstein et
Cromwell.

**EN APPEL DE LA COUR D'APPEL DE LA
COLOMBIE-BRITANNIQUE**

Droit constitutionnel — Charte des droits — Réparation — Dommages-intérêts accordés en réparation d'une atteinte aux droits — Quantum — Demandeur soumis à une fouille à nu et sa voiture saisie en violation de ses droits constitutionnels — Le demandeur est-il en droit

Canadian Charter of Rights and Freedoms — If so, how should quantum of damages be assessed.

During a ceremony in Vancouver, the city police department received information that an unknown individual intended to throw a pie at the Prime Minister who was in attendance. Based on his appearance, police officers mistakenly identified W as the would-be pie-thrower, chased him down and handcuffed him. W, who loudly protested his detention and created a disturbance, was arrested for breach of the peace and taken to the police lockup. Upon his arrival, the corrections officers conducted a strip search. While W was at the lockup, police officers impounded his car for the purpose of searching it once a search warrant had been obtained. The detectives subsequently determined that they did not have grounds to obtain the required search warrant or evidence to charge W for attempted assault. W was released approximately 4.5 hours after his arrest. He brought an action in tort and for breach of his rights guaranteed by the *Canadian Charter of Rights and Freedoms* against several parties, including the Province and the City. With respect to the strip search and the car seizure, the trial judge held that, although the Province and the City did not act in bad faith and were not liable in tort for either incident, the Province's strip search and the City's vehicle seizure violated W's right to be free from unreasonable search and seizure under s. 8 of the *Charter*. The trial judge assessed damages under s. 24(1) of the *Charter* at \$100 for the seizure of the car and \$5,000 for the strip search. The Court of Appeal, in a majority decision, upheld the trial judge's ruling.

Held: The appeal should be allowed in part.

The language of s. 24(1) is broad enough to include the remedy of constitutional damages for breach of a claimant's *Charter* rights if such remedy is found to be appropriate and just in the circumstances of a particular case. The first step in the inquiry is to establish that a *Charter* right has been breached; the second step is to show why damages are a just and appropriate remedy, having regard to whether they would fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches.

d'obtenir des dommages-intérêts à titre de réparation en vertu de l'art. 24(1) de la Charte canadienne des droits et libertés? — Dans l'affirmative, comment le montant des dommages-intérêts devrait-il être fixé?

Au cours d'une cérémonie se tenant à Vancouver, le service de police de cette ville a été informé qu'un individu non identifié avait l'intention d'entarter le premier ministre, qui y assistait. Des policiers ont identifié à tort W, en raison de son apparence, comme l'entarteur potentiel, l'ont poursuivi et lui ont passé les menottes. W, qui a protesté bruyamment contre sa détention et a fait du tapage, a été arrêté pour violation de la paix et conduit au centre de détention de la police. À son arrivée, les agents de correction l'ont soumis à une fouille à nu. Pendant que W se trouvait au centre de détention, des policiers ont remorqué sa voiture à la fourrière en vue de la fouiller après l'obtention d'un mandat de perquisition. Les enquêteurs ont par la suite conclu qu'ils n'avaient pas de motifs suffisants pour obtenir le mandat de perquisition nécessaire, ni les éléments de preuve requis pour inculper W de tentative de voies de fait. W a été libéré environ quatre heures et demie après son arrestation. Il a intenté une action en responsabilité délictuelle et pour violation des droits que lui garantit la *Charte canadienne des droits et libertés* contre plusieurs parties, dont la province et la ville. À propos de la fouille à nu et de la saisie de la voiture, le juge de première instance a conclu que même si la province, dans le cas de la fouille, et la ville, dans le cas de la saisie, n'avaient ni agi de mauvaise foi ni engagé leur responsabilité délictuelle, elles avaient violé le droit de W à la protection contre les fouilles, les perquisitions et les saisies abusives garanti par l'art. 8 de la *Charte*. Le juge de première instance a fixé le montant des dommages-intérêts accordés en vertu du par. 24(1) de la *Charte* à 100 \$ pour la saisie de la voiture et à 5 000 \$ pour la fouille à nu. La Cour d'appel, à la majorité, a confirmé la décision du juge de première instance.

Arrêt : Le pourvoi est accueilli en partie.

Le libellé du par. 24(1) est suffisamment large pour embrasser l'octroi de dommages-intérêts en matière constitutionnelle en réparation d'une violation des droits garantis à un demandeur par la *Charte* si une telle réparation est jugée convenable et juste eu égard aux circonstances d'une affaire donnée. À la première étape de l'analyse, il doit être établi qu'un droit garanti par la *Charte* a été enfreint; à la deuxième, il faut démontrer pourquoi les dommages-intérêts constituent une réparation convenable et juste, selon qu'ils peuvent remplir au moins une des fonctions interreliées suivantes : l'indemnisation, la défense du droit en cause et la dissuasion contre toute nouvelle violation.

Once the claimant has established that damages are functionally justified, the state has the opportunity to demonstrate, at the third step, that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust. Countervailing considerations include the existence of alternative remedies. Claimants need not show that they have exhausted all other recourses. Rather, it is for the state to show that other remedies including private law remedies or another *Charter* remedy are available in the particular case that will sufficiently address the *Charter* breach. Concern for effective governance may also negate the appropriateness of s. 24(1) damages. In some situations, the state may establish that an award of *Charter* damages would interfere with good governance such that damages should not be awarded unless the state conduct meets a minimum threshold of gravity.

If the state fails to negate that the award is “appropriate and just”, the final step is to assess the quantum of the damages. To be “appropriate and just”, an award of damages must represent a meaningful response to the seriousness of the breach and the objectives of s. 24(1) damages. Where the objective of compensation is engaged, the concern is to restore the claimant to the position he or she would have been in had the breach not been committed. With the objectives of vindication and deterrence, the appropriate determination is an exercise in rationality and proportionality. Generally, the more egregious the breach and the more serious the repercussions on the claimant, the higher the award for vindication or deterrence will be. In the end, s. 24(1) damages must be fair to both the claimant and the state. In considering what is fair to both, a court may take into account the public interest in good governance, the danger of deterring governments from undertaking beneficial new policies and programs, and the need to avoid diverting large sums of funds from public programs to private interests. Damages under s. 24(1) should also not duplicate damages awarded under private law causes of action, such as tort, where compensation of personal loss is at issue.

Une fois que le demandeur a démontré que l’octroi de dommages-intérêts est fondé, d’un point de vue fonctionnel, l’État a la possibilité de démontrer, à la troisième étape, que des facteurs faisant contrepoids l’emportent sur les considérations fonctionnelles favorables à l’octroi de dommages-intérêts, de sorte que ces derniers ne seraient ni convenables, ni justes. Au nombre des considérations qui peuvent faire contrepoids se trouve l’existence d’autres recours. Les demandeurs ne sont pas tenus de prouver qu’ils ont épuisé tous les autres recours. Au contraire, c’est à l’État de démontrer que d’autres recours possibles dans l’affaire, y compris les recours en droit privé ou d’autres réparations accordées en vertu de la *Charte*, offriraient une réparation suffisante pour remédier à la violation de la *Charte*. Le souci de l’efficacité gouvernementale est une autre considération en raison de laquelle l’octroi de dommages-intérêts en vertu du par. 24(1) peut ne pas être une réparation convenable. Dans certaines situations, l’État pourrait démontrer que l’octroi de dommages-intérêts en vertu de la *Charte* nuirait au bon gouvernement et devrait être limité aux cas où la conduite de l’État atteint un seuil minimal de gravité.

Si l’État ne réussit pas à réfuter le caractère « convenable et juste » de l’octroi de dommages-intérêts, la dernière étape consiste à fixer le montant des dommages-intérêts. Pour constituer une réparation « convenable et juste », les dommages-intérêts doivent répondre réellement à la gravité de l’atteinte et aux objectifs des dommages-intérêts accordés en vertu du par. 24(1). L’objectif d’indemnisation vise à replacer le demandeur dans la même situation que si ses droits n’avaient pas été violés. En ce qui a trait aux objectifs de défense du droit et de dissuasion, arriver à une décision adéquate est un exercice de rationalité et de proportionnalité. Règle générale, plus l’atteinte et ses conséquences pour le demandeur seront graves, plus le montant des dommages-intérêts accordés au titre des objectifs de défense du droit et de dissuasion sera élevé. Finalement, le montant des dommages-intérêts accordés en vertu du par. 24(1) doit être équitable à la fois envers le demandeur et envers l’État. Le tribunal, dans son évaluation d’un montant équitable envers les deux, peut mettre dans la balance l’intérêt public au bon gouvernement, le risque de dissuader les gouvernements d’élaborer des programmes et politiques bénéfiques et la nécessité d’éviter que de gros montants soient prélevés sur le budget des programmes publics pour être consacrés à des intérêts privés. Les dommages-intérêts accordés en vertu du par. 24(1) ne doivent pas non plus emporter duplication de dommages-intérêts obtenus sur le fondement de causes d’action relevant du droit privé, comme un délit civil, dans les cas où l’indemnisation d’un préjudice personnel est en cause.

Here, damages were properly awarded for the strip search of W. This search violated his s. 8 *Charter* rights and compensation is required, in this case, to functionally fulfill the objects of constitutional damages. Strip searches are inherently humiliating and degrading and the *Charter* breach significantly impacted on W's person and rights. The correction officers' conduct which caused the breach was also serious. Minimum sensitivity to *Charter* concerns within the context of the particular situation would have shown the search to be unnecessary and violative. Combined with the police conduct, the impingement on W also engages the objects of vindication of the right and deterrence of future breaches. The state did not establish countervailing factors and damages should be awarded for the breach. Considering the seriousness of the injury and the finding that the corrections officers' actions were not intentional, malicious, high-handed or oppressive, the trial judge's \$5,000 damage award was appropriate.

With respect to the seizure of the car, W has not established that damages under s. 24(1) are appropriate and just from a functional perspective. The object of compensation is not engaged as W did not suffer any injury as a result of the seizure. Nor are the objects of vindication of the right and deterrence of future breaches compelling. While the seizure was wrong, it was not of a serious nature. A declaration under s. 24(1) that the vehicle seizure violated W's right to be free from unreasonable search and seizure under s. 8 of the *Charter* adequately serves the need for vindication of the right and deterrence of future improper car seizures.

Cases Cited

Considered: *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405; **referred to:** *Mills v. The Queen*, [1986] 1 S.C.R. 863; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *Dunlea v. Attorney-General*, [2000] NZCA 84, [2000] 3 N.Z.L.R. 136; *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Anufrijeva v. Southwark London Borough Council*, [2003] EWCA Civ 1406, [2004] Q.B. 1124; *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Taunoa v. Attorney-General*, [2007] NZSC 70, [2008] 1 N.Z.L.R. 429; *Fose*

En l'espèce, la fouille à nu de W appelait à bon droit l'octroi de dommages-intérêts. Cette fouille a porté atteinte à ses droits garantis par l'art. 8 de la *Charte*, et l'octroi de dommages-intérêts est requis dans ce cas pour que, d'un point de vue fonctionnel, les objectifs des dommages-intérêts en matière constitutionnelle soient remplis. Les fouilles à nu sont fondamentalement humiliantes et avilissantes, et la violation de la *Charte* a eu des conséquences non négligeables sur la personne de W et sur ses droits. La conduite des agents de correction à l'origine de la violation des droits était grave elle aussi. Une conscience minimale des préceptes de la *Charte* dans ce contexte aurait permis de reconnaître que la fouille était inutile et attentatoire. Combinée à la conduite des policiers, l'atteinte portée aux droits de W fait aussi intervenir les objectifs de défense du droit en cause et de dissuasion contre de nouvelles violations. L'État n'a pas démontré l'existence de facteurs faisant contrepoids; il convient donc d'accorder des dommages-intérêts en réparation de l'atteinte. Vu la gravité de l'atteinte et la conclusion voulant que les actes des agents de correction ne fussent pas intentionnels, malveillants, tyranniques ou oppressifs, les dommages-intérêts de 5 000 \$ que le juge de première instance a accordés étaient convenables.

Quant à la saisie de sa voiture, W n'a pas démontré que l'octroi de dommages-intérêts en vertu du par. 24(1) constitue une réparation convenable et juste, d'un point de vue fonctionnel. L'objectif d'indemnisation n'intervient pas, la saisie n'ayant causé aucun préjudice à W. Les objectifs de défense du droit et de dissuasion contre de nouvelles violations ne sont pas non plus déterminants. Certes, la saisie de la voiture était fautive, mais n'était pas de nature grave. Un jugement déclaratoire fondé sur le par. 24(1) attestant que la saisie du véhicule a porté atteinte au droit à la protection contre les fouilles, perquisitions et saisies abusives que l'art. 8 de la *Charte* garantit à W répond adéquatement à la nécessité de défendre son droit et de décourager de nouvelles saisies irrégulières.

Jurisprudence

Arrêt examiné : *Mackin c. Nouveau-Brunswick (Ministre des Finances)*, 2002 CSC 13, [2002] 1 R.C.S. 405; **arrêts mentionnés :** *Mills c. La Reine*, [1986] 1 R.C.S. 863; *Doucet-Boudreau c. Nouvelle-Écosse (Ministre de l'Éducation)*, 2003 CSC 62, [2003] 3 R.C.S. 3; *Dunlea c. Attorney-General*, [2000] NZCA 84, [2000] 3 N.Z.L.R. 136; *Andrews c. Grand & Toy Alberta Ltd.*, [1978] 2 R.C.S. 229; *Anufrijeva c. Southwark London Borough Council*, [2003] EWCA Civ 1406, [2004] Q.B. 1124; *Bivens c. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Taunoa c. Attorney-General*, [2007] NZSC 70, [2008] 1 N.Z.L.R.

v. Minister of Safety and Security, 1997 (3) SA 786; *Attorney General of Trinidad and Tobago v. Ramanoop*, [2005] UKPC 15, [2006] 1 A.C. 328; *Smith v. Wade*, 461 U.S. 30 (1983); *R. v. B.W.P.*, 2006 SCC 27, [2006] 1 S.C.R. 941; *Simpson v. Attorney-General*, [1994] 3 N.Z.L.R. 667; *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129; *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.*, [1996] 2 S.C.R. 345; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765; *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679.

Statutes and Regulations Cited

Act respecting industrial accidents and occupational diseases, R.S.Q., c. A-3.001.
Canadian Charter of Rights and Freedoms, ss. 8, 9, 24, 32.
Charter of human rights and freedoms, R.S.Q., c. C-12, ss. 49, 51.
Constitution Act, 1982, s. 52(1).

APPEAL from a judgment of the British Columbia Court of Appeal (Finch C.J.B.C. and Saunders and Low J.J.A.), 2009 BCCA 23, 89 B.C.L.R. (4th) 217, 265 B.C.A.C. 174, 446 W.A.C. 174, 304 D.L.R. (4th) 653, [2009] 6 W.W.R. 261, 63 C.C.L.T. (3d) 165, [2009] B.C.J. No. 91 (QL), 2009 CarswellBC 115, affirming a decision of Tysoe J., 2007 BCSC 3, 63 B.C.L.R. (4th) 361, [2007] 4 W.W.R. 502, 45 C.C.L.T. (3d) 121, [2007] B.C.J. No. 9 (QL), 2007 CarswellBC 12, finding a breach of *Charter* rights and awarding damages. Appeal allowed in part.

Tomasz M. Zworski, for the appellant the City of Vancouver.

Bryant Alexander Mackey and *Barbara Carmichael*, for the appellant Her Majesty the Queen in Right of the Province of British Columbia.

Brian M. Samuels, *Kieran A. G. Bridge* and *Jennifer W. Chan*, for the respondent.

Mark R. Kindrachuk, *Q.C.*, and *Jeffrey G. Johnston*, for the intervener the Attorney General of Canada.

429; *Fose c. Minister of Safety and Security*, 1997 (3) SA 786; *Attorney General of Trinidad and Tobago c. Ramanoop*, [2005] UKPC 15, [2006] 1 A.C. 328; *Smith c. Wade*, 461 U.S. 30 (1983); *R. c. B.W.P.*, 2006 CSC 27, [2006] 1 R.C.S. 941; *Simpson c. Attorney-General*, [1994] 3 N.Z.L.R. 667; *Miazga c. Kvello (Succession)*, 2009 CSC 51, [2009] 3 R.C.S. 339; *Hill c. Commission des services policiers de la municipalité régionale de Hamilton-Wentworth*, 2007 CSC 41, [2007] 3 R.C.S. 129; *Béliveau St-Jacques c. Fédération des employées et employés de services publics inc.*, [1996] 2 R.C.S. 345; *R. c. Grant*, 2009 CSC 32, [2009] 2 R.C.S. 353; *R. c. Conway*, 2010 CSC 22, [2010] 1 R.C.S. 765; *R. c. Golden*, 2001 CSC 83, [2001] 3 R.C.S. 679.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 8, 9, 24, 32.
Charte des droits et libertés de la personne, L.R.Q., ch. C-12, art. 49, 51.
Loi constitutionnelle de 1982, art. 52(1).
Loi sur les accidents du travail et les maladies professionnelles, L.R.Q., ch. A-3.001.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (le juge en chef Finch et les juges Saunders et Low), 2009 BCCA 23, 89 B.C.L.R. (4th) 217, 265 B.C.A.C. 174, 446 W.A.C. 174, 304 D.L.R. (4th) 653, [2009] 6 W.W.R. 261, 63 C.C.L.T. (3d) 165, [2009] B.C.J. No. 91 (QL), 2009 CarswellBC 115, qui a confirmé une décision du juge Tysoe, 2007 BCSC 3, 63 B.C.L.R. (4th) 361, [2007] 4 W.W.R. 502, 45 C.C.L.T. (3d) 121, [2007] B.C.J. No. 9 (QL), 2007 CarswellBC 12, qui avait conclu à une violation des droits garantis par la *Charte* et accordé des dommages-intérêts. Pourvoi accueilli en partie.

Tomasz M. Zworski, pour l'appelante la Ville de Vancouver.

Bryant Alexander Mackey et *Barbara Carmichael*, pour l'appelante Sa Majesté la Reine du chef de la province de la Colombie-Britannique.

Brian M. Samuels, *Kieran A. G. Bridge* et *Jennifer W. Chan*, pour l'intimé.

Mark R. Kindrachuk, *c.r.*, et *Jeffrey G. Johnston*, pour l'intervenant le procureur général du Canada.

Robert E. Charney and Josh Hunter, for the interveners the Attorney General of Ontario.

Isabelle Harnois and Gilles Laporte, for the interveners the Attorney General of Quebec.

Kimberly R. Murray and Julian N. Falconer, for the interveners the Aboriginal Legal Services of Toronto Inc.

Louis Sokolov and Heidi Rubin, for the interveners the Association in Defence of the Wrongly Convicted.

Stuart Svonkin and Jana Stettner, for the interveners the Canadian Civil Liberties Association.

Vincent Westwick and Karine LeBlanc, for the interveners the Canadian Association of Chiefs of Police.

Sean Dewart and Tim Gleason, for the interveners the Criminal Lawyers' Association (Ontario).

Kent Roach and Grace Pastine, for the interveners the British Columbia Civil Liberties Association and the David Asper Centre for Constitutional Rights.

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

I. Introduction

[1] The *Canadian Charter of Rights and Freedoms* guarantees the fundamental rights and freedoms of all Canadians and provides remedies for their breach. The first and most important remedy is the nullification of laws that violate the *Charter* under s. 52(1) of the *Constitution Act, 1982*. This is supplemented by s. 24(2), under which evidence obtained in breach of the *Charter* may be excluded if its admission would bring the administration of justice into disrepute, and s. 24(1) — the provision at issue in this case — under which the court is authorized to grant such remedies to individuals

Robert E. Charney et Josh Hunter, pour l'intervenant le procureur général de l'Ontario.

Isabelle Harnois et Gilles Laporte, pour l'intervenant le procureur général du Québec.

Kimberly R. Murray et Julian N. Falconer, pour l'intervenante Aboriginal Legal Services of Toronto Inc.

Louis Sokolov et Heidi Rubin, pour l'intervenante Association in Defence of the Wrongly Convicted.

Stuart Svonkin et Jana Stettner, pour l'intervenante l'Association canadienne des libertés civiles.

Vincent Westwick et Karine LeBlanc, pour l'intervenante l'Association canadienne des chefs de police.

Sean Dewart et Tim Gleason, pour l'intervenante Criminal Lawyers' Association (Ontario).

Kent Roach et Grace Pastine, pour les intervenants l'Association des libertés civiles de la Colombie-Britannique et David Asper Centre for Constitutional Rights.

Version française du jugement de la Cour rendu par

LA JUGE EN CHEF —

I. Introduction

[1] La *Charte canadienne des droits et libertés* garantit les droits et libertés fondamentaux de tous les Canadiens et prévoit des recours en cas de violation. Le premier et le plus important de ces recours réside dans l'invalidation, prévue au par. 52(1) de la *Loi constitutionnelle de 1982*, des règles de droit contraires à la *Charte*. Viennent s'y ajouter le par. 24(2), en vertu duquel les éléments de preuve obtenus en contravention de la *Charte* peuvent être écartés dans le cas où leur utilisation est susceptible de déconsidérer l'administration de la justice, et le par. 24(1) — la disposition sur laquelle porte le litige —,

for infringement of *Charter* rights as it “considers appropriate and just in the circumstances”.

[2] The respondent Ward’s *Charter* rights were violated by Vancouver and British Columbia officials who detained him, strip searched his person and seized his car without cause. The trial judge awarded Mr. Ward damages for the *Charter* breaches, and the majority of the Court of Appeal of British Columbia upheld that award.

[3] This appeal raises the question of when damages may be awarded under s. 24(1) of the *Charter*, and what the amount of such damages should be. Although the *Charter* is 28 years old, authority on this question is sparse, inviting a comprehensive analysis of the object of damages for *Charter* breaches and the considerations that guide their award.

[4] I conclude that damages may be awarded for *Charter* breach under s. 24(1) where appropriate and just. The first step in the inquiry is to establish that a *Charter* right has been breached. The second step is to show why damages are a just and appropriate remedy, having regard to whether they would fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches. At the third step, the state has the opportunity to demonstrate, if it can, that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust. The final step is to assess the quantum of the damages.

[5] I conclude that damages were properly awarded for the strip search of Mr. Ward, but not justified for the seizure of his car. I would therefore allow the appeal in part.

qui habilite le tribunal à accorder, aux personnes dont les droits garantis par la *Charte* ont été violés, la réparation qu’il « estime convenable et juste eu égard aux circonstances ».

[2] Les droits que la *Charte* garantit à l’intimé, M. Ward, ont été violés par des agents de Vancouver et de la Colombie-Britannique qui l’ont mis en détention, l’ont soumis à une fouille à nu et ont saisi sa voiture sans motif suffisant. Le juge de première instance a accordé à M. Ward des dommages-intérêts pour des violations de la *Charte*, et ce jugement a été confirmé, à la majorité, par la Cour d’appel de la Colombie-Britannique.

[3] Le pourvoi soulève la question de savoir dans quels cas des dommages-intérêts peuvent être accordés en vertu du par. 24(1) de la *Charte*, et à quel montant ils devraient être fixés. Bien que la *Charte* soit en vigueur depuis 28 ans, la jurisprudence sur cette question demeure rare. Il semble donc opportun d’analyser en détail l’objectif des dommages-intérêts pour violation de la *Charte* et les considérations qui en guident l’octroi.

[4] Je conclus que des dommages-intérêts pour violation de la *Charte* peuvent être accordés en vertu du par. 24(1) lorsqu’ils constituent une réparation convenable et juste. À la première étape de l’analyse, il doit être établi qu’un droit garanti par la *Charte* a été enfreint. À la deuxième, il faut démontrer pourquoi les dommages-intérêts constituent une réparation convenable et juste, selon qu’ils peuvent remplir au moins une des fonctions interreliées suivantes : l’indemnisation, la défense du droit en cause et la dissuasion contre toute nouvelle violation. À la troisième, l’État a la possibilité de démontrer, le cas échéant, que des facteurs faisant contrepoids l’emportent sur les considérations fonctionnelles favorables à l’octroi de dommages-intérêts, de sorte que ces derniers ne seraient ni convenables, ni justes. La dernière étape consiste à fixer le montant des dommages-intérêts.

[5] Selon moi, la fouille à nu de M. Ward appelait à bon droit l’octroi de dommages-intérêts, mais pas la saisie de sa voiture. Par conséquent, je suis d’avis d’accueillir le pourvoi en partie.

II. Facts

[6] On August 1, 2002, Prime Minister Chrétien participated in a ceremony to mark the opening of a gate at the entrance to Vancouver's Chinatown. During the ceremony, the Vancouver Police Department ("VPD") received information that an unknown individual intended to throw a pie at the Prime Minister, an event that had occurred elsewhere two years earlier. The suspected individual was described as a white male, 30 to 35 years, 5' 9", with dark short hair, wearing a white golf shirt or T-shirt with some red on it.

[7] Mr. Ward is a Vancouver lawyer who attended the August 1 ceremony. On the day, Mr. Ward, a white male, had grey, collar-length hair, was in his mid-40s and was wearing a grey T-shirt with some red on it. Based on his appearance, Mr. Ward was identified — mistakenly — as the would-be pie-thrower. When the VPD officers noticed him, Mr. Ward was running and appeared to be avoiding interception. The officers chased Mr. Ward down and handcuffed him. Mr. Ward loudly protested his detention and created a disturbance, drawing the attention of a local television camera crew. The television broadcast showed that Mr. Ward had a "very agitated look on his face", "appeared to be yelling for the benefit of the onlookers" and was "holding back" as he was being escorted down the street.

[8] Mr. Ward was arrested for breach of the peace and taken to the police lockup in Vancouver, which was under the partial management of provincial corrections officers. Upon his arrival, the corrections officers instructed Mr. Ward to remove all his clothes in preparation for a strip search. Mr. Ward complied in part but refused to take off his underwear. The officers did not insist on complete removal and Mr. Ward was never touched during the search. After the search was completed, Mr. Ward was placed in a small cell where he spent several hours before being released.

II. Les faits

[6] Le 1^{er} août 2002, le premier ministre Chrétien participait à une cérémonie soulignant l'inauguration d'un portail à l'entrée du quartier chinois de Vancouver. Pendant la cérémonie, le service de police de Vancouver (« SPV ») a été informé qu'un individu non identifié avait l'intention d'entarter le premier ministre, un incident qui s'était produit ailleurs deux ans auparavant. Le suspect était décrit comme un homme de race blanche âgé de 30 à 35 ans, mesurant 5 pi 9 po, ayant les cheveux courts foncés et portant un polo ou un tee-shirt blanc avec un peu de rouge.

[7] M. Ward, un avocat de Vancouver, assistait à la cérémonie du 1^{er} août. Ce jour-là, M. Ward, un homme de race blanche dans la mi-quarantaine, aux cheveux gris au ras du cou, était vêtu d'un tee-shirt gris avec un peu de rouge. En raison de son apparence, M. Ward a été identifié — à tort — comme l'entarteur potentiel. Lorsque les agents du SPV l'ont remarqué, M. Ward courait et semblait essayer d'éviter d'être intercepté. Les agents l'ont poursuivi et lui ont passé les menottes. M. Ward a protesté bruyamment contre sa détention, et le tapage a attiré l'attention d'une équipe de télévision locale. Dans le reportage qui a été diffusé, M. Ward avait [TRADUCTION] « l'air très agité », « semblait hurler pour se faire remarquer des gens assistant à la scène » et « opposait une résistance » pendant qu'on l'escortait dans la rue.

[8] M. Ward a été arrêté pour violation de la paix et conduit au centre de détention de la police à Vancouver, administré en partie par des agents de correction provinciaux. À son arrivée, les agents de correction lui ont demandé d'enlever tous ses vêtements en vue d'une fouille à nu. M. Ward a obtempéré partiellement, mais a refusé de retirer son sous-vêtement. Les agents n'ont pas insisté pour qu'il se dénude complètement et M. Ward n'a pas été touché pendant la fouille. Une fois la fouille terminée, M. Ward a été enfermé dans une petite cellule où il a passé plusieurs heures avant d'être remis en liberté.

[9] While Mr. Ward was at the lockup, VPD officers impounded his car for the purpose of searching it once a search warrant had been obtained. VPD detectives subsequently determined that they did not have grounds to obtain the required search warrant or evidence to charge Mr. Ward for attempted assault. Mr. Ward was released from the lockup approximately 4.5 hours after he was arrested and several hours after the Prime Minister had left Chinatown following the ceremony.

III. Judicial History

A. *Supreme Court of British Columbia, 2007 BCSC 3, 63 B.C.L.R. (4th) 361*

[10] Mr. Ward brought an action in tort and for breach of his *Charter* rights against the City, the Province, and individual police and corrections officers for his arrest, detention, strip search, and car seizure. Justice Tysoe found Mr. Ward's arrest for breach of the peace to be lawful and dismissed the action against the individual police and corrections officers. However, Tysoe J. held that — although they did not act in bad faith and were not liable in tort for either incident — the Province's strip search and the City's vehicle seizure violated Mr. Ward's right to be free from unreasonable search and seizure under s. 8 of the *Charter*. In addition, Tysoe J. found that the City breached Mr. Ward's rights under s. 9 of the *Charter* and committed the tort of wrongful imprisonment by keeping Mr. Ward in the police lockup longer than necessary.

[11] Tysoe J. assessed damages under s. 24(1) of the *Charter* at \$100 for the seizure of the car and \$5,000 for the strip search. He rejected the governments' argument that damages were an inappropriate remedy for *Charter* breaches absent bad faith, abuse of power, or tortious conduct. In addition,

[9] Pendant que M. Ward se trouvait au centre de détention, des agents du SPV ont remorqué sa voiture à la fourrière en vue de la fouiller après l'obtention d'un mandat de perquisition. Les enquêteurs du SPV ont par la suite conclu qu'ils n'avaient pas de motifs suffisants pour obtenir le mandat de perquisition nécessaire, ni les éléments de preuve requis pour inculper M. Ward de tentative de voies de fait. M. Ward a été libéré du centre de détention environ quatre heures et demie après son arrestation, et plusieurs heures après que le premier ministre eut quitté le quartier chinois à l'issue de la cérémonie.

III. Historique judiciaire

A. *Cour suprême de la Colombie-Britannique, 2007 BCSC 3, 63 B.C.L.R. (4th) 361*

[10] M. Ward a intenté une action en responsabilité délictuelle et pour violation de ses droits garantis par la *Charte* contre la ville, la province ainsi que certains policiers et agents de correction à titre individuel par suite de son arrestation, sa détention, la fouille à nu qu'il a subie et la saisie de son véhicule. Le juge Tysoe a conclu à la légalité de l'arrestation de M. Ward pour violation de la paix et a rejeté l'action intentée contre les policiers et les agents de correction à titre individuel. Il a toutefois conclu que la fouille à nu et la saisie du véhicule avaient violé le droit de M. Ward à la protection contre les fouilles, les perquisitions et les saisies abusives garanti par l'art. 8 de la *Charte*, même si la province, dans le cas de la fouille, et la ville, dans le cas de la saisie, n'avaient ni agi de mauvaise foi ni engagé leur responsabilité délictuelle. De plus, le juge Tysoe a conclu que la ville avait porté atteinte au droit de M. Ward garanti par l'art. 9 de la *Charte* et avait commis le délit civil de séquestration en gardant M. Ward au centre de détention de la police plus longtemps que cela était nécessaire.

[11] Le juge Tysoe a fixé le montant des dommages-intérêts accordés en vertu du par. 24(1) de la *Charte* à 100 \$ pour la saisie de la voiture et à 5 000 \$ pour la fouille à nu. Il a rejeté l'argument du gouvernement selon lequel l'octroi de dommages-intérêts ne constitue pas une réparation

Tysoe J. awarded \$5,000 in damages for the wrongful imprisonment. This award is not at issue on this appeal.

B. *British Columbia Court of Appeal, 2009 BCCA 23, 89 B.C.L.R. (4th) 217*

[12] Justice Low, Finch C.J.B.C. concurring, upheld Tysoe J.'s ruling, agreeing with Mr. Ward that bad faith, abuse of power, or tortious conduct are not necessary requirements for the awarding of *Charter* damages.

[13] Justice Saunders, dissenting, would have allowed the Province and City appeals, holding that damages cannot be awarded where the police did not act in bad faith and simply made a mistake as to the proper course of action.

IV. Constitutional Provisions

[14] Section 24(1) of the *Charter* provides as follows:

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

V. Issues

[15] The issues are the following:

A. When are damages under s. 24(1) available?

1. The language of s. 24(1) and the nature of *Charter* damages;
2. Step one: Proof of a *Charter* breach;
3. Step two: Functional justification of damages;

convenable à une violation de la *Charte* s'il n'y a eu ni mauvaise foi, ni abus de pouvoir, ni conduite délictueuse. Le juge Tysoe a aussi accordé des dommages-intérêts en responsabilité délictuelle de 5 000 \$ pour séquestration. Ces dommages-intérêts ne sont pas en cause dans le pourvoi.

B. *Cour d'appel de la Colombie-Britannique, 2009 BCCA 23, 89 B.C.L.R. (4th) 217*

[12] Le juge Low, avec l'accord du juge en chef Finch, a confirmé la décision du juge Tysoe, retenant la prétention de M. Ward que la mauvaise foi, l'abus de pouvoir ou une conduite délictueuse ne sont pas des conditions préalables à l'octroi de dommages-intérêts en vertu de la *Charte*.

[13] La juge Saunders, dissidente, aurait accueilli les appels de la province et de la ville. À son avis, des dommages-intérêts ne peuvent être accordés si la police n'a pas agi de mauvaise foi et a tout simplement commis une erreur quant à la ligne de conduite à suivre.

IV. Dispositions constitutionnelles

[14] Le paragraphe 24(1) de la *Charte* est ainsi rédigé :

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

V. Questions en litige

[15] Les questions à trancher sont les suivantes :

A. Dans quels cas peut-on accorder des dommages-intérêts en vertu du par. 24(1)?

1. Libellé du par. 24(1) et nature des dommages-intérêts accordés en vertu de la *Charte*.
2. Première étape : preuve d'une violation de la *Charte*.
3. Deuxième étape : justification fonctionnelle des dommages-intérêts.

4. Step three: Countervailing factors;
5. Step four: Quantum of s. 24(1) damages;
6. Forum and procedure.

B. Application to the Facts

1. Damages for the strip search;
2. Damages for the car seizure.

VI. Analysis

A. *When Are Damages Under Section 24(1) Available?*

- (1) The Language of Section 24(1) and the Nature of *Charter* Damages

[16] Section 24(1) empowers courts of competent jurisdiction to grant “appropriate and just” remedies for *Charter* breaches. This language invites a number of observations.

[17] First, the language of the grant is broad. As McIntyre J. observed, “[i]t is difficult to imagine language which could give the court a wider and less fettered discretion”: *Mills v. The Queen*, [1986] 1 S.C.R. 863, at p. 965. The judge of “competent jurisdiction” has broad discretion to determine what remedy is appropriate and just in the circumstances of a particular case.

[18] Second, it is improper for courts to reduce this discretion by casting it in a strait-jacket of judicially prescribed conditions. To quote McIntyre J. in *Mills* once more, “[i]t is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion”: *Mills*, at p. 965.

4. Troisième étape : facteurs qui font contre-poids.
5. Quatrième étape : montant des dommages-intérêts accordés en vertu du par. 24(1).
6. Tribunal et procédure.

B. Application aux faits

1. Dommages-intérêts pour la fouille à nu.
2. Dommages-intérêts pour la saisie de la voiture.

VI. Analyse

A. *Dans quels cas peut-on accorder des dommages-intérêts en vertu du par. 24(1)?*

- (1) Libellé du par. 24(1) et nature des dommages-intérêts accordés en vertu de la *Charte*

[16] Le paragraphe 24(1) confère au tribunal compétent le pouvoir d'accorder une réparation « convenable et juste » en cas de violation des droits garantis par la *Charte*. Cette formulation appelle un certain nombre d'observations.

[17] Premièrement, ce pouvoir est conféré en termes très larges. Comme l'a constaté le juge McIntyre, « [i]l est difficile de concevoir comment on pourrait donner au tribunal un pouvoir discrétionnaire plus large et plus absolu » : *Mills c. La Reine*, [1986] 1 R.C.S. 863, p. 965. Le juge du « tribunal compétent » dispose d'un large pouvoir discrétionnaire pour déterminer la réparation convenable et juste eu égard aux circonstances d'une affaire donnée.

[18] Deuxièmement, les tribunaux ne sont pas autorisés à restreindre ce pouvoir discrétionnaire en l'enserrant dans un corset de conditions d'origine jurisprudentielle. Pour citer encore le juge McIntyre dans *Mills*, « [c]e large pouvoir discrétionnaire n'est tout simplement pas réductible à une espèce de formule obligatoire d'application générale à tous les cas, et les tribunaux d'appel ne sont nullement autorisés à s'approprier ce large pouvoir discrétionnaire ni à en restreindre la portée » : *Mills*, p. 965.

[19] Third, the prohibition on cutting down the ambit of s. 24(1) does not preclude judicial clarification of when it may be “appropriate and just” to award damages. The phrase “appropriate and just” limits what remedies are available. The court’s discretion, while broad, is not unfettered. What is appropriate and just will depend on the facts and circumstances of the particular case. Prior cases may offer guidance on what is appropriate and just in a particular situation.

[20] The general considerations governing what constitutes an appropriate and just remedy under s. 24(1) were set out by Iacobucci and Arbour JJ. in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3. Briefly, an appropriate and just remedy will: (1) meaningfully vindicate the rights and freedoms of the claimants; (2) employ means that are legitimate within the framework of our constitutional democracy; (3) be a judicial remedy which vindicates the right while invoking the function and powers of a court; and (4) be fair to the party against whom the order is made: *Doucet-Boudreau*, at paras. 55-58.

[21] Damages for breach of a claimant’s *Charter* rights may meet these conditions. They may meaningfully vindicate the claimant’s rights and freedoms. They employ a means well-recognized within our legal framework. They are appropriate to the function and powers of a court. And, depending on the circumstances and the amount awarded, they can be fair not only to the claimant whose rights were breached, but to the state which is required to pay them. I therefore conclude that s. 24(1) is broad enough to include the remedy of damages for *Charter* breach. That said, granting damages under the *Charter* is a new endeavour, and an approach to when damages are appropriate and just should develop incrementally. *Charter* damages are only one remedy amongst others available under s. 24(1), and often other

[19] Troisièmement, l’interdiction de restreindre la portée du par. 24(1) n’empêche pas les tribunaux de préciser dans quels cas il peut se révéler « convenable et juste » d’accorder des dommages-intérêts. L’expression « convenable et juste » limite les réparations possibles. Le pouvoir discrétionnaire du tribunal, si large soit-il, n’est pas pour autant absolu. Ce qui est convenable et juste dépendra des faits et des circonstances de chaque affaire. Les décisions antérieures peuvent donner des indications quant à ce qui pourra être jugé convenable et juste dans une situation donnée.

[20] Les facteurs généraux permettant de reconnaître une réparation convenable et juste au sens du par. 24(1) ont été énoncés par les juges Iacobucci et Arbour dans *Doucet-Boudreau c. Nouvelle-Écosse (Ministre de l’Éducation)*, 2003 CSC 62, [2003] 3 R.C.S. 3. En résumé, une réparation convenable et juste : (1) permet de défendre utilement les droits et libertés du demandeur; (2) fait appel à des moyens légitimes dans le cadre de notre démocratie constitutionnelle; (3) est une réparation judiciaire qui défend le droit en cause tout en mettant à contribution le rôle et les pouvoirs d’un tribunal; (4) est équitable pour la partie visée par l’ordonnance : *Doucet-Boudreau*, par. 55-58.

[21] L’octroi de dommages-intérêts à un demandeur en réparation de la violation de ses droits garantis par la *Charte* peut répondre à ces conditions. Il peut permettre de défendre utilement les droits et libertés du demandeur. Il fait appel à un moyen bien reconnu dans notre cadre juridique. Il s’accorde avec le rôle et les pouvoirs des tribunaux. Et, selon les circonstances et le montant accordé, il peut s’avérer équitable non seulement envers la personne dont les droits ont été violés, mais aussi envers l’État qui versera les dommages-intérêts. Je conclus donc que la portée du par. 24(1) est suffisamment large pour embrasser l’octroi de dommages-intérêts en réparation d’une violation de la *Charte*. Cela dit, l’octroi de dommages-intérêts en vertu de la *Charte* constitue une nouveauté, et les règles servant à déterminer s’il s’agit d’une réparation convenable et juste devraient

s. 24(1) remedies will be more responsive to the breach.

[22] The term “damages” conveniently describes the remedy sought in this case. However, it should always be borne in mind that these are not private law damages, but the distinct remedy of constitutional damages. As Thomas J. notes in *Dunlea v. Attorney-General*, [2000] NZCA 84, [2000] 3 N.Z.L.R. 136, at para. 81, a case dealing with New Zealand’s *Bill of Rights Act 1990*, an action for public law damages “is not a private law action in the nature of a tort claim for which the state is vicariously liable but [a distinct] public law action directly against the state for which the state is primarily liable”. In accordance with s. 32 of the *Charter*, this is equally so in the Canadian constitutional context. The nature of the remedy is to require the state (or society writ large) to compensate an individual for breaches of the individual’s constitutional rights. An action for public law damages — including constitutional damages — lies against the state and not against individual actors. Actions against individual actors should be pursued in accordance with existing causes of action. However, the underlying policy considerations that are engaged when awarding private law damages against state actors may be relevant when awarding public law damages directly against the state. Such considerations may be appropriately kept in mind.

(2) Step One: Proof of a Charter Breach

[23] Section 24(1) is remedial. The first step, therefore, is to establish a *Charter* breach. This is the wrong on which the claim for damages is based.

se développer graduellement. L’octroi de dommages-intérêts ne représente qu’une des réparations permises par le par. 24(1) et, souvent, d’autres réparations possibles répondront mieux à la violation.

[22] Le terme « dommages-intérêts » décrit commodément la réparation demandée en l’espèce. Toutefois, il faut toujours se rappeler qu’il ne s’agit pas de dommages-intérêts de droit privé, mais bien de la réparation distincte que constituent les dommages-intérêts en matière constitutionnelle. Ainsi que le fait remarquer le juge Thomas dans *Dunlea c. Attorney-General*, [2000] NZCA 84, [2000] 3 N.Z.L.R. 136, au par. 81, une décision portant sur le *Bill of Rights Act 1990* de la Nouvelle-Zélande, une action en dommages-intérêts de droit public [TRADUCTION] « n’est pas une action de droit privé de la nature d’un recours délictuel fondé sur la responsabilité du fait d’autrui de l’État, [mais une action distincte] de droit public intentée directement contre l’État dont la responsabilité est invoquée à titre principal ». Cela vaut également dans le contexte constitutionnel canadien, compte tenu de l’art. 32 de la *Charte*. Il s’agit d’un recours visant à obliger l’État (autrement dit, la société) à indemniser la personne dont les droits constitutionnels ont été violés. L’action en dommages-intérêts de droit public — y compris en dommages-intérêts en matière constitutionnelle — est intentée contre l’État, et non contre ses représentants à titre individuel. Les actions contre ces derniers devraient, pour leur part, être fondées sur les causes d’action existantes. Toutefois, les considérations sous-jacentes de politique générale qui interviennent dans la décision d’ordonner à des représentants de l’État de verser des dommages-intérêts de droit privé peuvent être pertinentes lorsqu’il s’agit de contraindre directement l’État à verser des dommages-intérêts de droit public. Ces considérations peuvent à bon droit être prises en compte.

(2) Première étape : preuve d’une violation de la Charte

[23] Le paragraphe 24(1) est une disposition réparatrice. Par conséquent, la première étape consiste à prouver la violation de la *Charte*. Il s’agit là du préjudice fondant l’action en dommages-intérêts.

(3) Step Two: Functional Justification of Damages

[24] A functional approach to damages finds damages to be appropriate and just to the extent that they serve a useful function or purpose. This approach has been adopted in awarding non-pecuniary damages in personal injury cases (*Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229), and, in my view, a similar approach is appropriate in determining when damages are “appropriate and just” under s. 24(1) of the *Charter*.

[25] I therefore turn to the purposes that an order for damages under s. 24(1) may serve. For damages to be awarded, they must further the general objects of the *Charter*. This reflects itself in three interrelated functions that damages may serve. The function of *compensation*, usually the most prominent function, recognizes that breach of an individual’s *Charter* rights may cause personal loss which should be remedied. The function of *vindication* recognizes that *Charter* rights must be maintained, and cannot be allowed to be whittled away by attrition. Finally, the function of *deterrence* recognizes that damages may serve to deter future breaches by state actors.

[26] These functions of s. 24(1) damages are supported by foreign constitutional jurisprudence and, by analogy, foreign jurisprudence arising in the statutory human rights context.

[27] Compensation has been cited by Lord Woolf C.J. (speaking of the *European Convention of Human Rights*) as “fundamental”. In most cases, it is the most prominent of the three functions that *Charter* damages may serve. The goal is to compensate the claimant for the loss caused by the *Charter* breach; “[t]he applicant should, in so far as this is possible, be placed in the same position as if his Convention rights had not been infringed”:

(3) Deuxième étape : justification fonctionnelle des dommages-intérêts

[24] Selon une approche fonctionnelle des dommages-intérêts, les dommages-intérêts sont tenus pour convenables et justes dans la mesure où ils remplissent une fonction ou un but utile. Cette approche a été suivie pour l’octroi de dommages-intérêts non pécuniaires pour préjudice personnel (*Andrews c. Grand & Toy Alberta Ltd.*, [1978] 2 R.C.S. 229) et il convient, à mon avis, d’adopter une approche similaire pour déterminer dans quels cas des dommages-intérêts constituent une réparation « convenable et juste » pour l’application du par. 24(1) de la *Charte*.

[25] J’en viens donc aux objectifs que peut remplir l’octroi de dommages-intérêts en vertu du par. 24(1). Des dommages-intérêts ne seront accordés que s’ils servent les objectifs généraux de la *Charte*. Trois fonctions interreliées des dommages-intérêts leur permettront de satisfaire à cette condition. La fonction d’*indemnisation*, généralement la plus importante, reconnaît que l’atteinte à un droit garanti par la *Charte* peut causer une perte personnelle qui exige réparation. La fonction de *défense* reconnaît que les droits conférés par la *Charte* doivent demeurer intacts et qu’il faut veiller à ce qu’ils ne s’effritent pas. Enfin, la fonction de *dissuasion* reconnaît que les dommages-intérêts peuvent permettre de décourager la perpétration d’autres violations par des représentants de l’État.

[26] Ces fonctions de l’octroi de dommages-intérêts en vertu du par. 24(1) sont étayées par la jurisprudence étrangère en matière constitutionnelle et, par analogie, par la jurisprudence étrangère fondée sur la législation en matière de droits de la personne.

[27] Le lord juge en chef Woolf a employé l’adjectif [TRADUCTION] « fondamentale » pour qualifier l’indemnisation (sous le régime de la *Convention européenne des droits de l’homme*). Dans la plupart des cas, il s’agit de la plus importante des trois fonctions des dommages-intérêts accordés en vertu de la *Charte*. Elle a pour objet d’indemniser le demandeur des pertes occasionnées par la violation de la *Charte*; [TRADUCTION] « [l]e demandeur

Anufrijeva v. Southwark London Borough Council, [2003] EWCA Civ 1406, [2004] Q.B. 1124, at para. 59, *per* Lord Woolf C.J. Compensation focuses on the claimant's personal loss: physical, psychological and pecuniary. To these types of loss must be added harm to the claimant's intangible interests. In the public law damages context, courts have variously recognized this harm as distress, humiliation, embarrassment, and anxiety: *Dunlea; Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Taunoa v. Attorney-General*, [2007] NZSC 70, [2008] 1 N.Z.L.R. 429. Often the harm to intangible interests effected by a breach of rights will merge with psychological harm. But a resilient claimant whose intangible interests are harmed should not be precluded from recovering damages simply because she cannot prove a substantial psychological injury.

devrait, dans la mesure du possible, être remis dans la même situation que si ses droits garantis par la Convention n'avaient pas été violés » : *Anufrijeva c. Southwark London Borough Council*, [2003] EWCA Civ 1406, [2004] Q.B. 1124, par. 59, le lord juge en chef Woolf. L'indemnisation est axée sur la perte personnelle subie par le demandeur : perte physique, psychologique et pécuniaire. À ces types de pertes, il faut ajouter le préjudice causé aux intérêts intangibles du demandeur. Dans le contexte des dommages-intérêts de droit public, les tribunaux ont assimilé ce préjudice, selon le cas, à la détresse, à l'humiliation, à l'embarras et à l'anxiété : *Dunlea; Bivens c. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Taunoa c. Attorney-General*, [2007] NZSC 70, [2008] 1 N.Z.L.R. 429. Souvent le préjudice causé aux intérêts intangibles par une atteinte aux droits se confond avec le préjudice psychologique. Néanmoins, une demanderesse dont les intérêts intangibles ont été lésés, mais qui fait montre de résilience, ne devrait pas se voir empêchée d'obtenir des dommages-intérêts du simple fait qu'elle est incapable d'établir l'existence d'un préjudice psychologique substantiel.

[28] Vindication, in the sense of affirming constitutional values, has also been recognized as a valid object of damages in many jurisdictions: see *Fose v. Minister of Safety and Security*, 1997 (3) SA 786 (C.C.), at para. 55, for a summary of the international jurisprudence. Vindication focuses on the harm the infringement causes society. As Didcott J. observed in *Fose*, violations of constitutionally protected rights harm not only their particular victims, but society as a whole. This is because they “impair public confidence and diminish public faith in the efficacy of the [constitutional] protection”: *Fose*, at para. 82. While one may speak of vindication as underlining the seriousness of the harm done to the claimant, vindication as an object of constitutional damages focuses on the harm the Charter breach causes to the state and to society.

[28] La défense du droit, dans le sens d'affirmation des valeurs constitutionnelles, a également été reconnue dans de nombreux pays comme un objectif valable de l'octroi de dommages-intérêts : voir *Fose c. Minister of Safety and Security*, 1997 (3) SA 786 (C.C.), par. 55, où l'on trouvera un résumé de la jurisprudence étrangère. La défense du droit est axée sur le préjudice que l'atteinte cause à la société. Comme le fait remarquer le juge Didcott dans *Fose*, les atteintes à des droits protégés par la Constitution causent un préjudice non seulement à leurs victimes, mais à la société dans son ensemble. Il en est ainsi car elles [TRADUCTION] « nuisent à la confiance qu'a le public en la vigueur de la protection [constitutionnelle] » : *Fose*, par. 82. Bien que l'on puisse concevoir la défense des droits comme servant à souligner la gravité du préjudice causé au demandeur — la défense des droits en tant qu'objectif des dommages-intérêts en matière constitutionnelle met l'accent sur le préjudice causé à l'État et à la société par la violation de la Charte.

[29] Finally, deterrence of future breaches of the right has also been widely recognized as a valid object of public law damages: e.g., *Attorney General of Trinidad and Tobago v. Ramanoop*, [2005] UKPC 15, [2006] 1 A.C. 328, at para. 19; *Taunoa*, at para. 259; *Fose*, at para. 96; *Smith v. Wade*, 461 U.S. 30 (1983), at p. 49. Deterrence, like vindication, has a societal purpose. Deterrence seeks to regulate government behaviour, generally, in order to achieve compliance with the Constitution. This purpose is similar to the criminal sentencing object of “general deterrence”, which holds that the example provided by the punishment imposed on a particular offender will dissuade potential criminals from engaging in criminal activity. When general deterrence is factored in the determination of the sentence, the offender is punished more severely, not because he or she deserves it, but because the court decides to send a message to others who may be inclined to engage in similar criminal activity: *R. v. B.W.P.*, 2006 SCC 27, [2006] 1 S.C.R. 941. Similarly, deterrence as an object of *Charter* damages is not aimed at deterring the specific wrongdoer, but rather at influencing government behaviour in order to secure state compliance with the *Charter* in the future.

[30] In most cases, all three objects will be present. Harm to the claimant will evoke the need for compensation. Vindication and deterrence will support the compensatory function and bolster the appropriateness of an award of damages. However, the fact that the claimant has not suffered personal loss does not preclude damages where the objectives of vindication or deterrence clearly call for an award. Indeed, the view that constitutional damages are available only for pecuniary or physical loss has been widely rejected in other constitutional democracies: see, e.g., *Anufrijeva*; *Fose*; *Taunoa*; *Smith*; and *Ramanoop*.

[31] In summary, damages under s. 24(1) of the *Charter* are a unique public law remedy, which

[29] Enfin, la dissuasion contre toute nouvelle violation du droit a aussi été reconnue dans plusieurs pays comme un objectif valable des dommages-intérêts de droit public : par ex., *Attorney General of Trinidad and Tobago c. Ramanoop*, [2005] UKPC 15, [2006] 1 A.C. 328, par. 19; *Taunoa*, par. 259; *Fose*, par. 96; *Smith c. Wade*, 461 U.S. 30 (1983), p. 49. La dissuasion, à l’instar de la défense des droits, joue un rôle sociétal. Elle cherche à régir la conduite du gouvernement, de manière générale, afin d’assurer le respect de la Constitution. Cet objectif est semblable à un objectif de la détermination de la peine en matière pénale, soit la « dissuasion générale », voulant que la punition infligée à un délinquant serve d’exemple pour dissuader des criminels potentiels de se livrer à des activités criminelles. Quand la dissuasion générale est prise en compte dans la détermination de la peine, le délinquant est puni plus sévèrement, non pas parce qu’il le mérite, mais parce que le tribunal décide de transmettre un message à quiconque pourrait être tenté de se livrer à des activités criminelles similaires : *R. c. B.W.P.*, 2006 CSC 27, [2006] 1 R.C.S. 941. De même, la dissuasion en tant qu’objectif des dommages-intérêts accordés en vertu de la *Charte* ne vise pas le contrevenant lui-même, mais vise plutôt à influencer sur la conduite du gouvernement de sorte que l’État respecte la *Charte* à l’avenir.

[30] Dans la plupart des cas, les trois objectifs interviendront. Le préjudice causé au demandeur appellera l’indemnisation; la défense du droit et la dissuasion étayeront la fonction d’indemnisation et renforceront le caractère convenable des dommages-intérêts. Or, l’absence de préjudice personnel subi par le demandeur n’empêche pas l’octroi de dommages-intérêts si ceux-ci sont par ailleurs manifestement exigés par les objectifs de défense du droit ou de dissuasion. En effet, le point de vue voulant que des dommages-intérêts en matière constitutionnelle ne puissent être accordés que pour un préjudice pécuniaire ou physique a été largement rejeté dans d’autres démocraties constitutionnelles : voir, p. ex., *Anufrijeva*; *Fose*; *Taunoa*; *Smith*; et *Ramanoop*.

[31] En résumé, les dommages-intérêts accordés en vertu du par. 24(1) de la *Charte* constituent une

may serve the objectives of: (1) compensating the claimant for loss and suffering caused by the breach; (2) vindicating the right by emphasizing its importance and the gravity of the breach; and (3) deterring state agents from committing future breaches. Achieving one or more of these objects is the first requirement for “appropriate and just” damages under s. 24(1) of the *Charter*.

(4) Step Three: Countervailing Factors

[32] As discussed, the basic requirement for the award of damages to be “appropriate and just” is that the award must be functionally required to fulfill one or more of the objects of compensation, vindication of the right, or deterrence of future *Charter* breaches.

[33] However, even if the claimant establishes that damages are functionally justified, the state may establish that other considerations render s. 24(1) damages inappropriate or unjust. A complete catalogue of countervailing considerations remains to be developed as the law in this area matures. At this point, however, two considerations are apparent: the existence of alternative remedies and concerns for good governance.

[34] A functional approach to damages under s. 24(1) means that if other remedies adequately meet the need for compensation, vindication and/or deterrence, a further award of damages under s. 24(1) would serve no function and would not be “appropriate and just”. The *Charter* entered an existent remedial arena which already housed tools to correct violative state conduct. Section 24(1) operates concurrently with, and does not replace, these areas of law. Alternative remedies include private law remedies for actions for personal injury, other *Charter* remedies like declarations

réparation de droit public tout à fait particulière, qui peut répondre aux objectifs suivants : (1) indemniser le demandeur du préjudice et des souffrances résultant de la violation du droit; (2) défendre le droit en cause en soulignant son importance et la gravité de la violation; (3) dissuader les agents de l’État de porter atteinte au droit à l’avenir. La réalisation d’au moins un de ces objectifs est la première exigence à laquelle les dommages-intérêts doivent répondre pour constituer une réparation « convenable et juste » au sens du par. 24(1) de la *Charte*.

(4) Troisième étape : facteurs qui font contre-poids

[32] Comme nous venons de le voir, l’exigence fondamentale pour que l’octroi de dommages-intérêts constitue une réparation « convenable et juste » est que les dommages-intérêts soient nécessaires, d’un point de vue fonctionnel, à la réalisation d’au moins un des objectifs d’indemnisation, de défense des droits ou de dissuasion contre toute nouvelle violation de la *Charte*.

[33] Toutefois, même si le demandeur démontre que l’octroi de dommages-intérêts en vertu du par. 24(1) est fondé, d’un point de vue fonctionnel, l’État peut y opposer d’autres considérations en raison desquelles cette réparation ne serait pas convenable et juste. La liste exhaustive des considérations qui peuvent faire contre-poids sera établie au fil de l’évolution du droit dans ce domaine. À l’heure actuelle, cependant, deux considérations se dégagent : l’existence d’autres recours et les préoccupations relatives au bon gouvernement.

[34] Suivant l’approche fonctionnelle des dommages-intérêts fondés sur le par. 24(1), si d’autres réparations répondent adéquatement aux objectifs d’indemnisation, de défense du droit ou de dissuasion, l’octroi additionnel de dommages-intérêts fondés sur le par. 24(1) ne servirait aucune fonction et ne serait ainsi pas « convenable et juste ». La *Charte* s’est inscrite dans un régime de recours qui comportait déjà des outils pour corriger les comportements attentatoires de l’État. Le paragraphe 24(1) s’applique parallèlement à ces autres domaines du droit, sans s’y substituer. Les autres recours

under s. 24(1), and remedies for actions covered by legislation permitting proceedings against the Crown.

[35] The claimant must establish basic functionality having regard to the objects of constitutional damages. The evidentiary burden then shifts to the state to show that the engaged functions can be fulfilled through other remedies. The claimant need not show that she has exhausted all other recourses. Rather, it is for the state to show that other remedies are available in the particular case that will sufficiently address the breach. For example, if the claimant has brought a concurrent action in tort, it is open to the state to argue that, should the tort claim be successful, the resulting award of damages would adequately address the *Charter* breach. If that were the case, an award of *Charter* damages would be duplicative. In addition, it is conceivable that another *Charter* remedy may, in a particular case, fulfill the function of *Charter* damages.

[36] The existence of a potential claim in tort does not therefore bar a claimant from obtaining damages under the *Charter*. Tort law and the Charter are distinct legal avenues. However, a concurrent action in tort, or other private law claim, bars s. 24(1) damages if the result would be double compensation: *Simpson v. Attorney-General*, [1994] 3 N.Z.L.R. 667 (C.A.), at p. 678.

[37] Declarations of *Charter* breach may provide an adequate remedy for the *Charter* breach, particularly where the claimant has suffered no personal damage. Considering declarations in *Taunoa*, at para. 368, McGrath J. writes:

comprennent les actions de droit privé pour préjudice personnel, les autres réparations fondées sur la *Charte*, comme les jugements déclaratoires rendus en vertu du par. 24(1), et les recours prévus par les lois qui autorisent des poursuites contre l'État.

[35] La demanderesse doit établir que les dommages-intérêts jouent un rôle fonctionnel minimal, eu égard aux objectifs des dommages-intérêts en matière constitutionnelle. Le fardeau de la preuve passe ensuite à l'État, qui doit démontrer que d'autres réparations permettraient de servir les fonctions en cause. La demanderesse n'est pas tenue de prouver qu'elle a épuisé tous les autres recours. Au contraire, c'est à l'État de démontrer que d'autres recours possibles dans l'affaire offriraient une réparation suffisante pour remédier à la violation. Par exemple, l'État pourrait faire valoir que les dommages-intérêts susceptibles d'être accordés à la demanderesse à l'issue de l'action concomitante en responsabilité délictuelle qu'elle a intentée constitueraient une réparation adéquate à la violation de la *Charte*. Si c'est le cas, l'octroi de dommages-intérêts en vertu de cette dernière emporterait duplication. En outre, il se peut qu'une autre réparation accordée en vertu de la *Charte*, dans une affaire donnée, accomplisse la fonction de l'octroi de dommages-intérêts en vertu de la *Charte*.

[36] La possibilité d'exercer un recours en responsabilité délictuelle n'empêche donc pas un demandeur d'obtenir des dommages-intérêts en vertu de la *Charte*. Le droit de la responsabilité délictuelle et la Charte constituent deux voies de droit distinctes. Cependant, une action concomitante en responsabilité délictuelle, ou autre action intentée en droit privé, fait obstacle à l'octroi de dommages-intérêts fondés sur le par. 24(1) s'il en résulte une double indemnisation : *Simpson c. Attorney-General*, [1994] 3 N.Z.L.R. 667 (C.A.), p. 678.

[37] Un jugement déclaratoire attestant qu'il y a eu violation de la *Charte* peut constituer une réparation adéquate, particulièrement lorsque le demandeur n'a subi aucun préjudice personnel. Le juge McGrath a écrit ce qui suit au sujet de telles déclarations dans *Taunoa*, au par. 368 :

The court's finding of a breach of rights and a declaration to that effect will often not only be appropriate relief but may also in itself be a sufficient remedy in the circumstances to vindicate a plaintiff's right. That will often be the case where no damage has been suffered that would give rise to a claim under private causes of action and, in the circumstances, if there is no need to deter persons in the position of the public officials from behaving in a similar way in the future. If in all the circumstances the court's pronouncement that there has been a breach of rights is a sufficiently appropriate remedy to vindicate the right and afford redress then, subject to any questions of costs, that will be sufficient to meet the primary remedial objective.

[38] Another consideration that may negate the appropriateness of s. 24(1) damages is concern for effective governance. Good governance concerns may take different forms. At one extreme, it may be argued that any award of s. 24(1) damages will always have a chilling effect on government conduct, and hence will impact negatively on good governance. The logical conclusion of this argument is that s. 24(1) damages would never be appropriate. Clearly, this is not what the Constitution intends. Moreover, insofar as s. 24(1) damages deter *Charter* breaches, they promote good governance. Compliance with *Charter* standards is a foundational principle of good governance.

[39] In some situations, however, the state may establish that an award of *Charter* damages would interfere with good governance such that damages should not be awarded unless the state conduct meets a minimum threshold of gravity. This was the situation in *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405, where the claimant sought damages for state conduct pursuant to a valid statute. The Court held that the action must be struck on the ground that duly enacted laws should be enforced until declared invalid, unless the state conduct under the law was "clearly wrong, in bad faith or an abuse of power":

[TRADUCTION] Dans bien des cas, la conclusion du tribunal que les droits d'un demandeur ont été violés et le jugement déclaratoire l'attestant constitueront une réparation qui, non seulement est appropriée, mais peut en soi suffire dans les circonstances pour défendre le droit du demandeur. Ce sera souvent le cas lorsque ce dernier n'a subi aucun préjudice susceptible de recours en droit privé et que, dans les circonstances, il n'est pas nécessaire de dissuader les personnes qui se trouvent dans la position des agents publics d'agir de manière semblable à l'avenir. Si la déclaration par le tribunal qu'il y a eu atteinte aux droits constitue, eu égard à l'ensemble des circonstances, une réparation suffisamment appropriée pour défendre le droit et accorder un redressement, sous réserve de la question des dépens, elle sera suffisante pour répondre à l'objectif principal de réparation.

[38] L'autre considération en raison de laquelle l'octroi de dommages-intérêts en vertu du par. 24(1) peut ne pas être une réparation convenable est le souci de l'efficacité gouvernementale. Les préoccupations relatives au bon gouvernement peuvent revêtir diverses formes. À l'extrême, on pourrait prétendre que l'octroi de dommages-intérêts en vertu du par. 24(1) aura toujours un effet paralysant sur la conduite de l'État, ce qui nuira au bon gouvernement. Logiquement, cet argument mène à la conclusion que les dommages-intérêts fondés sur le par. 24(1) ne seront jamais convenables. De toute évidence, ce n'est pas là l'intention exprimée dans la Constitution. En outre, lorsque les dommages-intérêts accordés en vertu du par. 24(1) découragent les violations de la *Charte*, ils contribuent au bon gouvernement. Le respect des normes établies dans la *Charte* constitue un principe fondamental de bon gouvernement.

[39] En revanche, dans certaines situations, l'État pourrait démontrer que l'octroi de dommages-intérêts en vertu de la *Charte* nuirait au bon gouvernement et devrait être limité aux cas où la conduite de l'État atteint un seuil minimal de gravité. Il en était ainsi dans *Mackin c. Nouveau-Brunswick (Ministre des Finances)*, 2002 CSC 13, [2002] 1 R.C.S. 405, où le demandeur a intenté une action en dommages-intérêts contre l'État pour des actes accomplis en vertu d'une loi valide. La Cour a rejeté l'action au motif que les lois dûment promulguées doivent être appliquées tant qu'elles ne sont pas frappées d'invalidité, « en l'absence de comportement clairement

para. 78. The rule of law would be undermined if governments were deterred from enforcing the law by the possibility of future damage awards in the event the law was, at some future date, to be declared invalid. Thus, absent threshold misconduct, an action for damages under s. 24(1) of the *Charter* cannot be combined with an action for invalidity based on s. 52 of the *Constitution Act, 1982*: *Mackin*, at para. 81.

[40] The *Mackin* principle recognizes that the state must be afforded some immunity from liability in damages resulting from the conduct of certain functions that only the state can perform. Legislative and policy-making functions are one such area of state activity. The immunity is justified because the law does not wish to chill the exercise of policy-making discretion. As Gonthier J. explained:

The limited immunity given to government is specifically a means of creating a balance between the protection of constitutional rights and the need for effective government. In other words, this doctrine makes it possible to determine whether a remedy is appropriate and just in the circumstances. Consequently, the reasons that inform the general principle of public law are also relevant in a *Charter* context. [para. 79]

[41] The government argues that the *Mackin* principle applies in this case, and, in the absence of state conduct that is at least “clearly wrong”, bars Mr. Ward’s claim. I cannot accept this submission. *Mackin* stands for the principle that state action taken under a statute which is subsequently declared invalid will not give rise to public law damages because good governance requires that public officials carry out their duties under valid statutes without fear of liability in the event that the statute is later struck down. The present is not a situation of state action pursuant to a valid statute that was subsequently declared invalid. Nor is the rationale animating the *Mackin* principle — that duly enacted laws should be enforced until

fautif, de mauvaise foi ou d’abus de pouvoir » de la part de l’État : par. 78. Il serait néfaste pour la primauté du droit que la crainte d’être éventuellement tenus de verser des dommages-intérêts par suite de l’invalidation d’une loi dissuade les gouvernements d’en assurer l’application alors qu’elle est encore valide. Par conséquent, sauf en cas de conduite atteignant le seuil minimal, une action en dommages-intérêts présentée en vertu du par. 24(1) de la *Charte* ne peut être jumelée à une action en déclaration d’invalidité fondée sur l’art. 52 de la *Loi constitutionnelle de 1982* : *Mackin*, par. 81.

[40] Suivant l’arrêt *Mackin*, l’État doit pouvoir jouir d’une certaine immunité qui écarte sa responsabilité pour les dommages résultant de certaines fonctions qu’il est seul à pouvoir exercer. Les fonctions législatives et l’élaboration de politiques sont un exemple de telles activités étatiques. L’immunité est justifiée, car le droit ne saurait paralyser l’exercice du pouvoir discrétionnaire en matière d’élaboration de politiques. À ce sujet, le juge Gonthier a tenu les propos suivants :

[L]’immunité restreinte accordée à l’État constitue justement un moyen d’établir un équilibre entre la protection des droits constitutionnels et la nécessité d’avoir un gouvernement efficace. Autrement dit, cette doctrine permet de déterminer si une réparation est convenable et juste dans les circonstances. Par conséquent, les raisons qui sous-tendent le principe général de droit public sont également pertinentes dans le contexte de la *Charte*. [par. 79]

[41] Le gouvernement prétend que l’arrêt *Mackin* s’applique en l’espèce et, en l’absence de comportement « clairement fautif » de la part de l’État, fait obstacle à la demande de M. Ward. Je ne peux retenir cette prétention. L’arrêt *Mackin* étaye l’affirmation générale selon laquelle les actes accomplis par l’État en vertu d’une loi invalidée par la suite n’ouvrent pas droit à des dommages-intérêts de droit public parce qu’un bon gouvernement exige que les représentants de l’État exercent leurs fonctions en vertu des lois valides sans peur d’engager leur responsabilité si jamais la loi était invalidée. Or, le cas qui nous occupe ne porte pas sur un acte accompli par l’État en vertu d’une loi valide qui aurait été invalidée par la suite. Le raisonnement à la base du

declared invalid — applicable in the present situation. Thus, the *Mackin* immunity does not apply to this case.

[42] State conduct pursuant to a valid statute may not be the only situation in which the state might seek to show that s. 24(1) damages would deter state agents from doing what is required for effective governance, although no others have been established in this case. It may be that in the future other situations may be recognized where the appropriateness of s. 24(1) damages could be negated on grounds of effective governance.

[43] Such concerns may find expression, as the law in this area matures, in various defences to s. 24(1) claims. *Mackin* established a defence of immunity for state action under valid statutes subsequently declared invalid, unless the state conduct is “clearly wrong, in bad faith or an abuse of power” (para. 78). If and when other concerns under the rubric of effective governance emerge, these may be expected to give rise to analogous public law defences. By analogy to *Mackin* and the private law, where the state establishes that s. 24(1) damages raise governance concerns, it would seem a minimum threshold, such as clear disregard for the claimant’s *Charter* rights, may be appropriate. Different situations may call for different thresholds, as is the case at private law. Malicious prosecution, for example, requires that “malice” be proven because of the highly discretionary and quasi-judicial role of prosecutors (*Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339), while negligent police investigation, which does not involve the same quasi-judicial decisions as to guilt or innocence or the evaluation of evidence according to legal standards, contemplates the lower “negligence” standard (*Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129). When appropriate, private law thresholds and defences may offer guidance in determining whether s. 24(1) damages would be “appropriate and just”. While

principe énoncé dans *Mackin* — voulant que les lois dûment promulguées soient appliquées tant qu’elles ne sont pas frappées d’invalidité — ne s’applique pas non plus en l’espèce. L’immunité visée dans l’arrêt *Mackin* ne trouve donc pas application ici.

[42] Il se peut que ce ne soit pas là la seule situation dans laquelle l’État voudra peut-être démontrer que l’octroi de dommages-intérêts en vertu du par. 24(1) dissuaderait ses agents de faire ce qui est nécessaire pour un gouvernement efficace, bien qu’il n’en ait soulevé aucune autre en l’espèce. Il n’est pas impossible que soient éventuellement reconnues d’autres situations dans lesquelles des préoccupations relatives à l’efficacité gouvernementale empêcheraient l’octroi de dommages-intérêts en vertu du par. 24(1) de constituer une réparation convenable.

[43] De telles préoccupations pourront, au fil de l’évolution du droit dans ce domaine, prendre la forme de divers moyens de défense aux demandes fondées sur le par. 24(1). L’arrêt *Mackin* a établi une défense d’immunité de l’État pour les actes accomplis en vertu d’une loi invalidée plus tard, sauf en cas de « comportement clairement fautif, de mauvaise foi ou d’abus de pouvoir » de la part de l’État (par. 78). D’autres préoccupations relatives à l’efficacité gouvernementale pourraient se dégager et fonder des moyens de défense de droit public semblables. Par analogie avec l’arrêt *Mackin* et le droit privé, dans les cas où l’État démontre que l’octroi de dommages-intérêts en vertu du par. 24(1) suscite des préoccupations relatives au bon gouvernement, il pourrait être opportun d’établir un seuil minimal, par exemple une insouciance manifeste à l’égard des droits garantis au demandeur par la *Charte*. Différentes situations appelleront sans doute différents seuils, comme c’est le cas en droit privé. Par exemple, pour qu’une poursuite soit jugée abusive, il faut prouver une « intention malveillante », vu le pouvoir éminemment discrétionnaire et le rôle quasi judiciaire des procureurs (*Miazga c. Kvello (Succession)*, 2009 CSC 51, [2009] 3 R.C.S. 339). En revanche, l’enquête policière négligente fait intervenir la norme moins élevée de « négligence », puisque le policier n’a pas à prendre les mêmes décisions quasi judiciaires quant à la culpabilité ou à l’innocence ni à soupeser la preuve en

the threshold for liability under the *Charter* must be distinct and autonomous from that developed under private law, the existing causes of action against state actors embody a certain amount of “practical wisdom” concerning the type of situation in which it is or is not appropriate to make an award of damages against the state. Similarly, it may be necessary for the court to consider the procedural requirements of alternative remedies. Procedural requirements associated with existing remedies are crafted to achieve a proper balance between public and private interests, and the underlying policy considerations of these requirements should not be negated by recourse to s. 24(1) of the *Charter*. As stated earlier, s. 24(1) operates concurrently with, and does not replace, the general law. These are complex matters which have not been explored on this appeal. I therefore leave the exact parameters of future defences to future cases.

[44] I find it useful to add a comment on the judgment of our Court in *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.*, [1996] 2 S.C.R. 345. *Béliveau St-Jacques* is not determinative of the availability of the public law remedy of damages under s. 24(1). The judgment raised specific issues concerning the interpretation of ss. 49 and 51 of the Quebec *Charter of human rights and freedoms*, R.S.Q., c. C-12, and its interaction with the statutory regime set up under the *Act respecting industrial accidents and occupational diseases*, R.S.Q., c. A-3.001.

[45] If the claimant establishes breach of his *Charter* rights and shows that an award of damages under s. 24(1) of the *Charter* would serve a functional purpose, having regard to the objects of s. 24(1) damages, and the state fails to negate that

fonction de normes juridiques (*Hill c. Commission des services policiers de la municipalité régionale de Hamilton-Wentworth*, 2007 CSC 41, [2007] 3 R.C.S. 129). Dans certains cas pertinents, les seuils et les moyens de défense issus du droit privé peuvent aider à déterminer si l’octroi de dommages-intérêts en vertu du par. 24(1) est « convenable et juste ». Certes, le seuil de responsabilité applicable sous le régime de la *Charte* est distinct et indépendant de celui établi en droit privé, mais les causes d’action existantes contre les représentants de l’État recèlent une certaine « sagesse pratique » à l’égard du genre de situations où il serait convenable ou non de contraindre l’État à verser des dommages-intérêts. De même, il peut se révéler nécessaire pour le tribunal de se pencher sur les exigences procédurales d’autres recours. Les exigences procédurales dont les recours existants sont assortis visent à concilier les intérêts publics et privés. Une demande en vertu du par. 24(1) de la *Charte* ne devrait pas faire échec aux considérations de politique générale qui sous-tendent ces exigences. Comme je l’ai dit précédemment, le par. 24(1) s’applique parallèlement aux règles générales du droit commun, sans s’y substituer. Il s’agit là de questions complexes inexplorées dans le cadre du présent pourvoi. Par conséquent, les paramètres exacts de moyens de défense à venir seront examinés à une autre occasion.

[44] Je crois utile d’ajouter une remarque au sujet du jugement de notre Cour dans *Béliveau St-Jacques c. Fédération des employées et employés de services publics inc.*, [1996] 2 R.C.S. 345. Cet arrêt n’est pas déterminant en ce qui a trait à la possibilité d’exercer un recours en dommages-intérêts de droit public en vertu du par. 24(1). Il portait sur des questions particulières concernant l’interprétation des art. 49 et 51 de la *Charte des droits et libertés de la personne*, L.R.Q., ch. C-12, et leur interaction avec le régime législatif établi par la *Loi sur les accidents du travail et les maladies professionnelles*, L.R.Q., ch. A-3.001.

[45] Si le demandeur prouve la violation de ses droits garantis par la *Charte* et démontre que l’octroi de dommages-intérêts en vertu du par. 24(1) de la *Charte* servirait un but fonctionnel eu égard aux objectifs de ces dommages-intérêts, et si l’État

the award is “appropriate and just”, the final step is to determine the appropriate amount of the damages.

(5) Step Four: Quantum of Section 24(1) Damages

[46] The watchword of s. 24(1) is that the remedy must be “appropriate and just”. This applies to the amount, or quantum, of damages awarded as much as to the initial question of whether damages are a proper remedy.

[47] As discussed earlier, damages may be awarded to compensate the claimant for his loss, to vindicate the right or to deter future violations of the right. These objects, the presence and force of which vary from case to case, determine not only whether damages are appropriate, but also the amount of damages awarded. Generally, compensation will be the most important object, and vindication and deterrence will play supporting roles. This is all the more so because other *Charter* remedies may not provide compensation for the claimant’s personal injury resulting from the violation of his *Charter* rights. However, as discussed earlier, cases may arise where vindication or deterrence play a major and even exclusive role.

[48] Where the objective of compensation is engaged, the concern is to restore the claimant to the position she would have been in had the breach not been committed, as discussed above. As in a tort action, any claim for compensatory damages must be supported by evidence of the loss suffered.

[49] In some cases, the *Charter* breach may cause the claimant pecuniary loss. Injuries, physical and psychological, may require medical treatment, with attendant costs. Prolonged detention may result in

ne réussit pas à réfuter le caractère « convenable et juste » de l’octroi de dommages-intérêts, la dernière étape consiste à fixer le montant des dommages-intérêts qu’il convient d’accorder.

(5) Quatrième étape : montant des dommages-intérêts accordés en vertu du par. 24(1)

[46] Le mot d’ordre du par. 24(1) veut que la réparation soit « convenable et juste ». Ce critère s’applique tout autant au montant des dommages-intérêts qu’à la question initiale de savoir si des dommages-intérêts constituent une réparation convenable.

[47] Comme nous l’avons vu, des dommages-intérêts peuvent être accordés afin d’indemniser le demandeur du préjudice subi, de défendre le droit en cause ou de décourager toute nouvelle violation de ce droit. C’est en fonction de ces objectifs, dont la présence et l’importance varient d’une affaire à l’autre, que le tribunal non seulement décidera s’il est opportun d’accorder des dommages-intérêts, mais en déterminera le montant. Règle générale, l’indemnisation constituera le plus important objectif, tandis que la défense du droit et la dissuasion joueront des rôles secondaires. Cela est d’autant plus vrai que d’autres réparations possibles en vertu de la *Charte* ne permettront pas nécessairement d’indemniser le demandeur pour le préjudice personnel découlant de l’atteinte à ses droits garantis par la *Charte*. Toutefois, comme je l’ai mentionné précédemment, il peut arriver que la défense du droit ou la dissuasion jouent un rôle important, voire exclusif.

[48] Rappelons que l’objectif d’indemnisation vise à replacer la demanderesse dans la même situation que si ses droits n’avaient pas été violés. Toute demande de dommages-intérêts compensatoires doit, comme dans le cadre d’une action en responsabilité délictuelle, être étayée par une preuve du préjudice subi.

[49] Dans certains cas, la violation de la *Charte* est susceptible de se traduire par des pertes financières pour le demandeur. Celui-ci pourrait en outre subir un préjudice physique ou psychologique nécessitant

loss of earnings. *Restitutio in integrum* requires compensation for such financial losses.

[50] In other cases, like this one, the claimant's losses will be non-pecuniary. Non-pecuniary damages are harder to measure. Yet they are not by that reason to be rejected. Again, tort law provides assistance. Pain and suffering are compensable. Absent exceptional circumstances, compensation is fixed at a fairly modest conventional rate, subject to variation for the degree of suffering in the particular case. In extreme cases of catastrophic injury, a higher but still conventionally determined award is given on the basis that it serves the function purpose of providing substitute comforts and pleasures: *Andrews v. Grand & Toy*.

[51] When we move from compensation to the objectives of vindication and deterrence, tort law is less useful. Making the appropriate determinations is an exercise in rationality and proportionality and will ultimately be guided by precedent as this important chapter of *Charter* jurisprudence is written by Canada's courts. That said, some initial observations may be made.

[52] A principal guide to the determination of quantum is the seriousness of the breach, having regard to the objects of s. 24(1) damages. The seriousness of the breach must be evaluated with regard to the impact of the breach on the claimant and the seriousness of the state misconduct: see, in the context of s. 24(2), *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353. Generally speaking, the more egregious the conduct and the more serious the repercussions on the claimant, the higher the award for vindication or deterrence will be.

[53] Just as private law damages must be fair to both the plaintiff and the defendant, so s. 24(1) damages must be fair — or “appropriate and

des soins médicaux qui engendrent des frais. Aussi, une longue incarcération peut lui causer des pertes de revenus. Le principe *restitutio in integrum* appelle l'indemnisation de ces pertes financières.

[50] Dans d'autres cas, comme celui qui nous occupe, le préjudice n'est pas de nature pécuniaire. Un tel préjudice est plus difficile à évaluer. Il ne doit cependant pas pour autant être écarté. Le droit de la responsabilité délictuelle peut à nouveau nous être utile. La souffrance est un préjudice indemnisable. À moins de circonstances exceptionnelles, le montant de l'indemnisation sera fixé selon l'usage à un niveau assez modeste, bien qu'il puisse varier en fonction du degré de souffrance dans un cas donné. Des dommages-intérêts d'un montant plus élevé, fixé lui aussi selon l'usage, sont accordés dans les cas extrêmes de préjudice catastrophique, parce qu'ils servent un objectif fonctionnel en procurant réconfort et agrément en guise de consolation : *Andrews c. Grand & Toy*.

[51] Lorsqu'on ne s'intéresse plus à l'indemnisation, mais aux objectifs de défense du droit et de dissuasion, le droit de la responsabilité délictuelle perd de son utilité. Statuer sur ces questions est un exercice de rationalité et de proportionnalité qui s'inspire des précédents établis au gré de l'évolution de cet important chapitre de la jurisprudence canadienne relative à la *Charte*. Cela dit, certaines observations préliminaires peuvent être faites.

[52] Un paramètre important de la fixation du montant est la gravité de la violation eu égard aux objectifs des dommages-intérêts accordés en vertu du par. 24(1). La gravité de l'atteinte doit être évaluée au regard de son incidence sur le demandeur et de la gravité de la faute de l'État : voir, dans le contexte du par. 24(2), *R. c. Grant*, 2009 CSC 32, [2009] 2 R.C.S. 353. Règle générale, plus la conduite et ses conséquences pour le demandeur seront graves, plus le montant des dommages-intérêts accordés au titre des objectifs de défense du droit et de dissuasion sera élevé.

[53] De même que les dommages-intérêts de droit privé doivent être équitables à la fois envers le demandeur et envers le défendeur, le montant des

just” — to both the claimant and the state. The court must arrive at a quantum that respects this. Large awards and the consequent diversion of public funds may serve little functional purpose in terms of the claimant’s needs and may be inappropriate or unjust from the public perspective. In considering what is fair to the claimant and the state, the court may take into account the public interest in good governance, the danger of deterring governments from undertaking beneficial new policies and programs, and the need to avoid diverting large sums of funds from public programs to private interests.

[54] Courts in other jurisdictions where an award of damages for breach of rights is available have generally been careful to avoid unduly high damage awards. This may reflect the difficulty of assessing what is required to vindicate the right and deter future breaches, as well as the fact that it is society as a whole that is asked to compensate the claimant. Nevertheless, to be “appropriate and just”, an award of damages must represent a meaningful response to the seriousness of the breach and the objectives of compensation, upholding *Charter* values, and deterring future breaches. The private law measure of damages for similar wrongs will often be a useful guide. However, as Lord Nicholls warns in *Ramanoop*, at para. 18, “this measure is no more than a guide because . . . the violation of the constitutional right will not always be coterminous with the cause of action at law”.

[55] In assessing s. 24(1) damages, the court must focus on the breach of *Charter* rights as an independent wrong, worthy of compensation in its own right. At the same time, damages under s. 24(1) should not duplicate damages awarded under

dommages-intérêts accordés en vertu du par. 24(1) doit être équitable — ou « convenable et juste » — à la fois envers le demandeur et envers l’État. Le tribunal doit fixer un montant qui respecte ce principe. Il se peut que l’octroi d’une somme élevée — prélevée sur les fonds publics — ne soit pas très utile, d’un point de vue fonctionnel, pour ce qui est de répondre aux besoins du demandeur et ne se révèle ni convenable ni juste dans une perspective publique. Le tribunal, dans son évaluation d’un montant équitable à la fois envers le demandeur et envers l’État, peut mettre dans la balance l’intérêt public au bon gouvernement, le risque de dissuader les gouvernements d’élaborer des programmes et politiques bénéfiques et la nécessité d’éviter que de gros montants soient prélevés sur le budget des programmes publics pour être consacrés à des intérêts privés.

[54] Les tribunaux d’autres pays où l’octroi de dommages-intérêts pour la violation d’un droit est possible ont en général veillé à éviter l’octroi de dommages-intérêts exagérément élevés. Cette tendance tient sans doute à la difficulté de déterminer la somme requise pour la défense du droit et la dissuasion contre de nouvelles violations, et aussi au fait que c’est la société dans son ensemble qui se voit tenue d’indemniser le demandeur. Néanmoins, pour constituer une réparation « convenable et juste », les dommages-intérêts doivent répondre réellement à la gravité de l’atteinte et aux objectifs d’indemnisation, d’affirmation des valeurs de la *Charte* et de dissuasion contre de nouvelles violations. Le calcul des dommages-intérêts de droit privé accordés pour un préjudice semblable pourra souvent servir de guide. Mais il faut tenir compte de la mise en garde faite par lord Nicholls, au par. 18, dans *Ramanoop* : [TRADUCTION] « ce montant ne constitue cependant qu’un guide parce que [. . .] la violation du droit constitutionnel ne coïncidera pas toujours avec la cause d’action en common law ».

[55] Pour fixer le montant des dommages-intérêts accordés en vertu du par. 24(1), le tribunal doit aborder la violation des droits garantis par la *Charte* comme un préjudice distinct justifiant en soi une indemnisation. Par ailleurs, les dommages-intérêts

private law causes of action, such as tort, where compensation of personal loss is at issue.

[56] A final word on exemplary or punitive damages. In *Mackin*, Justice Gonthier speculated that “[i]n theory, a plaintiff could seek compensatory and punitive damages by way of ‘appropriate and just’ remedy under s. 24(1) of the *Charter*”: para. 79. The reality is that public law damages, in serving the objects of vindication and deterrence, may assume a punitive aspect. Nevertheless, it is worth noting a general reluctance in the international community to award purely punitive damages: see *Taunoa*, at paras. 319-21.

[57] To sum up, the amount of damages must reflect what is required to functionally serve the objects of compensation, vindication of the right and deterrence of future breaches, insofar as they are engaged in a particular case, having regard to the impact of the breach on the claimant and the seriousness of the state conduct. The award must be appropriate and just from the perspective of the claimant and the state.

(6) Forum and Procedure

[58] For a tribunal to grant a *Charter* remedy under s. 24(1), it must have the power to decide questions of law and the remedy must be one that the tribunal is authorized to grant: *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765. Generally, the appropriate forum for an award of damages under s. 24(1) is a court which has the power to consider *Charter* questions and which by statute or inherent jurisdiction has the power to award damages. Provincial criminal courts are not so empowered and thus do not have the power to award damages under s. 24(1).

accordés en vertu du par. 24(1) ne doivent pas emporter duplication des dommages-intérêts obtenus sur le fondement de causes d’action relevant du droit privé, comme un délit civil, dans les cas où l’indemnisation d’un préjudice personnel est en cause.

[56] Un mot, en terminant, sur la question des dommages-intérêts punitifs ou exemplaires. Dans *Mackin*, le juge Gonthier a avancé l’hypothèse qu’un demandeur « pourrait, en théorie, solliciter des dommages-intérêts compensatoires et punitifs à titre de réparation “convenable et juste” en vertu du par. 24(1) de la *Charte* » : par. 79. Dans les faits, les dommages-intérêts de droit public, de par leurs objectifs de défense des droits et de dissuasion, peuvent revêtir un aspect punitif. Il convient toutefois de souligner une réticence générale dans la communauté internationale à accorder des dommages-intérêts purement punitifs : voir *Taunoa*, par. 319-321.

[57] En résumé, le montant des dommages-intérêts doit correspondre à la somme nécessaire pour réaliser, d’un point de vue fonctionnel, les objectifs d’indemnisation, de défense du droit et de dissuasion contre de nouvelles violations, dans la mesure où ces objectifs interviennent dans l’affaire, eu égard à l’incidence de la violation pour le demandeur et à la gravité de la conduite des représentants de l’État. La réparation doit être convenable et juste du point de vue à la fois du demandeur et de l’État.

(6) Tribunal et procédure

[58] Pour qu’un tribunal puisse accorder une réparation en vertu du par. 24(1) de la *Charte*, il doit avoir le pouvoir de trancher une question de droit et d’accorder la réparation en cause : *R. c. Conway*, 2010 CSC 22, [2010] 1 R.C.S. 765. Règle générale, le tribunal approprié pour l’obtention de dommages-intérêts en vertu du par. 24(1) est un tribunal qui a le pouvoir de trancher des questions relatives à la *Charte* et celui, en vertu d’une loi ou de sa compétence inhérente, d’accorder des dommages-intérêts. Les cours provinciales de juridiction criminelle ne possèdent pas de tels pouvoirs et ne peuvent donc pas accorder des dommages-intérêts en vertu du par. 24(1).

[59] As was done here, the claimant may join a s. 24(1) claim with a tort claim. It may be useful to consider the tort claim first, since if it meets the objects of *Charter* damages, recourse to s. 24(1) will be unnecessary. This may add useful context and facilitate the s. 24(1) analysis. This said, it is not essential that the claimant exhaust her remedies in private law before bringing a s. 24(1) claim.

B. Application to the Facts

[60] At trial, Justice Tysoe held that the provincial correction officers' strip search and the Vancouver Police Department's vehicle seizure violated Mr. Ward's right to be free from unreasonable search and seizure under s. 8 of the *Charter*. There are thus two distinct claims to consider.

(1) Damages for the Strip Search

[61] The first question is whether Mr. Ward has established entitlement to the s. 24(1) remedy of damages. This requires him to show: (1) a breach of his *Charter* rights; and (2) that an award of damages would serve a functional purpose in the circumstances, having regard to the objects of s. 24(1) damages. If these are established, the burden shifts to the state (step 3) to show why, having regard to countervailing factors, an award of damages under s. 24(1) of the *Charter* would be inappropriate. If the state fails to negate s. 24(1) damages, the inquiry moves to the final step, assessment of the appropriate amount of the damages.

[62] Here the first step is met. Justice Tysoe found that the strip search violated Mr. Ward's personal rights under s. 8 of the *Charter*. This finding is

[59] Le demandeur peut, comme en l'espèce, joindre une demande fondée sur le par. 24(1) à une demande en responsabilité délictuelle. Et il peut être utile d'examiner en premier la demande en responsabilité délictuelle, étant donné qu'il ne sera pas nécessaire de faire appel au par. 24(1) si cette demande répond aux objectifs de l'octroi de dommages-intérêts en vertu de la *Charte*. Cet examen peut révéler des éléments contextuels pertinents et faciliter l'analyse fondée sur le par. 24(1). Cela dit, il n'est pas essentiel que le demandeur épuise ses recours en droit privé avant de présenter une demande fondée sur le par. 24(1).

B. Application aux faits

[60] Lors du procès, le juge Tysoe a conclu que la fouille à nu effectuée par les agents de correction employés par la province et la saisie du véhicule par le service de police de Vancouver ont porté atteinte au droit de M. Ward à la protection contre les fouilles, perquisitions et saisies abusives garanti par l'art. 8 de la *Charte*. Il faut donc examiner deux demandes distinctes.

(1) Dommages-intérêts pour la fouille à nu

[61] La première question à trancher est de savoir si M. Ward a établi son droit à des dommages-intérêts en application du par. 24(1). Il lui faut pour cela démontrer 1) qu'il a été porté atteinte à l'un de ses droits garantis par la *Charte* et 2) que l'octroi de dommages-intérêts servirait un but fonctionnel dans les circonstances, eu égard aux objectifs des dommages-intérêts fondés sur le par. 24(1). Une fois ces éléments établis, le fardeau est inversé et l'État (étape 3) doit démontrer pourquoi, au regard de facteurs faisant contre-poids, l'octroi de dommages-intérêts en vertu du par. 24(1) de la *Charte* ne serait pas convenable. Si l'État n'y parvient pas, on passe à l'étape finale qui consiste à fixer le juste montant des dommages-intérêts.

[62] En l'espèce, il est satisfait à la première étape. Le juge Tysoe a conclu que la fouille à nu a porté atteinte aux droits personnels garantis à M. Ward

not challenged on this appeal. Nor is it suggested that the British Columbia Supreme Court is not an appropriate forum for the action.

[63] The second question is whether damages would serve a functional purpose by serving one or more of the objects of s. 24(1) damages — compensation, vindication and deterrence.

[64] In this case, the need for compensation bulks large. Mr. Ward's injury was serious. He had a constitutional right to be free from unreasonable search and seizure, which was violated in an egregious fashion. Strip searches are inherently humiliating and degrading regardless of the manner in which they are carried out and thus constitute significant injury to an individual's intangible interests: *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679, at para. 90.

[65] The corrections officers' conduct which caused the breach of Mr. Ward's *Charter* rights was also serious. Minimum sensitivity to *Charter* concerns within the context of the particular situation would have shown the search to be unnecessary and violative. Mr. Ward did not commit a serious offence, he was not charged with an offence associated with evidence being hidden on the body, no weapons were involved and he was not known to be violent or to carry weapons. Mr. Ward did not pose a risk of harm to himself or others, nor was there any suggestion that any of the officers believed that he did. In these circumstances, a reasonable person would understand that the indignity resulting from the search was disproportionate to any benefit which the search could have provided. In addition, without asking officers to be conversant with the details of court rulings, it is not too much to expect that police would be familiar with the settled law that routine strip searches are inappropriate where the individual is being held for a short time in police cells, is not mingling with the general prison population, and where the police have no legitimate concerns that the individual is

par l'art. 8 de la *Charte*. Cette conclusion n'est pas contestée devant nous. Il n'est pas allégué non plus que la Cour suprême de la Colombie-Britannique ne serait pas le tribunal approprié pour entendre l'action.

[63] La deuxième question est de savoir si l'octroi de dommages-intérêts servirait un but fonctionnel en répondant à un ou plusieurs des objectifs de l'octroi de dommages-intérêts en vertu du par. 24(1), soit l'indemnisation, la défense du droit et la dissuasion.

[64] En l'espèce, l'indemnisation occupe une place importante. Le préjudice subi par M. Ward est grave. Il a le droit constitutionnel de ne pas subir de fouilles, perquisitions ni saisies abusives et il a été porté atteinte à ce droit de façon flagrante. Les fouilles à nu sont fondamentalement humiliantes et avilissantes, peu importe la manière dont elles sont effectuées et constituent une atteinte importante aux intérêts intangibles de la personne : *R. c. Golden*, 2001 CSC 83, [2001] 3 R.C.S. 679, par. 90.

[65] La conduite des agents de correction à l'origine de la violation des droits garantis à M. Ward par la *Charte* était grave elle aussi. Une conscience minimale des préceptes de la *Charte* dans ce contexte aurait permis de reconnaître que la fouille était inutile et attentatoire. M. Ward n'a pas commis d'infraction grave, n'a pas été accusé d'une infraction reliée à un élément de preuve caché sur lui, aucune arme n'était en cause et il n'était pas reconnu pour être une personne violente ou pour porter des armes. M. Ward ne présentait aucun risque pour lui-même ou pour autrui, et rien ne donnait à penser que l'un ou l'autre des agents n'était pas de cet avis. En pareilles circonstances, une personne raisonnable aurait compris que l'humiliation résultant de la fouille était disproportionnée par rapport à tout avantage qui aurait pu en découler. En outre, sans demander aux agents de connaître à fond les détails des décisions judiciaires, il n'est pas exagéré de s'attendre à ce que les policiers connaissent bien le principe juridique reconnu selon lequel une fouille à nu de routine n'est pas appropriée lorsque la personne est détenue pour une courte période dans les cellules du poste de police, qu'elle n'est pas mêlée

concealing weapons that could be used to harm themselves or others: *Golden*, at para. 97.

[66] In sum, the *Charter* breach significantly impacted on Mr. Ward's person and rights and the police conduct was serious. The impingement on Mr. Ward calls for compensation. Combined with the police conduct, it also engages the objects of vindication of the right and deterrence of future breaches. It follows that compensation is required in this case to functionally fulfill the objects of public law damages.

[67] The next question is whether the state has established countervailing factors that would render s. 24(1) damages inappropriate or unjust.

[68] The state has not established that alternative remedies are available to achieve the objects of compensation, vindication or deterrence with respect to the strip search. Mr. Ward sued the officers for assault, as well as the City and the Province for negligence. These claims were dismissed and their dismissal was not appealed to this Court. While this defeated Mr. Ward's claim in tort, it did not change the fact that his right under s. 8 of the *Charter* to be secure against unreasonable search and seizure was violated. No tort action was available for that violation and a declaration will not satisfy the need for compensation. Mr. Ward's only recourse is a claim for damages under s. 24(1) of the *Charter*. Nor has the state established that an award of s. 24(1) damages is negated by good governance considerations, such as those raised in *Mackin*.

à la population carcérale générale et que les policiers n'ont aucune crainte légitime qu'elle dissimule des armes qu'elle pourrait retourner contre elle-même ou employer pour blesser d'autres personnes : *Golden*, par. 97.

[66] En résumé, la violation de la *Charte* a eu des conséquences non négligeables sur la personne de M. Ward et sur ses droits, et la conduite reprochée aux policiers était grave. L'atteinte portée aux droits de M. Ward exige qu'il soit indemnisé. Combinée à la conduite des policiers, elle fait aussi intervenir les objectifs de défense du droit en cause et de dissuasion contre de nouvelles violations. Par conséquent, l'octroi de dommages-intérêts est requis en l'espèce pour que, d'un point de vue fonctionnel, les objectifs des dommages-intérêts de droit public soient remplis.

[67] La question qui se pose ensuite est de savoir si l'État a démontré l'existence de facteurs pouvant faire contrepoids, compte tenu desquels les dommages-intérêts ne constitueraient pas une réparation convenable et juste au sens du par. 24(1).

[68] L'État n'a pas démontré que d'autres recours pourraient permettre de répondre aux objectifs d'indemnisation, de défense du droit et de dissuasion concernant la fouille à nu. M. Ward a poursuivi les agents pour voies de fait, ainsi que la ville et la province pour négligence. Ces demandes ont été rejetées et leur rejet n'a pas été porté en appel devant nous. Bien que le recours de M. Ward en responsabilité délictuelle ait ainsi échoué, il demeure qu'il a été porté atteinte à son droit à la protection contre les fouilles, les perquisitions et les saisies abusives garanti par l'art. 8 de la *Charte*. Aucune action en responsabilité délictuelle n'était possible relativement à cette atteinte et un jugement déclaratoire ne répondrait pas à la nécessité d'indemniser M. Ward. Son seul recours consiste à demander des dommages-intérêts en vertu du par. 24(1) de la *Charte*. De plus, l'État n'a pas démontré que des préoccupations relatives à l'efficacité gouvernementale semblables à celles soulevées dans *Mackin* empêchent l'octroi de dommages-intérêts en vertu du par. 24(1).

[69] I conclude that damages for the strip search of Mr. Ward are required in this case to functionally fulfill the objects of public law damages, and therefore are *prima facie* “appropriate and just”. The state has not negated this. It follows that damages should be awarded for this breach of Mr. Ward’s *Charter* rights.

[70] This brings us to the issue of quantum. As discussed earlier, the amount of damages must reflect what is required to functionally fulfill the relevant objects of s. 24(1) compensation, while remaining fair to both the claimant and the state.

[71] The object of compensation focuses primarily on the claimant’s personal loss: physical, psychological, pecuniary, and harm to intangible interests. The claimant should, in so far as possible, be placed in the same position as if his *Charter* rights had not been infringed. Strip searches are inherently humiliating and thus constitute a significant injury to an individual’s intangible interests regardless of the manner in which they are carried out. That said, the present search was relatively brief and not extremely disrespectful, as strip searches go. It did not involve the removal of Mr. Ward’s underwear or the exposure of his genitals. Mr. Ward was never touched during the search and there is no indication that he suffered any resulting physical or psychological injury. While Mr. Ward’s injury was serious, it cannot be said to be at the high end of the spectrum. This suggests a moderate damages award.

[72] The objects of vindication and deterrence engage the seriousness of the state conduct. The corrections officers’ conduct was serious and reflected a lack of sensitivity to *Charter* concerns. That said, the officers’ action was not intentional,

[69] Je conclus que l’octroi de dommages-intérêts à M. Ward pour la fouille à nu qu’il a subie est requis en l’espèce pour répondre, d’un point de vue fonctionnel, aux objectifs des dommages-intérêts de droit public et qu’il constitue par conséquent une réparation à première vue « convenable et juste ». L’État n’a pas fait la preuve du contraire. Il convient donc d’accorder des dommages-intérêts en réparation de l’atteinte aux droits garantis à M. Ward par la *Charte*.

[70] Ce qui nous amène à la question du montant. Comme je l’ai expliqué, le montant des dommages-intérêts doit correspondre à la somme nécessaire, d’un point de vue fonctionnel, à la réalisation des objectifs pertinents d’une indemnisation fondée sur le par. 24(1), tout en demeurant équitable pour le demandeur et pour l’État.

[71] L’objectif d’indemnisation est axé principalement sur le préjudice personnel subi par le demandeur : préjudice physique, psychologique ou pécuniaire et atteinte à ses intérêts intangibles. Le demandeur devrait, dans la mesure du possible, être remis dans la même situation que si ses droits garantis par la *Charte* n’avaient pas été violés. Les fouilles à nu sont fondamentalement humiliantes et constituent de ce fait une atteinte importante aux intérêts intangibles de la personne, peu importe la manière dont elles sont effectuées. Cela dit, la fouille qui nous occupe en l’espèce a été relativement brève et n’a pas été effectuée de manière extrêmement irrespectueuse par comparaison avec d’autres fouilles. M. Ward n’a pas été contraint d’enlever son sous-vêtement ni de dévoiler ses organes génitaux. Il n’a jamais été touché durant la fouille, et rien n’indique que celle-ci lui ait causé un préjudice physique ou psychologique. Certes, le préjudice subi par M. Ward est grave, mais on ne peut pas dire qu’il se situe au haut de l’échelle de gravité. La situation appellerait donc des dommages-intérêts d’un montant modéré.

[72] Les objectifs de défense du droit et de dissuasion sont liés à la gravité de la conduite de l’État. La façon dont les agents de correction se sont conduits est grave et témoigne d’une ignorance des préceptes de la *Charte*. Cela dit, les actes des agents n’étaient

in that it was not malicious, high-handed or oppressive. In these circumstances, the objects of vindication and deterrence do not require an award of substantial damages against the state.

[73] Considering all the factors, including the appropriate degree of deference to be paid to the trial judge's exercise of remedial discretion, I conclude that the trial judge's \$5,000 damage award was appropriate.

(2) Damages for the Car Seizure

[74] As with the strip search, we must determine whether Mr. Ward has established entitlement to the s. 24(1) remedy of damages to compensate for the constitutional wrong he suffered due to the City's seizure of his vehicle. Again, this requires determining: (1) breach of *Charter* right; (2) whether an award of damages would serve a functional purpose, having regard to the objects of s. 24(1) damages; (3) whether the state has established countervailing factors negating an award of s. 24(1) damages; and (4) quantum, if the right to damages is established.

[75] The trial judge found that the seizure of the car violated Mr. Ward's rights under s. 8 of the *Charter*. This finding is not contested and thus satisfies the first requirement.

[76] The next question is whether Mr. Ward has established that damages under s. 24(1) for the car seizure are appropriate and just from a functional perspective.

[77] The object of compensation is not engaged by the seizure of the car. The trial judge found that Mr. Ward did not suffer any injury as a result of the seizure. His car was never searched and, upon his

pas intentionnels, en ce sens qu'ils n'ont pas agi d'une manière malveillante, tyrannique ou oppressive. Compte tenu de ces circonstances, les objectifs de défense du droit et de dissuasion n'exigent pas que l'État soit contraint de verser des dommages-intérêts substantiels.

[73] Tout bien considéré, y compris le degré de déférence requis envers l'exercice du pouvoir discrétionnaire du juge de première instance en matière de réparation, je conclus que les dommages-intérêts de 5 000 \$ qu'il a accordés étaient convenables.

(2) Dommages-intérêts pour la saisie de la voiture

[74] Comme dans le cas de la fouille à nu, il nous faut déterminer si M. Ward a établi son droit à des dommages-intérêts en application du par. 24(1), à titre d'indemnisation pour l'atteinte à ses droits constitutionnels causée par la saisie de son véhicule par la ville. Là encore, il faut établir (1) qu'il a été porté atteinte à un droit garanti par la *Charte*; (2) que l'octroi de dommages-intérêts servirait un but fonctionnel, eu égard aux objectifs des dommages-intérêts fondés sur le par. 24(1); (3) pourquoi, au regard de facteurs pouvant faire contrepoids, l'octroi de dommages-intérêts en vertu du par. 24(1) de la *Charte* ne serait pas convenable et (4) le montant des dommages-intérêts, si le droit à ceux-ci est établi.

[75] Le juge de première instance a conclu que la saisie de la voiture portait atteinte aux droits garantis à M. Ward par l'art. 8 de la *Charte*. Cette conclusion n'étant pas contestée, la première condition est remplie.

[76] La question suivante est de savoir si M. Ward a démontré que l'octroi de dommages-intérêts en vertu du par. 24(1) pour la saisie de sa voiture constitue une réparation convenable et juste, d'un point de vue fonctionnel.

[77] L'objectif d'indemnisation n'intervient pas à l'égard de la saisie de la voiture. Le juge de première instance a conclu que la saisie n'avait causé aucun préjudice à M. Ward. Sa voiture n'a jamais

release from lockup, Mr. Ward was driven to the police compound to pick up the vehicle. Nor are the objects of vindication of the right and deterrence of future breaches compelling. While the seizure was wrong, it was not of a serious nature. The police officers did not illegally search the car, but rather arranged for its towing under the impression that it would be searched once a warrant had been obtained. When the officers determined that they did not have grounds to obtain the required warrant, the vehicle was made available for pickup.

[78] I conclude that a declaration under s. 24(1) that the vehicle seizure violated Mr. Ward's right to be free from unreasonable search and seizure under s. 8 of the *Charter* adequately serves the need for vindication of the right and deterrence of future improper car seizures.

VII. Disposition

[79] The appeal is allowed in part. The award against the City in the amount of \$100 is set aside, substituted by a declaration under s. 24(1) that the vehicle seizure violated Mr. Ward's right to be free from unreasonable search and seizure under s. 8 of the *Charter*. The award of damages against the Province in the sum of \$5,000 for breach of Mr. Ward's s. 8 *Charter* rights is confirmed.

[80] We have been informed of a pre-existing agreement between Mr. Ward and the Province regarding costs and, as such, no cost order is made between Mr. Ward and the Province. No costs are awarded to or against the City.

Appeal allowed in part.

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City of Vancouver, Vancouver.*

été fouillée et, à sa libération du centre de détention, M. Ward a été conduit à la fourrière, où il a pu récupérer son véhicule. Les objectifs de défense du droit et de dissuasion contre de nouvelles violations ne sont pas non plus déterminants. Certes, la saisie de la voiture était fautive, mais n'était pas de nature grave. Les policiers n'ont pas fouillé illégalement la voiture; ils l'ont plutôt fait remorquer, croyant qu'une fouille serait effectuée après obtention d'un mandat. Lorsque les policiers sont arrivés à la conclusion qu'ils ne disposaient pas des motifs nécessaires à l'obtention du mandat requis, ils ont pris des mesures pour restituer le véhicule.

[78] Je conclus qu'un jugement déclaratoire fondé sur le par. 24(1) attestant que la saisie du véhicule a porté atteinte au droit à la protection contre les fouilles, perquisitions et saisies abusives que l'art. 8 de la *Charte* garantit à M. Ward répond adéquatement à la nécessité de défendre son droit et de décourager de nouvelles saisies irrégulières.

VII. Dispositif

[79] Le pourvoi est accueilli en partie. L'octroi des dommages-intérêts de 100 \$ payables par la ville est annulé et remplacé par un jugement déclaratoire, rendu en vertu du par. 24(1), attestant que la saisie de la voiture a porté atteinte au droit à la protection contre les fouilles, perquisitions et saisies abusives garanti à M. Ward par l'art. 8 de la *Charte*. La décision d'ordonner à la province de verser des dommages-intérêts de 5 000 \$ à M. Ward en réparation de la violation des droits que lui garantit l'art. 8 de la *Charte* est confirmée.

[80] Nous avons été informés de l'existence d'une entente intervenue entre M. Ward et la province relativement aux dépens et, pour cette raison, aucune ordonnance quant aux dépens n'est rendue à leur égard. La ville ne recevra ni ne paiera aucuns dépens.

Pourvoi accueilli en partie.

*Procureur de l'appelante la Ville de Vancouver :
Ville de Vancouver, Vancouver.*

Tab 15

CONSTITUTIONAL LAW OF CANADA

Fifth Edition Supplemented

Volume 2

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remedies", although based on a constitutional ground, will be subject to any applicable statute of limitations of general application.^{125c}

40.2 Remedy clause

(a) Section 24(1)

Section 24(1) of the Charter¹²⁶ provides as follows:

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

Section 24(1) provides for the granting of a remedy to enforce the rights or freedoms guaranteed by the Charter.¹²⁷

(b) Applicable to Charter only

Section 24(1) is available only for a breach of the Charter. It is not a remedy for unconstitutional action in general. Breaches of other parts of the Constitution of Canada may only be challenged by the traditional methods referred to in the earlier discussion of the supremacy clause. In respect of enforcement, the Charter is thus in a preferred position. While many of the rights or freedoms guaranteed by the Charter existed before the Charter, in the sense that before April 17, 1982 Canadian law afforded some protection to them, the inclusion of a pre-existing right or freedom in the Charter has the effect of significantly strengthening the right: it becomes part of "the supreme law of Canada" to which inconsistent laws must yield (s. 52(1)), it becomes entrenched (alterable only by the process of constitutional amendment) (s. 52(3)), and it becomes enforceable under s. 24.

(c) Non-exclusive remedy

Section 24(1) is not the exclusive remedy for a breach of the Charter of Rights.¹²⁸ It will be recalled that the supremacy clause of s. 52(1), which is the topic of the earlier part of this chapter, renders "of no force or effect" any law that is inconsistent with the Constitution of Canada. As has been explained, s. 52(1) authorizes a court to hold that a law that abridges a Charter right is invalid. Whenever the validity of a statute (or other official act) is relevant to the outcome of a dispute, the court that is seized of the dispute has the power and the duty to determine whether or not the statute (or other act) is valid. For example, a court trying a criminal case is obliged to rule on the validity of the statute creating the

^{125c} Section 40.2(j), "Limitation of actions", below.

¹²⁶ See J. Krane, "Proprietary Rights and Remedies under the Charter" (2008) 54 Crim. L. Q. 215. For larger works covering the supremacy clause as well as s. 24(1), see note 1, above.

¹²⁷ The legislative history of s. 24(1) is related by Gibson, note 1, above, 192-195.

¹²⁸ *R. v. Big M Drug Mart* [1985] 1 S.C.R. 295, 313.

offence if the defendant argues that the statute violates the Charter of Rights; if the court accepts the defendant's argument, then the court will acquit the defendant on the ground that the offence charged is not known to the law.¹²⁹ In this example, the ruling of invalidity is authorized by s. 52(1) and the remedy of acquittal is authorized by the Criminal Code. Section 24(1) is not needed in such a case, and it is not applicable.

As will be explained later in this chapter, an administrative tribunal will be a "court of competent jurisdiction" for the purpose of s. 24(1) if it has the power to decide questions of law.¹³⁰ But, without the need to rely on s. 24(1), an administrative tribunal with power to decide questions of law has power to rule on the validity of a statute that is potentially applicable and that is argued to be in violation of the Charter.¹³¹ For example, if a union applies to a labour board for certification as the collective bargaining agent of agricultural workers, and a statute excludes agricultural workers from collective bargaining, the labour board would have the power to rule on the question whether the statutory exclusion of agricultural workers violated the Charter.¹³² If the board held that the statutory exclusion was a violation of the Charter, then the board would also have the power to certify the union. In this example, the ruling of invalidity is authorized by s. 52(1), and the remedy of certification is authorized by the board's empowering statute. Section 24(1) is not applicable.

As these examples show, s. 24(1) is not needed to provide a remedy for a Charter infringement where a holding of invalidity is all that the applicant needs in order to obtain an appropriate remedy that is available under the general law. Section 24(1) is needed only where a remedy provided by the general law is not available for some reason, or will not provide satisfactory redress. Generally speaking, it will be the declaration of invalidity under s. 52(1) that provides the remedy for *laws* that violate a Charter right (or indeed any constitutional right), while s. 24(1) provides the remedy for *government acts* that violate an individual's Charter right. Section 24(1) provides a "personal remedy against unconstitutional government action".^{132a} That is why the only person who has standing to seek a remedy under s. 24(1) is the very person whose Charter right has been infringed. Standing is the topic of the next section of this chapter.

Charter claimants have occasionally sought individual relief under s. 24(1) in the same proceeding as they have sought a declaration of invalidity under s. 52(1). In principle, there is no reason why both remedies should not be available

129 *Ibid.*

130 Section 40.2(f), "Court of competent jurisdiction," below.

131 Section 40.3, "Administrative tribunals", below.

132 *Cuddy Chicks v. Ont.* [1991] 2 S.C.R. 5.

132a *R. v. Ferguson* [2008] 1 S.C.R. 96, para. 61 per McLachlin C.J. for the Court. Followed in *Greater Vancouver Transportation Authority v. Can. Federation of Students* [2009] 2 S.C.R. 295, paras. 85-90 (declaration of invalidity under s. 52(1) granted as remedy for rules of general application that infringe the Charter; remedy under s. 24(1) not appropriate).

in the same proceeding in the rare case where both remedies are needed to provide full relief to the claimant.¹³³ That was the situation in *R. v. Demers* (2004),¹³⁴ where the Supreme Court of Canada held that the provisions of the Criminal Code respecting accused persons who were found permanently unfit to stand trial were unconstitutional for overbreadth.¹³⁵ The Court suspended the declaration of invalidity for a period of one year to permit Parliament to enact a new law. That, of course, was a remedy under s. 52(1).¹³⁶ But the Court was concerned that, if Parliament failed to act, persons unfit to stand trial would still be subject to criminal charges and to the restrictions on their liberty that follow from criminal charges. The Court therefore added a second remedy. Acting under s. 24(1), the Court ordered that, in the event of Parliament not acting within a year, those persons permanently unfit to stand trial who were found to be no danger to the public should have their proceedings stayed.¹³⁷

(d) Standing

Standing to apply for a remedy under s. 24(1) is granted to “anyone”¹³⁸ whose Charter rights “have been infringed or denied”. This imposes stricter requirements of standing than are applicable to many remedies under the general law.¹³⁹

Section 24(1) contemplates that it is the applicant’s own rights that have been infringed or denied. For example, it has been held that an accused could not complain about an unreasonable search of his girlfriend’s apartment, even though the search yielded evidence (a cache of drugs) that was relied upon by the Crown as part of its case against the accused. Since the accused had no reasonable expectation of privacy in someone else’s apartment, the search was not a breach

¹³³ *Schachter v. Can.* [1992] 2 S.C.R. 679, 720 per Lamer C.J. for majority (“An individual remedy under s. 24(1) will rarely be available in conjunction with an action under s. 52 . . .”); *R. v. Ferguson*, previous note, para. 63 per McLachlin C.J. for the Court (s. 24(1) remedy is available “in connection with a s. 52(1) declaration of invalidity in unusual cases where additional s. 24(1) relief if necessary to provide the claimant with an effective remedy”).

¹³⁴ [2004] 2 S.C.R. 489. Iacobucci and Bastarache JJ. wrote the opinion of the eight-judge majority. LeBel J. wrote a concurring opinion. On the remedial issue, he disagreed with the majority that the s. 24(1) remedy should be postponed for a year; he would have granted to the claimant an immediate stay of proceedings: sec. 40.2(e), “Apprehended infringements”, below.

¹³⁵ Chapter 47, Fundamental Justice, under heading 47.15, “Overbroad laws”, below.

¹³⁶ Section 40.1(d), “Temporary validity”, above.

¹³⁷ A new law was enacted within one year. S.C. 2005, c. 22, s. 33, adds a new section to the Criminal Code (s. 672.851), which authorizes a court to order a stay of proceedings if the court is satisfied that the accused is not likely ever to become fit to stand trial and does not pose a significant threat to the public.

¹³⁸ The meaning of “anyone” is examined in ch. 37, Application of Charter, under heading 37.1, “Benefit of rights”, above.

¹³⁹ Standing under the general law is examined in ch. 59, Procedure, under heading 59.2, “Standing”, above.

of the accused's s. 8 right to be secure against unreasonable search or seizure. Only the tenant of the apartment could pursue a remedy under s. 24.¹⁴⁰

A corporation cannot obtain a remedy under s. 24(1) for a denial of freedom of religion, because a corporation cannot hold a religious belief. But, in *R. v. Big M Drug Mart* (1985),¹⁴¹ the Supreme Court of Canada held that a corporation could defend a criminal charge under a Sunday closing law on the ground that the law was a denial of the freedom of religion of individuals. The Court held that a defendant to a criminal charge was at liberty to raise any constitutional defect in the law under which the charge is laid, because "no one can be convicted of an offence under an unconstitutional law".¹⁴² The fact that the corporation had no standing under s. 24(1) to challenge the law was irrelevant. The challenge was based on the supremacy clause of s. 52(1): "Where, as here, the challenge is based on the unconstitutionality of legislation, recourse to s. 24 is unnecessary and the particular effect on the challenged party is irrelevant".¹⁴³

In *R. v. Big M Drug Mart*, the corporation was allowed to invoke a right that did not extend to corporations in order to escape criminal liability under a statute that purported to apply to it. Sometimes a person, motivated by public interest, wishes to make a Charter challenge to a statute that does not even apply to the challenger. This cannot be done under s. 24(1). However, in *Minister of Justice v. Borowski* (1981),¹⁴⁴ the Supreme Court of Canada granted standing to an anti-abortion activist to bring an action for a declaration that the Criminal Code's abortion provisions were unconstitutional. Those provisions could never actually be applied to the applicant, who was neither a doctor nor a woman, but he was granted standing nevertheless. This illustrates that the availability of a declaration of invalidity under s. 52(1) is governed by more generous standing requirements than are the remedies authorized by s. 24(1).^{144a}

(e) Apprehended infringements

Section 24(1) stipulates that the applicant's rights "have been" infringed or denied, which contemplates that the infringement has occurred at the time of the application. It does not authorize an application in respect of a merely apprehended

¹⁴⁰ *R. v. Edwards* [1996] 1 S.C.R. 128; folld. in *R. v. Belnavis* [1997] 3 S.C.R. 341 (passenger in someone else's car).

¹⁴¹ [1985] 1 S.C.R. 295.

¹⁴² *Id.*, 313.

¹⁴³ *Ibid.* Accord, *R. v. Morgentaler* [1988] 1 S.C.R. 30 (male doctor acquitted of performing an illegal abortion on ground that women's Charter right to liberty or security of the person infringed by law); *R. v. Wholesale Travel Group* [1991] 3 S.C.R. 154 (corporation successfully attacked part of law under which it was charged on ground that it infringed liberty of individual); *Can. Egg Marketing Agency v. Richardson* [1998] 3 S.C.R. 157 (corporate defendant in civil suit by government allowed standing to invoke mobility rights of individual).

¹⁴⁴ [1981] 2 S.C.R. 575.

^{144a} See also *R. v. Ferguson* [2008] 1 S.C.R. 96, para. 61 per McLachlin C.J. for the Court (distinguishing between the remedy under s. 52(1) and that under s. 24(1)).

future infringement. For example, no one could bring a s. 24(1) application after nothing more than an announcement of a new police interrogation procedure, even if the announced procedure was going to infringe the Charter. However, it seems to be generally accepted that the imminent threat of a Charter violation will satisfy s. 24(1).¹⁴⁵ For example, s. 24(1) will authorize a remedy for English-speaking parents who are denied by statute their Charter right under s. 23 to send their children to an English-speaking school, even if the application is made before the school year has started, and therefore before any parent's child has actually been refused admission.¹⁴⁶ It is not clear whether s. 24(1) will extend as far as the general remedies of declaration and injunction, which are both available in respect of threatened violations of rights.¹⁴⁷

In *R. v. Demers* (2004),¹⁴⁸ the Supreme Court of Canada awarded a s. 24(1) remedy for an infringement that it feared might occur in the future. The Court had issued a suspended declaration of invalidity that gave Parliament one year to replace the provisions in the Criminal Code dealing with accused persons who had been charged with an offence, but who had been found unfit to stand trial. The existing provisions, the Court held, were unconstitutional for overbreadth under s. 7 of the Charter. However, the majority of the Court added a second remedy to the suspended declaration of invalidity.¹⁴⁹ Acting under s. 24(1), the majority ordered that, in the event that Parliament did not act within the one-year period, those persons who were permanently unfit to stand trial and who had been found not to be a danger to the public should receive a stay of proceedings. LeBel J., who wrote a concurring opinion, disagreed with this remedy. He was concerned that the majority's prospective remedy provided no immediate relief to the claimant (an accused person permanently unfit to stand trial) whose liberty had been restricted by an unconstitutional law. The majority's order left him in this condition for another year (or until a corrective law was enacted). LeBel J. would have ordered an immediate stay of proceedings for those accused persons who were permanently unfit to stand trial and whose release into the community would not create a risk of danger.

¹⁴⁵ E.g., Gibson, note 1, above, 195-198; Cromwell, *Locus Standi* (1986), 99-100.

¹⁴⁶ *Que. Assn. of Protestant School Bds. v. A.-G. Que.* (1982) 140 D.L.R. (3d) 33 (Que. S.C.). This decision was affirmed by the Quebec Court of Appeal ((1983) 1 D.L.R. (4th) 573) and by the Supreme Court of Canada ((1984) 2 S.C.R. 66), although neither appellate court commented on the remedial issue. Accord, *New Brunswick v. G.(J.)* [1999] 3 S.C.R. 46, paras. 50-51 (ordering provision of state-funded counsel for custody hearing in order to remedy prospective breach of s. 7).

¹⁴⁷ S.A. de Smith, Lord Woolf and J. Jowell, *Judicial Review of Administrative Action* (Sweet & Maxwell, London, 5th ed., 1995), 637-648.

¹⁴⁸ [2004] 2 S.C.R. 489.

¹⁴⁹ The second remedy is discussed in sec. 40.2(c), "Non-exclusive remedy", above.

(f) Court of competent jurisdiction

Section 24(1)'s remedies may be granted only by a "court of competent jurisdiction". We have already noticed the important point that the power to make a finding of invalidity on Charter grounds under the supremacy clause of s. 52(1) is not restricted to a court of competent jurisdiction, but is possessed by any court or tribunal (with power to decide questions of law) before which the validity of the law is brought into contention.¹⁵⁰ The meaning of the phrase "court of competent jurisdiction" is thus relevant only to the availability of a remedy under s. 24(1).

A superior court, which is a court of general jurisdiction, is always a court of competent jurisdiction.¹⁵¹ Moreover, the power of a superior court to grant a remedy under s. 24(1) cannot be limited by statute.¹⁵² (As will be explained, inferior courts and administrative tribunals have been held to be bound by statutory restrictions on their remedial powers.) Therefore, an application for a remedy under s. 24(1) can always be made to a superior court. This does not mean that the application will always be successful if a Charter violation is established, because the award of a remedy under s. 24(1) is discretionary. If, for example, the applicant interrupted a trial in an inferior court in order to bring a s. 24(1) application before a superior court, the superior court should normally refuse the application on the ground that the trial court is the most convenient forum to hear the s. 24(1) application.¹⁵³

A trial court, even if it is not a superior court, is a court of competent jurisdiction to hear an application for a remedy that relates to the conduct of the trial, for example, the exclusion of evidence that has been obtained in violation of the Charter or a stay of proceedings that have gone on for an unreasonable time or an award of costs against the Crown for failure to make timely disclosure to the defence.^{153a} It is not necessary to make a separate application to a superior court, although a superior court would also be a court of competent jurisdiction. If a separate application were made to a superior court, the superior court should generally decline to grant any remedy, because it is the trial judge who is in the best position to assess what is the remedy that is just and appropriate.¹⁵⁴ However, a defendant to a criminal charge who has not been given a trial date, and is not likely to get one for a long time, has no trial court within reach, and therefore may apply to a superior court to stay the proceedings on the ground of unreason-

150 Section 40.1, "Supremacy clause", above.

151 *R. v. Rahey* [1987] 1 S.C.R. 588; *R. v. Smith* [1989] 2 S.C.R. 1120.

152 *Doucet-Boudreau v. Nova Scotia* [2003] 3 S.C.R. 3, paras. 51, 105, and note explicit contrast (para. 49) with the situation of inferior courts and administrative tribunals.

153 *R. v. Smith* [1989] 2 S.C.R. 1120, 1129.

153a *R. v. 974649* [2001] 3 S.C.R. 575 (provincial offences court, during trial, awarded costs against the Crown for late disclosure in breach of Charter).

154 *Ibid.*

able delay.¹⁵⁵ Even after the trial has commenced, an application to a superior court may be appropriate if it is the action of the trial judge that is the subject of the complaint; for example, when the trial judge has failed to render a decision on a motion for a directed verdict.¹⁵⁶

The Supreme Court of Canada has held that a judge conducting a preliminary inquiry into a criminal charge is not a court of competent jurisdiction.¹⁵⁷ This means that a preliminary inquiry judge has no power to stay proceedings on the ground of unreasonable delay under s. 11(b), and no power to exclude evidence on the ground that the evidence was obtained in breach of the Charter. This is a rather surprising result when one considers that the preliminary inquiry judge would have to rule on non-Charter grounds on the validity of the charge and the admissibility of the evidence adduced.¹⁵⁸ In the case where the defendant claims that the trial of a criminal charge has been unreasonably delayed because too much time has elapsed even before the preliminary inquiry has been held, the defendant can make a separate application to a superior court to stay the proceedings.¹⁵⁹ But, in the normal course of events, Charter applications have to await the trial.

Can an *administrative tribunal* be a court of competent jurisdiction? The Supreme Court of Canada answered yes to that question in 1995, holding that an administrative tribunal was a court of competent jurisdiction if its constituent statute gave it power over (1) the parties to the dispute, (2) the subject matter of the dispute, and (3) the Charter remedy that was sought.¹⁶⁰ In that case, an administrative tribunal had power to grant a remedy under s. 24 for breach of the Charter. The Court continued to apply this definition until 2010 when it noticed that it had been applying a somewhat different definition to identify those administrative tribunals that had the power to hold invalid those laws that were apparently applicable to the proceedings but which the tribunal found to be in breach of the Charter. On this latter issue, which was a remedy under s. 52 not s. 24, the Court had held that an administrative tribunal with jurisdiction over the parties and subject matter could apply the Charter only if it had the power (express or implied) to decide questions of law (provided its constituent legislation did not exclude Charter issues from the tribunal's authority over questions of law).¹⁶¹

¹⁵⁵ *Ibid.*

¹⁵⁶ *R. v. Rahey* [1987] 1 S.C.R. 588.

¹⁵⁷ *R. v. Hynes* [2001] 3 S.C.R. 623.

¹⁵⁸ Even more surprising is the holding in *R. v. Seaboyer* [1991] 2 S.C.R. 577 that the preliminary inquiry judge has no power to determine Charter issues under s. 52(1): see text accompanying note 228, below.

¹⁵⁹ *R. v. Smith* [1989] 2 S.C.R. 1120.

¹⁶⁰ *Weber v. Ont. Hydro* [1995] 2 S.C.R. 929 (labour arbitrator had power to award declaration and damages for breach of Charter). See also *Mooring v. Can.* [1996] 1 S.C.R. 75 (National Parole Board had no power to exclude evidence for breach of Charter); *R. v. 974649* [2001] 3 S.C.R. 575 (provincial offences court had power to award costs for breach of Charter).

¹⁶¹ Section 40.3, "Administrative tribunals", below.

There seemed to be no good reason why an administrative tribunal's authority over questions of law was necessary to empower the tribunal to grant a Charter remedy under s. 52, but was not necessary to empower the tribunal to grant a Charter remedy under s. 24.

In *R. v. Conway* (2010),¹⁶² the Supreme Court decided to merge the two lines of remedial cases by holding that an administrative tribunal *with authority to decide questions of law* was a court of competent jurisdiction for the purpose of s. 24 (unless Charter issues had been clearly withdrawn from the tribunal's jurisdiction). It was the authority to decide questions of law that qualified an administrative tribunal to decide constitutional questions, whether those questions arose under s. 24 or s. 52.¹⁶³ The applicant in *Conway* had in 1984 been charged with a crime and found not guilty by reason of insanity (in modern parlance not criminally responsible by reason of mental disorder—an NCR patient). The Criminal Code required that he be incarcerated in mental health facilities subject to regular reviews of his case by the Ontario Review Board, which was an administrative tribunal established by the Criminal Code for the province of Ontario with supervisory jurisdiction over NCR patients. The Board held an annual hearing for each patient. In 2006, in advance of his annual review by the Board, the applicant applied to the Board under s. 24 of the Charter for an absolute discharge from custody on the ground that his Charter rights had been infringed. The application was initially denied by the Board (and on appeal by the Ontario Court of Appeal), using the three-part test that prevailed before 2010: the Board was held not to be a court of competent jurisdiction because it lacked the power to grant the remedy sought. The Supreme Court, applying its new test, held that the Board was a court of competent jurisdiction because it was authorized by the Criminal Code to decide questions of law. However, as will be explained in the next paragraph, the Court agreed that the Board lacked the power to grant the remedy sought, and therefore dismissed the applicant's appeal.

Once it is determined that an administrative tribunal is a court of competent jurisdiction, the remaining question is whether the tribunal can grant the remedy sought. A literal reading of s. 24 would suggest that the tribunal should not be restricted to the remedies authorized by its constituent statute because a court of competent jurisdiction is empowered by s. 24 itself to grant "such remedy as the court considers appropriate and just in the circumstances". However, there is much to be said for the proposition that an administrative tribunal (or even an inferior court) should be confined to its normal range of remedies, so that a Charter claim does not move it beyond its statutory mandate, which alone is the sphere

¹⁶² [2010] 1 S.C.R. 765. Abella J. wrote the opinion of the Court.

¹⁶³ *Id.*, paras. 80-81.

of its undoubted competence.¹⁶⁴ This was the position taken in *Conway*, where the Court, following previous authority,¹⁶⁵ held that the tribunal was restricted by its constituent statute as to the remedies that could be granted under s. 24. The tribunal did not need to have explicit statutory authority over the precise remedy sought, but the tribunal was restricted to “the kind of remedy that the legislature intended would fit within the statutory framework of the particular tribunal”.¹⁶⁶ In this case, the Criminal Code imposed some restrictions on the remedial powers of a Review Board. In particular, the Board was explicitly prohibited from granting an absolute discharge to an NCR patient who had been found by the Board to be “a significant threat to the safety of the public”. The Board had found that the applicant was a significant threat to the safety of the public, and therefore the Board had no *statutory* power to grant an absolute discharge. The applicant argued that s. 24 freed the Board from statutory limits to its jurisdiction, but the Court disagreed. The withdrawal of the power to grant an absolute discharge to an NCR patient who was dangerous was consistent with the Board’s mandates to protect public safety and to adequately prepare NCR patients for their reintegration into society. For the Board to grant such a remedy under s. 24 “would be a clear contradiction of Parliament’s intent”. The application for an absolute discharge had to be denied.

(g) Range of remedies

The argument made in the previous section was that the phrase “court of competent jurisdiction” did not limit the range of remedies available under s. 24(1). Section 24(1) does limit the range of remedies by the phrase “such remedy as the court considers appropriate and just in the circumstances”. While this phrase confers a discretion on the court, the cases are slowly developing principles that will structure and limit the discretion. For example, the courts have usually insisted that existing procedures be employed for s. 24(1) applications, so that well-understood procedural values are not ignored simply because a constitutional point is in issue.¹⁷⁰ This is why applications respecting the conduct of a trial should normally be made to the trial judge, who is in the best position to determine whether a trial should be delayed or interrupted.¹⁷¹ For the same reason, the courts have generally refused to countenance the creation of new procedural mechanisms, such as the pre-trial motion to suppress evidence, despite

¹⁶⁴ So held in the case of an inferior court in *R. v. 974649* [2001] 3 S.C.R. 575, paras. 26, 43 (enabling legislation granted provincial offences court only narrow power to award costs; held, legislation should be interpreted as conferring by implication the power to award costs for Charter breaches). The power of a superior court to grant a s. 24 remedy cannot be limited by statute: note 152, above.

¹⁶⁵ Cases cited in note 160, above.

¹⁶⁶ [2010] 1 S.C.R. 765, para. 82.

[There are no notes 167-169.]

¹⁷⁰ See Gibson, note 1, above, 284-286.

¹⁷¹ Note 153, above.

its common use in the United States.¹⁷² This kind of procedural caution would obviously bar the award of damages or other civil remedies in a criminal trial, where the person against whom the remedy is sought was not represented by counsel and has not received the normal civil safeguards of pleadings, discovery and the like, which ensure a proper trial of the issue of civil liability.¹⁷³

Subject to the important qualification that a remedy must be appropriate and just in all the circumstances of the case, there is no limit to the remedies that may be ordered under s. 24(1).¹⁷⁴ They include "defensive" remedies,¹⁷⁵ where the court nullifies or stops some law or act, for example, by dismissing a charge, staying a proceeding,^{175a} quashing a search warrant or a committal or a conviction, enjoining an act, or declaring a law to be invalid.¹⁷⁶ The exclusion of evidence obtained in breach of the Charter also falls into the defensive category, but the exclusion of evidence is subject to a special set of rules under s. 24(2), and it is discussed in the next chapter.¹⁷⁷ The remedies available under s. 24(1) also include "affirmative" remedies, such as ordering a province to provide state-funded counsel to an indigent litigant,¹⁷⁸ ordering the return of goods improperly seized¹⁷⁹ or a mandatory injunction requiring positive action.¹⁸⁰ In one case,¹⁸¹ the court contemplated ordering a provincial Legislature to enact legislation to make provision for absentee voting, but the court contented itself with issuing a declaration that the absence of any provision for absentee voting was a breach of s. 3 of the Charter.

Selecting from the broad range of remedies which are possible under s. 24(1) of the Charter presents the courts with a difficult and value-laden task. As L'Heureux-Dubé J. has eloquently stated:¹⁸²

172 *Re Blackwoods Beverages* (1984) 15 D.L.R. (4th) 231 (Man. C.A.).

173 *Mills v. The Queen* [1986] 1 S.C.R. 863, 971 per La Forest J., obiter. Compare *R. v. Zelensky* [1978] 2 S.C.R. 940 (upholding validity of Criminal Code provision providing for compensation to victim, but suggesting circumstances in which compensation award should not be made).

174 The numerous cases in which remedies have been awarded by courts are collected in the two loose-leaf services cited in note 1, above.

175 The distinction between defensive and affirmative constitutional remedies is made by A. Hill, "Constitutional Remedies" (1969) 69 Colum. L. Rev. 1109 and W.E. Dellinger, "Of Rights and Remedies: the Constitution as a Sword" (1972) 85 Harv. L. Rev. 1532.

175a E.g., *R. v. Bellusci* [2012] 2 S.C.R. 509 (upholding stay of proceedings against accused who had been assaulted by prison guard while in custody of guard); *R. v. Singh* (2013) 118 O.R. (3d) 253 (C.A.) (ordering stay of proceedings against accused who had been beaten by police officers during interrogation).

176 Note that defensive remedies will often be available under s. 52(1) (the supremacy clause), and no recourse to s. 24(1) will be necessary: sec. 40.1, "Supremacy clause", above.

177 Chapter 41, Exclusion of Evidence, below.

178 *New Brunswick v. G.(J.)* [1999] 3 S.C.R. 46.

179 E.g., *Re Chapman* (1984) 46 O.R. (2d) 65 (C.A.); *Lagiorgia v. Can.* [1987] 3 F.C. 28 (C.A.).

180 See R.J. Sharpe, "Injunctions and the Charter" (1984) 22 Osgoode Hall L.J. 473. As the author explains, in the United States, despite the absence of any equivalent of s. 24, it has been held that the "civil rights injunction" is available to enforce the Bill of Rights.

181 *Re Hoogbruin* (1985) 24 D.L.R. (4th) 718 (B.C.C.A.).

182 *R. v. O'Connor* [1995] 4 S.C.R. 411, para. 69.

It is important to recognize that the *Charter* has now put into judges' hands a scalpel instead of an axe: a tool that may fashion, more carefully than ever, solutions taking into account the sometimes complementary and sometimes opposing concerns of fairness to the individual, societal interests, and the integrity of the judicial system.

It has been suggested that the court's discretion should be governed by three factors: (1) the redress of the wrong suffered by the applicant; (2) the encouragement of future compliance with the Constitution; and (3) the avoidance of unnecessary interference with the exercise of governmental power.¹⁸³ To these might be added: (4) the ability of the court to administer the remedy awarded. But, as L'Heureux-Dubé J. has emphasized, each case will also present its own unique set of considerations. The trial judge is normally in the best position to weigh the relevant considerations and select the appropriate and just remedy, and the decision of the trial judge is accordingly entitled to deference from an appellate court, even if the appellate court would have selected a different remedy. The decision at first instance should be disturbed on appeal "only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice".^{183a}

(g.1) Declaration

The declaration is a remedy that declares the legal position, but does not actually order the defendant to do anything. However, a simple declaration that the government is in default of its *Charter* duties would almost invariably be obeyed, and would therefore usually be an effective remedy.¹⁸⁴ The declaration is especially appropriate if the court is not sure what would be the appropriate remedial action by government, and is content to leave that choice to the government—informed, obviously, by the court's reasons for holding that the government is in breach of the *Charter*. In *Canada v. Khadr* (2010),¹⁸⁵ a Canadian citizen, who was being held for trial by the United States at a military base in Cuba, applied to the Federal Court for an order that Canada request the United States to return him to Canada. The accused was alleged to have killed an American soldier in Afghanistan, and the evidence against him included the record of interviews by Canadian officials. The Supreme Court of Canada held

¹⁸³ Pilkington, note 182, above.

^{183a} *R. v. Regan* [2002] 1 S.C.R. 297, para. 117 (but still reversing the trial judge's remedy of a stay of proceedings on the ground that he made palpable and overriding errors of fact and misdirected himself on the law); *R. v. Bellusci* [2012] 2 S.C.R. 509, 2012 SCC 44, para. 17 (upholding trial judge's remedy of a stay of proceedings); *R. v. Singh* (2013) 118 O.R. (3d) 253 (C.A.) (reversing trial judge's denial of a stay of proceedings on the ground that it was "so clearly wrong as to amount to an injustice").

¹⁸⁴ E.g., *Re Hoogbruin*, note 182, above; *Re Gamble* [1988] 2 S.C.R. 595 (declaration that prisoner held in violation of s. 7 was eligible for parole); *Vancouver v. Ward* [2010] 2 S.C.R. 28, paras. 74-78 (declaration that car seized in violation of s. 8; no actual harm done to owner).

¹⁸⁵ [2010] 1 S.C.R. 44. The opinion is by "the Court". The case is a sequel to *Can. v. Khadr* [2008] 2 S.C.R. 125; discussed in ch. 37, Application of *Charter*, under heading 37.2(i), "Extraterritorial application", above.

that the Canadian officials had acted in breach of the Charter, and that the breach contributed to the accused's ongoing detention by the United States. But the Court refused to order Canada to request the return of the accused to Canada. The Court recognized that the making of representations to foreign governments was a complex matter upon which the courts should generally defer to the executive branch. The Court granted only a declaration that the accused's Charter rights had been infringed, thereby leaving to the government "a measure of discretion in deciding how best to respond."¹⁸⁶

(g.2) Damages

The award of damages is sometimes an appropriate and just remedy for a breach of the Charter.¹⁸⁷ This was the case in *Vancouver v. Ward* (2010),¹⁸⁸ where the plaintiff, a Vancouver lawyer, was mistakenly identified by the police as a person who was planning to throw a pie at the Prime Minister, who was attending a public ceremony in Vancouver. The city police confronted the plaintiff and handcuffed him, and when he protested and created a scene they arrested him for a breach of the peace and took him to a police lock-up, where provincial corrections officers took charge of him. They strip-searched him and held him in a cell for more than four hours before releasing him without laying any charges. During this time the police also seized his car, but realized that they did not have enough evidence to obtain a warrant to search it, and returned it to him when he was released. The plaintiff sued, and at trial was awarded damages under s. 24(1) of \$5,000 from the province for the strip search in breach of s. 8 (unreasonable search or seizure) and of \$100 from the city for the seizure of the car (another breach of s. 8). (He was also awarded damages of \$5,000 from the city for the tort of wrongful imprisonment.) The awards of Charter damages (but not the tort damages) were appealed on up to the Supreme Court of Canada, which agreed that the plaintiff's rights under s. 8 had been infringed, and upheld the award of

186 *Id.*, para. 2, and see also paras. 33-39 (reasons), 48 (text of declaration). After the decision, Canada sent a diplomatic note to the United States requesting that the U.S. not use any of the information provided by Canadian officials in the prosecution of the accused. The U.S. responded with a diplomatic note that did not give a direct answer to the request, but which assured Canada that evidence obtained through torture or other improper means would not be admissible in military commission proceedings: *Can. v. Khadr* (2010) 321 D.L.R. (4th) 448 (F.C.A.), paras. 7, 8 (sequel proceedings).

187 M.L. Pilkington, "Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms" (1984) 62 Can. Bar Rev. 517; K. Cooper-Stephenson, "Tort Theory for the Charter Damages Remedy" (1988) 52 Sask. L. Rev. 1; Cooper-Stephenson, *Charter Damages Claims* (1990); Hogg and Monahan, *Liability of the Crown* (3rd ed., 2000), sec. 6.5(d); G.S. Gildin, "Allocating Damages Caused by Violation of the Charter: The Relevance of American Constitutional Remedies Jurisprudence" (2009) 24 Nat. J. Con. Law 121; K. Roach, "A Promising Late Spring for Charter Damages: *Ward v. Vancouver*" (2011) 29 Nat. J. Con. Law 135.

188 [2010] 2 S.C.R. 28. McLachlin C.J. wrote the opinion of the Court.

damages for the strip search, but held that a declaration was a sufficient remedy for the seizure of the car.

McLachlin C.J., who wrote for the Court in *Ward*, held that damages was an appropriate and just remedy for a breach of the Charter when they served a useful function. That function was threefold: not only (1) to compensate the plaintiff for his loss, but also (2) to vindicate Charter rights and (3) to deter future Charter breaches.¹⁸⁹ Because vindication and deterrence pursued societal goals,

(Continued on page 40-39)

¹⁸⁹ [2010] 2 S.C.R. 28, para. 25.

Charter damages under s. 24(1) would not necessarily be the same as common-law damages (which are purely compensatory).¹⁹⁰ Even where no personal loss was suffered, a damages award might be appropriate and just under s. 24(1). For example, in an earlier case, an arrest of a soldier by military police in violation of s. 9 (arbitrary detention or imprisonment) attracted a damages award of \$5,000, although the claimant had not suffered any harm that would be compensable by common law damages.¹⁹¹ In another case, the action of police officers in removing a sick man from his car to attend court in breach of s. 7 (security of the person) attracted a damages award of \$5,000, despite the absence of any harm to the claimant.¹⁹² In the *Ward* case itself, the Court upheld the trial judge's award of \$5,000 damages for the strip search on the ground that his humiliating experience should receive some compensation, and that the functions of vindication and deterrence also justified some damages. However, the Court showed no sympathy for merely symbolic awards of damages, and reversed the trial judge's award of \$100 for the seizure of the plaintiff's car: this caused the plaintiff no harm, the car was not searched, and, although the seizure was a breach of s. 8, it was not a serious one. For that breach, the remedy of a declaration, which was sufficient to fulfil the functions of vindication and deterrence, was all that should be granted.¹⁹³

McLachlin C.J., in her review of s. 24(1) damages, explained that, even when damages are "functionally required" to fulfil one or more of the objects of compensation, vindication or deterrence, there could be countervailing considerations that would render an award of damages inappropriate and unjust. She offered two examples, while warning that this was not a complete catalogue. One countervailing consideration was the availability of alternative remedies. "The Charter entered an existent remedial arena which already housed tools to correct violative state conduct."¹⁹⁴ This was illustrated by the denial of damages for the seizure of the plaintiff's car: the alternative remedy of the declaration was available and was sufficient. Moreover, if private actions in tort would adequately address the Charter breach, then Charter damages would be duplicative and should not be awarded. The Chief Justice said that a tort claim could be joined with a Charter claim, and it would be "useful" for the court to consider the tort claim first in case it rendered recourse to s. 24(1) unnecessary; but it was not "essential" to exhaust the tort remedies first.¹⁹⁵ In this case, the plaintiff's tort action for wrongful imprisonment was successful and yielded damages of \$5,000 for his detention in

190 McLachlin C.J. did not allude to the possibility of punitive damages, which are available at common law to punish a defendant where a tort (or breach of contract or other cause of action) consists of "misconduct that represents a marked departure from ordinary standards of decent behaviour", and where purely compensatory damages would not be a sufficient punishment for the misconduct: *Whiten v. Pilot Insurance Co.* [2002] 1 S.C.R. 595, para. 36.

191 *Du-Lude v. Can.* (2000) 192 D.L.R. (4th) 714 (F.C.A.).

192 *Hawley v. Bapoo* (2005) 76 O.R. (3d) 649 (Ont. S.C.J.).

193 2010 SCC 27, paras. 74-78.

194 *Id.*, para. 34.

195 *Id.*, para. 59.

the police lock-up; on appeal, he did not pursue any additional Charter damages for the detention. No tort damages were awarded for the strip search or the seizure of the car, and so no issue of duplicative remedies arose for those causes of action.

A second consideration that could negate the appropriateness of Charter damages is "concern for effective governance".¹⁹⁶ Of course, Charter damages would usually promote good governance, since they should deter Charter breaches by government. However, what the Chief Justice had in mind was the line of cases holding that no damages are available "for the harm suffered as the result of the mere enactment or application of a law that is subsequently held to be unconstitutional."¹⁹⁷ Nor does s. 24(1) authorize damages for harm caused by government officials who act in good faith and without negligence under the "claim of right" of a statute subsequently held to be unconstitutional for breach of the Charter.¹⁹⁸ According to McLachlin C.J. in *Ward*, these doctrines are exemplary of the principle of good governance, because damages awards would "chill the exercise of policy-making discretion" and deter public officials from carrying out their duties under apparently valid statutes.¹⁹⁹ She did not mention the indeterminate extent of Crown liability that would be opened up if damages claims could be brought by all who had suffered harm as the result of the enactment and implementation of a statute that was subsequently held to be unconstitutional. Perhaps that is an issue of good governance as well. In *Ward* itself, however, the good governance immunity was not relevant: the public officials had not been acting on the faith of statutes subsequently held to be unconstitutional.

The action for Charter damages under s. 24(1) is commonly described (following American terminology) as a "constitutional tort". However, it is not literally a species of tort. In *Ward*, McLachlin C.J. described damages under s. 24(1) as "a unique public law remedy"; it was not "a private law action in the nature of a tort claim".²⁰⁰ For one thing, the Charter action "lies against the state and not against individual actors". Since individual actors are not bound by the Charter, they are not liable for damages under s. 24(1), and the Crown is not liable vicariously for their Charter breaches. The Crown is liable directly (not vicariously) for breaches of the Charter. Any personal liability of individual actors such

196 *Id.*, paras. 38-43.

197 *Mackin v. N.B.* [2002] 1 S.C.R. 405, para. 78 (refusing damages for enactment of legislation in breach of Charter right to judicial independence), following pre-Charter cases of *Wellbridge Holdings v. Greater Winnipeg* [1971] S.C.R. 957 and *Central Canada Potash v. Govt. of Sask.* [1979] 1 S.C.R. 42.

198 *Guimond v. Que.* [1996] 3 S.C.R. 347, paras. 13-19.

199 2010 SCC 27, paras. 40-41.

200 *Id.*, paras. 22, 30, 31. Compare the restitutionary remedy against the Crown for unconstitutional taxes, which is not based on s. 24(1), because it is not based on a breach of the Charter. The Court has insisted that this is a special public-law remedy, although it is very similar to the private-law remedy for restitution based on unjust enrichment: *Kingstreet Investments v. N.B.* [2007] 1 S.C.R. 3, para. 40; discussed in ch. 58, Effect of Unconstitutional Law, under heading 58.8, "Unconstitutional taxes", below.

as police or corrections officers would have to be found in the private law of tort, and if so found the Crown would be vicariously liable for the tort, provided it was committed by an official in the course of employment. Another distinction between the public-law remedy under the Charter and the private-law remedy of tort is that the quantum of damages may differ. As explained above, in assessing Charter damages, vindication and deterrence must be taken into account, and these could justify a damages award where no loss cognizable by the common law had been suffered. Still these two differences are not so marked as to require the abandonment of the common phrase “constitutional tort”—since the adjective “constitutional” signals the existence of some distinctions from the private law of tort.

(g.3) Costs

The award of costs²⁰¹ is sometimes an appropriate and just remedy for those Charter breaches that cause inconvenience or delay to a litigant. Default in the Crown’s Charter obligation to make pre-trial disclosure to a criminal defendant²⁰² has often been sanctioned by an award of costs against the Crown. A stay of proceedings would normally be too severe a sanction and a mere adjournment not severe enough. The Supreme Court of Canada has upheld an award of costs against the Crown for delay in making disclosure, although the Court warned that this remedy was appropriate and just only in exceptional cases: “costs awards will not flow from every failure to disclose in a timely fashion”, but are restricted to “circumstances of a marked and unacceptable departure from the reasonable standards expected of the prosecution”.²⁰³

(g.4) Exclusion of evidence

Evidence that has been obtained in breach of the Charter may be excluded as a remedy for the Charter breach, but this remedy is regulated by s. 24(2), which provides that the evidence shall only be excluded if its admission “would bring the administration of justice into disrepute”. That has turned out to be the topic of much litigation, and so s. 24(2) is the topic of the next chapter, namely, 41, Exclusion of Evidence.

Evidence that has been obtained in compliance with the Charter is not covered by s. 24(2) (or by the next chapter of this book), and yet in some situations the exclusion of the evidence will be an appropriate and just remedy *under s.*

201 On costs in constitutional cases generally, see ch. 59, Procedure, under heading 59.7, “Costs”, below.

202 Chapter 47, Fundamental Justice, under heading 47.21(c), “Pre-trial disclosure by the Crown”, below.

203 *R. v. 974649* [2001] 3 S.C.R. 575, para. 87 per McLachlin C.J. for the Court. For discussion, see K. Jull, “Costs, the Charter and Regulatory Offences: the Price of Fairness” (2002) 81 Can. Bar Rev. 646.

24(1). In *R. v. White* (1999),²⁰⁴ an accident report, which had been given to the police by the accused under the (valid) compulsion of a provincial law that required the reporting of all serious traffic accidents, was excluded from the accused's trial for leaving the scene of the accident. The exclusion was ordered under s. 24(1) on the ground that the admission of the accused's report would offend one of the principles of fundamental justice under s. 7, namely, the principle against self-incrimination.

In *R. v. Bjelland* (2009),²⁰⁵ the question arose whether the exclusion of evidence was an appropriate and just remedy under s. 24(1) when the Charter breach was the late disclosure of the evidence by the Crown to the accused. It is a principle of fundamental justice under s. 7 that the Crown must, in advance of a criminal trial, make timely disclosure to the accused all evidence in the possession of the Crown.²⁰⁶ In *Bjelland*, a criminal trial for drug offences, the Crown, after making timely disclosure to the defence of what was thought to be most of the evidence, discovered and disclosed further evidence shortly before the date set for trial. The trial judge excluded the late-breaking evidence for breach of the Charter obligation of timely disclosure. The trial proceeded and the accused was acquitted. An appeal by the Crown went up to the Supreme Court of Canada, which ordered that the evidence be admitted and a new trial held. Rothstein J., who wrote for the majority, held that the trial judge had erred in excluding the evidence when the less drastic remedy of an adjournment was available as a remedy under s. 24(1).²⁰⁷ Because the exclusion of relevant evidence impairs the truth-seeking function of a trial, the normal remedy for a Crown default in timely disclosure should be an adjournment of the trial to give the defence time to consider the new evidence. The exclusion of the new evidence should be ordered only in exceptional cases affecting the fairness of the trial or the integrity of the justice system.²⁰⁸ Examples of exceptional cases would be where the postponement of the trial would lead to a breach of the accused's Charter right to be tried within a reasonable time, or where the accused was in pre-trial custody and the

204 [1999] 2 S.C.R. 417; the case is more fully discussed in ch. 47, Fundamental Justice, under heading 47.20, "Right to silence", below.

205 [2009] 2 S.C.R. 651. Rothstein J. (with three others) wrote the opinion of the majority. Fish J. (with two others) wrote a dissenting opinion.

206 *R. v. Stinchcombe* [1991] 3 S.C.R. 326; discussed in ch. 47, Fundamental Justice, under heading 47.21(c), "Pre-trial disclosure by the Crown", below.

207 As Fish J. pointed out in dissent, the most drastic remedy is a stay of proceedings, which would terminate the prosecution entirely. The accused actually applied for a stay of proceedings, and the trial judge made the "intermediate" order to exclude the evidence, which allowed the prosecution to continue, but without the late evidence. The least drastic remedy is an adjournment of the trial, which the majority holds is to be the normal remedy, although it causes a delay of the trial and provides only a weak incentive for Crown compliance with the duty of timely disclosure.

208 Fish J., dissenting, disagreed with these "novel" restrictions on the discretion of the trial judge to exclude evidence under s. 24(1). In his view, the Supreme Court should have deferred to the trial judge's exercise of remedial discretion, which was to exclude the evidence.

postponement of the trial would significantly prolong the custody. Another possible (but less clear) example would be where the Crown had abused the process by deliberately withholding the evidence from the accused. None of these exceptional circumstances was present in this case, and the prejudice to the accused would have been cured by the less drastic remedy of postponing the trial.

(g.5) Remedies outside s. 24(1)

It is not always necessary for a court to rely on s. 24(1) to remedy a Charter breach. In exercising a statutory discretion, for example, a court may properly be influenced by a relevant Charter breach. In *R. v. Nasogaluak* (2010),²⁰⁹ the accused had pleaded guilty and been convicted of impaired driving and fleeing from the police, offences that would normally attract a sentence of imprisonment. Instead, the trial judge granted him a 12-month conditional discharge coupled with a 12-month driving prohibition. The police had used excessive force in making the arrest and in preventing flight, and they had inflicted injuries on the accused. The trial judge held that the police actions were a breach of the accused's s. 7 right to security of the person, and a reduced sentence was an appropriate and just remedy for the breach under s. 24(1). The Supreme Court of Canada agreed that there had been a breach of s. 7, and that it justified a reduction of the accused's sentence. However, the Court held that the trial judge had been wrong to rely on s. 24(1) as the justification for the reduced sentence. Sentence reduction was not an appropriate remedy under s. 24(1), except in the exceptional case where it was the "sole effective remedy" for a Charter breach.²¹⁰ However, under normal sentencing principles, a Charter breach that related to the circumstances of the offence or the offender could properly be taken into account in sentencing. Even state misconduct that did not amount to a Charter breach could be taken into account in sentencing. In this case, the police breach of the accused's Charter rights was properly taken into account in fixing the accused's sentence without the need to invoke s. 24(1). The Court upheld the reduced sentence. The implication of this case, never clearly spelled out, is that s. 24(1) is a remedy of last resort, to be invoked only where a Charter breach cannot be remedied by the application of the general law. We noticed the same implication in the discussion of Charter damages, above: if a tort action would provide adequate redress for the harm suffered from the Charter breach, then no damages should be awarded under s. 24(1).²¹¹

209 [2010] 1 S.C.R. 206. LeBel J. wrote the opinion of the Court.

210 *Id.*, paras. 6, 64. Both these paragraphs contemplate that a sentence reduction under s. 24(1) could even go "outside statutory limits", that is, reduce a mandatory minimum sentence. That was an obiter dictum in the circumstances of this case where no mandatory minimum was applicable.

211 Section 40.2(g.2), "Damages", above.

(h) Supervision of court orders

In *Doucet-Boudreau v. Nova Scotia* (2003),²¹² a superior-court judge in Nova Scotia, acting on the application of French-speaking parents, ordered the government of Nova Scotia to use its “best efforts” to build French-language schools in five districts of the province and to develop programs of instruction for the schools. The order was made under s. 24(1) of the Charter, and its purpose was to enforce the guarantee of minority language educational rights in s. 23 of the Charter. The judge’s order was unusual in that it not only specified the dates by which each school should be built, but it provided that “the Court shall retain jurisdiction to hear reports from [the government] respecting the [government’s] compliance with the order”. Under this last provision, the judge presided over a series of “reporting hearings” throughout the period of construction of the schools. For each hearing, the judge required the government to file an affidavit as to its progress in building the schools and developing their curricula, he permitted affidavits in rebuttal to be filed, and he made provision for the cross-examination of all deponents. The Attorney General of Nova Scotia appealed only the part of the order that retained jurisdiction to hear reports of compliance. By the time the appeal reached the Supreme Court of Canada, the hearings were completed, the schools were all built, and the appeal was moot. However, the Court proceeded to decide the question anyway. The question was whether a judge could retain jurisdiction to supervise compliance with a remedial order under s. 24(1). The Court split five-four on the question, but the answer of the five-judge majority was yes.

Iacobucci and Arbour JJ., who wrote for the majority in *Doucet-Boudreau*, pointed out that the Charter was supposed to receive a large and liberal construction, and this applied to the remedial power of s. 24(1) no less than to the substantive rights. Section 24(1) authorized a court of competent jurisdiction to grant the remedy that is “appropriate and just in the circumstances”. It was “difficult to imagine language which could give the court a wider and less fettered discretion”.²¹³ Remedies under s. 24(1) could include “novel and creative features when compared with traditional and historical remedial practice”.²¹⁴ In this case, the trial judge had been concerned about the progressive assimilation of the French-speaking minority in the province, and the delays in building French-language schools that had occurred in the past (before any court order had been issued). The judge was concerned that, without the reporting requirement, the order to build the schools would be “ineffective”²¹⁵ (meaning, of course, that the government might refuse to comply with the court order). Iacobucci and Arbour

212 [2003] 3 S.C.R. 3. Iacobucci and Arbour JJ. wrote the opinion for the five-judge majority. LeBel and Deschamps JJ. wrote the opinion for the four-judge dissenting minority.

213 *Id.*, para. 52.

214 *Id.*, para. 59.

215 *Id.*, para. 66.

JJ. concluded that the trial judge's supervisory order was appropriate and just in the circumstances. LeBel and Deschamps JJ. wrote the dissenting opinion. In their view, once the order to build the schools was made, the judge had fully discharged his duty (*functus officio*), and it became the function of the executive to carry out the order. They pointed out that "Canada has maintained a tradition of compliance by governments and public servants with judicial interpretations of the law and court orders".²¹⁶ The court was entitled to assume compliance and should "resist the temptation to directly oversee and supervise the administration of their orders".²¹⁷ In the unlikely (and, one might add, unprecedented) event that a government failed to comply with a s. 24(1) order, contempt proceedings would be available to the parents to enforce compliance.

In my opinion, the dissenting view in *Doucet-Boudreau* is the better one. A supervisory order should be a remedy of last resort, to be employed only against governments who have refused to carry out their constitutional responsibilities. The courts exhaust their expertise when they find the facts, apply the law to those facts, and order the defendant to rectify any wrong. After that, no legal issue remains, just the practical details of implementation, and that is a function of the executive. Moreover, the courts cannot easily be apprised of all the information and other considerations that are required to evaluate progress in the funding, planning and development of school curricula and school building. To the extent that judicial supervision is intended to put pressure on the executive, the task is akin to that of the political opposition, and could easily draw the courts into political conflict. Curiously, neither the majority nor the minority in the Supreme Court of Canada referred to the extensive American experience with judicial orders of supervision to achieve the desegregation of school systems, police forces and public facilities, and to impose constitutional standards on prisons and mental hospitals. But the federal courts of the United States were driven to these highly controversial expedients by the intransigent refusal of some governments to comply with their constitutional duties. Supervision orders are remedies of last resort.²¹⁸ Canada has had no history of governmental defiance of the constitution, and, until it does, there is no need for judicial supervision orders.

A judicial supervision order was made by the Federal Court in *Abdel-razik v. Canada* (2009).²¹⁹ In that case, a Canadian citizen, who had made a visit to Sudan (the land of his birth), was arrested without charge, imprisoned for several years and tortured by the Sudanese authorities. When he was released, his Canadian passport had expired, and efforts to obtain a new one, even just a temporary one to get him back home to Montreal where his family awaited him,

216 *Id.*, para. 106.

217 *Id.*, para. 111.

218 D.L. Horowitz, "Decreeing Organizational Change: Judicial Supervision of Public Institutions" [1983] *Duke L.J.* 1265, 1281; M.L. Pilkington, "Enforcing the Charter: The Supervisory Role of Superior Courts" (2004) 25 *Supreme Court L.R.* (2d) 77.

219 [2010] 1 *F.C.R.* 267 (F.C.) (Zinn J.).

all proved unavailing. The applicant brought an application for a declaration that his right to enter Canada under s. 6(1) of the Charter of Rights had been violated, and for an appropriate and just remedy for the violation under s. 24(1). The Federal Court found that the Canadian government had been complicit in the applicant's arrest and imprisonment (but not in the torture) by Sudan. The Court also found that, after the applicant's release from prison in Sudan, when he was staying in the Canadian embassy, the Canadian government in Ottawa, while giving him assurances of aid and comfort, had actually been doing its best to block his return to Canada. The Court held that the applicant had a constitutional right to return to Canada under s. 6(1), and that the right had been violated.²²⁰ The Court ordered that an emergency passport be issued to enable the applicant to return to Canada. But, based on the past history of governmental bad faith in dealing with the applicant, the Court also ordered that the applicant be brought before the Court after his return for the purpose of satisfying the Court that he had in fact returned to Canada.²²¹ And, in case that did not happen in a timely fashion, the Court reserved the right "to issue further orders as may be required to safely return Mr. Abdelrazik to Canada".²²² The government did not appeal the Court's orders and fully complied with them. The applicant was able to return to Canada and he was duly produced to the Court, which pronounced itself "satisfied that the judgment has been respected."²²³

(i) Appeals

Section 24(1) does not authorize an appeal from the decision of a court of competent jurisdiction.²²⁴ The existence of a right of appeal will depend upon the rules of the court to which the s. 24(1) application was made. Where there is no existing right of appeal, as will often be the case in applications in criminal proceedings before the trial is over, there will be no appeal from the Charter ruling by the court of competent jurisdiction.²²⁵

220 For discussion, see ch. 46, Mobility, under heading 46.1(b) "International movement", below.

221 [2010] 1 F.C.R. 267, para. 167. There was a second reason for the order (paras. 162-165): the applicant was the subject of a United Nations travel ban to which an exception was the fulfillment of a "judicial process".

222 *Id.*, para. 168.

223 Federal Court Index and Docket (online), entry for July 7, 2009.

224 *Mills v. The Queen* [1986] 1 S.C.R. 863; *James Doyle v. Anderson* (1990) 71 D.L.R. (4th) 731 (Nfld. C.A.).

225 A wrong decision on a Charter issue by a court of competent jurisdiction, unless "manifestly and palpably wrong", will not be a jurisdictional error giving rise to judicial review by prerogative writ or other extraordinary remedy: *Re Corbeil* (1986) 27 C.C.C. (3d) 245 (Ont. C.A.). Of course, if the court of competent jurisdiction is a superior court, the prerogative writs and other extraordinary remedies would not normally be available to review the decision, although it is possible that the invocation of the Charter would remove the superior court's immunity: *Kourtesis v. M.N.R.* [1993] 2 S.C.R. 53, 90 per La Forest J., obiter; compare cases denying

In *Knox Contracting v. Canada* (1990),²²⁶ the Supreme Court of Canada, by a majority, held that there was no appeal from a refusal by a judge to quash a search warrant issued under the Income Tax Act. The Court held that, because neither the Income Tax Act nor the Criminal Code provided for any right of appeal, there was no right of appeal, despite the fact that the applicant claimed that the warrant had been issued in breach of the Charter of Rights.²²⁷ In *Kourtessis v. Minister of National Revenue* (1993),²²⁸ another attempt was made to quash a search warrant issued under the Income Tax Act. This time the applicant applied for a declaration that the statutory provision authorizing the warrant and the warrant itself were unconstitutional for breach of the Charter. The Supreme Court of Canada was unanimous that an appeal was available in these proceedings. An application (or action) for a declaration of invalidity was a civil proceeding. The declaration “is not transformed from a civil remedy to a criminal remedy merely because the declaration relates to a criminal statutory provision”.²²⁹ It followed that the application for a declaration in this case was governed by the provincial rules of civil procedure, which made provision for an appeal. In this way, the rules of criminal procedure were bypassed, although the Court emphasized that there would be a discretion to refuse to issue the declaration if another procedure were available to resolve the constitutional issue.²³⁰

(j) Limitation of actions

Where proceedings are brought, whether under s. 24(1) or under the general law, for a “personal remedy”,²³¹ such as the recovery of unconstitutional taxes or damages for breach of the Charter, statutes of limitation of general application

Crown immunity to shield an unconstitutional act: Hogg and Monahan, *Liability of the Crown* (3rd ed., 2000), secs. 2.4(d), 2.6(d), 4.5(d).

226 [1990] 2 S.C.R. 338.

227 Sopinka J., dissenting, would have avoided this unfortunate result by classifying the Income Tax Act as a taxation law rather than a criminal law, and by allowing the appellant to invoke the appeal procedures allowed by provincial law.

228 [1993] 2 S.C.R. 53.

229 *Id.*, 114 per Sopinka J.

230 *Id.*, 86, 115.

231 A personal remedy such as damages is to be contrasted with a declaration of invalidity under s. 52(1) (the supremacy clause). There is no limitation period on the making of a declaration of invalidity of a statute no matter how long ago the statute was passed, and the new state of the law will take effect from the time when the invalid statute was passed (or when a valid statute became invalid, for example, by the passage of the Constitution Act, 1982), and the benefits and obligations flowing from the new state of the law will take effect automatically. However, if legal proceedings are needed to obtain a personal remedy under the new state of the law, statutes of limitation of general application will apply to the proceedings. These distinctions are explained and applied in *Ravndahl v. Sask.* [2009] 1 S.C.R. 181, para. 27; and see discussion of the case at note 238, below.

will apply to the proceedings.²³² In general, constitutional claimants are not liberated from the rules of practice and procedure of the court in which a claim is made, despite the fact that failure to comply with the rules will sometimes defeat proceedings. In the case of limitation periods, the policy reasons for bringing finality to disputes and relieving defendants of the risk of stale claims, when evidence is likely to be lost or unreliable, do not disappear whenever the constitution is invoked by a claimant. Indeed, the Supreme Court of Canada has required persons convicted of unconstitutional crimes to serve out their time in prison if they were outside the time limits for appeals from conviction.²³³

The leading case on limitation of actions is *Kingstreet Investments v. New Brunswick* (2007),²³⁴ which was an action by taxpayers against the Crown in right of New Brunswick to recover taxes that had been imposed by the provincial Legislature without constitutional authority. (The taxes, which were on the sale of liquor, were held to be indirect and outside the provincial power of taxation, which is limited to "direct" taxes.) The plaintiffs' cause of action was of course based on the unconstitutionality of the taxes, but s. 24(1) was not applicable because there had been no breach of the Charter. The plaintiffs simply relied on the law of restitution to recover the taxes that had unjustly enriched the Crown. The Supreme Court of Canada held that the plaintiffs were entitled to recover the taxes under the law of restitution, but the Court held that the recovery was subject to the province's limitation statute, which included a residuary limitation period (for all actions not otherwise provided for) of six years after the cause of action arose. That period applied to the plaintiffs' action, and their recovery was accordingly limited to those taxes that had been paid during the six-year period preceding the commencement of the action.

In *Kingstreet*, Bastarache J., who wrote the opinion of the Court, distinguished the Court's earlier decision in *Amax Potash v. Government of Saskatchewan* (1977),²³⁵ where the Court had struck down a provincial law that purported to bar the recovery of unconstitutional taxes. The bar had been enacted for the sole purpose of denying relief for things done under an unconstitutional law. The invalidity of the bar was said to be demanded by a principle of federalism: a constitutional restriction on the power of the province to tax could not be evaded by the indirect means of barring the recovery of a tax that had been levied in violation of the restriction.²³⁶ In *Kingstreet*, Bastarache J. drew a distinction

232 Statutes of limitation also apply to aboriginal claims against the Crown: *Can. v. Laneman* [2008] 1 S.C.R. 372 (claim statute-barred).

233 *R. v. Thomas* [1990] 1 S.C.R. 713 (person convicted of felony-murder three years before the offence was held to be unconstitutional could not obtain relief because accused no longer "in the judicial system").

234 [2007] 1 S.C.R. 3. Bastarache J. wrote the opinion of the Court.

235 [1977] 2 S.C.R. 576.

236 *Amax Potash* was followed in *Air Canada v. B.C.* [1986] 2 S.C.R. 539 (petition of right to recover unconstitutional taxes, levied at a time when the petition of right was the only means of suing the Crown, cannot be blocked by discretionary refusal of fiat).

between a law that was enacted for the purpose of barring the recovery of an unconstitutional tax from the Crown (*Amax Potash*) and a law of general application that imposed a limitation period on a class of generally-described causes of action. There was no reason, he said, why a general limitation statute should not be effective to bar stale claims for the recovery of unconstitutional taxes.²³⁷

In *Ravndahl v. Saskatchewan* (2009),²³⁸ the widow of a person who had been killed in the course of his employment received a workers compensation pension from 1975, the date of her husband's death, until 1984, when she remarried. On her remarriage the workers compensation legislation of that time terminated her pension. The Supreme Court of Canada held that the termination of her pension was a violation of s. 15 of the Charter, and that she had a cause of action against the Crown in right of Saskatchewan under s. 24(1) for damages for breach of the Charter.²³⁹ However, that cause of action arose on April 17, 1985, when s. 15 came into force. Following *Kingstreet*, the Court held that her proceedings, which had been commenced in 2000, were defeated by the province's limitation statute, which imposed a residuary limitation period (for all actions not otherwise provided for) of six years after the cause of action arose.²⁴⁰

The distinction between the limitation period of general application that was applied in *Kingstreet* and *Ravndahl* and the specific bar on the recovery of an unconstitutional tax that was struck down in *Amax Potash* is clear and sound in principle. There is, however, a middle case exemplified by *Prete v. Ontario* (1993).²⁴¹ In that case, the plaintiff brought an action for damages under s. 24(1) of the Charter alleging various Charter breaches by the law officers of the Crown, who had prosecuted him unsuccessfully. The plaintiff brought his action outside the six-month limitation period that was then prescribed for proceedings against the Crown and public officials by Ontario's Public Authorities Protection Act. The Ontario Court of Appeal held that the limitation period did not bar the action. Carthy J.A., who wrote for the Court on this issue, explained that governments should not, even by statute, be permitted "to decide when they would like to be free of [constitutional] controls".²⁴² The result was that the plaintiff was allowed to proceed with his action, although an action framed in tort for malicious pros-

237 [2007] 1 S.C.R. 3, paras. 59-61.

238 [2009] 1 S.C.R. 181. McLachlin C.J. wrote the opinion of the Court.

239 The Court did not address the problem that this involved giving retroactive effect to the Charter of Rights, since the remarriage and consequent termination of the pension had taken place before the coming into force of s. 15: see ch. 36, Charter of Rights, under heading 36.11, "Commencement of Charter", above.

240 The limitation period did not bar her actions for declarations that the applicable legislation was unconstitutional: note 231, above; however, the Court did not deal with the claims for declaratory relief.

241 (1993) 16 O.R. (3d) 161 (C.A.). Carthy J. wrote for the majority; Weiler J. dissented on another point, but agreed with the majority that the limitation period was inapplicable.

242 *Id.*, 168. The only limitation Carthy J.A. suggested was the doctrine of laches. In this case, the action had been commenced within 18 months, which he evidently did not consider to be the kind of unreasonable delay that would amount to laches.

ecution (which the plaintiff's constitutional claim closely resembled) would have been statute-barred.

Prete was decided before *Kingstreet* and *Ravndahl*, and was (surprisingly) not referred to by the Supreme Court in either of the later cases. It is possible that *Prete* has been implicitly overruled by the later cases. The limitation period in the Public Authorities Protection Act had not been passed for the specific purpose of barring constitutional claims, and it was not limited to constitutional claims. On the other hand, the Public Authorities Protection Act was hardly a law of general application, since it applied only to proceedings against public authorities (including the Crown) and imposed a very short limitation period on those proceedings. In my view, *Prete* was rightly decided, and for the reason given by Carthy J.A. The Crown should not be allowed to immunize itself from constitutional controls by enacting special, short limitation periods for proceedings against itself. While most special limitation periods in favour of the Crown have been repealed (including Ontario's Public Authorities Protection Act), there are still some on the statute books.²⁴³ Such special limitation periods are, of course, effective to bar claims in tort or contract or other non-constitutional causes of action,²⁴⁴ but in my view they will not apply to constitutional claims.

40.3 Administrative tribunals

(a) With power to decide questions of law

Can administrative tribunals decide Charter issues? The Supreme Court of Canada has answered yes to this question. In *Douglas/Kwantlen Faculty Association v. Douglas College* (1990),²⁴⁵ the Court held that an arbitration board, which had been appointed by the parties under a collective agreement, but which was empowered by statute to decide questions of law, had the power to determine the constitutionality of a mandatory retirement provision in the collective agreement. In *Cuddy Chicks v. Ontario* (1991),²⁴⁶ the Court held that a labour relations

243 Hogg, Monahan and Wright, *Liability of the Crown* (4th ed., 2010), sec. 4.5, "Limitation of actions".

244 Constitutional challenges to Crown privileges in litigation, which have been based on the equality guarantee of s. 15 of the Charter, have been unsuccessful for lack of a listed or analogous ground: ch. 55, Equality, under heading 55.8(a), "Requirement of a listed or analogous ground", at note 128, below.

245 [1990] 3 S.C.R. 570. On the ability of the arbitrator to decide Charter issues, all judges agreed with La Forest J.'s opinion, except that Wilson J. (with L'Heureux-Dubé J.) preferred "to leave open the question whether a tribunal may have such jurisdiction even in the absence of specific provisions in the governing legislation" (606-607). (This reservation related to the fact that the arbitrator had express power to decide questions of law.)

246 [1991] 2 S.C.R. 5. The principal opinion was written by La Forest J., with whom all judges agreed, although Wilson J. (with L'Heureux-Dubé J.) added brief concurring reasons, making the same reservation as she had made in *Douglas College*, previous note.

Tab 16

A Promising Late Spring for Charter Damages: Ward v. Vancouver

Kent Roach*

Part one of this article provides a brief overview of the Supreme Court's decision in *Ward* including not only its upholding of a \$5000 damages under s. 24(1) of the Charter for an unconstitutional strip search, but its overturning of a \$100 award for an unconstitutional seizure as not needed to compensate, vindicate or deter Charter violations. The second part examines threshold issues such as court of competent jurisdiction of small claims courts and statutes of limitations. The remedial purposes of compensation, vindication and deterrence of Charter violations are examined in the third part and the fourth part examines how governments may discharge their burden of establishing that Charter damage claims are not appropriate or fair to the government because of good governance concerns and the availability of alternative remedies. It suggests that *Ward* has largely rejected concerns about the overdeterrence of individual officials. The last part suggests that the quantum of Charter damages should be driven by consideration of the remedial purposes of compensation, vindication and deterrence and that the \$5,000 award should not be seen as either a starting point or a cap on Charter damages. The interrelated issues of quantum and access to justice are likely to be the most important factors in determining whether Charter damages blossom after the late spring set off by the Court's promising decision in *Ward*.

Dans la première partie de cet article, l'auteur présente un survol bref d'une décision de la Cour suprême dans l'arrêt *Ward* qui maintient la décision d'accorder des dommages-intérêts de 5 000 \$ pour une violation de l'article 24(1) de la Charte en raison d'une fouille à nu. Toutefois, dans cette même décision, la Cour casse la décision d'accorder des dommages de 100 \$ pour une saisie illégale, car les objectifs d'indemnisation et de dissuasion par rapport à une violation de la Charte n'interviennent pas à ce sujet. Dans la deuxième partie, l'auteur examine les questions préliminaires, dont les tribunaux compétents en matière de petites créances et la prescription. Les objectifs de réparation de l'indemnisation, la défense du droit et la dissuasion relativement aux violations des droits garantis par la Charte sont examinés dans la troisième partie de l'article. Dans la quatrième partie, l'auteur examine comment les gouvernements peuvent se décharger de leur

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fardeau pour démontrer que des réclamations contre eux en vertu de la Charte ne sont pas appropriées ou justes en raison de préoccupations de saine gestion publique et de la disponibilité de solutions de rechange. Cela suggère que dans l'arrêt *Ward*, la Cour a rejeté les préoccupations concernant l'excès de dissuasion des agents individuels. Dans la dernière partie, l'auteur suggère que le montant de dommages accordés en vertu de la Charte devrait se fonder sur la prise en compte des objectifs de réparation de l'indemnisation, la défense du droit et la dissuasion et que le montant de 5 000 \$ ne devrait être considéré ni comme un point de départ ni comme une limite aux dommages accordés en vertu de la Charte. Les questions interreliées de quantum et d'accès à la justice sont probablement les facteurs les plus importants pour déterminer si les dommages accordés en vertu de la Charte prendront leur envol à la suite de cette décision très prometteuse de la Cour dans l'affaire *Ward*.

1. INTRODUCTION

In 1996, Professor David Mullan accurately declared that early enthusiasm for *Charter* damages had amounted to a "false spring."¹ Basic issues such as whether governments should be held directly liable for damages; whether plaintiffs had to establish a level of fault beyond establishing a *Charter* violation; and whether and how non-pecuniary damages would be valued were still not resolved in the jurisprudence.² The Supreme Court had only decided in *Guimond*³ and then *Mackin*⁴ that damages under s. 24(1) of the *Canadian Charter of Rights and Freedoms* (the *Charter*) would not be available in conjunction with a declaration of invalidity under s.52 unless the plaintiff established some form of fault such as bad faith, abuse of power or perhaps negligence in addition to establishing a *Charter* violation. Academic debates revolved largely around whether and to what extent private law concepts taken from the law of torts or delict would be applied to *Charter* damages⁵ and whether some minimum or per se damage award was justified to recognize the violation of the *Charter*.⁶ *Charter* damages withered on the vine, even while the Court expanded the common law liability of the state and affirmed the availability of novel *Charter* remedies.

Much of the disappointment about *Charter* damages should be dispelled by

¹ David Mullan "Damages for Violation of the Charter: A False Spring" (1996) 6 NJCL 105.

² Peter Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, as updated) ch. 37.2; Kent Roach *Constitutional Remedies in Canada* (Aurora: Canada Law Book, as updated) ch. 11; Robert J. Sharpe and Kent Roach *The Canadian Charter of Rights and Freedoms*, 4th ed. (Toronto: Irwin Law, 2009) ch. 17.

³ *Guimond c. Québec (Procureur général)*, [1996] 3 S.C.R. 347, 1996 CarswellQue 919, 1996 CarswellQue 918 (S.C.C.).

⁴ *Mackin v. New Brunswick (Minister of Justice)*, [2002] 1 S.C.R. 405, 2002 CarswellNB 60, 2002 CarswellNB 59 (S.C.C.).

⁵ Marilyn Pilkington "Damages as a Remedy for Infringement of the *Charter of Rights and Freedoms*" (1984) 62 Can Bar Rev. 517; Ken Cooper-Stephenson *Charter Damage Claims* (Toronto: Carswell, 1990)

⁶ Ghislain Otis "Constitutional Liability for the Infringement of Rights Per Se: A Misguided Theory" (1992) 26 UBCLR 21.

the Supreme Court's recent decision in *Ward v. Vancouver*.⁷ *Ward* provides a principled and promising foundation for *Charter* damages to evolve as an important *Charter* remedy. The Court in *Ward* recognized *Charter* damages as a distinct public law remedy that is ordered against governments and not, as in the United States, against individual government officials. There is no rigid requirement under *Ward* for the plaintiff to establish some level of fault beyond the *Charter* violation as there is under the *Mackin* line of cases. *Ward* recognizes that *Charter* damages must be justified on the basis of three broad remedial purposes — compensation, vindication and deterrence of *Charter* violence — and that compensation includes non-pecuniary damages. Finally, *Ward* provides state defendants with an opportunity to demonstrate that damage awards are not appropriate for a broad range of reasons related to proper governance and the availability of more appropriate alternative remedies. In short, *Ward* does not assure that damages will invariably be awarded or rejected, but it establishes a principled framework for litigating such claims. There is a new and promising spring for *Charter* damages. It may be late, but better late than never.

In the first part of this paper, I will provide a brief overview of the *Ward* decision. Although most attention has been focused on the Court's decision to uphold an award of \$5000 damages for an unconstitutional strip search, the Court's decision to overturn a \$100 award against the city for an unconstitutional seizure of Mr. Ward's car should not be ignored. It demonstrates the need for plaintiffs to justify damages as necessary to compensate, vindicate or deter *Charter* violations and the rejection of a theory of per se nominal damages for all *Charter* violations.

The second part of this paper will examine some threshold procedural issues that should be considered before the litigation of *Charter* damage claims. These include questions such as the availability of a court of competent jurisdiction, statutes of limitations, and the impact of cost and fee arrangements. The biggest obstacles to *Charter* damages are not doctrinal restrictions, but rather practical access to justice considerations and the interrelated question of the quantum of *Charter* damages. Given these concerns, small claims courts may be a particularly promising venue for individuals to litigate *Charter* damage claims.

The third part of this paper will examine the broad remedial purposes of compensation, vindication and deterrence of *Charter* violations that the Court has defined as the guiding purposes for *Charter* damage awards. It will be suggested that this decision, like the Court's *Doucet-Boudreau*⁸ decision, appropriately establishes broad principles to guide the exercise of remedial discretion as opposed to leaving the issue to unfettered remedial discretion or binding remedial discretion by inflexible rules⁹ such as the requirement for proof of specified forms of fault that is still required when *Charter* damage claims are combined with declarations of invalidity under s. 52. Compensation will serve a corrective function of attempting to repair

⁷ *Ward v. Vancouver (City)*, 2010 SCC 27, 2010 CarswellBC 1948, 2010 CarswellBC 1947 (S.C.C.).

⁸ *R. v. Doucet-Boudreau*, [2003] 3 S.C.R. 3, 2003 CarswellNS 376, 2003 CarswellNS 375 (S.C.C.).

⁹ Kent Roach "Principled Remedial Discretion under the Charter" (2004) 25 S.C.L.R. (2d) 101.

the harms caused by the *Charter* violation while the goals of vindication and deterrence are designed more to affirm the constitution and regulate governmental conduct in the future.

The fourth part of this paper will examine how governments may discharge their burden of establishing that *Charter* damage claims are not appropriate or fair to the government because of good governance concerns and the availability of alternative remedies. It will be suggested that *Ward* implicitly rejected arguments that *Charter* damage claims will overdeter government officials. It also found that a declaration was not an adequate remedy in the context of an unconstitutional strip search. There is, however, a possibility that in other contexts, concerns about individual liability, overdeterrence and a preference for declaratory relief may reassert themselves as reasons not to award *Charter* damages. These concerns, however, should be closely evaluated in light of the findings of the *Ward* case.

The last part of this paper will examine the quantum of *Charter* damage claims. The Court has indicated that the quantum of *Charter* damages should be driven by consideration of the remedial purposes of compensation, vindication and deterrence. Compensatory damages will perform the corrective function of attempting to restore plaintiffs to the position they would have occupied but for the *Charter* violation. It is less clear how the regulatory objectives of vindication and deterrence will be quantified, but the seriousness of the *Charter* violation will be an important factor. The \$5000 award in *Ward* should not be seen as either a starting point or a cap on *Charter* damages. It will also be suggested that the quantum of *Charter* damages is the most unsettled issue in *Ward*. Moreover, the interrelated issues of quantum and access to justice will be the most important factors in determining whether *Charter* damages blossom in the late spring set off by the Court's promising decision in *Ward*.

2. THE WARD DECISION

Cameron Ward was arrested for breach of the peace in August, 2002 in relation to a political demonstration involving a visit of Prime Minister Chretien to Vancouver. He was taken to a holding cell where he was asked to remove his clothes. He did so, but refused to remove his underwear. He was held for about four and half hours before being released after the Prime Minister had left downtown Vancouver. His car was also seized by the police, but returned to him after his release. Without any criminal charges pending, the event may have been just another low visibility encounter between police and citizens and much less well-known than the harsh treatment of protesters at the APEC or G20 demonstrations. The case was different, however, because Mr. Ward is a civil rights lawyer. He commenced a damage action alleging not only *Charter* violations but a variety of common law torts against the province, Vancouver and individual officers. Even though Mr. Ward was a lawyer, he did not act as his own counsel but was represented by a Vancouver lawyer, Brian Samuels, who litigated the case all the way to the Supreme Court of Canada on a pro-bono basis.

After a six day trial, the trial judge rejected most of Mr. Ward's tort claims and those against individual officers relating to his arrest. The trial judge did, however, award Mr. Ward \$5,000 in *Charter* damages in relation to his strip search which he found violated s. 8 of the *Charter* including the restrictions on strip

searches articulated in 2001 by the Supreme Court in *Golden*.¹⁰ He also awarded \$100 in *Charter* damages in relation to the seizure of Mr. Ward's car.¹¹ Tysoe J. rejected the government's argument that, as under *Makin*, it was necessary to establish bad faith, abuse of power or an independent tort in addition to a *Charter* breach if damages were sought only under s. 24(1) of the *Charter* and not in conjunction with a challenge of statutory authorization under s. 52(1).

The British Columbia Court of Appeal upheld the trial judge's ruling 2:1.¹² The majority implicitly departed from authority in the Ontario Court of Appeal that had applied the *Mackin* line of cases to cases which only involved s. 24(1) and in which the government did not assert that the *Charter* violation had been authorized by valid legislation that would have to be struck down under s. 52 of the *Constitution Act*.¹³ The minority, however, would have applied the *Mackin* additional fault and qualified immunity requirements to s. 24(1) claims, including those made in the Ward case. On this view of the law, both damage awards would be reversed because the trial judge had found that the governmental officials had not acted in bad faith.¹⁴

On a subsequent appeal by both the province and the city, the Supreme Court unanimously upheld a \$5,000 damage award under s. 24(1) against the province for the unconstitutional strip search and overturned a \$100 award against the city for an unconstitutional seizure of a car. The damages for the strip search were upheld on the basis that they were necessary to compensate and vindicate the plaintiff's *Charter* rights and to deter future unconstitutional strip searches. The Court also found that a declaration would not be an adequate remedy and the government had not demonstrated that the damage award would harm the functioning of government. On the other hand, the Court reversed the nominal damage award for the unconstitutional seizure of the car. It held that the plaintiff "did not suffer any injury as a result of the seizure"¹⁵ and that damages were not necessary to vindicate or deter a *Charter* violation that it characterized as not serious.

From a doctrinal perspective, the Court made clear that governments would not enjoy the same immunities for damage claims made under s. 24(1) alone as they enjoyed when damages were sought in conjunction with a declaration of inval-

¹⁰ *R. v. Golden*, [2001] 3 S.C.R. 679, 2001 CarswellOnt 4253, 2001 CarswellOnt 4301 (S.C.C.).

¹¹ In addition, \$5,000 was awarded in relation to false imprisonment. *Ward v. Vancouver (City)*, 2007 BCSC 3, 2007 CarswellBC 12 (B.C. S.C.); additional reasons at 2007 CarswellBC 282 (B.C. S.C.); affirmed 2009 CarswellBC 115 (B.C. C.A.); leave to appeal allowed 2009 CarswellBC 1603, 2009 CarswellBC 1604 (S.C.C.); reversed 2010 CarswellBC 1947, 2010 CarswellBC 1948, [2010] 2 S.C.R. 28 (S.C.C.). This tort issue was not appealed to the Supreme Court.

¹² *Ward v. Vancouver (City)*, 2009 BCCA 23, 2009 CarswellBC 115 (B.C. C.A.); leave to appeal allowed 2009 CarswellBC 1603, 2009 CarswellBC 1604 (S.C.C.); reversed 2010 CarswellBC 1947, 2010 CarswellBC 1948, [2010] 2 S.C.R. 28 (S.C.C.).

¹³ *Ferri v. Root*, 279 D.L.R. (4th) 643, 2007 CarswellOnt 563 (Ont. C.A.); *Hawley v. Bapoo*, 2007 ONCA 503, 2007 CarswellOnt 4355 (Ont. C.A.).

¹⁴ *Ward v. Vancouver (City)*, *supra* note 12 at para. 90 per Saunders J.A. in dissent.

¹⁵ *Ward v. Vancouver (City)*, *supra* note 7 at para. 77.

idation. Chief Justice McLachlin distinguished *Mackin* for a unanimous Court by stating:

Mackin stands for the principle that state action taken under a statute which is subsequently declared invalid will not give rise to public law damages because good governance requires that public officials carry out their duties under valid statutes without fear of liability in the event that the statute is later struck down. The present is not a situation of state action pursuant to a valid statute that was subsequently declared invalid. Nor is the rationale animating the *Mackin* principle — that duly enacted laws should be enforced until declared invalid — applicable in the present situation. Thus, the *Mackin* immunity does not apply to this case.¹⁶

This ruling does not mean that good governance concerns will not be relevant when s. 24(1) damages are sought. Rather, they will be considered on a case-by-case basis with the government bearing the burden of establishing that functional good governance concerns should preclude the award of damages when they are sought under s. 24(1). The more categorical *Mackin* immunities or fault requirements will still apply when damages are sought in conjunction with a declaration of invalidity under s. 52(1).

The Court in *Ward* held that after establishing a *Charter* violation, the plaintiff will have to establish that damages are an appropriate and just remedy that is needed for compensation of pecuniary or non-pecuniary harm, vindication of *Charter* rights and/or deterrence of *Charter* violations. These remedial purposes will be examined in the third part of this article.

The Court next found that if damages were justified under any of these three remedial purposes, the government would then have an opportunity to demonstrate that damages would not be appropriate and just for an open-ended range of reasons relating to good governance including concerns about overdeterrence, diversion of funds or the availability of alternative remedies. These countervailing factors to damage awards will be examined in the fourth part of this article.

Finally, the Court addressed the appropriate quantum of damages stressing both the purposes of *Charter* damages and the seriousness of the *Charter* violation as well as the need to be fair to the government. These considerations will be evaluated in the fifth part of this article.

One last comment should be made about the Supreme Court's decision. It was systematically written and laid out a clear point-by-point approach to *Charter* damage claims. The Court did not, however, attempt to articulate precise rules to govern *Charter* damage claims. The Court's focus was on broad principles such as the need to compensate, vindicate and deter *Charter* violations while also being fair to the government and respecting the government's role. The decision was also quite brief, containing only 80 paragraphs, many of them quite short. Stylistically, *Ward* is a model judgment that provides clear and principled guidance.

3. THRESHOLD PROCEDURAL MATTERS

A threshold issue for many in Mr. Ward's position is the question of the costs of litigation and the forum that is available to award *Charter* damages. The Ward

¹⁶ *Ibid.* at para. 41.

litigation was conducted in the British Columbia Supreme Court. Costs of litigation in superior courts, even under simplified procedures available in many provinces, are high. In addition, plaintiffs are faced with the possibility of adverse costs award if they lose. In the end, the Supreme Court did not award costs in *Ward* because the parties were able to reach an agreement about costs. This may not be possible in other cases, and litigants may seek out less expensive forums to raise *Charter* damage claims than the superior courts

(a) Court of Competent Jurisdiction

In many cases, potential plaintiffs may seek to assert *Charter* damage claims in alternative forums. Potential alternatives include administrative tribunals, criminal courts and small claims courts. In *Ward*, the Court addressed the question of the appropriate forum in the following terms:

For a tribunal to grant a *Charter* remedy under s. 24(1), it must have the power to decide questions of law and the remedy must be one that the tribunal is authorized to grant: *R. v. Conway*, 2010 SCC 22. Generally, the appropriate forum for an award of damages under s. 24(1) is a court which has the power to consider *Charter* questions and which by statute or inherent jurisdiction has the power to award damages. Provincial criminal courts are not so empowered and thus do not have the power to award damages under s. 24(1).¹⁷

This statement affirms that the tests for court of competent jurisdiction in *Conway*¹⁸ will govern the availability of *Charter* damages. Hence, there will be a strong presumption that administrative tribunals with powers to decide questions of law may also now award s. 24(1) remedies including *Charter* damages.

In many cases, it may be less expensive for plaintiffs to make *Charter* damage claims in an administrative process where they will generally not face the prospect of an adverse cost award. At the same time, administrative tribunals may be able to order a broad range of remedies that may in some circumstances be an adequate alternative remedy to damages. Administrative tribunals will often have many remedies designed to ensure compliance with the *Charter* but perhaps less remedies designed to compensate individuals for past *Charter* violations. Compensatory damages under s. 24(1) may thus be particularly important in expanding the range of remedies that administrative tribunals can order.

The impact of *Conway* in making *Charter* remedies available in administrative tribunals can also be overstated. Consistent with prior jurisprudence¹⁹, *Conway*²⁰ recognized that legislatures can deprive administrative bodies of jurisdiction to award specific *Charter* remedies in specific circumstances. It will be interesting to see if governmental concerns about damage awards led to reactive legislation that

¹⁷ *Ibid.* at para. 58

¹⁸ 2010 SCC 22, 2010 CarswellOnt 3848, 2010 CarswellOnt 3847 (S.C.C.)

¹⁹ For my criticisms of this jurisdiction as positivistic, see Kent Roach *Constitutional Remedies in Canada*, *supra* note 2, ch. 6. See also Christopher Brecht and Ewa Krajewska, “*R. v. Conway*: Simplifying the Test for Administrative Tribunal’s Jurisdiction to Consider *Charter* Issues” in this volume.

²⁰ *Supra* note 18 at para. 101.

deprives administrative bodies of the power to award *Charter* damages. Such a blunt approach would be unfortunate given the ability of governments under *Ward* to raise concerns that damage awards will divert funds or otherwise harm good governance on a case by case basis. Depriving administrative tribunals of the power to award *Charter* damages will force potential litigants to bear the costs of litigation in the superior courts.

The Court in *Ward* affirms that provincial criminal courts do not have statutory jurisdiction to award *Charter* damages, but leaves open the question of whether superior courts in criminal cases can rely on their inherent jurisdiction to award damages. Although the criminal courts have exercised their jurisdiction to award costs, it is not likely that they will be eager to take on the task of considering damage awards in a criminal trial. Although one stop shopping for the accused would be more efficient and damages in some cases might be better remedy than stays of proceedings or sentence reductions, it is unlikely that criminal courts will award *Charter* damages. In principle, it would also be inequitable if the small number of accused in superior criminal courts had access to damages while the vast majority of accused in provincial criminal courts did not.

Finally, the possibility of litigating *Charter* damage claims in small claims courts should not be ignored. In many provinces, the monetary jurisdiction of these courts has been increased well above the \$5,000 in damages awarded in *Ward*. In addition, small claims courts are designed to allow individuals to make claims without the assistance of a lawyer and without facing the spectre of adverse cost awards if they are unsuccessful. Some might object that the litigation of *Charter* claims in small claims courts demeans the dignity of our supreme law and the role of the bar in vindicating the *Charter*. In my view, however, it reflects the reality of our expensive civil justice system and the modest quantum of *Charter* damage awards. Moreover, small claims litigation has the potential to allow citizens to mobilize to defend their rights. Small claims courts have the potential to make *Charter* remedies accessible for more people.

(b) Charter Damages as a Public Law Remedy Against Governments Authorized by Sections 24 and 32 of the Charter

Although legislatures can deprive administrative bodies of the power to award damages and other *Charter* remedies under the court of competent jurisdiction jurisprudence, *Ward* suggests that Crown immunity acts or other legislative restrictions on damages should not apply to s. 24(1) damage claims.²¹ The Court recognized that *Charter* damages under s. 24(1) should be sought against the state, and unlike in the United States,²² not against private officials. It stressed that *Charter* damages “require the state (or society writ large) to compensate an individual for

²¹ *Vancouver v. Ward*, *supra* note 7 at para. 22.

²² *Redding v. Safford Unified School District*, 129 S.Ct. 2633 (2009). For arguments about the inappropriateness of the American jurisprudence given the lack of state immunities in Canada see Gary Gildin “Allocating Damages Caused by Violation of the Charter” (2009) 24 NJCL 121; Gary Gildin “The American Experience with Damages” in Sharpe and Roach, eds. *Taking Remedies Seriously* (Ottawa: Canadian Institute for the Administration of Justice, 2010).

breaches of the individual's constitutional rights. An action for public law damages — including constitutional damages — lies against the state and not against individual actors. Actions against individual actors should be pursued in accordance with existing causes of action.”²³ Although the Court did not cite the case, its approach to *Charter* damages as a unique public law remedy is consistent with the Privy Council's approach in *Maharaj v. Attorney-General for Trinidad & Tobago* (No. 2).²⁴ The Court did, however, cite with approval a subsequent Privy Council case that stressed that damages under Trinidad and Tobago's constitution should not be limited to compensation as in private law, but should also be designed to vindicate the constitution and deter constitutional violations.²⁵

Any statutory or common law liabilities enjoyed by the state against *Charter* damages should not apply by virtue of s.32(1) of the *Charter* which makes the *Charter* applicable to governments.²⁶ This means that any restraint on the award of *Charter* damages should be internal to s. 24(1). Countervailing factors that counsel against the award of damages are part of the s. 24(1) calculus in determining what remedy is appropriate and just in the circumstances.

The Ward litigation featured both tort and *Charter* damage claims which is understandable given the unsettled nature of the jurisprudence at the time. After *Ward*, plaintiffs may chose to focus on *Charter* damage claims as a simpler and more direct remedy as opposed to private law actions that might be restricted by legislation and might be influenced by policy concerns especially those relating to the possible overdeterrence of individual officials that may not be relevant to determining an appropriate and just remedy. The Court has indicated that it “it is not essential that the claimant exhaust her remedies in private law before bringing a s. 24(1) claim.”²⁷ The fact that the Court in *Ward* warns about the dangers of double counting common law and *Charter* damage claims also takes away an incentive that plaintiffs may have to join private law and *Charter* damage claims. Finally, joining private law claims with *Charter* damage claims may encourage courts to apply restrictions taken from private law to the distinct *Charter* claim.²⁸

(c) Statutes of Limitations

Statute of limitations will apply to s. 24(1) damages claims as a result of

²³ *Ward*, *supra* note 7 at para. 22.

²⁴ (1978), [1979] A.C. 385 at 399 (England P.C.).

²⁵ *Attorney General of Trinidad and Tobago v. Ramanoop* (2005), [2006] 1 A.C. 328 (Trinidad & Tobago P.C.) at para. 20 cited in *Ward*, *supra* note 7 at para. 29.

²⁶ See also *Doucet-Boudreau v. Nova Scotia (Department of Education)*, [2003] 3 S.C.R. 3, 2003 CarswellNS 376, 2003 CarswellNS 375 (S.C.C.) at para. 70 (per majority) and at para. 105 (per minority recognizing that ss. 24(1) and ss. 32(1) displaces common law and statutory immunities.

²⁷ *Ward v. Vancouver (City)*, *supra* note 7 at para. 59.

²⁸ This process is partially encouraged by the Court when it stated that “when appropriate, private law thresholds and defences may offer guidance in determining whether s. 24(1) damages would be “appropriate and just” as well as “the procedural requirements of alternative remedies”. *Ibid.* at para. 43.

*Ravndahl v. Saskatchewan*²⁹. In some cases, short statutes of limitations designed to protect public authorities may preclude s. 24(1) claims. The Ontario Court of Appeal was alive to this danger when it held in *Prete v. Ontario*³⁰ that a short 6 month statute of limitation would not apply to a s. 24(1) claim. The approach in *Prete* is also superior in recognizing the supremacy of constitutional damages under both ss. 24(1) and 32 of the *Charter*.³¹ Nevertheless, it seems to have been implicitly overruled by the Supreme Court's 2009 decision in *Ravndahl*.

4. THE PURPOSES OF CHARTER DAMAGES

One of the most important features of *Ward* is its articulation of a range of legitimate purposes for *Charter* damage awards. As suggested above, the purposes recognized in *Ward* are compensation, vindication and deterrence of *Charter* violations. Compensation looks backwards and attempts to correct or repair the effects of a *Charter* violation on the particular person. Vindication and deterrence are more concerned with ensuring that the *Charter* is upheld and respected in the future.

The broad purposes or remedial goals of compensation, vindication and deterrence are not self-executing or precise. The Court articulated broad principles that will in subsequent cases be subject to interpretation and application. The Court's principled based approach can be contrasted to a more specific rule based approach in *Mackin* which attempts to outline certain factual circumstances (i.e., abuse of process, bad faith) when damages would be appropriate and just. The principled approach in *Ward* can also be contrasted with a more discretionary approach taken by the Nova Scotia Court of Appeal³² which essentially left the question of whether damages were appropriate and just and how they should be determined to the discretion of the judge or jury. As I have argued elsewhere, a principled approach to remedial discretion provides a foundation for continued interpretation and debate and is in many ways preferable to either a less flexible rules-based approach or one that simply empowers individual trial judges to exercise remedial discretion as they see fit.³³

(a) Compensation for Pecuniary and Non-Pecuniary Harm and Loss

The Supreme Court has defined the compensatory purposes of *Charter* damages very broadly to include "physical, psychological and pecuniary" loss, as well as harm to "intangible interests" including "distress, humiliation, embarrassment, and anxiety"³⁴ and "pain and suffering".³⁵ The Court has explicitly ruled that it is

²⁹ [2009] 1 S.C.R. 181, 2009 CarswellSask 50, 2009 CarswellSask 49 (S.C.C.).

³⁰ (1993), 110 D.L.R. (4th) 94, 1993 CarswellOnt 810 (Ont. C.A.); leave to appeal refused [1994] 1 S.C.R. x (note) (S.C.C.).

³¹ See also Dianne Pothier "Not So Simple After All: A Comment on *Ravndahl v. Saskatchewan*" (2009) 41 Ottawa Law Review 139.

³² *Bevis v. Burns* (2006), 269 D.L.R. (4th) 696, 2006 CarswellNS 188 (N.S. C.A.).

³³ Roach "Principled Remedial Discretion under the Charter", *supra* note 9.

³⁴ *Ward v. Vancouver (City)*, *supra* note 7 at para. 27

³⁵ *Ibid.* at para. 50. The fact that a particular plaintiff does not suffer extensive pain and suffering from a *Charter* violation does not mean that courts should not attempt to

an error to restrict damages to pecuniary losses, and this holding effectively reverses many early *Charter* cases that implicitly or explicitly limited *Charter* damages in such a manner. The Court's approach is appropriate because the *Charter* is designed to protect many important non-pecuniary values including fairness, privacy, security of the person, liberty and equality.

Although "non-pecuniary damages are harder to measure" than pecuniary losses and require a "fairly modest conventional rate, subject to variation for the degree of suffering in the particular case",³⁶ the Court clearly requires that they be measured and compensated. As will be seen, compensation also emerges as a dominant force in calculating the quantum of damages. The Court has stressed that when calculating damages "the concern is to restore the claimant to the position she would have been in had the breach not been committed."³⁷ At the same time, it would be a mistake to restrict damages only to harm caused if the resulting damage award will not sufficiently satisfy the remaining remedial purposes of vindication of *Charter* rights and deterrence of *Charter* violations. A *Charter* damage should satisfy all three remedial purposes recognized by the Court.

(b) Vindication of the Charter Right

A second functional justification for awarding *Charter* damages is the need to provide vindication of *Charter* rights. Compensation focuses on the particular individual whose *Charter* rights have been violated, while the need to vindicate *Charter* rights "focuses on the harm the infringement causes society."³⁸ This recognizes that public confidence in the *Charter* may be adversely impaired even if a particular *Charter* violation does not cause compensable harm to the plaintiff and even if the *Charter* violation is not particularly egregious. Chief Justice McLachlin stressed the social interest in ensuring tangible remedies for *Charter* violations when she stated that "[w]hile one may speak of vindication as underlining the seriousness of the harm done to the claimant, vindication as an object of constitutional damages focuses on the harm the *Charter* breach causes to the state and to society."³⁹ The need to vindicate the *Charter* may, like the need to compensate or deter *Charter* violations, vary with the particular circumstances of the violation, but there may be a relatively constant requirement that the *Charter* generally be vindicated by some meaningful remedy.

(c) Deterrence of Future Charter Violations

The third functional consideration that can justify the award of *Charter* damages is the need to deter future *Charter* violations. Before *Ward*, the Court was

compensate for the intangible values of the *Charter* violation. The Court explicitly warns that "the resilient claimant whose intangible interests are harmed should not be precluded from recovering damages simply because she cannot prove a substantial psychological injury." *Ibid.* at para. 27.

³⁶ *Ibid.* at para. 50

³⁷ *Ibid.* at para. 48

³⁸ *Ibid.* at para. 28

³⁹ *Ibid.* at para. 28.

reluctant to recognize deterrence or the regulation of governmental conduct as a legitimate goal for constitutional remedies. In the 2009 s. 24(2) case of *Grant*⁴⁰, for example, the Court recognized deterrence, but saw it more as a happy by-product of responding to the seriousness of the violation. In addition, deterrence was not one of the four considerations of vindication, legitimate, judicial and fair remedies that were recognized in *Doucet-Boudreau*⁴¹ as the guiding principles for crafting remedies under s. 24(1). In *Ward*, however, deterrence and the regulation of governmental conduct is recognized as a legitimate remedial purpose. Chief Justice McLachlin states that “deterrence seeks to regulate government behaviour, generally, in order to achieve compliance with the Constitution.”⁴² This part of *Ward* should have an influence not only in shaping damage remedies, but also other remedies such as declarations and injunctions, stays of proceedings and the exclusion of evidence under s. 24(2).

The Court’s recognition of deterrence does not mean that deterrence is the only rationale for constitutional remedies and the Court’s approach should not run afoul those who criticize the American use of deterrence as the sole rationale for exclusion of evidence on the basis that there is little empirical evidence that the remedy actually deters violations.⁴³ The deterrent effect of damage awards may not be great especially if damages are paid out of general revenues and are not internalized to the department that violated the *Charter*. This does not necessarily mean that courts should not try to deter *Charter* violations, especially in circumstances where there is a history of lack of full and prompt compliance with known *Charter* standards, as arguably was the case in *Ward* and continues to be the case with frequent use of strip searches.

At the end of the day, the constitutional purpose of any remedy is to provide a response that is appropriate and just in the particular circumstances. Compensation may often be the dominant purpose and be supported by vindication and deterrence concerns. Nevertheless, the court has recognized that there is a range of social interests including vindication of the right and deterrence that are also relevant in determining the appropriate and just remedy. Specifically, this means that “the fact that the claimant has not suffered personal loss does not preclude damages where the objectives of vindication or deterrence clearly call for an award”.⁴⁴ This suggests that a damage award might be justified under any one of the remedial pur-

⁴⁰ *R. v. Grant*, [2009] 2 S.C.R. 353, 2009 CarswellOnt 4104, 2009 CarswellOnt 4105 (S.C.C.), at para. 73 noting that the concern of the inquiry into the seriousness of the *Charter* violation “is not to punish the police or to deter *Charter* breaches, although deterrence of *Charter* breaches may be a happy consequence.”

⁴¹ *Doucet-Boudreau v. Nova Scotia (Department of Education)*, [2003] 3 S.C.R. 3, 2003 CarswellNS 375, 2003 CarswellNS 376 at paras. 55–58 (S.C.C.).

⁴² *Ward v. Vancouver (City)*, *supra* note 7 at para. 29

⁴³ For an interesting argument that damage awards against governments as opposed to individuals can be both an effective and efficient means of deterrence as they allow states to decide what, if any, actions should be taken to prevent future violations by its officials see Peter Schuck, *Suing Government* (New Haven: Yale University Press, 1983).

⁴⁴ *Ward*, *supra* note 7 at para. 30.

poses. Conversely, a court should only find that damages are not justified if it finds that none of the three purposes would be served by a damage award.

(d) Summary: Remedial Purposes and Principles Applied

The importance of the principles of compensation, vindication and deterrence are demonstrated by the Court's rulings on the merits. The \$5000 damage award for the unconstitutional strip search was upheld by stressing that compensation was required because strip searches are "inherently humiliating and degrading"⁴⁵ and that there was a need to vindicate and deter *Charter* violations because "it is not too much to expect that police would be familiar with the settled law that routine strip searches are inappropriate where the individual is being held for a short time in police cells, is not mingling with the general prison population, and where the police have no legitimate concerns that the individual is concealing weapons that could be used to harm themselves or others."⁴⁶ At the same time, the \$100 damage award for the unconstitutional seizure of the car could not be justified because Mr. Ward suffered no pecuniary or non-pecuniary harm from the seizure and a declaration would serve the remaining purposes of vindication and deterrence.⁴⁷ It is noteworthy that damages were found not to be justified because they would serve none of the three remedial purposes in relation to the seizure of the car.

It is, of course, possible to take issues with some of the Court's conclusions. Perhaps Mr. Ward deserved compensation for the inconvenience of retrieving his car.⁴⁸ Perhaps a declaration was insufficient to deter and vindicate the *Charter* given that the police's rationale in seizing the car seems murky. Nevertheless the broad principles endorsed as the remedial goals for *Charter* damages provide a structured framework for debate about whether damages are appropriate and just in a particular case. The remedial purposes avoid the extremes of a checklist approach that requires some specific factual circumstance such as proof of fault or the opposite extreme of simply leaving the question of whether damages are appropriate and just to the unguided discretion of the trial judge. The result is consistent with the Court's admonition that the exercise of remedial discretion should be driven by the purposes of the *Charter*.⁴⁹ There will be reasonable disagreement about whether damages are required to compensate, vindicate or deter *Charter* violations in particular cases, but litigants and judges can now agree about the terms of the debate.

⁴⁵ *Ibid.* at para. 64.

⁴⁶ *Ibid.* at para. 65.

⁴⁷ *Ibid.* at para. 78.

⁴⁸ The Court did, however, note that the police drove Mr. Ward to where his car had been impounded after he was released. *Ibid.* at para. 77.

⁴⁹ *R. v. Gamble*, [1988] 2 S.C.R. 595 at para. 73, 1988 CarswellOnt 90, 1988 CarswellOnt 969 (S.C.C.).

5. COUNTERVAILING FACTORS TO THE AWARD OF DAMAGES

The Supreme Court in *Ward*⁵⁰ decided that there should be an open-ended category of countervailing factors that may justify not awarding damages even in cases where the *Charter* has been violated and damages would serve compensatory, vindictory or deterrence purposes. In a functional sense, these countervailing factors serve a purpose similar to those served by prior cases that imposed a fault requirement such as negligence or bad faith⁵¹ in addition to the *Charter* violation as well as cases that recognized qualified or good faith immunities that prevented the award of *Charter* damages.⁵² The Supreme Court's approach, however, is less rule-based than the previous jurisprudence. It allows contextual and open-ended balancing of the factors for and against damages in any particular case. This approach may make damage awards less predictable for both plaintiffs and defendants, but it also allows both sides to make full arguments on the advantages and disadvantages of damages in the particular case without having to fit their arguments into narrow categories. It also requires the government to bear the burden of justifying restrictions on *Charter* remedies because of the collective interest in good governance. This approach is consistent with the overall structure of the *Charter* which provides individuals with rights, but allows governments to demonstrate that reasonable restrictions are required on those rights. It recognizes the superior ability and resources of governments to demonstrate any harms that might result from the award of damages.

(a) Alternative Remedies

Once the plaintiff has established a *Charter* violation and the functional need for damages, the state will have an opportunity to establish that an alternative remedy will be equally as effective. The alternative remedies available include not only other *Charter* remedies such as declarations, but also private law actions and statutory actions against the government such as human rights legislation.⁵³ This is a factor that may encourage plaintiffs to join common law actions with *Charter* damages and could be at odds with the Court's statements elsewhere in *Ward* that a plaintiff does not have to exist administrative or common law remedies before seeking *Charter* damages.⁵⁴

The government must establish that the alternative remedy adequately fulfills all of the purposes of the *Charter* damage remedy. For example, a tort remedy may serve compensation, but not necessarily the purposes of vindicating and recognizing that a *Charter* right has been violated or deterring future *Charter* violations.

⁵⁰ The Chief Justice stated: "A complete catalogue of countervailing considerations remains to be developed as the law in this area matures. At this point, however, two considerations are apparent: the existence of alternative remedies and concerns for good governance." *Ward v. Vancouver (City)*, *supra* note 7 at para. 33.

⁵¹ *Ferri v. Root*, *supra* note 13; *Hawley v. Bapoo*, *supra* note 13.

⁵² *Mackin v. New Brunswick (Minister of Justice)*, *supra* note 4.

⁵³ *Ibid.* at para. 34.

⁵⁴ *Ibid.* at para. 59.

The Court, however, warns that “double compensation”⁵⁵ under civil law and s. 24(1) is not appropriate. In some cases, a nominal damage award or a declaration in addition to a private law award may serve the purposes of vindicating *Charter* rights and deterring *Charter* violations. In most cases, private law remedies will not address the need to vindicate or deter *Charter* violations. In such cases, much will depend on whether a declaration of a *Charter* violation without a damage award is sufficient to vindicate and deter *Charter* violations.

In *Ward*, the Court rejected the government’s argument that a declaration that Mr. Ward’s s. 8 *Charter* rights had been violated would be an adequate alternative to the \$5000 award of *Charter* damages for the unconstitutional strip search. The Court concluded “no tort action was available for that violation and a declaration will not satisfy the need for compensation. Mr. Ward’s only recourse is a claim for damages under s. 24(1) of the *Charter*.”⁵⁶ It might be added that a declaration would also fail to deter what the Court found was a serious *Charter* violation that ignored settled law restricting strip searches.⁵⁷ The uncertain experience about how the government will implement declarations⁵⁸ should make courts think twice before relying on the idea that a declaration will automatically vindicate *Charter* rights and deter future *Charter* violations. This is particularly so in cases like *Ward* where the officials did not follow the Court’s 2001 *Golden* decision stressing the need for specific reasonable grounds to justify a strip search. Sometimes a damage award will be more meaningful and forceful remedy than a declaration.

In overturning a \$100 award for a four hour unconstitutional seizure of Mr. Ward’s car, the Court concluded that a declaration would be sufficient. The Court found there was no need for compensation because no tangible or intangible loss flowed from this *Charter* violation. In addition, the *Charter* violation was not serious in large part because the police did not search the car while it was unconstitutionally seized.⁵⁹ In general, declarations will only be an adequate alternative remedy in situations where there is no compensable tangible or intangible loss and no need to deter future *Charter* violations.⁶⁰

(b) Effective Governance Concerns

Another factor that “may negate the appropriateness of s. 24(1) damages is

⁵⁵ *Ibid.* at para. 36.

⁵⁶ *Ibid.* at para. 68.

⁵⁷ *Ibid.* at para. 65.

⁵⁸ There was follow up litigation after the Court’s use of declarations in *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 CarswellBC 2452, 2000 CarswellBC 2442 (S.C.C.) and *Khadr v. Canada (Prime Minister)*, [2010] 1 S.C.R. 44, 2010 CarswellNat 122, 2010 CarswellNat 121 (S.C.C.). In both cases, the follow on litigation arguably provided less than a full and effective remedy for the original beneficiary of the declaration. See *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*, [2007] 1 S.C.R. 38 (advance costs denied follow on litigation); *Prime Minister of Canada v. Khadr*, 2010 PC 715 (finding of lack of effective remedy) rev’d 2011 PCA 92 (appeal dismissed as moot).

⁵⁹ *Ward supra* note 7 at para. 77.

⁶⁰ *Ibid.* at para. 37.

concern for effective governance.”⁶¹ The Court in *Ward* recognized that the *Mackin* line of cases holds that *Charter* damages will not be appropriate in a case where the state relies on legislative authorization of the violation unless there is proof of misconduct (in addition to the *Charter* violation) in the form of conduct that is clearly wrong, in bad faith or an abuse of process. As discussed above, the Court distinguished *Mackin* on the basis that the unconstitutional strip search in this case was not conducted under a valid statute and thus “the rationale animating the *Mackin* principle — that duly enacted laws should be enforced until declared invalid “⁶² was not applicable. The government will have an incentive to argue that the *Charter* violation was authorized by some valid law in an attempt to win the benefit of the *Mackin* immunity or fault requirements. In this sense, the basic issue in *Ward* — whether the *MacKin* immunity or fault requirements apply — will be re-litigated in future cases with governments arguing that any *Charter* violation was authorized by legislation and plaintiffs arguing that the violation was not authorized by legislation and that damages can be awarded under s. 24(1) of the *Charter* without any resort to s. 52(1) and with it the *Mackin* immunity and fault requirements. There is a danger that the litigation of such issues about whether s. 24(1) applies alone or in conjunction with s. 52(1) will be fact-specific and quite divorced from the functional questions of whether damages are justified both in relation to their purposes and competing concerns about good governance. The litigation of such issues could be avoided and the law would be consistent if the rule-based *Mackin* requirements were replaced by the more flexible good governance factors stressed in *Ward*. In all cases then the focus could be on the functional case for damages and the case that damages could harm good governance.

In *Ward*, the Court left the door open for the state to establish the need for good governance immunities outside of the *Mackin* context involving parallel actions under ss. 24(1) and 52(1). At the same time, however, the Court rejected extensive arguments by the governments that damage awards in this case would chill the exercise of law enforcement discretion and open the floodgates to potentially harmful claims against the public purse. The Court did not rehearse these arguments which were made at length by the governmental appellants and an intervenor representing the Chiefs of Police, but tersely concluded that the state had not “established that an award of s. 24(1) damages is negated by good governance considerations, such as those raised in *Mackin*.”⁶³

If concerns about chilling law enforcement discretion and draining the public purse in *Ward* are not sufficient to negate the award of damages, it is difficult to see that many violations of the *Charter* rights of a single *Charter* applicant should be defeated on such grounds. As the Court recognized, routine arguments that *Charter* damage awards adversely affect good governance discount the fact both deterrence and compliance with the *Charter* “is a foundation principle of good governance.”⁶⁴ It is especially significant that s. 24(1) damage claims will be levied against governments and not against individual officials who may be more susceptible to being

⁶¹ *Ibid.* at para. 38.

⁶² *Ibid.* at para. 44.

⁶³ *Ibid.* at para. 68.

⁶⁴ *Ibid.* at para. 38.

overdeterred.

The Court did hint that governance concerns taken from the private law context may still be applicable to *Charter* damage claims. The main concern seems to be the tort of malicious prosecution where the Court has maintained the malice requirement because of concerns about not chilling the exercise of prosecutorial discretion.⁶⁵ Even in that context, however, there is an argument that prosecutorial discretion will be less chilled in cases where governments would be sued and pay any damage awards as opposed to individual prosecutors.

Although the Court suggests that substantive and procedural restrictions on private law damage claims can be a source of “practical wisdom”, any such restrictions should be closely evaluated before being imported into s. 24(1). In many cases, the “practical wisdom” of the common law will be more relevant in determining whether there is a violation of s. 7 of the *Charter* or perhaps a justified limitation under s.1 than in determining the availability of the remedy. For example in the prosecutorial context, the difficult issue will generally be to establish that prosecutorial practices violated s. 7 of the *Charter*. If the prosecutor has violated s. 7, however, it may not be consistent with the purposes of the *Charter* and overly restrictive to only award damages if the plaintiff can demonstrate the individual prosecutors acted with the subjective fault of malice. The “practical wisdom” of the common law may also relate to the fear of holding individuals liable for performing difficult public duties. Under *Ward*, however, s. 24(1) damages are awarded against governments and not against individual public servants.

(c) Fairness to the Government

Although the Court in *Ward* stressed on several occasions the need for damages awards to be “fair”⁶⁶ to government, the focus on fairness taken from *Doucet Boudreau* is arguably misplaced. The concern in *Doucet-Boudreau*⁶⁷ was that the government might not have fair notice and that overly specific or unrealistic remedies may impose “substantial hardships” on governments. In damage cases, however, governments will know what is expected of them. Moreover, they will have the capacity to absorb and redistribute damages and to decide what, if any, remedial steps to take to prevent future violations.⁶⁸ The focus on fairness to governments seems to conceive of the government as an individual with claims to dignity and fairness. In reality, government is the collective embodiment of all of us and for that reason has special duties and obligations that are not imposed on individuals.

Arguments about the need to be fair to government and not to impose large amounts of damages will likely be made in cases like *Hislop* where damages are claimed on behalf of a class. Speculative notions that *Charter* damage awards to potentially large classes will disrupt the finances of the government are difficult if not impossible to reconcile with the Court’s insistence that governments should repay unconstitutional taxes to ensure that the division of powers is vindicated and

⁶⁵ *Ibid.* at para. 43, citing *Kvello v. Miazga*, [2009] 3 S.C.R. 339, 2009 CarswellSask 718, 2009 CarswellSask 717 (S.C.C.).

⁶⁶ *Ibid.* at paras 20, 21, 53, 70.

⁶⁷ [2003] 3 S.C.R. 3 at para. 58.

⁶⁸ Schuck, *Suing Government*, *supra* note 43.

that taxpayers should not be forced to absorb the costs of the government's unconstitutional conduct.⁶⁹ The requirement to prove an unjustified *Charter* violation and to demonstrate the need for damages should ensure that the successful plaintiff class is at least prima facie worthy of receiving damages. Governments should have to justify restrictions on remedies and not simply rely on the fact that the damages in the aggregate can no longer be characterized as modest.

One possible way to discipline governmental claims that damages will be burdensome is to require them to demonstrate reliance interests such as those recognized in *Hislop v. Canada*.⁷⁰ *Hislop* starts from the rebuttable presumption of full retroactive relief whereas the "practical wisdom" of the common law could provide the government with absolute immunity for policy decisions taken in breach of the *Charter*.⁷¹ *Hislop* then requires that the case in which damages are sought substantially changes the law and that the government has reasonably relied upon the pre-existing law. It also requires that not awarding damages would still be fair to all the parties including the plaintiffs. These factors at least ensure that the government goes beyond general claims of good governance and they also have the virtue of directing the court's attention to the vital question of whether not awarding damages would still treat the successful plaintiff fairly. That said, it may not be appropriate to rely on *Hislop* factors justifying departures from full retroactive relief in cases where the *Charter* violation was not clearly authorized by statute and as in *Ward*, damages are only sought under s. 24(1) of the *Charter*.

(d) Double-counting Good Governance Concerns

There is a question about how effective governance concerns will be divided between the distinct tasks of 1) determining if damages should be awarded and 2) determining the appropriate quantum of damages. In discussing the appropriate quantum of damage, the Court made generous allowance for governance interests when it states that "in considering what is fair to the claimant and the state, the court may take into account the public interest in good governance, the danger of deterring governments from undertaking beneficial new policies and programs, and the need to avoid diverting large sums of funds from public programs to private interests."⁷² It thus appears that the state can argue good governance both as a reason not to award damages and as a reason to reduce the quantum of damages. This approach may present a danger of double counting.

If double counting is not to be encouraged when the plaintiff seeks both private law and *Charter* damages, it also should not be allowed when the government argues that good governance will be harmed by the award of damage and in the alternative will be harmed by a higher quantum of damages. Governments that do

⁶⁹ *Kingstreet Investments Ltd. v. New Brunswick (Department of Finance)*, [2007] 1 S.C.R. 3, 2007 CarswellNB 7, 2007 CarswellNB 6 (S.C.C.).

⁷⁰ *Hislop v. Canada (Attorney General)*, [2007] 1 S.C.R. 429 at paras. 99–101, 2007 CarswellOnt 1050, 2007 CarswellOnt 1049 (S.C.C.).

⁷¹ *Just v. British Columbia*, [1989] 2 S.C.R. 1228, 1989 CarswellBC 234, 1989 CarswellBC 719 (S.C.C.) at 1239 [S.C.R.]; *Blackwater v. Plint*, [2005] 3 S.C.R. 3 at para. 9, 2005 CarswellBC 2359, 2005 CarswellBC 2358 (S.C.C.).

⁷² *Ward v. Vancouver (City)*, *supra* note 7 at para. 53.

not succeed in having damages denied on good governance grounds may nevertheless see the same arguments have some success as a reason for reducing the quantum of the damage awards. It should be remembered that the plaintiff will have to justify the quantum of damages for legitimate reasons related to compensation, vindication and deterrence. Given this burden, the government should not be able to make casual and routine claims that damage awards will be costly and disruptive or invoke a rigid rule that damage awards should always be modest. Even if double counting is allowed, the government should have the burden of demonstrating precise harms that may be caused by damage awards in general and by particular quantum of damages as requested and justified by the plaintiff as needed for compensation, vindication and deterrence.

6. QUANTUM OF CHARTER DAMAGES

The decision in *Ward* provides the least guidance when it comes to determining the quantum of damages. The Court upheld the \$5000 award for the unconstitutional strip search, but it did not hear a specific appeal on whether that quantum was either too high or too low. Litigants and judges will pay attention to *Ward* to the extent that it suggests that \$5000 was justified in the particular case. Nevertheless, it would be a mistake to place too much emphasis on the particular quantum awarded in this case or to use it as either a starting point or a cap when calculating damages in subsequent cases.

(a) Rejection of Minimum or Maximum or Per se Awards

In *Ward*,⁷³ the Supreme Court did not establish minimum or maximum awards for *Charter* violations. Consistent with a purposive approach to remedies, it stressed that damages should depend on what was required to fulfill the purposes of the award, namely compensation, vindication and deterrence of *Charter* violations. At the same time, the Court also stressed a number of good governance factors that counseled against the award of high damages. It warned that damage awards must be appropriate, just and fair to both the government and the plaintiff. .

The Court has implicitly rejected the idea that there should be some amount of damage award that is a conventional, per se or minimum award for all *Charter* violations. This follows from the holding that in order to establish damages, a plaintiff must not only establish a *Charter* violation, but also a functional need for damages in terms of compensation, vindication or deterrence of *Charter* violations. The fact that there is no per se entitlement to damages is underlined by the Court's decision to overturn the \$100 damage award for the unconstitutional seizure of a car. The Court decided that such an award was not required to compensate the plaintiff or to vindicate or deter *Charter* violations.

(b) Compensatory Awards

The Court indicated that “[g]enerally, compensation will be the most important object, and vindication and deterrence will play supporting roles” when calcu-

⁷³ *Ibid.* at para. 57.

lating damage awards⁷⁴ The *Ward* case represents a context where the demands for compensation were particularly compelling because of the unconstitutional strip search. The search of Mr. Ward revealed nothing incriminating and factually innocent persons subject to *Charter* violations can only seek compensation and vindication of their *Charter* rights through damage claims either in the courts or before police complaints or human rights tribunals.⁷⁵ In this all too common context of *Charter* violations followed by no criminal charge, damages are the only way that *Charter* violations will be remedied.

The concern with compensation is “is to restore the claimant to the position she would have been in had the breach not been committed.”⁷⁶ The Court alluded to the need to prove a causal connection between the violation and the harm to be remedied when it stated that “as in a tort action, any claim for compensatory damages must be supported by evidence of the loss suffered.”⁷⁷ This requirement means that the plaintiff should establish the full costs of repairing an injury caused by the *Charter* violation whether the injury was to pecuniary interests or intangible interests. Loss of earnings caused by prolonged detention is specifically mentioned⁷⁸ and this may prompt the wrongfully convicted to bring *Charter* damage claims.

The Court also made clear that courts must undertake the difficult task of attempting to compensate for non-pecuniary loss and damage to intangible values. It suggested that “[a]bsent exceptional circumstances, compensation is fixed at a fairly modest conventional rate, subject to variation for the degree of suffering in the particular case. In extreme cases of catastrophic injury, a higher but still conventionally determined award is given on the basis that it serves the function purpose of providing substitute comforts and pleasures: *Andrews v. Grand & Toy*.”⁷⁹

The Court approved the \$5000 award for the unconstitutional strip search in *Ward* concluding that the search “was relatively brief and not extremely disrespectful, as strip searches go. It did not involve the removal of Mr. Ward’s underwear or the exposure of his genitals. Mr. Ward was never touched during the search and there is no indication that he suffered any resulting physical or psychological injury. While Mr. Ward’s injury was serious, it cannot be said to be at the high end of the spectrum. This suggests a moderate damages award.”⁸⁰ These particular facts should be considered when attempts are made to use *Ward* as a precedent on quantum.

It would be unfortunate if the quantum of \$5000 became a standard award for s. 24(1) damages because of *Ward*. Such an award would not make litigation in the superior courts economically rationale given the costs of litigation and the threat of adverse costs awards. It would also produce *Charter* damage claims that lag well

⁷⁴ *Ibid.* at para. 47.

⁷⁵ For discussion of the choice of forum, see Kent Roach, “Remedies for Discriminatory Profiling” in Sharpe and Roach, eds, *Taking Remedies Seriously*, *supra* note 22.

⁷⁶ *Ward*, *supra* note 7 at para. 48.

⁷⁷ *Ibid.* at para. 48.

⁷⁸ *Ibid.* at para. 49.

⁷⁹ *Ibid.* at para. 50.

⁸⁰ *Ibid.* at para. 71.

beyond increasing damage awards that are being awarded under human rights codes.⁸¹ By categorizing the \$5000 quantum as moderate, the Supreme Court contemplated that some higher (and some lower) awards will be within the range of what is appropriate and just.

(c) Vindictory Awards

Although compensation will be the dominant factor in determining the quantum of *Charter* damages, the Court recognized that “cases may arise where vindication or deterrence play a major and even exclusive role.”⁸² With respect to these purposes, “a principal guide to the determination of quantum is the seriousness of the breach, having regard to the objects of s. 24(1) damages. The seriousness of the breach must be evaluated with regard to the impact of the breach on the claimant and the seriousness of the state misconduct.”⁸³ In *Ward*, the breach was serious because the officials ignored settled law restricting strip searches. At the same time, however, the Court also concluded that the conduct “was not intentional, in that it was not malicious, high-handed or oppressive. In these circumstances, the objects of vindication and deterrence do not require an award of substantial damages against the state.”⁸⁴ This later observation focused on the specific deterrence of the specific officers, but the Court also recognized that the general deterrence of other violations and the regulation of governmental conduct were legitimate objectives of *Charter* damage claims. If damages are a public law remedy that is imposed on governments and not individuals, the focus should be more on whether the government as opposed to individual officials was at fault. In any event, *Ward* suggests that while fault is not a prerequisite for *Charter* damages, it may be an aggravating factor that will increase the quantum of damages.

(d) Deterrent Awards

As suggested above, the Court’s recognition of the deterrence of *Charter* violations as a legitimate purpose for *Charter* damages is novel and significant. That said, the Court has provided little guidance about how a concern about deterrence will be actualized in the quantum of damages. As with the vindication of *Charter* rights, the main concern will be with the seriousness of the *Charter* violation with an emphasis on whether the state was justified in violating the *Charter* right.

The unconstitutional strip search in *Ward* was an unjustifiable one that cried out for deterrence of similar violations. It was a routine strip search of a person arrested for a minor offence that was not “associated with evidence being hidden on the body, no weapons were involved and he was not known to be violent or to carry weapons. Mr. Ward did not pose a risk of harm to himself or others, nor was there any suggestion that any of the officers believed that he did.” Moreover, the government should have made the officers “familiar with the settled law that routine strip

⁸¹ See for example *Chan v. Tai Pan Vacations Inc.*, 2009 HRTO 273, 2009 CarswellOnt 2061 (Ont. Human Rights Trib.) (\$15,000 in damages).

⁸² *Ward*, *supra* note 7 at para. 47.

⁸³ *Ibid.* at para. 52.

⁸⁴ *Ibid.* at para. 72.

searches are inappropriate where the individual is being held for a short time in police cells, is not mingling with the general prison population, and where the police have no legitimate concerns that the individual is concealing weapons that could be used to harm themselves or others: *Golden*, at para. 97.”⁸⁵ Even if the officers themselves did not act, as the trial judge found, in bad faith, deterrence speaks to the need for general deterrence of others in similar positions not to commit similar violations of the *Charter*. In *Ward*, the Court by analogy with the sentencing purpose of general deterrence stressed that “deterrence as an object of *Charter* damages is not aimed at deterring the specific wrongdoer, but rather at influencing government behaviour in order to secure state compliance with the *Charter* in the future.”⁸⁶ As suggested above, the focus on general deterrence of the government as a whole also follows from the nature of damages under s. 24(1) as a public law remedy to be ordered against governments and not individual officials.

This understanding of general deterrence could have laid the basis for an award of damages that was much greater than the \$5000 awarded in the case. The quantum of damage was, however, not appealed to the Supreme Court. Nevertheless, the Supreme Court appeared to approve of the \$5000 quantum which it characterized as a “moderate damages award”⁸⁷ by stressing that the individual officers who conducted the search were not at fault. This disregards what the Court noted elsewhere was the “general deterrence” concern of ensuring that damages were significant enough to ensure that other officers would not commit similar *Charter* violations in the future. The focus should not be on whether the individual officers who conducted the search were at fault or acted maliciously or in bad faith, but whether the government as a whole had taken reasonable steps to comply with *Charter* restrictions on strip searches.

Although the Court did not rule out the availability of punitive damages, it hinted that they may not be necessary when it noted “that public law damages, in serving the objects of vindication and deterrence, may assume a punitive aspect.”⁸⁸ As a result of *Ward*, courts will be reluctant to award explicitly punitive awards. Nevertheless, courts should not hesitate, especially in the face of a serious and unjustifiable violation that shows that the state has taken a negligent approach to *Charter* compliance, to award higher damage awards in order to vindicate and deter future *Charter* violations. Although fault is not a requisite for *Charter* damage awards under s. 24(1), it can, in appropriate cases, increase the quantum of the award.

Any concerns about a *Charter* plaintiff receiving an unjustified windfall will often be met by the fact that the low quantum of damages awarded under s. 24(1), including the \$5000 in *Ward*, will not normally compensate for the full cost of litigation in the superior courts even considering costs awards in favour of the plaintiff. Moreover, the Court clearly recognizes the deterrence of *Charter* violations as a legitimate purpose of *Charter* damages. In this sense, plaintiffs seeking s. 24(1) *Charter* damages can act as private Attorney Generals vindicating the public

⁸⁵ *Ibid.* at para. 65.

⁸⁶ *Ibid.* at para. 29.

⁸⁷ *Ibid.* at para. 71.

⁸⁸ *Ibid.* at para. 56.

interest in *Charter* compliance.

7. CONCLUSION

The Supreme Court's landmark decision in *Vancouver v. Ward* should encourage *Charter* damage claims against governments by recognizing broad interests in compensation, vindication and deterrence of *Charter* violations as legitimate factors in justifying damages. The Court has recognized that the state can rebut these factors with countervailing considerations such as the adequacy of other remedies and good governance concerns. The Court's own decision in this case, however, suggests that declarations will often be an inadequate remedy and that courts should not accept on face value claims that damage awards will overdeter officials employed by the state in the exercise of their duties.

On the facts, the Court found that a declaration would not be a sufficient remedy for an unconstitutional strip search and rejected the government's argument that the \$5000 award would overdeter officials and open the floodgates. The Court did, however, overturn a \$100 award for an unconstitutional seizure of a car on the basis that there was no need for compensation, the violation was not serious and that a declaration of the violation would be an adequate remedy. The quantum of the \$5,000 award was not appealed. It could have been much higher if, consistent with the public law nature of the s. 24(1) damage remedy, the focus was on general deterrence of the government's future conduct with regards to strip searches as opposed to the specific deterrence of the individual officers who were found by the trial judge not to have acted in bad faith when they conducted the unconstitutional strip search.

The Court took a principled approach that stressed broad remedial purposes and countervailing factors that speak to whether damages are appropriate and just in a particular case. The Court did not fetter remedial discretion to award damages by requiring specific levels of fault or imposing specific forms of qualified immunity rules such as those found in the *Mackin* line of cases. The Court's approach is a considerable advance over the previous jurisprudence because it emphasizes the purposes and principles of *Charter* remedies. *Ward* provides a solid framework for both individuals and governments to contest whether damages are an appropriate and just remedy. As such *Ward* provides a late spring for *Charter* damages that has replaced the false spring that came before it. Just how much *Charter* damages will blossom in the future may depend on the interrelated issues of access to justice including the availability of damages in administrative tribunals and small claims courts and the quantum of future *Charter* damage awards.

Tab 17

Enforcement of the Charter — Subsections 24(1) and 52(1)

Kent Roach^{*}

This chapter will examine the enforcement of the *Canadian Charter of Rights and Freedoms*¹ under subsection 24(1) of the Charter and section 52 of the *Constitution Act, 1982*. It will assess the remedial performance of the courts to date but also examine some challenges for the future. It will employ a functional approach that first examines threshold issues of standing, jurisdiction, pre-trial remedies and advanced costs before examining the range of remedies available after a full trial has found a Charter violation. Issues of remedial choice will be highlighted. These include the choice between seeking remedies for unconstitutional laws under section 52 and for unconstitutional governmental acts under section 24 and the choice between various remedies under each remedial provision.

After brief historical and theoretical introductions, this chapter will examine remedies available before a Charter violation has occurred. It will also examine remedies available before a full trial including advanced costs and interlocutory injunctions or interlocutory stays of legislation. It will then examine remedies for unconstitutional laws under subsection 52(1) of the *Constitution Act, 1982* including threshold issues of standing and jurisdiction to apply the Charter. Although subsection 52(1) appears simple in its direction to strike unconstitutional laws down to the extent of their inconsistency, there are a wide variety of subsection 52(1) remedies including reading down, constitutional exemptions, severance, reading in and extension of under-inclusive laws, suspended declarations of invalidity and prospective rulings that limit the normally retroactive effects of declaration of invalidity.

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¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

The next part of the chapter will examine the range of remedies available for unconstitutional acts by governmental actors under subsection 24(1) of the Charter including threshold issues of standing under subsection 24(1) and jurisdiction to award subsection 24(1) remedies. Subsection 24(1) remedies include damages, costs, declarations, injunctions and other mandatory remedies. There will also be a brief discussion of subsection 24(1) remedies in the criminal process² with the exclusion of evidence under subsection 24(2) being dealt with in another chapter of this work.³

The final part of the chapter explores remedial challenges for the future including remedies that may involve positive governmental action, costs, delay, negotiation between the affected parties, balancing of affected interests and dialogue or confrontation between courts and government.

I. HISTORICAL INTRODUCTION: THE IMPORTANCE OF REMEDIES

Before the enactment of the *Constitution Act, 1982* and the patriation of Canada's Constitution, courts struck down laws that infringed the constitutional division of powers on the basis that the *British North America Act, 1867*⁴ as imperial legislation was superior legislation. The invalidation of various provincial laws restricting fundamental freedoms served as an indirect, but not always reliable, means of protecting civil liberties. Today, subsection 52(1) of the *Constitution Act, 1982* is a clear supremacy clause that provides that "the Constitution of Canada is the supreme law of the land and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect". The Charter was also added to the Constitution in 1982 and it provides direct recognition of various civil liberties including fundamental freedoms, legal rights and equality rights as well as a specific clause providing for appropriate and just remedies for its violations.

There were early difficulties in enforcing language and denominational school rights. Judicial decisions striking down restrictions of the

² For extended discussion of these and other remedies, see Kent Roach, *Constitutional Remedies in Canada*, 2d ed., as updated (Toronto: Canada Law Book), at c. 9 [hereinafter "Roach, *Constitutional Remedies*"].

³ See Chapter 23 of this volume.

⁴ Now *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 [hereinafter "*Constitution Act, 1867*"].

language rights of Franco-Manitobans were ignored until the Supreme Court of Canada in 1985 retained jurisdiction over the matter until Manitoba's laws were translated into French.⁵ The *Constitution Act, 1867* contemplated the enactment of remedial legislation, but the federal Parliament stopped short of enacting remedial laws to restore the denominational school rights of the Roman Catholic minority in Manitoba. Similarly, the federal power of disallowance of provincial laws was not generally used as a means to enforce the rights of minorities or civil liberties.

Historically, the Crown was immune from both damages and injunctions. This meant that remedies had to be sought against individual officials, most famously in *Roncarelli v. Duplessis*.⁶ In that case, the Supreme Court enforced the rule of law by holding the Premier of Quebec personally liable for arbitrarily withdrawing a liquor licence from a Jehovah's Witness. Today, subsection 24(1) of the Charter authorizes the award of both damages and injunctions against governments, though it still remains possible to sue individual officials under a private law action.

The *Canadian Bill of Rights*, first enacted in 1960,⁷ did not contain any enforcement provisions. Because of this and its lack of constitutional status, the courts were reluctant to declare statutes invalid under it or to award remedies for its violations. The unwillingness of courts to provide remedies under the *Bill of Rights*, as well as international law recognition of the right to an effective remedy, help explain why the Charter contains explicit enforcement provisions both in subsection 52(1) of the *Constitution Act, 1982* and subsection 24(1) of the Charter which provides:

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

Remedial provisions were dropped from earlier drafts of the Charter in an attempt to win provincial approval, but were reinstated after a Joint Parliamentary Committee heard concerns from civil liberties groups,

⁵ *Reference re Manitoba Language Rights*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721 (S.C.C.) [hereinafter "*Manitoba Language Reference*"]. See an earlier decision that was ignored by the government, *Pellant v. Hebert* (1892), 12 R.G.D. 242 (Man. Co. Ct.). For a full description, see Roach, *Constitutional Remedies*, *supra*, note 2, at 2.110-2.270.

⁶ [1959] S.C.J. No. 1, [1959] S.C.R. 121 (S.C.C.).

⁷ S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III, s. 2.

defence lawyers and others about the lack of enforcement of the *Canadian Bill of Rights*. Enforcement of the Charter was seen as an important part of its new constitutional status, but also as something that could adversely affect governments that would have to comply with judicial remedies.

II. THEORETICAL INTRODUCTION: THE PURPOSES OF AND CONSTRAINTS ON REMEDIES

In a number of early cases, the Supreme Court stressed that the remedial provisions, like other parts of the Charter, should be given a generous and purposive interpretation.⁸ In particular the Court stressed that subsection 24(1) of the Charter provided a court of competent jurisdiction with the widest possible remedial discretion.⁹ The Court, however, also reasoned that subsection 24(1) was not intended to make radical changes in the legal system and that a court or tribunal had to have jurisdiction independent of the Charter to award either subsection 24(1) or subsection 52(1) remedies. This cautious approach was balanced off by statements that the superior courts would always be a court of competent jurisdiction that could award subsection 24(1) remedies or strike laws down under subsection 52(1) because they were unconstitutional.¹⁰ In the course of holding that prosecutors would no longer be absolutely immune from suit, the Supreme Court stressed that “to create a right without a remedy is antithetical to one of the purposes of the *Charter* which surely is to allow courts to fashion remedies when constitutional infringements occur”.¹¹

Constitutional remedies raise a host of complex theoretical issues that cannot be decided through a textual analysis of either subsection 24(1) or 52(1). Indeed, the Supreme Court has recognized that the general language of those provisions is not particularly helpful in determining the appropriate approach to remedies.¹² For example, subsection 24(1), on its

⁸ *R. v. Gamble*, [1988] S.C.J. No. 87, [1988] 2 S.C.R. 595 (S.C.C.) [hereinafter “*Gamble*”].

⁹ *R. v. Mills*, [1986] S.C.J. No. 39, [1986] 1 S.C.R. 863 (S.C.C.) [hereinafter “*Mills*, 1986”].

¹⁰ *Id.*

¹¹ *Nelles v. Ontario*, [1989] S.C.J. No. 86, [1989] 2 S.C.R. 170, at 196 (S.C.C.).

¹² *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] S.C.J. No. 63, [2003] 3 S.C.R. 3, at para. 54 (S.C.C.) [hereinafter “*Doucet-Boudreau*”]; *Schachter v. Canada*, [1992] S.C.J. No. 68, [1992] 2 S.C.R. 679 (S.C.C.) [hereinafter “*Schachter*”].

face, seems to contemplate the award of appropriate and just remedies only to those who have established that their rights have already been violated, but subsection 24(1) remedies may be available before a violation occurs and they may be designed to ensure compliance with the Charter in the future. Similarly, subsection 52(1) seems to contemplate that courts can only strike down laws or parts of laws to cure constitutional defects, but the Court has recognized that in some cases, courts can read in terms to cure constitutional defects and they can suspend declarations of invalidity.¹³

The remedial discretion of independent judges is an important part of Canada's constitutional structure. Rather than attempt to confine such discretion to rigid categories or to abandon it simply to the will of judges, the best approach is to apply general and universal principles in particular contexts.¹⁴ A remedial principle is a statement of general goals and constraints for remedies that then has to be applied in a particular context. Principles can be contrasted with rules, which attempt to outline specific factual conditions for the exercise of remedial discretion. For example, a general principle would be that a court should not order a remedy that exceeds judicial functions whereas a more specific rule would be that courts should only suspend declarations of invalidity if an immediate declaration of invalidity would adversely affect the rule of law or public safety or would deprive a group of an under-inclusive benefit. People will not always agree on the application or concrete meaning of principles. Rules tend to be either over or under-inclusive. Both can be contrasted with strong forms of discretion, which are based more on the will of trial judges and cannot easily be reviewed by either appellate courts or commentators.

There has been a healthy trend for the Supreme Court to articulate general principles to guide the exercise of remedial discretion. The principles will be examined in some detail below but they include:

- (1) remedies should provide compensation for the pecuniary and non-pecuniary harms of Charter violations;
- (2) remedies should vindicate the values of the Charter;

¹³ *Id.*

¹⁴ Kent Roach, "Principled Remedial Discretion under the Charter" (2004) 24 S.C.L.R. (2d) 101.

- (3) remedies should deter Charter violations and ensure compliance with the Charter in the future;
- (4) remedies should be effective, meaningful and responsive to the Charter violation and the situation of the claimant and may require that remedial discretion be exercised in a novel manner;
- (5) remedies should be fair to all parties and balance the affected interests including concerns about good governance; and
- (6) remedies should be appropriate for a court to devise and they should respect the role of the executive and the legislature.

The idea that remedies should be proportionate is also an emerging remedial principle.¹⁵ Not everyone will agree on the precise implications and applications of these general principles, but they provide a helpful starting point to govern the exercise and review of remedial discretion.

Chief Justice McLachlin has commented extra-judicially about the importance of discretion in producing constitutional remedies that are “free of common law and equitable limits”.¹⁶ She has suggested that remedies are united by a “big idea: remedies make things better. They heal wounds. They put things right. Remedies allow us to mend our wounds and carry on — as individuals and as a society”.¹⁷ Effective remedies are designed both to repair the harms of the past and in doing so to restore successful Charter applicants as far as possible to the position that they would have occupied without the Charter violation. At the same time, remedies are also concerned with ensuring that governments respect their constitutional duties in the future.

Perhaps because constitutional remedies almost always involve interaction among courts and other parts of government, a constant theme in remedial jurisprudence is the need to respect the roles of the judiciary, executive and legislature and the need to ensure that courts treat both Charter applicants and governmental defendants

¹⁵ The role of proportionality with respect to balancing of interests and costs will be discussed in the last part of this chapter. See also Roach, *Constitutional Remedies*, *supra*, note 2, at 3.970-3.1090.

¹⁶ Beverley McLachlin, “Rights and Remedies - Remarks” in R.J. Sharpe & Kent Roach, *Taking Remedies Seriously* (Ottawa: Canadian Institute for the Administration of Justice, 2010), at 27.

¹⁷ *Id.*, at 30.

fairly.¹⁸ The role of each institution, however, is not static and depends in part on the behaviour of the other. In other words, the restraints of the judicial function and the need to respect and to be fair to governments will vary with the context including the way that government has behaved with respect to its constitutional obligations. When necessary, the courts can order mandatory remedies and retain jurisdiction to ensure compliance with the Charter,¹⁹ but such strong remedies will not be necessary in every case.

The concept of dialogue that has been used to describe the interaction of courts and legislatures under sections 1 and 33 of the Charter can also be used to describe the interaction between these institutions with respect to remedies. The Canadian development of the remedial innovation of the suspended or delayed declaration of invalidity in particular is an example of courts recognizing that while they have responsibilities to declare unconstitutional laws to be invalid and of no force and effect, there are contexts where it is appropriate first to provide the legislature with an opportunity to exercise its powers to select among a variety of ways to comply with the Constitution.²⁰ A similar recognition lies behind the use of general declarations as a means to signal to the government in general terms what is required to comply with the Charter while allowing government an opportunity to select the precise means of compliance.²¹

The Supreme Court of Canada has stressed that subsection 24(1) must, like other Charter provisions, be given a generous and purposive interpretation. The Court's most influential discussion of remedial purposes and principles was made by Iacobucci and Arbour JJ. in their majority judgment in *Doucet-Boudreau* which upheld the trial judge's retention of jurisdiction in a complex minority language education case in Nova Scotia. They stated:

First, an appropriate and just remedy in the circumstances of a *Charter* claim is one that meaningfully vindicates the rights and freedoms of the claimants. Naturally, this will take account of the nature of the right that has been violated and the situation of the claimant. A meaningful

¹⁸ *Schachter*, *supra*, note 12; *Doucet-Boudreau*, *supra*, note 12; *Vancouver (City) v. Ward*, [2010] S.C.J. No. 27, [2010] 2 S.C.R. 28 (S.C.C.) [hereinafter "*Ward*"].

¹⁹ *Doucet-Boudreau*, *supra*, note 12.

²⁰ *Schachter*, *supra*, note 12.

²¹ Kent Roach, "Remedial Consensus and Challenge under the Charter" (2002) 35 U.B.C. L. Rev. 211.

remedy must be relevant to the experience of the claimant and must address the circumstances in which the right was infringed or denied. An ineffective remedy, or one which was “smothered in procedural delays and difficulties”, is not a meaningful vindication of the right and therefore not appropriate and just ...

Second, an appropriate and just remedy must employ means that are legitimate within the framework of our constitutional democracy. As discussed above, a court ordering a *Charter* remedy must strive to respect the relationships with and separation of functions among the legislature, the executive and the judiciary. This is not to say that there is a bright line separating these functions in all cases. A remedy may be appropriate and just notwithstanding that it might touch on functions that are principally assigned to the executive. The essential point is that the courts must not, in making orders under s. 24(1), depart unduly or unnecessarily from their role of adjudicating disputes and granting remedies that address the matter of those disputes.

Third, an appropriate and just remedy is a judicial one which vindicates the right while invoking the function and powers of a court. It will not be appropriate for a court to leap into the kinds of decisions and functions for which its design and expertise are manifestly unsuited. The capacities and competence of courts can be inferred, in part, from the tasks with which they are normally charged and for which they have developed procedures and precedent.

Fourth, an appropriate and just remedy is one that, after ensuring that the right of the claimant is fully vindicated, is also fair to the party against whom the order is made. The remedy should not impose substantial hardships that are unrelated to securing the right.

Finally, it must be remembered that s. 24 is part of a constitutional scheme for the vindication of fundamental rights and freedoms enshrined in the *Charter*. As such, s. 24, because of its broad language and the myriad of roles it may play in cases, should be allowed to evolve to meet the challenges and circumstances of those cases. That evolution may require novel and creative features when compared to traditional and historical remedial practice because tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand. In short, the judicial approach to remedies must remain flexible and responsive to the needs of a given case.²²

²² *Doucet-Boudreau, supra*, note 12, at paras. 55-59 (citations omitted).

There is a danger of taking a laundry-list approach to the multiple factors articulated in *Doucet-Boudreau*. The factors can usefully be broken down to those that relate to the purposes of remedies and those that constrain how courts order remedies in pursuit of those remedial purposes. The general purpose of the remedy is to vindicate the Charter right by responding both to “the experience of the complainant” and to “the circumstances in which the right was infringed or denied”.²³ The concern with vindicating Charter rights speaks to backward looking compensation or correction of the violation and the need to respond to circumstances that may frustrate future compliance with the Charter. The legitimacy of the latter concerns are demonstrated by the context of the case which raised not backward looking concerns about repairing past violations of the Charter, but focused on whether Nova Scotia would have sufficient facilities in place to comply with their minority language education responsibilities. Even the four judges who dissented did not doubt that the courts could enforce a clear injunction if need be through their contempt powers. When crafting constitutional remedies, judges should look backwards in order to compensate for the harms of Charter violations as much as is possible, but they should also look forwards to ensure compliance with the Charter in the future.

A variety of constraints are contemplated on subsection 24(1) remedies in *Doucet-Boudreau*. First, the remedy must respect the functions of the courts. The majority stressed that no bright line distinguished judicial from non-judicial remedies. In some contexts, judicial remedies might be novel and touch on what might otherwise be seen as executive functions. In other words, what is appropriate and just for the judiciary to order depends in part on how the executive and legislature have fulfilled their duties to comply with the Charter. The Court has similarly recognized that in some contexts remedies under subsection 52(1) might touch on legislative functions by reading in words to cure constitutional defects.²⁴ That said, judges should respect the role of the legislature by allowing the legislature to make policy choices between multiple ways to comply with the Charter and in making other policy choices that are not influenced by the Charter.

Another constraint on constitutional remedies is the need to be fair to all the parties including the government. Courts should not impose

²³ *Id.*, at para. 55.

²⁴ *Schachter*, *supra*, note 12.

hardships on governments that are unrelated or unnecessary to securing the rights, but conversely they may impose such costs on government when necessary to enforce Charter rights. The need for fairness when devising Charter remedies can cut in both directions. For example, it may involve recognition that government has reasonably relied on the law and should be excused from full retroactive relief, but it also requires the court to be satisfied that the resulting remedy remains fair to the successful Charter applicant.²⁵

The other leading case that addresses the purposes of Charter remedies is the Court's unanimous judgment in *Vancouver (City) v. Ward*.²⁶ The Court in that case articulated the purposes or objectives of damages under subsection 24(1) as:

(1) compensating the claimant for loss and suffering caused by the breach; (2) vindicating the right by emphasizing its importance and the gravity of the breach; and (3) deterring state agents from committing future breaches. Achieving one or more of these objects is the first requirement for "appropriate and just" damages under s. 24(1) of the *Charter*.²⁷

These remedial purposes are consistent with but more fleshed out than those articulated in *Doucet-Boudreau*. The purpose of compensation looks to the past and requires a remedy that responds both to the nature of the violation and relevant circumstances of the Charter application. Following the purposes of Charter rights, compensation should be available for both pecuniary and non-pecuniary harms. The purposes of vindication and deterrence speak to the future and underline that courts should be concerned with ensuring compliance with the Charter in the future.

The Court in *Ward* articulated "countervailing factors" under which the state could demonstrate that it would not be appropriate or just to award damages. The open-ended list of countervailing factors in *Ward* included "the existence of alternative remedies and concerns for good governance".²⁸ These countervailing factors are consistent with the

²⁵ *Canada (Attorney General) v. Hislop*, [2007] S.C.J. No. 10, [2007] 1 S.C.R. 429 [hereinafter "*Hislop*"].

²⁶ *Supra*, note 18. The author acted as counsel for the British Columbia Civil Liberties Association in its interventions in the B.C. Court of Appeal and the Supreme Court in support of the Charter damage remedy in this case.

²⁷ *Id.*, at para. 31.

²⁸ *Id.*, at para. 33.

constraints on constitutional remedies recognized in *Doucet-Boudreau*, but perhaps less developed. The Court's concern for good governance speaks to the need for the remedy to be fair and also to respect the other branches of government.

The attention paid in *Ward* to alternative remedies suggests that remedies should be proportionate to the violation. In other words, courts should not order remedies that are stronger or more drastic than necessary to repair the violation. At the same time, however, they should also not order remedies that are weaker than necessary and fail to compensate for the violation in the past or to vindicate and deter similar violations in the future. In some respects, the structure in *Ward* mimics the division of labour between the determination of whether Charter rights have been violated and whether the violation is reasonable. In other words, the Charter applicant must first establish not only a Charter violation but a functional need that a remedy is required to compensate, vindicate, or deter Charter violations. The government then has an opportunity to demonstrate that a remedy would not be appropriate and just because of countervailing factors related to the demands of good governance in a free and democratic society or the availability of less drastic remedies.

Remedies are shaped by the context of the case including the history of the violation and the interaction between courts and government. A remedy that may be appropriate and just in one context at one point in time may not be appropriate and just in another context and at another time. For example, the Supreme Court relied on a general declaration in a 1990 case that involved minority language educational rights in Alberta and assumed that the government would take prompt steps to comply with the declaration.²⁹ In 2003, however, the Supreme Court upheld a judge's retention of jurisdiction and order that the government provide progress reports in large part of Nova Scotia's delay in complying with minority language educational rights.³⁰ In 2010, the Supreme Court held that a declaration of a past violation would be sufficient with respect to the Omar Khadr case and would leave the government freedom to decide what remedy should be provided.³¹ In subsequent litigation, however, a trial judge who had concluded that Omar Khadr had still not received an

²⁹ *Mahe v. Alberta*, [1990] S.C.J. No. 19, [1990] 1 S.C.R. 342 (S.C.C.) [hereinafter "*Mahe*"].

³⁰ *Doucet-Boudreau*, *supra*, note 12.

³¹ *Khadr v. Canada (Prime Minister)*, [2010] S.C.J. No. 3, [2010] 1 S.C.R. 44 (S.C.C.) [hereinafter "*Khadr*, SCC"].

effective remedy was prepared to retain jurisdiction and require the government to present its proposal for an effective remedy both to the court and Khadr's lawyers.³² In 2011, the Supreme Court took a more aggressive approach than it had in the Omar Khadr case a year earlier by issuing a mandatory remedy that required the Minister of Health to grant Insite, a safe injection site in Vancouver, an exemption from drug laws. The Court was influenced by the danger of delay and further litigation and by its determination that no other remedy could be justified in the particular circumstances of the case.³³ Remedies are shaped by the particular context of a violation and the circumstances of the case.

In addition to the above purposes and constraints, general principles of proportionality taken from section 1 can also be useful with respect to remedial decision-making.³⁴ Proportionality can be relevant to remedies in two respects. The first is that courts can use proportionality in order to determine whether a particular remedy is necessary to achieve specific remedial purposes. For example, in some contexts damages or an injunction may be necessary to achieve the purposes of compensation or ensuring future compliance with the Constitution, but in other contexts a declaration alone may suffice. The use of proportionality to inform such questions of remedial choice will also force judges to be clear about the precise purposes of the remedy and the reasons why a particular remedy is sufficient to fulfil those purposes.

The second use of proportionality in remedial decision-making is as a means to require the state to justify social interests that limit remedies and to evaluate those justifications provided by the state. For example in *Ward*, the Court contemplated as a mini section 1 exercise that the government could persuade the Court that damages would not be appropriate and just because of an open-ended list of "countervailing factors" including concerns about good governance. The use of proportionality as a guide for

³² *Khadr v. Canada (Prime Minister)*, [2010] F.C.J. No. 818, [2010] 4 F.C.R. 36 (F.C.) [hereinafter "*Khadr*, FC"]. Note, however, that this remedial order was stayed pending appeal with the judge expressing doubts about whether the court could order the government to make diplomatic representations with the U.S. on Khadr's behalf. *Khadr v. Canada (Prime Minister)*, [2010] F.C.J. No. 901, [2012] 1 F.C.R. 396 (F.C.A.) [hereinafter "*Khadr*, FCA, 2010"]. The case was subsequently declared moot after Khadr pleaded guilty at an American military commission. *Khadr v. Canada*, [2011] F.C.J. No. 339, 333 D.L.R. (4th) 303 (F.C.A.) ["*Khadr*, FCA, 2011"].

³³ *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44, [2011] 3 S.C.R. 134 (S.C.C.) [hereinafter "*Insite*"].

³⁴ Grant Hoole, "Proportionality as a Remedial Principle: A Framework for Suspended Declarations of Invalidity" (2011) 49 Alta. L. Rev. 107 [hereinafter "Hoole"]; Roach, *Constitutional Remedies*, *supra*, note 2, at 3.970ff.

justifying limits on remedies will again require governments to justify the use of lesser remedies and encourage judges to be more explicit and rational about remedial decision-making. As under section 1 of the Charter, the objective that limits remedies should be clear and not inconsistent with the very concepts of rights or remedies. Moreover, there should be a rational connection between the government's objective and the proposed limit on the remedy and the remedy should be limited as little as possible to serve that governmental objective. In *Ward*, the government proposed that the damage remedy be limited by the concern that governmental officials might be over-deterred from performing their governmental duties because of the prospect of damage awards. The Court essentially held that while the concern with over-deterrence was legitimate, limiting modest subsection 24(1) damages was not rationally connected or necessary to the concern because the damages would be awarded against the state and not against individual officials who might be over-deterred by concerns about damage awards. Finally, there should be an appropriate overall balance and reconciliation between the objectives that limit a remedy and the provision of a remedy. For example, the Supreme Court stressed in *Hislop*³⁵ that while the government had justified not requiring fully retroactive relief because of its reasonable reliance on prior law, there was a reasonable balance because the successful Charter applicants would receive some, albeit, not fully retroactive relief for being denied benefits because they were in a same-sex conjugal relationship.

There are a variety of legitimate purposes for Charter remedies including compensating Charter applicants for past violations and ensuring that the government respects the Charter right in the future by vindicating the right and even deterring future Charter violations. Remedies should be meaningful for the Charter applicant and effective in securing compliance with the Charter. At the same time, remedies are constrained by a variety of factors, including a preference for less drastic remedies when such remedies would be effective and concerns about good governance. Remedies should respect the roles of courts, legislature, and the executive, but these roles are not set in stone and will vary with the performance of the other institution. Finally, remedies should be fair to all affected parties including the successful Charter applicant and the government.

³⁵ *Supra*, note 25.

III. REMEDIES AVAILABLE BEFORE A CHARTER VIOLATION HAS OCCURRED AND/OR AT THE START OF THE TRIAL

One of the main impediments to obtaining effective and meaningful Charter remedies is the costs and delay of litigation. The Court in *Doucet-Boudreau* adverted to these difficulties when it stated that a remedy that is “smothered in procedural delays and difficulties”, is not a meaningful vindication of the right and therefore not appropriate and just”.³⁶ In the *Insite* case,³⁷ the Court ordered a mandatory remedy in part because of concerns about the costs and delay that would be caused should further litigation over the matter prove necessary. This decision recognized the wisdom of Iacobucci J.’s prophetic dissent in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*,³⁸ where he warned that a declaration of a past violation would not be sufficient to resolve the dispute between customs officials and the gay and lesbian bookstore.

In this section, remedies that may be available to stop a Charter violation from occurring and in advance of a full trial on the merits will be examined. Such remedies may ease the access of justice burden of full litigation. As will be seen, however, courts have been cautious about granting advanced costs and interlocutory injunctions and stays precisely because such remedies are ordered before a full trial has taken place.

1. Remedies to Prevent a Charter Violation

Despite the clear wording of subsection 24(1) which contemplates that a person whose Charter rights have been violated may seek a remedy, the Supreme Court has long held that “remedies can be ordered in anticipation of future *Charter* violations, notwithstanding the retrospective language of s. 24(1)”.³⁹ This means that subsection 24(1) remedies can be ordered by courts to prevent irreparable harm caused by Charter violations such as the conduct of an unfair trial or clearly unconstitutional conduct. A categorical refusal of courts to order a Charter violation until after it occurred would result in remedies that were not meaningful

³⁶ *Supra*, note 12, at para. 55.

³⁷ *Supra*, note 33.

³⁸ [2000] S.C.J. No. 66, [2000] 2 S.C.R. 1120 (S.C.C.) [hereinafter “*Little Sisters*, 2000”].

³⁹ *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46, at para. 51 (S.C.C.) [hereinafter “*G. (J.)*”].

and effective for the applicant. It would also mean that courts would fail to vindicate Charter rights, deter Charter violations, and promote respect for the Charter.

Whether a remedy to prevent a Charter violation will be necessary in a particular case will often depend on the nature of the Charter right. Although the Court found the connection between the government's decision to test cruise missiles and the infringement of section 7 rights to be too speculative to justify a remedy in *Operation Dismantle Inc. v. Canada*,⁴⁰ some section 7 rights might be meaningless if the courts waited until after a person's life or security of the person had been threatened.⁴¹ Much will depend on the particular context. In one case, the Court held that it was premature to grant a subsection 24(1) remedy because jury selection procedures could still be used to ensure that a fair trial occurred despite prejudicial remarks made by the Premier of Quebec⁴² while in another case, the Court was willing to consider a pre-trial challenge to legislation that limited the accused's disclosure rights.⁴³ The Court has held that an extradition judge can provide a remedy for section 7 abuse of process type violations, but that alleged violations of a fugitive's rights to remain in Canada under section 6 of the Charter are premature before the Minister of Justice has made a surrender decision.⁴⁴

2. Interlocutory Injunctions and Stays

In many civil cases, the procedural vehicle for obtaining a remedy to prevent a Charter violation before it occurs may be a motion for an interim or interlocutory injunction or stay of legislation pending a full trial on the merits. Such relief can prevent irreparable harm to Charter rights, but courts are cautious in granting such relief in recognition that they are granting Charter relief before a full trial on the merits. This caution means that courts will carefully consider whether granting pre-trial relief will harm the public interest.

The first step in obtaining an interim remedy is for the Charter applicant to establish that there is a serious issue of constitutionality that is not

⁴⁰ [1985] S.C.J. No. 22, [1985] 1 S.C.R. 441 (S.C.C.).

⁴¹ See e.g., *R. v. A.*, [1990] S.C.J. No. 43, [1990] 1 S.C.R. 995 (S.C.C.) [hereinafter "*R. v. A.*"].

⁴² *R. v. Vermette*, [1988] S.C.J. No. 47, [1988] 1 S.C.R. 985 (S.C.C.).

⁴³ *R. v. Mills*, [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668 (S.C.C.).

⁴⁴ *United States of America v. Kwok*, [2001] S.C.J. No. 19, [2001] 1 S.C.R. 532 (S.C.C.); *United States of America v. Cobb*, [2001] S.C.J. No. 20, [2001] 1 S.C.R. 58 (S.C.C.).

frivolous or vexatious. This is usually not a high hurdle. There is no presumption that legislation or executive action is constitutional. The test of a serious Charter issue will generally be satisfied if the issue is whether a limitation on a Charter right can be justified under section 1.⁴⁵ In some cases where the grant of interim relief will effectively resolve the issue, it may be necessary for the courts to decide the case on the merits.⁴⁶

The next hurdle is to establish a risk of irreparable harm if the interim relief is not granted. Again, this is often a low hurdle given the intangible but important values that are protected by many Charter rights. The Supreme Court has found irreparable harm in cases where tobacco companies challenged legislation that required health warnings on tobacco products and when the state sought access to business documents.⁴⁷ One factor that might influence such a generous approach is the difficulty of obtaining damages for harm caused by unconstitutional litigation.⁴⁸

In most cases where interim relief is requested the decisive issue is whether the balance of convenience favours granting the relief requested. The public interest must be considered and the Supreme Court has indicated that it should be assumed that democratically enacted laws serve the public interest. It can also be assumed that requests that ask the Court to suspend a democratically enacted law will harm the public interest more than requests that ask for a particular party or group to be exempted from the law.⁴⁹ The Court has stressed such assumptions that laws serve the public interest in denying interlocutory relief from laws that allowed first contracts to be imposed in the labour relations context⁵⁰ and laws that restricted third party spending and advertising during elections.⁵¹

⁴⁵ *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] S.C.J. No. 17, [1994] 1 S.C.R. 311 (S.C.C.) [hereinafter "*RJR-Macdonald*"]; *Harper v. Canada (Attorney General)*, [2000] S.C.J. No. 58, [2000] 2 S.C.R. 764 [hereinafter "*Harper*"]. Note that in the former but not the latter case, the Court eventually struck down the impugned legislation on its merits. See *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] S.C.J. No. 68, [1995] 3 S.C.R. 199 (S.C.C.); *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, [2004] 1 S.C.R. 827 (S.C.C.).

⁴⁶ *Tremblay v. Daigle*, [1989] S.C.J. No. 79, [1989] 2 S.C.R. 530 (S.C.C.) (deciding that injunction preventing a woman from having an abortion was not justified on the merits).

⁴⁷ *RJR-MacDonald*, *supra*, note 45; *143471 Canada Inc. v. Quebec (Attorney General)*; *Tabah v. Quebec (Attorney General)*, [1994] S.C.J. No. 45, [1994] 2 S.C.R. 339 (S.C.C.).

⁴⁸ *Mackin v. New Brunswick (Minister of Finance)*; *Rice v. New Brunswick*, [2002] S.C.J. No. 13, [2002] 1 S.C.R. 405 (S.C.C.) [hereinafter "*Mackin*"].

⁴⁹ *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] S.C.J. No. 6, [1987] 1 S.C.R. 110 (S.C.C.) [hereinafter "*Metropolitan Stores*"].

⁵⁰ *Id.*

⁵¹ *Harper*, *supra*, note 45.

The public interest is not, however, always on the side of the government opposing interlocutory remedies. A Charter applicant can, but does not have to, establish that granting interim relief is in the public interest. In other words, the “public interest” includes both the concerns of society generally and the particular interests of identifiable groups”.⁵² Courts are often cautious about staying the operation of legislation before it has been established to be an unjustified violation of the Charter on the merits, but such relief is possible and can serve to prevent irreparable harm to Charter rights in cases where the courts are satisfied that such remedy also not does harm the public interest.

3. Advanced Costs

The most direct answer to access to justice concerns about Charter litigation is the willingness of the courts in exceptional cases to grant advanced costs. In a series of cases, the Supreme Court has articulated a three-part test for the grant of advance costs while also making clear that such awards are both discretionary and exceptional. The first hurdle is that the party seeking advanced costs must demonstrate that they cannot pay for the litigation and there is no other realistic funding option for the case to proceed to trial. The Court has granted advanced costs in a language rights case, but only after convincing itself that the Charter applicant had exhausted all possible avenues of funding.⁵³

The next hurdle is that the claim must be sufficiently meritorious to justify the grant of advance costs. In some respects, this mirrors the serious question that is not frivolous and vexatious test used with respect to interim injunctions. In both cases, the court is forced to evaluate the merits even though it will not generally be in a good position to do so at such a preliminary stage.⁵⁴

The final and most critical hurdle is that advanced costs are only justified when the issues are of public importance and transcend the interests of the individual litigant. This hurdle has been passed in some

⁵² *RJR-MacDonald*, *supra*, note 45, at para. 66.

⁵³ *R. v. Caron*, [2011] S.C.J. No. 5, [2011] 1 S.C.R. 78 (S.C.C.) [hereinafter “*Caron*”].

⁵⁴ But for a recent case where an advance costs order was overturned largely because of concerns about the lack of merit of the applicant’s case, see *Dish Network LLC v. Rex*, [2012] B.C.J. No. 747, 350 D.L.R. (4th) 213 (B.C.C.A.).

Aboriginal⁵⁵ and minority language rights cases,⁵⁶ but was not passed in follow on litigation by the Little Sisters bookstore in its dispute with customs about the importation of gay and lesbian pornography. The majority of the Court saw the dispute between the gay and lesbian bookstore and Customs officials about the import of pornography as mainly of interest to the bookstore and not to sexual minorities generally. This part of the advanced costs test also somewhat mirrors the final balance of convenience/public interest stage for the granting of interim relief, though awards of advanced costs are much rarer than grants of interim relief in part because of judicial concerns about creating a parallel court managed legal aid scheme.⁵⁷

IV. REMEDIES AVAILABLE FOR UNCONSTITUTIONAL LAWS UNDER SUBSECTION 52(1) OF THE *CONSTITUTION ACT, 1982*

1. The Importance of the Distinction between Remedies under Section 52 and Section 24

The Supreme Court has stressed that section 52 provides remedies for laws that violate the Charter whereas subsection 24(1) provides remedies for governmental acts that violate the Charter.⁵⁸ Litigants thus must determine whether impugned acts are specifically authorized by statutes and as such require a subsection 52(1) challenge or whether they are acts that are not authorized by legislation and as such only require a subsection 24(1) remedy. A subsection 52(1) challenge to a law will generally require advance notice to relevant Attorney General in part to allow the government to mount a section 1 defence of the impugned law.

It is possible for litigants to seek both a subsection 52(1) remedy for an unconstitutional law and a subsection 24(1) remedy for governmental acts under that law. Courts are, however, reluctant to combine such remedies, especially in cases where the government has reasonably relied on statutes that have not yet been found to be unconstitutional. As will be

⁵⁵ *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] S.C.J. No. 76, [2003] 3 S.C.R. 371 (S.C.C.).

⁵⁶ *Caron*, *supra*, note 53.

⁵⁷ *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2007] S.C.J. No. 2, [2007] 1 S.C.R. 38, at para. 5 (S.C.C.) [hereinafter "*Little Sisters*, 2007"].

⁵⁸ *R. v. Ferguson*, [2008] S.C.J. No. 6, [2008] 1 S.C.R. 96, at para. 61 (S.C.C.) [hereinafter "*Ferguson*"].

seen, governments enjoy a qualified immunity when subsection 24(1) damages are sought along with a subsection 52(1) declaration that a law is unconstitutional,⁵⁹ but they do not enjoy such a qualified immunity when damages are sought under subsection 24(1) for governmental acts that are not specifically authorized by legislation.⁶⁰ In most cases, governments will have an incentive to claim that a section 52 remedy is required whereas the applicant will have an incentive to claim that the case can be decided under subsection 24(1) because it involves an unconstitutional government act that is not specifically authorized by legislation.

2. Threshold Issues of Standing and Jurisdiction

The test for standing to seek a subsection 52(1) declaration that a law is invalid is broader than the test for standing to seek a subsection 24(1) remedy against a government act that violates the Charter. The broader section 52 test incorporates pre-Charter cases that recognized that those not directly affected by a law may nevertheless challenge its constitutionality if they raise a serious issue in constitutionality, have a genuine interest in the matter, and present a reasonable and effective way to test the constitutionality of the law.⁶¹ This test should be administered in a flexible and practical manner. A public interest litigant should not be precluded simply because some more directly affected person could possibly contest the constitutionality of legislation.⁶² The rationale for such discretionary public interest standing is the public interest in having constitutional laws. A subsection 52(1) declaration changes the law for all whereas a subsection 24(1) remedy is designed to provide an appropriate and just remedy for a person whose rights have been violated.

⁵⁹ See *Mackin*, *supra*, note 48, discussed below.

⁶⁰ See *Ward*, *supra*, note 18, discussed below.

⁶¹ *Thorson v. Canada (Attorney General)*, [1974] S.C.J. No. 45, [1975] 1 S.C.R. 138 (S.C.C.); *Nova Scotia (Board of Censors) v. McNeil*, [1975] S.C.J. No. 77, [1976] 2 S.C.R. 265 (S.C.C.); *Canada (Minister of Justice) v. Borowski*, [1981] S.C.J. No. 103, [1981] 2 S.C.R. 575 (S.C.C.); *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] S.C.J. No. 5, [1992] 1 S.C.R. 236 (S.C.C.).

⁶² *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] S.C.J. No. 45, [2012] 2 S.C.R. 524 (S.C.C.). The author acted as counsel for the Asper Centre on Constitutional Rights which intervened in this case in support of the grant of public interest standing.

A tribunal must have jurisdiction to apply the Charter and to issue a subsection 52(1) remedy. The superior courts obviously have such a jurisdiction. Any person, including corporations, accused of a criminal or regulatory offence also will have standing to argue that they should not be convicted under an unconstitutional law. Corporations can thus challenge the constitutionality of laws as they could be applied to natural persons even if the corporation itself does not enjoy the particular right.⁶³ Provincial courts, which try the vast majority of criminal and regulatory offences, should have the right to devise a subsection 52(1) remedy, though the precedential effects of remedies issued by all trial courts will not be as great as those confirmed by appellate courts.

Not all administrative tribunals will have jurisdiction to issue a section 52 remedy. The Supreme Court has held that any tribunal that has explicit or implicit powers to decide a question of law will be presumed to have jurisdiction to apply the Charter and issue remedies under subsection 52(1).⁶⁴ At the same time, this presumption can be rebutted by clear legislation indicating that the legislature does not intend the tribunal to apply the Charter or devise Charter remedies. In such a case, a Charter applicant would have to seek a section 52 remedy from the superior courts. Under both sections 52 and 24, the Court has in recent years stressed the presumption that administrative tribunals should be able to devise Charter remedies.⁶⁵ At the same time, however, the Court has retained the positivistic and somewhat odd idea that legislatures can by clear legislation prevent courts and tribunals from applying the Charter and issuing Charter remedies.

3. The Range of Section 52(1) Remedies

Once the threshold requirements of standing and jurisdiction are satisfied, there are a range of remedies that can be devised under subsection 52(1). Although a plain reading of section 52 would suggest that courts can only declare laws to be no force and effect with immediate effect, the courts

⁶³ *R. v. Big M Drug Mart*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 (S.C.C.); *R. v. Wholesale Travel*, [1991] S.C.J. No. 79, [1991] 3 S.C.R. 154 (S.C.C.).

⁶⁴ *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] S.C.J. No. 54, [2003] 2 S.C.R. 504 (S.C.C.); *Paul v. British Columbia (Forest Appeals Commission)*, [2003] S.C.J. No. 34, [2003] 2 S.C.R. 585 (S.C.C.); *Okwuobi v. Lester B. Pearson School Board*, [2005] S.C.J. No. 16, [2005] 1 S.C.R. 257 (S.C.C.).

⁶⁵ *R. v. Conway*, [2010] S.C.J. No. 22, [2010] 1 S.C.R. 765 (S.C.C.) [hereinafter "Conway"].

have actually employed a much broader range of remedies. All of the alternatives to an immediate declaration of invalidity preserve some or all of the laws from complete and immediate invalidation. As such these alternatives respond to concerns that a full declaration of invalidity will create a legislative vacuum or frustrate clear legislative intent that can be reconciled with the demands of the Charter. The courts sometimes save laws permanently by reading words down to comply with the Constitution; by reading in words to cure constitutional defects; or by severing unconstitutional parts from constitutional parts of laws. Courts can also suspend a declaration of invalidity so that an unconstitutional law remains in force for a temporary basis, usually between six and 18 months. Sometimes courts soften the effects of a declaration of invalidity by fashioning relief that is prospective and not fully retroactive.

Two main principles guide the fashioning of relief under subsection 52(1) of the Charter. As the Supreme Court emphasized in *Schachter v. Canada*,⁶⁶ courts must respect both the role of the legislature including its purposes in enacting the impugned legislation and the Charter including the broader purposes of the Charter when devising subsection 52(1) remedies. In order to respect the role of the legislature, courts should not drastically alter the nature of the statutory scheme through a subsection 52(1) remedy. They should also not make policy choices that are not guided by the Charter, including policy choices among different ways to comply with the Charter. At the same time, courts should also consider the Charter including the broader purposes of the Charter when devising subsection 52(1) remedies. For example, striking down benefits provided to single mothers because they were not also provided to single fathers would not be an appropriate remedy because “while s. 15 may not absolutely require that benefits be available to single mothers, surely it at least encourages such action to relieve the disadvantaged position of persons in those circumstances. In cases of this kind, reading in allows the court to act in a manner more consistent with the basic purposes of the *Charter*”.⁶⁷ The Court in the *Morgentaler*⁶⁸ case did not sever an unconstitutional committee structure from a criminal prohibition on abortion. Such a subsection 52(1) remedy would have violated the rights of women more by criminalizing all

⁶⁶ *Supra*, note 12.

⁶⁷ *Id.*, at 702.

⁶⁸ *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (S.C.C.) [hereinafter “*Morgentaler*”].

abortions. It also would have created a scheme that Parliament did not intend.

4. Reading Down

Reading down refers to a process where courts adopt an interpretation of a statute so as to avoid constitutional problems that might lead to its complete invalidation. Courts used this remedy before the Charter by, for example, reading down municipal by-laws against lawn signs so that they did not apply to federal election signs.⁶⁹ A reading down remedy fixes a potentially unconstitutional law by providing an interpretation that should apply in all cases.

(a) Reading Down as a Form of Interpretation

It is a general principle of statutory interpretation that if there are reasonable ambiguities in a law, then the court should opt for an interpretation consistent with the Constitution.⁷⁰ Such forms of reading down may not constitute a section 52 remedy in the strict sense, but rather an interpretation of the statute. Nevertheless, they generally involve an implicit finding that any other interpretation of the law would be an unjustified violation of the Charter.⁷¹ The courts have creatively interpreted and imposed new limits on both obscenity and child correction laws before deciding that the law as interpreted was not an unjustified violation of the Charter.⁷² In such cases, the threat of invalidation of a potentially overbroad law may have influenced the Court to interpret the impugned law in new and restrictive ways. The Court has justified such approaches on the basis that there is a presumption that the legislature intended for its legislation to be unconstitutional.

There are some dangers in using reading down as an interpretative device. One is the possible distortion of the legislature's actual intent and

⁶⁹ *R. v. McKay*, [1965] S.C.J. No. 51, [1965] S.C.R. 798 (S.C.C.).

⁷⁰ *Bell ExpressVu Limited Partnership v. Rex*, [2002] S.C.J. No. 43, [2002] 2 S.C.R. 554 (S.C.C.).

⁷¹ *Osborne v. Canada (Treasury Board)*, [1991] S.C.J. No. 45, [1991] 2 S.C.R. 69 (S.C.C.) [hereinafter "*Osborne*"].

⁷² *R. v. Butler*, [1992] S.C.J. No. 15, [1992] 1 S.C.R. 452 (S.C.C.); *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76 (S.C.C.) [hereinafter "*Canadian Foundation for Children*"].

purposes in enacting the law. Courts should be careful not to distort legislative purposes and to give the government a full opportunity to justify an interpretation of a statute that violates Charter rights as nevertheless a reasonable limit on a Charter right. Another danger of reading down is that it may produce a disjunction between the plain meaning of the law and the way it has been restrictively interpreted by the court. This disjunction between the law as written by the legislature and as interpreted and applied by the courts may send the wrong signals to those who read the law. This is particularly a danger when the reading down remedy has the effect of expanding the ambit of a criminal sanction⁷³ or when a broad law as written by the legislature may deter or chill the exercise of Charter rights such as freedom of expression despite the court's reading down remedy.⁷⁴ Despite these dangers, the courts continue to read down and interpret laws to save them from constitutional invalidity. In doing so, they must consider both the scope of the relevant Charter and possible section 1 limits on the rights while they are engaged in the process of interpreting the statute.

(b) Reading Down (or In) as a Constitutional Remedy

Courts on occasion use an even stronger form of reading down to save laws from constitutional invalidation in some other cases. The high-water mark of such an approach was in the child pornography case of *R. v. Sharpe*.⁷⁵ In that case, the Court both employed the interpretative technique described above on the basis that Parliament had intended that the offence be constitutional, but also read in under subsection 52(1) limited exceptions to the offence for certain self-created pornography that it concluded could not constitutionally be prohibited. The Court did not attempt to justify the latter form of reading in as a form of legislative interpretation, but rather saw it as a Charter remedy that was necessary to save the law from invalidation. The justification for such a robust approach is that the court reconciled the legislative purposes of the impugned law with the Charter in a manner that followed precisely from the Court's interpretation of the scope of permissible restrictions on freedom of expression. It did not involve the Court in making policy choices

⁷³ *Id.*

⁷⁴ *Osborne, supra*, note 71.

⁷⁵ [2001] S.C.J. No. 3, [2001] 1 S.C.R. 45, at para. 115 (S.C.C.).

best left to the legislature. Although reading down remedies depart from the plain language of legislation, they can be justified if they advance legislative objectives as far and to the extent allowed by the Constitution and avoid making detailed amendments to the law that are not guided by considerations of the purposes of the legislation and the Charter.⁷⁶ Such a strong form of reading down or reading in of exceptions from the law can be distinguished from the courts' reluctance to craft case-by-case exemptions from the law⁷⁷ on the basis that the former remedy changes the law in all cases and as such did not create the uncertainty of case-by-case constitutional exemptions.

5. Constitutional Exemptions

Although the Court has been prepared to read down legislation to prevent invalidation, it has been much more reluctant to cure potentially overbroad legislation by the use of case-by-case constitutional exemptions. A common concern in both the reading down and exemption case is that the courts should not use remedies to alter the clear intent of the legislature. In *Seaboyer*,⁷⁸ the Court refused to save an overbroad law imposing categorical restrictions on the admissibility of the complainants' prior sexual history in sexual assault cases. It reasoned that such an approach was inconsistent with Parliament's clear intent. Instead, the Court invalidated the law while also recognizing that the common law could fill any legislative vacuum. The dialogue produced by this declaration of invalidity is instructive. It allowed Parliament to accept the Court's ruling that it could no longer categorically restrict the admissibility of the complainant's prior sexual history, but also to take the opportunity to engage in comprehensive reform of the law of sexual assault that went well beyond the issues that were litigated in *Seaboyer*.⁷⁹

⁷⁶ *M. v. H.*, [1999] S.C.J. No. 23, [1999] 2 S.C.R. 3 (S.C.C.) [hereinafter "*M. v. H.*"]; *R. v. Demers*, [2004] S.C.J. No. 43, [2004] 2 S.C.R. 489, at para. 58 (S.C.C.) [hereinafter "*Demers*"].

⁷⁷ *Ferguson*, *supra*, note 58.

⁷⁸ *R. v. Seaboyer*; *R. v. Gayme*, [1991] S.C.J. No. 62, [1991] 2 S.C.R. 577 (S.C.C.) [hereinafter "*Seaboyer*"]. The House of Lords read down a similar law in the United Kingdom rather than declare it incompatible with the European Convention on Human Rights: *R. v. A.*, [2002] 1 A.C. 45, [2001] 3 All E.R. 1 (H.L.). American courts would also apply more limited invalidations or constitutional exemptions in similar cases of overbroad restrictions on the admissibility of evidence.

⁷⁹ For a defence of the legislative response to *Seaboyer* as an example of a genuine and constructive dialogue between the Court and Parliament, see Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001), at c. 14.

One of the reasons why courts should respect the role of the legislature when devising subsection 52(1) remedies is that the legislature generally has many more remedial options open to it than does the court.

Similar concerns about respecting legislative intent also featured in the Court's 2008 decision holding that it was inappropriate to use constitutional exemptions to moderate mandatory sentences.⁸⁰ The Court noted that constitutional exemptions would reinsert judicial sentencing discretion when Parliament had clearly decided to abolish the exercise of such discretion below the statutory minimum. The Court stressed that allowing judges to depart from mandatory sentences on a case-by-case basis would "create something different in nature from what Parliament intended".⁸¹ In the result, judges faced with a mandatory minimum sentence must either uphold it and apply it in all cases or strike it down under section 52 so that it does not apply in all cases.

In rejecting the use of constitutional exemptions, the Court was also concerned that constitutional exemptions would create uncertainty about the law and a divergence between the law as written by the legislature and as applied by the courts. The Court stressed that "[b]ad law, fixed up on a case-by-case basis by the courts does not accord with the role and responsibility of Parliament to enact constitutional laws for the people of Canada".⁸² Reading down also has similar effects, but one difference is that reading down remedies will alter the law as applied to all whereas constitutional exemptions would only alter the law in a particular case. Section 52 provides global remedies for all affected by the law even though American courts have been attracted to using more minimal remedies, such as applied invalidity and constitutional exemptions.⁸³

It is possible that some forms of reading down or severance could have the same functional effect as a constitutional exemption. This would happen if a court held that a law would be unconstitutional as applied to some discrete group of persons, such as those exercising Aboriginal rights⁸⁴ or those observing a religious Sabbath other than Sunday.⁸⁵ Such

⁸⁰ *Ferguson, supra*, note 58.

⁸¹ *Id.*, at para. 50.

⁸² *Id.*, at para. 73.

⁸³ Carol Rogerson, "The Judicial Search for Appropriate Remedies under the Charter: The Examples of Overbreadth and Vagueness" in R.J. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987). This narrow approach to remedies can be seen as part of constitutional minimalism. See generally Cass Sunstein, *One Case at a Time: Judicial Minimalism in the Supreme Court* (Cambridge, MA: Harvard University Press, 1999).

⁸⁴ *R. v. McPherson*, [1994] M.J. No. 750, 90 Man. R. (2d) 290 (Man. Q.B.).

section 52 remedies would effectively exempt those groups from the law. The difference, however, is that the group would be exempted in advance through reading down or severance and not on a retroactive case-by-case basis by judges imposing constitutional exemptions.

An open question is whether constitutional exemptions can be combined with suspended or delayed declarations of invalidity. The Supreme Court has granted such exemptions in the past, but in one case has suggested that such exemptions under subsection 24(1) cannot be combined with subsection 52(1) remedies.⁸⁶ In a recent case, a trial judge found that the law prohibiting assisted suicide was an unjustified violation of the Charter but should be subject to a one-year suspended declaration of invalidity in order to allow Parliament to regulate assisted suicide. At the same time, however, the trial judge exempted one of the successful applicants from the period of delay but subject to various restrictions on access to the exemption.⁸⁷ The government sought but was denied an interlocutory stay of the exemption. At the Court of Appeal, Prowse J.A. stressed that the applicant, who was dying of a terminal disease that would render her unable to take her own life, would suffer irreparable harm if the exemption was stayed and that the government had failed to establish that the public interest would be irreparably harmed by the exemption.⁸⁸

The temporary use of exemptions during a period of suspended declaration can be distinguished from the use of exemptions as a permanent remedy for unconstitutional legislation. The use of a temporary exemption from a suspended declaration of invalidity allows the court to ensure that a successful Charter applicant receives a meaningful and effective remedy. At the same time, it respects the Court's ruling in *Ferguson* that case-by-case exemptions should not be used as a permanent remedy for

⁸⁵ For an earlier use of a constitutional exemption in such a context, see *R. v. Westfair Foods Ltd.*, [1989] S.J. No. 550, 80 Sask. R. 33 (Sask. C.A.). The Supreme Court suggested in *Seaboyer*, *supra*, note 78, that an exemption in such context could be justified as certain and predictable provided that it was shaped by "a criterion external to the Charter". In such a context, however, the criterion of observing a rest day other than Sunday would be shaped in part at least by the Charter and its concerns about protecting religious minorities.

⁸⁶ For cases where such exemptions were granted, see *R. v. Guignard*, [2002] S.C.J. No. 16, [2002] 1 S.C.R. 47 (S.C.C.) and *Nguyen v. Quebec (Education, Recreation and Sports)*, [2009] S.C.J. No. 47, [2009] 3 S.C.R. 208 (S.C.C.). For a case suggesting that there is a rule against issuing a s. 24(1) remedy during a suspended declaration of invalidity, see *Demers*, *supra*, note 76. For criticisms of the latter case, see Roach, *Constitutional Remedies*, *supra*, note 2, at c. 14, at 14.940.

⁸⁷ *Carter v. Canada (Attorney General)*, [2012] B.C.J. No. 2259, 271 C.R.R. (2d) 224, at paras. 1400ff. (B.C.S.C.) [hereinafter "*Carter*, BCSC"].

⁸⁸ *Carter v. Canada (Attorney General)*, [2012] B.C.J. No. 1672, 291 C.C.C. (3d) 373 (B.C.C.A.).

unconstitutional laws. New cases going forward will be governed by any new law that the legislature enacts, or barring such actions, by the declaration of invalidity that will take effect after the period of the suspension. Although constitutional exemptions have emerged as a remedy disfavoured by the Supreme Court, they still have a role to play as a temporary remedy that can mitigate the adverse effects on successful litigants of a suspended declaration of invalidity.

6. Severance

Subsection 52(1) contemplates severance as a remedy by providing that unconstitutional laws should only be struck down to the extent of their inconsistency. As with other subsection 52(1) remedies, courts should be guided by respect for the purposes of both the Charter and the legislature. In *R. v. Logan*,⁸⁹ the Court held that the Charter only required the severance of a provision that provided for criminal liability on the basis of negligence to the extent that the generic provision was used in murder and attempted murder cases. The result was both severance of the phrase “ought to have known” from a general provision providing for accomplice liability and statements that the severed phrase could constitutionally be applied in cases other than murder and attempted murder. This remedy can be justified on the basis that Parliament clearly intended to provide for negligence liability and the court only severed such a form of liability in the cases where it would violate the Charter.

The courts will not use severance when the result is the creation of a radically different legislative regime. For example, the Court in the *Morgentaler*⁹⁰ case refused to sever an exemption from a criminal ban on abortions that it found was procedurally flawed under section 7. Severance was not appropriate because it would create a law that banned all abortions. Parliament never intended to enact such a law. As Beetz J. recognized, such a law would violate the Charter even more than the existing law. Severance was not supported by either the Charter or the purposes of the legislation and the entire abortion law was declared of no force and effect. The Court did not employ a suspended declaration of invalidity in this case. Although Parliament attempted to create a new law, it was eventually defeated by a tied vote in the Senate. This indicates

⁸⁹ [1990] S.C.J. No. 89, [1990] 2 S.C.R. 731 (S.C.C.).

⁹⁰ *Supra*, note 68.

that dialogue or a legislative response will not always occur after a declaration of invalidity especially when the issue is as divisive as the abortion issue. It is interesting to speculate whether subsequent use of robust forms of reading down or reading in on divisive issues such as child pornography, gay marriage, and the correction of children was influenced by unmentioned concerns that legislatures would have difficulty agreeing on new legislation if the laws had been declared to be invalid.

The Court has used severance as a means to preserve but significantly change the nature of criminal offences⁹¹ and to remove grounds for the denial of bail that were found to violate subsection 11(e) of the Charter.⁹² The use of both robust forms of reading down and severance can perhaps be justified in these criminal cases because such provisions are applied by trained professionals who should be aware of how the court's remedy has altered the legislation. At the same time, there is a danger that the use of such remedies may leave individuals who read the *Criminal Code* with an inaccurate sense of what exactly is prohibited.⁹³ Some of this danger can be mitigated, however, if Parliament amends the law to reflect the Court's reading down or severance remedy.⁹⁴ Parliament's refusal to amend subsection 229(c) of the *Criminal Code* to reflect the Supreme Court's severance of the phrase "ought to have known" from a murder offence has had the unfortunate consequence of requiring several murder convictions to be overturned when trial judges erroneously gave juries a copy of the law as written by Parliament and not as reformulated by the Court.⁹⁵ Parliament should amend laws to reflect the Supreme Court's use of severance remedies.

The use of severance can result in significant changes to legislation. In the 1991 case of *Tétraault-Gadoury v. Canada (Employment and Immigration Commission)*,⁹⁶ the Supreme Court severed a provision that denied unemployment insurance benefits to those over 65 years of age.

⁹¹ *R. v. Hess*; *R. v. Nguyen*, [1990] S.C.J. No. 91, [1990] 2 S.C.R. 906 (S.C.C.); *R. v. Martineau*, [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633 (S.C.C.).

⁹² *R. v. Morales*, [1992] S.C.J. No. 98, [1992] 3 S.C.R. 711 (S.C.C.); *R. v. Hall*, [2002] S.C.J. No. 65, [2002] 3 S.C.R. 309 (S.C.C.) [hereinafter "*Hall*"].

⁹³ *Criminal Code*, R.S.C. 1985, c. C-46; *R. v. Lucas*, [1998] S.C.J. No. 28, [1998] 1 S.C.R. 439 (S.C.C.).

⁹⁴ This has been done after *Hall*, *supra*, note 92, with respect to the denial of bail under s. 515(10)(c) of the *Criminal Code*, but not with respect to the definition of publishing under s. 299(c) for the offence of defamatory libel.

⁹⁵ These cases are examined in Kent Roach, "The Problematic Revival of Section 229(c)" (2010) 47 Alta. L. Rev. 675.

⁹⁶ [1991] S.C.J. No. 41, [1991] 2 S.C.R. 22 (S.C.C.).

The effect of severing this exclusion was to extend the benefits to senior citizens otherwise not entitled to the benefit. The next year, the Court recognized in *Schachter*⁹⁷ that it should not let the style of legislative drafting constrain its remedial powers. As will be discussed below, the Court held that words could be read in to statutes in order to cure constitutional deficiencies. In *Schachter*, however, the Court stressed that the purposes of the Charter and the impugned statute must be carefully examined before statutes are changed either through severance or reading in. In *Schachter*, the Court refused to extend a benefit provided to a small group of adoptive parents to the much larger group of biological parents because such a result would radically change the legislation and require much more money to be spent on the benefit. It was also not clear to the Court that the group sought to be added — biological parents — was vulnerable to discrimination in the legislative process. The Court's concern about altering existing legislation will also apply in severance cases. The extension of the unconstitutionally under-inclusive statute by severance in *Tétreault-Gadoury* can be justified, but only because it is consistent with both the purposes of the Charter and the legislation. The purposes of section 15 of the Charter were served by protecting senior citizens as a group vulnerable to discrimination and the legislation was not fundamentally changed by adding such a smaller group to those who received benefits.

7. Reading in and Extension of Under-inclusive Statutes

The *Schachter* case illustrates that the extension of under-inclusive statutes whether through severance or reading in will not be appropriate in all cases. As mentioned above, a biological parent successfully challenged a benefit scheme that provided parental leave for adoptive parents under section 15. The issue then was whether the unconstitutionally under-inclusive parental leave scheme should be extended to include biological as well as adoptive parents or whether it should be struck down under section 15. The trial judge opted for the former remedy, but the Supreme Court held that he had erred and that the law should be struck down instead, albeit subject to a suspended declaration of invalidity. It reasoned that the addition of the much larger group of biological parents would significantly change the nature of a legislative scheme

⁹⁷ *Supra*, note 12.

intended by Parliament only to benefit the smaller group of adoptive parents. Chief Justice Lamer distinguished *Tétreault-Gadoury* on the basis that the group added to the benefit in that case was small and did not have significant budgetary implications that would change the nature of the legislative scheme. Courts will examine the budgetary implications of extension of under-inclusive statutes, but the ultimate question is whether the proposed subsection 52(1) remedy will significantly change the legislation. Courts have rejected an absolutist position that they can never devise constitutional remedies that will require the government to spend money.

Comparisons of the size of the groups included by the legislature in the under-inclusive benefit and the group that wants to be included by reading in (or by severance) can also assist in determining whether the proposed remedy is supported by the purposes of the Charter. In *Schachter*,⁹⁸ the Supreme Court expressed some concerns about whether the exclusion of the large group of biological parents actually violated section 15 of the Charter. The extension remedy in *Tétreault-Gadoury* served the purposes of the Charter by adding a small group of senior citizens who are vulnerable to discrimination while extension of the benefits in *Schachter* to include the larger group of biological parents would not obviously advance the purposes of the Charter. Attention to the purposes of the Charter may also support extension to avoid the achievement of equality with a vengeance in cases such as *Phillips v. Nova Scotia (Social Assistance Appeal Board)*,⁹⁹ where a man challenged benefits provided only to single mothers. Even if such laws violated section 15 and even if benefits to single mothers were not required by the Charter, it would be consistent with the Charter and the legislation to extend the benefit and preserve a benefit provided to a group vulnerable to discrimination. The courts should be influenced by the purposes of the Charter even if these are only “constitutional hints” and not full-fledged findings of a Charter violation.¹⁰⁰

⁹⁸ *Id.*

⁹⁹ [1986] N.S.J. No. 401, 76 N.S.R. (2d) 240 (N.S.C.A.). Although the benefits for single mothers were struck down by the courts, a regulation was quickly enacted extending the benefits in a gender neutral manner: N.S. Reg. 15/1987.

¹⁰⁰ Evan Caminker, “A Norm-Based Remedial Model for Underinclusive Statutes” (1986) 95 Yale L.J. 11; Nitya Duclos & Kent Roach, “Constitutional Remedies as „Constitutional Hints”: A Comment on *R. v. Schachter*” (1991) 36 McGill L.J. 1.

The courts have extended under-inclusive benefits in other cases. The most famous cases involve adding gays and lesbians to existing anti-discrimination and marriage regimes. In *Vriend v. Alberta*,¹⁰¹ the Supreme Court held that the appropriate response to the unconstitutional exclusion of protection against discrimination on the basis of sexual orientation was to read such protections into Alberta's human rights code rather than striking the Code down in its entirety. Such a remedy advanced the purposes of both the legislation and the Charter in combating discrimination. The Court also recognized that legislatures could still amend the new law after the reading in remedy. Courts of Appeal also were prepared to read in same-sex couples to marriage laws,¹⁰² but divided on the critical issue of whether the reading in remedy should have immediate effect. The Ontario Court of Appeal ordered that the reading in should have immediate effect while the British Columbia and Quebec Courts of Appeal initially did not.¹⁰³ The Ontario approach gave same-sex partners an immediate remedy, but it also created vested rights that could not be undone had the government wished to adopt and defend some legislative response short of gay marriage, perhaps through the use of the section 33 override which cannot be used retroactively.¹⁰⁴

In another gay rights case, however, the Supreme Court was not prepared to read in same-sex couples on the basis that reading in would have significant effects on other legislative provisions not before the court. It concluded that "where reading in to one part of a statute will have significant repercussions for a separate and distinct scheme under that Act, it is not safe to assume that the legislature would have enacted the statute in its altered form".¹⁰⁵ The Court was also concerned that a limited reading in remedy might deny same-sex couples options available to heterosexual couples, contrary to the purposes of the Charter. The legislature did

¹⁰¹ [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493 (S.C.C.).

¹⁰² The Supreme Court has also read in common law spouses to a legislative scheme that only applied to married couples: *Miron v. Trudel*, [1995] S.C.J. No. 44, [1995] 2 S.C.R. 418 (S.C.C.).

¹⁰³ *Halpern v. Canada (Attorney General)*, [2003] O.J. No. 2268, 65 O.R. (3d) 161 (Ont. C.A.); *Hendricks v. Quebec (Attorney General)*, [2004] Q.J. No. 2593, 238 D.L.R. (4th) 577 (Que. C.A.); *EGALE Canada Inc. v. British Columbia (Attorney General)*, [2003] B.C.J. No. 994, 228 D.L.R. (4th) 416 (B.C.C.A.).

¹⁰⁴ *Ford v. Quebec (Attorney General)*, [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712 (S.C.C.). On the override, see R.J. Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 5th ed. (Toronto: Irwin Law, 2013), at c. 5.

¹⁰⁵ *M. v. H.*, *supra*, note 76, at para. 142.

engage in comprehensive reform after the ruling, but decided not to call same-sex couples “spouses” but rather called them “same-sex partners”.

As in other subsection 52(1) cases, the basic principles in the reading in and extension cases are that courts should devise remedies that respect the role of the legislature and the purposes of the Charter. Words can be added or read in to cure constitutional defects if they follow with some precision from the interaction of the purposes of the impugned legislation and the court’s interpretation of the Charter. Words should not be read in if they require judges to make policy choices that are not obvious from the interaction of the Charter and the legislation.

8. Suspended Declarations of Invalidity

The Supreme Court softened its refusal to extend under-inclusive benefits to biological parents in *Schachter* by suspending the declaration that the benefits to adoptive parents were invalid. This provided Parliament with an opportunity to decide whether to introduce new legislation that could preserve the under-inclusive benefits provided to adoptive parents. Parliament in fact enacted new legislation that provided benefits to both adoptive and biological parents, albeit at a reduced rate. This was an option that was not available to courts faced with an option of either extending or invalidating the legislation as initially written. A suspended declaration of invalidity provides the legislature with an opportunity to make choices between a variety of ways to comply with the Charter. It does not require the legislature to act. Should the legislature be unwilling or unable to enact new legislation during the period of the suspension (usually six, 12 or 18 months) then the court’s remedy of a declaration of invalidity will take effect.

The Court in *Schachter* recognized that suspended declarations of invalidity could be justified in contexts other than the invalidation of legislation that was only unconstitutional because it was under-inclusive. Drawing on the past precedents of the use of suspended declarations of invalidity in the *Manitoba Language Reference*¹⁰⁶ and *R. v. Swain*,¹⁰⁷ the Court stated that they could be justified when required to prevent threats to the rule of law or public safety. The Court seemed to indicate that these categories were closed. As suggested above, this follows a

¹⁰⁶ *Supra*, note 5.

¹⁰⁷ [1991] S.C.J. No. 32, [1991] 1 S.C.R. 933 (S.C.C.) [hereinafter “*Swain*”].

rule-based approach to the exercise of remedial discretion, something that is inevitably under- or over-inclusive. In many subsequent cases, the Court and lower courts have suspended declarations of invalidity without applying *Schachter* or its three categories.

Courts have often been attracted to suspended declarations of invalidity because of their recognition that legislatures have a legitimate role and a broader range of options in devising constitutional responses to court decisions. At the same time, the Supreme Court in *Schachter* warned that suspended declarations of invalidity should not become routine and that they can force matters back on the legislative agenda. A number of commentators have criticized the Court for routinely suspending declarations of invalidity and not justifying its decisions.¹⁰⁸ These criticisms have some validity, but the answer is not to abandon the useful technique of a suspended declaration of invalidity or to retreat to the three limited categories or pigeonholes outlined in *Schachter*. Rather, courts should justify the use of suspended declarations in each case on the basis of remedial principles.

Suspended declarations should be used where an immediate declaration could cause a significant social harm including but not limited to threats to the rule of law and public safety. Suspended declarations should also be used in cases of unconstitutionally under-inclusive legislation where legislatures have a range of remedial options such as extending but also reducing benefits that are not open to the court. More generally, they should be used in cases where legislatures can select among a number of options in complying with the court's interpretation of the Charter.¹⁰⁹ This latter principle is in tension with Lamer C.J.C.'s statement in *Schachter*¹¹⁰ that the use of suspended declarations of invalidity should "turn not on considerations of the role of the courts and the legislatures" but rather on the three listed categories. Nevertheless, the need to respect the roles of courts and legislatures¹¹¹ has emerged as important principles that govern constitutional remedies in the Court's subsequent remedial jurisprudence and indeed in its own decision in *Schachter* with respect to when reading in would be an appropriate subsection 52(1) remedy.

¹⁰⁸ Bruce Ryder, "Suspending the Charter" (2003) 21 S.C.L.R. (2d) 267 [hereinafter "Ryder"]; Hoole, *supra*, note 34.

¹⁰⁹ One example would be that courts could suspend declarations of invalidity to allow legislatures or boundary commission to select the precise way to redistribute seats or redistrict ridings to reflect Charter standards of relative equality of voting power. See *Dixon v. British Columbia (Attorney General)*, [1989] B.C.J. No. 583, 59 D.L.R. (4th) 247 (B.C.S.C.).

¹¹⁰ *Supra*, note 12.

¹¹¹ See, e.g., *Doucet-Boudreau*, *supra*, note 12.

Suspended declarations of invalidity deny successful Charter applicants an immediate remedy. One dramatic example was the 18-month suspended declaration of invalidity that was used when the Court found that an *Indian Act* provision denying off-reserve Band members a vote in their Band elections was unconstitutional.¹¹² This gave Parliament an opportunity to consult, research, and devise its own way to comply with the Charter, but it also meant that the successful Charter applicant was not able to vote in his Band's election for 18 months. In early cases, the Court appropriately indicated that the applicant or others could seek relief during the period of the suspension if the law was misused during that time.¹¹³ The Court has, however, more recently become more reluctant to combine individual subsection 24(1) remedies with section 52 relief.¹¹⁴ This raises the danger that Charter applicants and others may be harmed by a period of suspension that might otherwise be justified on an institutional basis. As LeBel J. has recognized in *Demers*, "[c]orrective justice suggests that the successful applicant has a right to a remedy. There will be occasions where the failure to grant the claimant immediate and concrete relief will result in an ongoing injustice."¹¹⁵ A trial judge recently used this approach when she exempted a successful applicant from a suspended declaration that the *Criminal Code* provisions against assisted suicide were unconstitutional.¹¹⁶ Such a remedy recognizes that Parliament could devise a range of constitutional regimes but also ensures that the successful Charter applicant not suffer irreparable harm during the period of a suspended declaration of invalidity.

As suggested above, exempting successful applicants from suspended declarations of invalidity can also be reconciled with the Court's *Ferguson*¹¹⁷ decision on constitutional exemptions because the exemption will only be a temporary remedy. Once the period of suspension has expired, either the declaration of invalidity or new legislation will apply to all persons. Borrowing from the jurisprudence on interlocutory

¹¹² *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] S.C.J. No. 23, [1999] 2 S.C.R. 203 [hereinafter "*Corbiere*"].

¹¹³ *Swain*, *supra*, note 107; *R. v. Bain*, [1992] S.C.J. No. 3, [1992] 1 S.C.R. 91 (S.C.C.) [hereinafter "*Bain*"].

¹¹⁴ *Demers*, *supra*, note 76.

¹¹⁵ *Id.*, at para. 101.

¹¹⁶ *Carter*, BCSC, *supra*, note 87, at paras. 1400ff. A similar approach was taken by the dissenting judges in *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519 (S.C.C.).

¹¹⁷ *Supra*, note 58.

remedies,¹¹⁸ courts should be particularly concerned about protecting applicants and others from irreparable harm to their Charter protected interests during the period in which a declaration of invalidity is suspended.

Suspended declarations of invalidity combine the court's ultimate responsibility under section 52 to declare unconstitutional laws to be invalid with delays that provide legislatures with an opportunity to select among a variety of means to comply with the court's rulings that existing legislation is unconstitutional. The Canadian innovation of suspended declarations of invalidity is now specifically recognized in subsection 172(1) of the South African Constitution. Suspended declarations of invalidity recognize that compliance with the Charter will often require the legislature to enact positive measures and that simply declaring laws to be of no force with immediate effect is a blunt remedy. At the same time, a number of commentators have argued that the Supreme Court has too frequently employed suspended declarations of invalidity so that they verge on the routine.¹¹⁹ In my view, suspended declarations of invalidity should, like other subsection 52(1) remedies, be justified by the court in individual cases as a remedy that respects the role of the legislature while also respecting the role of the Charter. Courts should assume some responsibility about what happens during any period of suspension. In some cases, it may be appropriate to exempt successful Charter applicants and perhaps others from the period of suspension, especially if they will suffer serious and irreparable harm to Charter interests by the delay in the ultimate subsection 52(1) remedy of a declaration of invalidity.

9. Prospective Rulings and Departures from the Norm of Full Retroactive Relief

A related but distinct issue raised in some cases is whether a ruling that a law is unconstitutional should always have retroactive effect. In *Hislop v. Canada*,¹²⁰ the Supreme Court recognized that the norm should be fully retroactive relief, but that exceptions could be justified in circumstances when the government reasonably relied on laws that have since been declared unconstitutional and when departures from fully retroactive relief would still be fair to the successful Charter applicants.

¹¹⁸ *Metropolitan Stores*, *supra*, note 49, discussed above.

¹¹⁹ *Ryder*, *supra*, note 108; *Hoole*, *supra*, note 34.

¹²⁰ *Supra*, note 25.

This ruling demonstrates concerns with the remedial principles recognized in *Doucet-Boudreau* and *Ward* that remedies should be fair to all the affected parties, but also that they should accommodate good governance concerns. In particular, the Court was concerned that in some cases “[f]ully retroactive remedies might prove highly disruptive in respect of government action which, on the basis of settled or broadly held views of the law as it stood, framed budgets or attempted to design social programs”.¹²¹

In *Hislop* the Court declined to provide relief fully retroactive to the proclamation of equality rights in 1985. The Court provided relief retroactive to 1999 when, in their view, it was no longer reasonable for governments to believe that the law supported the exclusion of same-sex couples. The remedy in this case was defended by the Court as striking “an appropriate balance between fairness to individual litigants and respecting the legislative role of Parliament”.¹²² The result in the *Hislop* case can be criticized, but it is less anomalous if viewed in the context of the Court’s caution in imposing damages for harms caused by laws, once thought to be constitutional, but subsequently found to be unconstitutional.

10. Qualified Immunities with Respect to Damages Caused by Unconstitutional Laws

Another manifestation of the Court’s concern that remedies should be fair to all parties and not excessively burden government is the Court’s caution in allowing a successful Charter applicant who has obtained a subsection 52(1) declaration that a law is invalid to also obtain damages under subsection 24(1) for harms caused by the unconstitutional law. In such situations, there is a need for a balance “between the protection of constitutional rights and the need for effective government”. This balance is achieved by only allowing subsection 24(1) damages to be combined with a subsection 52(1) declaration of invalidity in cases where there is “conduct that is clearly wrong, in bad faith or an abuse of power”.¹²³ The Court also hinted that damages might be justified in cases where the government also acted “negligently”. Governments will not

¹²¹ *Id.*, at para. 101.

¹²² *Id.*, at para. 117.

¹²³ *Mackin, supra*, note 48, at para. 78.

benefit from such a qualified immunity in cases where a taxpayer sues to recover taxes that have been unconstitutionally collected¹²⁴ or when unconstitutional acts are not specifically authorized by legislation and the applicant only seeks a subsection 24(1) remedy.¹²⁵ Such qualified immunities, as well as the ability for governments to justify departures from retroactive relief, demonstrate how concerns about respecting the role of the legislature play a fundamental role in the crafting of constitutional remedies. They also suggest that the issue of whether a remedy is simply a subsection 24(1) one or one that also requires a subsection 52(1) declaration of invalidity may become both critical and contested. Governments will have incentives to portray cases as involving a subsection 52(1) remedy in order to benefit from qualified immunities for damages, whereas applicants will have incentives to portray such cases as subsection 24(1) cases.

V. REMEDIES AVAILABLE FOR UNCONSTITUTIONAL ACTS UNDER SUBSECTION 24(1) OF THE CHARTER

1. Threshold Issues — Standing and Jurisdiction

There are distinct threshold standing and jurisdiction issues for obtaining a subsection 24(1) remedy. Standing under subsection 24(1) is limited to a person whose own rights are affected and there is not the same concept of public interest standing for those not directly affected by a law. The difference between the two standing rules can be explained by reference to the different nature of subsections 24(1) and 52(1) remedies. The former are personal remedies for unconstitutional acts against specific individuals, while the latter are more systemic remedies designed to benefit the broader public interest in having constitutional laws. Though the personal standing requirement in subsection 24(1) can be justified both by the nature of the personal remedy and by the text of subsection 24(1), it can have some harsh results. In the leading subsection 24(1) standing case, a majority of the Court held that an accused did not have standing to seek a remedy under section 24 for an unconstitutional search of his girlfriend's apartment, even though he was charged with the possession

¹²⁴ *Kingstreet Investments Ltd v. New Brunswick (Finance)*, [2007] S.C.J. No. 1, [2007] 1 S.C.R. 3 (S.C.C.).

¹²⁵ *Ward*, *supra*, note 18, at para. 41.

of drugs found during that search. Justice La Forest in dissent pointed out that the narrow approach taken by the Court could result in courts ignoring serious violations of the Charter. The courts have not tempered the requirement for personal standing, but they have at times allowed a person claiming a violation of his or her own right to also argue that violations of the rights of third parties are relevant to the Charter claim.¹²⁶

The Supreme Court has also rejected the idea that subsection 24(1) provides courts and tribunals with jurisdiction to order remedies. The superior courts are constitutionally guaranteed and they should always be available to provide a subsection 24(1) remedy.¹²⁷ Other inferior or statutory tribunals must have jurisdiction independent of the Charter over the subject matter, the parties, and the remedy to be a court of competent jurisdiction able to provide subsection 24(1) remedies. The courts have followed a functional and structural approach that balances the need for “meaningful access to *Charter* relief and deference to the role of the legislature”.¹²⁸ Statutory courts including the provincial courts can order costs under subsection 24(1) as a Charter remedy,¹²⁹ but judges at a preliminary inquiry do not have jurisdiction under the *Criminal Code* to exclude evidence under subsection 24(2) of the Charter.¹³⁰

In *R. v. Conway*,¹³¹ the Court endorsed a generous and holistic approach that presumed that any tribunal with powers to decide questions of law should be able to grant remedies under both subsections 24(1) and 52(1). The Court stressed the importance of people being able to access remedies in the administrative process and recognized the expense of having to seek remedies in the superior courts. At the same time, clear legislation can still preclude or place limits on the ability of tribunals to award Charter remedies. As suggested above, this limit on remedies is positivistic and odd given the emphasis that was placed in the Charter on ensuring access to remedies.

¹²⁶ *R. v. A.*, *supra*, note 41; *Benner v. Canada (Secretary of State)*, [1997] S.C.J. No. 26, [1997] 1 S.C.R. 358 (S.C.C.); *Doucet-Boudreau*, *supra*, note 12.

¹²⁷ *Mills*, 1986, *supra*, note 9.

¹²⁸ *R. v. 974649 Ontario Inc.*, [2001] S.C.J. No. 79, [2001] 3 S.C.R. 575, at para. 75 (S.C.C.) [hereinafter “974649 Ontario”].

¹²⁹ *Id.*

¹³⁰ *R. v. Hynes*, [2001] S.C.J. No. 80, [2001] 3 S.C.R. 623 (S.C.C.).

¹³¹ *Supra*, note 65.

2. The Range of Subsection 24(1) Remedies

The Court has emphasized that subsection 24(1) allows courts to use remedial discretion to create innovative and novel remedies.¹³² Some subsection 24(1) remedies, such as damages and costs, focus on providing remedies for the harms of past violations while others such as declarations and injunctions are designed more to ensure compliance with the Charter in the future.

3. Damages

After almost three decades of uncertainty, the Supreme Court has clarified that damages against governments are an important subsection 24(1) remedy. After having established a Charter violation, a Charter applicant must demonstrate that damages are an appropriate and just way to compensate pecuniary or non-pecuniary losses from a Charter violation or to deter Charter breaches or to vindicate Charter rights. In *Ward*,¹³³ the Court held that damages served all three remedial purposes with respect to an unconstitutional strip search, but that they were not necessary with respect to a short-term but unconstitutional detention of the plaintiff's car. Damages will be appropriate and just as a means to compensate for a broad range of pecuniary and non-pecuniary harms that flow from a Charter violation. In this case, there was a need to compensate the plaintiff for the non-pecuniary harm of the unconstitutional strip search, but there was no need to compensate him for the short-term unconstitutional seizure of his car. In addition, the strip search was a serious Charter violation that required vindication of Charter restraints on such intrusive powers and deterrence of future violations. At the same time, the unconstitutional seizure of the car was not serious enough to engage remedial concerns about vindication or deterrence.

Even if damages can be justified to compensate, vindicate or deter, they will not be awarded if the government can demonstrate that they are not appropriate and just because they will harm effective government. There is an open-ended category of countervailing factors that includes the adequacy of alternative remedies and concerns about effective governance. In *Ward*, the Court concluded that a declaration of a violation

¹³² *Mills*, 1986, *supra*, note 9; *Doucet-Boudreau*, *supra*, note 12.

¹³³ *Supra*, note 18.

would be an adequate but less drastic alternative to damages with respect to the seizure of the car, but not with respect to the strip search. The government defendants argued that damage awards for the strip search could harm good governance by chilling the exercise of law enforcement discretion. The Court was not persuaded, perhaps because the damage award would be paid by the city and the province, and not the individual officers and perhaps because of the modest quantum of \$5,000 that was awarded at trial. In subsequent cases, courts have struck out subsection 24(1) damage claims made against individuals on the basis that subsection 24(1) remedies are sought against governments under section 32 of the Charter and not against individuals, even though related tort claims may be sought against individual police officers and prosecutors.¹³⁴

In *Ward*, the Court indicated that compensation will generally be the most important consideration in determining the quantum of subsection 24(1) damages while “vindication and deterrence will play supporting roles”.¹³⁵ There is a need for evidence establishing some form of pecuniary or non-pecuniary damage. There is no minimum or maximum amount for Charter damages. That said, the Court approved of the modest \$5,000 quantum and suggested that “[a]bsent exceptional circumstances, compensation is fixed at a fairly modest conventional rate, subject to variation for the degree of suffering in the particular case”.¹³⁶ Given that most Charter rights protect intangible values, a conventional rate for damages is inevitable. At the same time, however, the \$5,000 awarded in *Ward* should not be taken as a cap or even a starting point, especially given that the quantum was not the subject of the appeal in the Supreme Court. The practical reality is that an economically rational plaintiff would not pursue an action for subsection 24(1) damages if there were a \$5,000 cap given the costs of litigation including the risk of having to pay the government’s costs if the litigation was not successful.¹³⁷

¹³⁴ *Wiese v. Martin*, [2011] S.J. No. 483, 379 Sask. R. 262, at paras. 60-62 (Sask. C.A.); *McCreight v. Canada (Attorney General)*, [2012] O.J. No. 1996, 2012 ONSC 1983, at paras. 70-72 (Ont. S.C.J.); *Spidel v. Canada*, [2011] F.C.J. No. 1744, 2011 FC 1448 (F.C.); *Young v. Ewatski*, [2012] M.J. No. 228, 351 D.L.R. (4th) 81, at para. 68 (Man. C.A.).

¹³⁵ *Supra*, note 18, at para. 47.

¹³⁶ *Id.*, at para. 50.

¹³⁷ Kent Roach, “A Promising Late Spring for Charter Damages: *Vancouver v. Ward*” (2010) 29 N.J.C.L. 135.

4. Costs

Costs are an important practical consideration in seeking Charter remedies. As discussed above, advance costs are available in exceptional cases where important litigation that would benefit the public could not proceed without such funding. Courts will also have to decide whether to apply normal rules of party and party costs following the event in cases where Charter remedies are sought. Unfortunately, the Supreme Court has not developed a coherent jurisprudence on this issue. It has, however, exercised discretion not to award costs against some, but not all, unsuccessful Charter applicants¹³⁸ and to award some successful Charter litigants a higher scale of costs.¹³⁹ It has also even awarded costs for unsuccessful Charter applicants.¹⁴⁰

Mechanical rules for costs are not appropriate, but it would be helpful if the courts recognized some principles to guide the exercise of discretion in this area. The more developed jurisprudence on advance costs provides a starting point.¹⁴¹ Costs may be necessary to discipline frivolous requests for Charter remedies, but there is a danger that routine award of costs against unsuccessful Charter applicants will deter litigation that seeks remedies in the public interest and may effectively prevent much Charter litigation. It should also be recognized that governments do not have the same interests as private litigants in recovering costs and that they should be prepared to defend the constitutionality of their actions.¹⁴² The British Columbia Court of Appeal has recognized the need to consider departures from ordinary cost rules in cases where the applicant “has no personal, proprietary or pecuniary interest in the outcome of

¹³⁸ For example, the Court did not award costs against the Canadian Foundation for Children in its unsuccessful Charter challenge to a *Criminal Code* provision allowing corrective force against children because the Foundation had “brought an important issue of constitutional and criminal law that was not otherwise capable of coming before the Court. This justifies deviating from the normal costs rule and supports an order that both parties bear their own costs throughout”. *Canadian Foundation for Children*, *supra*, note 72, at para. 69.

¹³⁹ *G. (J.)*, *supra*, note 39, at para. 109.

¹⁴⁰ *Schachter*, *supra*, note 12.

¹⁴¹ For recognition of the importance of considering whether the case was brought in the general public interest, compare *Little Sisters*, 2007, *supra*, note 57, with *Caron*, *supra*, note 53.

¹⁴² Courts should be cautious about applying tests to justify departures from costs rules in all public interest litigation because it may be easier to justify departures from costs rules that disadvantage governmental as opposed to private defendants. See more generally Roach, *Constitutional Remedies*, *supra*, note 2, at 11.990-11.1230.

the litigation that would justify the proceeding economically”.¹⁴³ The courts cannot use advanced costs and costs awards to create a parallel legal aid system, but they should not ignore access to justice considerations and the public interest that is often served by Charter litigation when making costs orders.

Costs can also be awarded as a remedy under subsection 24(1) against governments for Charter violations. Such remedies are often used with respect to late disclosure because they allow for compensation for delay and increased legal fees caused by the violation and they provide some vindication and deterrence of such violations.¹⁴⁴ Such awards are more meaningful than a declaration and adjournment but less drastic than a stay of proceedings or the exclusion of incriminating evidence that was disclosed too late to the accused. In affirming the jurisdiction of statutory penal courts to award such costs, the Supreme Court has warned that “cost awards will not flow from every failure to disclose in a timely fashion” and that their prime purpose should be “to discipline egregious incidents of non-disclosure”.¹⁴⁵

Costs, like damages, should not be automatically awarded. Following the more recent damage case of *Ward*, however, there is an argument that they should presumptively be available in a case where they are required to compensate for the proven harms of a Charter value or to vindicate or deter Charter violations, subject to the government being able to demonstrate that such a remedy would not be appropriate and just because it would harm good governance. Costs are awarded as a subsection 24(1) remedy against unconstitutional governmental acts that have not been authorized by legislation and governments should not enjoy a form of qualified immunity that would require proof of governmental fault in every case in addition to proof of a Charter violation.

5. Declarations

If damages and costs are the prime and interrelated subsection 24(1) remedies to repair past violations of the Charter with money, then declarations and injunctions play a similar role with respect to remedies

¹⁴³ *Victoria (City) v. Adams*, [2009] B.C.J. No. 2451, 313 D.L.R. (4th) 29, at para. 188 (B.C.C.A.).

¹⁴⁴ 974649 *Ontario*, *supra*, note 128.

¹⁴⁵ *Id.*, at paras. 89, 87, following *R. v. Jedyneck*, [1994] O.J. No. 29, 16 O.R. (3d) 612 (Ont. Gen. Div.).

designed to ensure future compliance with the Charter. Declarations have the advantage of allowing the Court to outline in broad and general terms what is required to comply with the Charter while at the same time allowing the government to decide what precise steps should be taken. In early minority language education cases, the Court relied on general declarations as a means to:

ensure that the appellant's rights are realized while, at the same time, leaving the government with the flexibility necessary to fashion a response suited to the circumstances ... the courts should be loath to interfere and impose what will be necessarily procrustean standards, unless that discretion is not exercised at all, or is exercised in such a way as to deny a constitutional right.¹⁴⁶

In other words, declarations allow courts to respect the role of the executive and the legislature to select among "myriad options available to the government that may rectify the unconstitutionality of the current system".¹⁴⁷

Although declarations may often be an attractive remedy that respects the role of government, further judicial intervention may be warranted if the government fails to achieve compliance with the Charter. A court that makes a declaration is typically *functus* and litigants may have to endure additional delay and expense should continued litigation be necessary. Justice Iacobucci raised this concern about relying on declarations of past violations to settle what turned out to be a protracted dispute between a gay and lesbian bookstore and customs over the importation of pornography.¹⁴⁸ The small bookstore in that case did continue its litigation against customs and returned to the Supreme Court six years later when it was denied advanced costs.¹⁴⁹ In the 2011 *Insite* case, the Supreme Court recognized the limits of declarations when it issued a mandatory order that the Minister of Health grant a statutory exemption from drug laws to allow a safe injection site to continue to operate. The unanimous Court stressed a declaration "would be

¹⁴⁶ *Mahe, supra*, note 29, at para. 96.

¹⁴⁷ *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624, at para. 96 (S.C.C.).

¹⁴⁸ *Little Sisters*, 2000, *supra*, note 38.

¹⁴⁹ *Little Sisters*, 2007, *supra*, note 57.

inadequate” and might only lead to increased litigation with its attendant delay and costs.¹⁵⁰

The limits of declarations and the potential of innovative remedies are well illustrated in the Omar Khadr saga. In 2010, the Supreme Court overturned a mandatory remedy that Canada request that the United States return Omar Khadr who had been detained since 15 years of age at Guantánamo Bay, Cuba. The Court stressed that a declaration would give the government flexibility to decide what steps should be taken while considering its broader foreign policy with the United States.¹⁵¹ The Court’s remedy in this case, as in *Little Sisters*, consisted of a declaration that the government had violated the Charter in the past without even attempting to provide guidance about what the government should do to repair this violation or to ensure compliance with the Charter in the future.¹⁵² The government eventually responded to the Supreme Court’s declaration by issuing a diplomatic note that requested that the U.S. not use materials obtained by Canadian officials who interrogated Khadr at Guantánamo. This request, however, did not result in an effective remedy.

As in *Little Sisters*, follow on litigation was necessary. The trial judge in the subsequent litigation, Zinn J., took an innovative approach that resulted in what might be termed a “declaration plus”. His approach did not restore the original remedy of a mandatory order that Canada request the U.S. to repatriate Khadr but provided a more structured process to ensure that some effective remedy was awarded. Justice Zinn found that Canada had violated a common law duty to consult Khadr’s representatives before deciding what it would do to comply with the Supreme Court’s 2010 declaration. Consultation will generally assist in achieving the broader purposes of the Charter¹⁵³ and it may help prevent subsequent litigation by providing applicants who have received a declaration an opportunity to make representations to the government about how the government should respond to the general declaration. In this case, consultation might have made the government aware of Khadr’s remedial priorities, needs and strategy in his litigation in

¹⁵⁰ *Insite*, *supra*, note 33, at paras. 147-148, warning that a declaration would not be sufficient and “Litigation might break out anew. A bare declaration is not an acceptable remedy in this case.”

¹⁵¹ *Khadr*, SCC, *supra*, note 31.

¹⁵² For my criticisms of this remedy, see Kent Roach, “„The Supreme Court at the Bar of Politics”: The Afghan Detainee and Omar Khadr Cases” (2010) 28 N.J.C.L. 115, at 143-53 [hereinafter “Roach, 2010”].

¹⁵³ *Corbiere*, *supra*, note 112.

American military tribunals. Justice Zinn concluded that Canada's response to the Supreme Court's declaration had still failed to produce an effective remedy and ordered Canada to propose another remedy in seven days. Khadr would then have seven days to comment on the proposed remedy and Zinn J. would then issue a remedy that took into account both the government's proposals and Khadr's response. This process was transparent and fair to the affected parties. Justice Zinn also hinted that he would not rule out the possibility that a mandatory order that Canada request Khadr's return from the United States might be the only effective remedy in this case.¹⁵⁴

Justice Zinn's innovative declaration plus approach combined the generality of a declaration with a judicially structured consultation process. In this way, it avoided the shortcomings of declarations in often being vague and resulting in further litigation. At the same time, the declaration was fair to both parties by giving them both a say. It was judicious in being transparent and allowing adversarial argument about what remedy should be ordered. It respected the roles of courts and government because it did not immediately jump into what could be seen as governmental and foreign policy functions: it allowed the government to propose the remedy. Such an approach allows a judge to compensate for the generality and vagueness of declarations while also avoiding the specificity of immediate mandatory orders.

Justice Zinn's innovative remedial order was, however, stayed pending appeal with Blais C.J. expressing serious doubts that a mandatory order to make diplomatic representations could be made in light of the Supreme Court's decision in the *Khadr* case overturning such a remedy.¹⁵⁵ Chief Justice Blais would limit courts to issuing declarations in situations involving the government's conduct of foreign policy. Such an approach would limit the scope of remedial discretion in the foreign policy context and might result in a lack of effective remedies as it arguably did in the Omar Khadr case.¹⁵⁶ This issue will not be resolved in this case as the appeal has been declared moot after Khadr pleaded guilty in an American military tribunal subject to a diplomatic agreement that he be allowed to return to Canada to serve the remainder of his sentence.¹⁵⁷ At the same time, the stay of Zinn J.'s remedy because of concerns about

¹⁵⁴ *Khadr*, FC, *supra*, note 32.

¹⁵⁵ *Khadr*, FCA, 2010, *supra*, note 32.

¹⁵⁶ See Roach, 2010, *supra*, note 152, at 149-50.

¹⁵⁷ *Khadr*, FCA, 2011, *supra*, note 32.

interfering with the government's prerogatives with respect to the conduct of foreign affairs did not disapprove of Zinn J.'s innovative declaration plus approach that attached the common law of fair expectations to the aftermath of the issuance of a declaration. As suggested above, this new declaration plus approach is transparent as befits the judicial function and it is fair to all parties by providing them with an opportunity to propose and comment on remedies before the court actually orders them. The declaration plus responds to the acknowledged weaknesses of declarations as a remedy that may be vague and might produce further disputes and litigation between the parties.

6. Mandatory Remedies Including Injunctions and Retention of Jurisdiction

Although declarations assume that Canadian governments will always comply promptly and in good faith with the court's declarations, sometimes this does not happen and stronger remedies are necessary. An early example is the Supreme Court's decision in the 1985 *Manitoba Language Reference*¹⁵⁸ where the Court ruled that it was necessary to retain jurisdiction over the case to ensure that Manitoba translated all of its unilingual laws into French. The Manitoba legislature had failed to honour its constitutional bilingualism obligations since 1890, despite at least two court decisions that its actions breached the Constitution. The Supreme Court remained seized of the matter from 1985 to 1992 and assisted the affected parties by making various rulings on the extent of Manitoba's bilingual obligations. In many ways, the Court followed a public law and managerial model of judging sometimes used in the United States, India and South Africa in cases involving structural or systemic constitutional violations and remedies.¹⁵⁹

Despite the example of the Court's unanimous decision in the *Manitoba Language Reference*, the retention of jurisdiction by trial judges in Canada to ensure Charter compliance has remained rare and contested. In *Doucet-Boudreau*,¹⁶⁰ the Court, in a 5-4 decision, upheld the actions of a trial judge who, when faced with delay in complying with section 23

¹⁵⁸ *Supra*, note 5.

¹⁵⁹ R.J. Sharpe, "Injunctions and the Charter" (1984) 22 Osgoode Hall L.J. 474; Roach, *Constitutional Remedies*, *supra*, note 2, at 13.130-13.400.

¹⁶⁰ *Supra*, note 12.

minority language educational rights and complex and dynamic province wide compliance challenges, ordered the government to make best efforts to comply with section 23 by constructing French language education facilities and retained jurisdiction so that the government could make periodic progress reports by way of affidavit and subject to cross-examination. The majority of the Court stressed the breadth of the trial judge's remedial discretion and the long delay in compliance while also expressing some concerns about the lack of clarity of the order and the procedure used. The minority argued that the judge had acted unfairly towards the government by retaining jurisdiction and not making a precise order. The dissenting judges suggested that the trial judge could do little at the reporting sessions. On the one hand, it maintained that it would be unfair for the judge to make new remedial orders at the reporting session and on the other hand the judge would act improperly if he attempted to exercise moral suasion over the government. The minority would have tied the trial judge's hands in the reporting sessions, re-affirming that it had thought that the trial judge should not have conducted them in the first place.

The minority's position does accept that courts can issue mandatory remedies under subsection 24(1) but stresses that the proper vehicle for their enforcement is contempt proceedings for violating a precise order. One problem is that such an approach may force courts to usurp executive functions by making orders that are precise enough to be enforced through contempt at an early stage. In *Doucet-Boudreau*, for example, it might not have been wise or even possible for the judge to go beyond a best efforts order and set detailed deadlines for the construction of French language facilities in five different parts of Nova Scotia. Given this, the judge may have simply issued a general declaration. Such a remedy, while appropriate in early section 23 cases such as *Mahe*,¹⁶¹ might have been inappropriate given Nova Scotia's poor record and delay in implementing minority language education rights. The use of a general declaration may well have resulted in more delay and litigation.

Another alternative is Zinn J.'s declaration plus approach in the *Khadr* case. Taking that approach, the judge in *Doucet-Boudreau* could have declared that section 23 rights were violated in Nova Scotia and then asked Nova Scotia to propose a remedy including perhaps a specific timetable for compliance and allowed the applicants an opportunity to

¹⁶¹ *Mahe*, *supra*, note 29.

comment on this proposal. The judge then could make the final remedial order including perhaps mandatory but specific orders. In any event, the trial judge's remedy in this case in making a best efforts order supplemented by reporting sessions was novel. The judge did not attempt to administer the schools, but he did recognize that the circumstances of delay and non-compliance required that the courts monitor, but not take over, the government's compliance efforts, while being transparent and fair to both sides. The majority of the Supreme Court approved of this approach as within the remedial discretion of the trial judge. Both this case and Zinn J.'s approach in *Khadr* demonstrate how trial judges faced with novel and difficult situations may come up with innovative and workable remedies to ensure compliance with the Charter while being fair to all the parties and respecting the respective roles of courts and governments.

Despite the important *Doucet-Boudreau* precedent, trial judges do not appear eager to order mandatory remedies and retain jurisdiction in Charter cases. Justice Zinn's declaration plus approach taken in the *Khadr* case has some similarities to the approach taken by LeBlanc J., the trial judge in *Doucet-Boudreau*, but as discussed above, the Federal Court of Appeal stayed Zinn J.'s decision. The Federal Court of Appeal has recently followed the approach taken by the minority in *Doucet-Boudreau* by ruling that a judge should not have retained supervisory jurisdiction in a systemic equality case but instead should have ordered specific orders that could if necessary be enforced through contempt.¹⁶² The Court of Appeal held that the majority decision in *Doucet-Boudreau* was limited to cases where Charter issues had been repeatedly litigated. In my view, this is a narrow reading of the majority's approach in *Doucet-Boudreau* and it discounts the Supreme Court's repeated statements that subsection 24(1) gives trial judges a wide remedial discretion that can include innovative remedies. The Federal Court of Appeal also gave undue weight to the dissenting opinion in *Doucet-Boudreau*, given the demands of precedent. Both the *Manitoba Language Reference* and *Doucet-Boudreau* demonstrate that mandatory remedies can be administered by the courts in a manner that is fair to all the affected parties and within the competence of the judiciary.

¹⁶² *Canada (Attorney General) v. Jodhan*, [2012] F.C.J. No. 614, 350 D.L.R. (4th) 400, at para. 179 (F.C.A.) [hereinafter "*Jodhan*"], for a case where the Federal Court of Appeal overturned a systemic remedy by a trial judge and expressed preference for the minority opinion of the Court in *Doucet-Boudreau*, *supra*, note 12.

Despite the controversy over *Doucet-Boudreau* and the retention of supervisory jurisdiction, the Court has recognized that in some contexts mandatory orders will be preferable to declarations. In 2011, the Supreme Court issued a mandatory order that the Minister of Health grant an exemption from drugs law to Insite, a safe injection site on Vancouver's downtown eastside. The Court reasoned that a declaration was not acceptable because of the risk of further delay and litigation should the Minister make good on political commitments not to renew the statutory exemption. The Court distinguished its cases relying on declarations by concluding that in "the special circumstances of the case ... the only constitutional response" was to grant the exemption. As discussed above, the main rationale for declarations is that they allow governments to decide among different options in order to comply with the Constitution. The Court's use of the mandatory remedy in the *Insite* case was limited to the special circumstances of a case where the Court concluded that the government had only one constitutional option.¹⁶³ At the same time, the use of a mandatory remedy was a prudent remedial choice given that the Court's previous use of declarations in both the *Little Sisters* and *Khadr* cases failed to resolve the underlying dispute and required the delay and expense of additional litigation.

7. Remedies in the Criminal Process

The prime Charter remedy in the criminal process is exclusion of evidence under subsection 24(2) and this is the subject of a separate chapter in this volume.¹⁶⁴ This chapter will briefly examine other remedies in the criminal process.¹⁶⁵ Exclusion of evidence can, however, also be ordered under subsection 24(1) as a remedy for late disclosure.¹⁶⁶ Subsection 24(2) would not apply in most late disclosure cases because the evidence would not have been obtained in a manner that involved a Charter violation as required under subsection 24(2). The Court has imposed a restrictive test for exclusion of evidence under subsection 24(1), which in many respects parallels the restrictive test used with respect to stays of

¹⁶³ Kent Roach, "The Supreme Court's Remedial Decision in the Insite Case" (2012) 6 J. Parliamentary and Political Law 283.

¹⁶⁴ See Chapter 23.

¹⁶⁵ For a much more detailed examination, see, Roach, *Constitutional Remedies*, *supra*, note 2, at c. 9.

¹⁶⁶ *R. v. Bjelland*, [2009] S.C.J. No. 38, [2009] 2 S.C.R. 651 (S.C.C.).

proceedings which will be discussed below. In order to exclude evidence as a remedy for late disclosure under subsection 24(1), courts must be satisfied that the admission of the evidence in the trial would result in an unfair trial or undermine the integrity of the justice system and that less drastic remedies such as adjournments, disclosure orders, and costs orders would not be effective.¹⁶⁷ A focus on the adequacy of alternative remedies demonstrates a concern that remedies be proportionate and necessary to cure the violation. The focus on the effects of proceeding to trial without excluding the evidence suggests that exclusion of evidence as a subsection 24(1) remedy, like stays of proceedings, is more concerned with preventing unfair trials or perpetuating abuses in the future than in providing remedies to compensate or correct for the effects of violations in the past.

Another important remedy in the criminal process is the stay of proceedings. This is a remedy that is more drastic than the exclusion of evidence because it puts a permanent halt to the criminal proceedings. The Supreme Court has indicated that it is not useful to distinguish between the use of a stay as a remedy under the common law abuse of doctrine or as a subsection 24(1) remedy.¹⁶⁸ In both cases, a stay of proceedings will only be justified if the continuation of the trial would cause irreparable harm either to the integrity of the justice system or to the accused's Charter rights. This suggests that the focus of the remedy is on preventing harms in future trials rather than repairing harms of past Charter violations. Judges should also consider the adequacy of less drastic alternative remedies suggesting a concern about the proportionality of remedies. The drastic remedy of a stay should not be used when less drastic remedies, such as adjournments, costs orders, or the exclusion of evidence, will satisfy the relevant remedial purposes. In close cases, judges can balance society's interests in having a decision on the merits of the criminal allegation against the competing interests in favour of a stay. As suggested above, the need to balance the affected interests is a recurring theme in remedial jurisprudence but it can be made more disciplined and transparent if the court focuses on principles of proportionality and justification.

It is not easy to obtain the drastic remedy of a stay of proceedings. The Court has held that a stay of proceedings was not necessary after section 7 violations involving judge shopping, jury vetting, and *ex parte*

¹⁶⁷ *Id.*, at paras. 3, 24.

¹⁶⁸ *R. v. O'Connor*, [1995] S.C.J. No. 98, [1995] 4 S.C.R. 411 (S.C.C.).

communications with judges or jurors. It concluded that the holding of a subsequent trial would not result in irreparable harm to the integrity of the justice system.¹⁶⁹ The Court has been somewhat more generous with respect to using stays of proceedings to protect the accused's Charter rights. In 1987, the Court held that a stay of proceedings was the minimum remedy for a violation of a right to a trial in a reasonable time in subsection 11(b) of the Charter.¹⁷⁰ Translated into current doctrinal terms, this would mean that it is not possible to have a fair trial after a subsection 11(b) violation. This approach meant that thousands of cases were stayed after the Court articulated ambitious subsection 11(b) standards in *Askov*. The government subsequently increased spending to achieve criminal justice efficiencies, thus indicating that even negative remedies in individual cases may require the spending of money. The Court has maintained the position that a stay of proceedings is the minimum remedy for a subsection 11(b) violation, while also taking a more flexible approach to subsection 11(b) rights that tolerates more delay.¹⁷¹ This confirms the accuracy of La Forest J.'s dissent in the original 1987 case which stressed the connection between strong remedies and the interpretation of the underlying right and predicted that the courts would allow more delay in order to avoid the drastic remedy of a stay.

Stays of proceedings have also been used as a remedy when a court determines that the accused cannot receive a fair trial without publicly funded counsel.¹⁷² This use of stays allows the state to decide whether it wishes to provide counsel or to not prosecute the offence. This avoids courts having to manage remedial problems and essentially delegates the issues to government. At the same time, the remedial powers of superior courts at least would include an order appointing counsel.¹⁷³ Inferior courts of statutory jurisdiction are limited to the exercise of remedies provided by statute, but the Court has interpreted these broadly so that

¹⁶⁹ *R. v. Latimer*, [1997] S.C.J. No. 11, [1997] 1 S.C.R. 217 (S.C.C.); *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] S.C.J. No. 82, [1997] 3 S.C.R. 391 (S.C.C.); *R. v. Regan*, [2002] S.C.J. No. 14, [2002] 1 S.C.R. 297 (S.C.C.). But see *R. v. Bellusci*, [2012] S.C.J. No. 44, [2012] 2 S.C.R. 509 (S.C.C.), deferring to trial judge's use of a stay of proceedings to protect judicial integrity in a case where a prisoner charged with an offence had been assaulted and threatened with violence.

¹⁷⁰ *R. v. Rahey*, [1987] S.C.J. No. 23, [1987] 1 S.C.R. 588 (S.C.C.).

¹⁷¹ *R. v. Morin*, [1992] S.C.J. No. 25, [1992] 1 S.C.R. 771 (S.C.C.).

¹⁷² *R. v. Rowbotham*, [1988] O.J. No. 271, 41 C.C.C. (3d) 1 (Ont. C.A.) [hereinafter "*Rowbotham*"].

¹⁷³ *G. (J.)*, *supra*, note 39.

provincial offences courts can order costs as a Charter remedy.¹⁷⁴ In cases where statutory courts and tribunals clearly lack remedial powers, it is also possible that superior courts can come to their aid. This was contemplated in a case where advanced costs were ordered to allow a minority language challenge to be mounted by a person charged with a regulatory offence before a statutory court.¹⁷⁵

Another important subsection 24(1) remedy in the criminal process is *habeas corpus*, which, along with exclusion of evidence under subsection 24(2), is the only other remedy that is specifically mentioned and guaranteed in the Charter, in subsection 10(c). Understandably, the Court has administered this important remedy in a flexible and generous manner, while also recognizing that it should not be used as a substitute for appeals on the merits or when the legislature has provided a comprehensive and adequate review mechanism.¹⁷⁶ Importantly, provincial superior courts can use *habeas* to supervise the legality of correctional decisions not only about the release of inmates but also their transfer to a higher security institution.¹⁷⁷ That said, the courts have been more reluctant to use *habeas corpus* in the immigration context.¹⁷⁸

Most criminal cases end in convictions and sentencing is often the most relevant part of the process for the accused. The Supreme Court has indicated that Charter violations and other abuses of state power can be relevant to the determination of a fit sentence, provided that the state misconduct relates to the offender and the offence and that the sentence reduction does not result in an unfit sentence or a sentence below a statutory minimum. The court approved the use of minimum sentences and conditional discharges for impaired driving and fleeing the police in the case where the police violated the accused's Charter rights by using excessive force in his arrest to the extent of breaking his ribs and puncturing his lung.¹⁷⁹ If the conditions for

¹⁷⁴ 974649 *Ontario*, *supra*, note 128.

¹⁷⁵ *Caron*, *supra*, note 53.

¹⁷⁶ *Gamble*, *supra*, note 8.

¹⁷⁷ *Steele v. Mountain Institute*, [1990] S.C.J. No. 111, [1990] 2 S.C.R. 1385 (S.C.C.); *May v. Ferndale Institution*, [2005] S.C.J. No. 84, [2005] 3 S.C.R. 809 (S.C.C.).

¹⁷⁸ *Reza v. Canada*, [1994] S.C.J. No. 49, [1994] 2 S.C.R. 394 (S.C.C.).

¹⁷⁹ *R. v. Nasogaluak*, [2010] S.C.J. No. 6, [2010] 1 S.C.R. 206 (S.C.C.). The Court did suggest that a sentence reduction below a mandatory minimum sentence might be authorized under s. 24(1) but this is at odds with the Court's decision in *Ferguson*, *supra*, note 58, that it is not appropriate to order constitutional exemptions from mandatory sentences and that such sentences if found to be unconstitutional must be struck down in their entirety.

a sentence reduction are not met, the accused will have to commence a separate civil action for damages.¹⁸⁰

VI. REMEDIAL CHALLENGES IN THE FUTURE

In this last part of the chapter, some remedial challenges in the future will be outlined and assessed. As will be seen, remedies are a site where courts and the government interact. Much will depend on how governments comply with court decisions and governmental intransigence in this regard might result in more remedial activism. Much will also depend on the evolution of Charter rights. A generous approach to socio-economic or Aboriginal rights or rights to legal assistance will pose some distinct challenges for the courts relating to issues such as costs, delay and competing interests. Conversely it is possible that concerns about the manageability of remedies for such rights might implicitly influence the courts to interpret such rights in a less generous manner.

1. The Challenges of Remedies that Require Government Action

Distinctions are sometimes drawn between positive and negative remedies with the idea expressed that the former are often more problematic for the judiciary. Such distinctions are slippery in practice. For example, the negative remedy of a stay of proceedings can effectively require the government to spend money. This is precisely what happened when the Ontario government hired more prosecutors and judges after the Supreme Court's *Askov* decision led to thousands of stays of proceedings. A similar result could occur again should subsection 11(b) problems emerge, or if courts make widespread use of stays of proceedings because legal aid cutbacks resulted in Charter violations. Relying on negative remedies in such contexts will allow the government to decide exactly how to respond.¹⁸¹ Nevertheless, such remedies are negative in form only because their substance requires governments to devote more resources to providing legal assistance.

¹⁸⁰ *Ward, supra*, note 18 (\$5,000 damages for unconstitutional strip search).

¹⁸¹ This can be seen as a form of general deterrence as opposed to specific deterrence implicit in mandatory orders. See Peter Shuck, *Suing Government* (New Haven: Yale University Press, 1983). The U.S. Supreme Court took this approach when it was held in *Brown v. Plata*, 131 S.Ct. 1910 (2011) that California would have to release prisoners if prison overcrowding continued.

In times of financial austerity and a re-thinking of the role of government, there may be reluctance on the part of judges to issue remedies that require government spending. Although this reluctance is understandable, it ignores the fact that all Charter rights — even negative rights, such as the right not to be subject to cruel and unusual punishment — require funds to be spent, for example, to maintain decent standards in custodial institutions. Cases such as *Manitoba Language Reference* and *Doucet-Boudreau* provide support for a more systemic approach that could allow courts to consider the problems faced by governments in complying with constitutional standards. A constant theme in the remedial jurisprudence is the need for courts to respect the role of the executive and the legislature, but such respect might be better achieved when the judiciary directly confronts the challenges affecting governmental compliance with the Charter rather than pretending that its decisions only affect single cases or that a negative remedy, like a stay of proceedings, has no positive or systemic effect.

There are many concerns about cuts in legal aid funding and the increasing number of unrepresented accused and litigants in the civil system. In the criminal context, courts tend to order stays of proceedings as a remedy in cases where they determine that an unfair trial will result if the accused is not represented by counsel.¹⁸² In the child welfare context, there is Supreme Court precedent for ordering that counsel be provided and paid by the state.¹⁸³ Courts have, however, generally been cautious when providing both forms of subsection 24(1) remedies, in part because they recognize that remedies in individual cases can set precedents for subsequent cases. There is a danger of a vicious circle in which courts shy away from individual remedies not so much because they cannot be justified in the particular case but because of perhaps unstated concerns about the precedential¹⁸⁴ and systemic effects of such remedies. One possible way out of such a vicious circle is for the court to take a more systemic approach to remedies that stem from systemic problems. The challenges of such an approach should not, however, be underestimated. Although *Doucet-Boudreau* provides a precedent for a systemic remedial approach in which judges retain jurisdiction and require progress reports from the government, courts have been loath to follow this approach and some courts have recently expressed support for the

¹⁸² *Rowbotham*, *supra*, note 172.

¹⁸³ *G. (J.)*, *supra*, note 39.

¹⁸⁴ For the Court's own recognition that a remedy may have precedential effects, see *Metropolitan Stores*, *supra*, note 49.

approach of the minority in that case.¹⁸⁵ Another possible alternative is the declaration plus approach taken in the follow on litigation from the Supreme Court's 2010 decision in the *Khadr* case. Such an approach allows the government to propose an appropriate remedy but then allows the Charter applicant to comment on the adequacy and effectiveness of the proposed remedy before the judge orders the appropriate remedy. This approach is transparent and fair to all parties and gives the judge an opportunity to be more fully informed about possible remedies.

2. The Challenges of Remedies that Involve Negotiation between the Affected Interests

Another means of dealing with systemic issues is to encourage the affected parties to negotiate a solution. Judges encourage such forms of negotiation daily with respect to civil litigation, yet its role in constitutional remedies seems more problematic. Indeed one of the reasons given by the dissenting judges that the remedy in *Doucet-Boudreau* was illegitimate was the idea that the judges would use the reporting sessions as a means to pressure the government.

The Supreme Court has stressed that enforcement of a duty to consult is an attractive alternative to the use of interlocutory injunctions to stop development that threatens Aboriginal rights.¹⁸⁶ Such injunctions forced governments and developers back to the negotiating table, but subject to the important power equalizer that the burden of inertia was placed by the interlocutory injunction in the favour of the Aboriginal people who opposed resource development on lands that they claimed. The Supreme Court has warned that the interlocutory injunction approach "typically represent an all-or-nothing solution. Either the project goes ahead or halts. By contrast, the alleged duty to consult and accommodate by its very nature entails balancing of Aboriginal and other interests and thus lies closer to the aim of reconciliation at the heart of Crown-Aboriginal relations".¹⁸⁷ The Court warned that injunctions "might work unnecessary prejudice and may diminish incentives on the part of the successful party

¹⁸⁵ *Jodhan*, *supra*, note 162, at para. 179.

¹⁸⁶ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, at para. 14 (S.C.C.) [hereinafter "*Haida Nation*"]. For a more detailed examination of remedies for violations of Aboriginal rights, see Roach, *Constitutional Remedies*, *supra*, note 2, at c. 15.

¹⁸⁷ *Haida Nation*, *id.*, at para. 14.

to compromise”.¹⁸⁸ It warned that Aboriginal groups do not have a “veto over what can be done with land pending final proof of the claim. ... what is required is a process of balancing interests, of give and take”.¹⁸⁹ This approach has led to increased litigation over the duty to consult. The South African Constitutional Court has also shown some enthusiasm for the use of mediation, negotiation, and other forms of engagement to resolve complex land and housing issues in both the *Port Elizabeth* case¹⁹⁰ and the *Occupiers of Olivia Road* case.¹⁹¹ The courts’ increased use of suspended declarations of invalidity also reflects the idea that legislatures are better placed than courts to consult with all the affected interests and devise systemic solutions.¹⁹²

The idea of encouraging parties to consult and negotiate solutions will often be an attractive way to deal with complex systemic problems, but the fact remains that courts still have duties under sections 24 and 52 to enforce the Constitution. For example, suspended declarations of invalidity provide governments with an opportunity to embark on systemic reforms that are broader than could be achieved through judicial remedies, but they also do not abdicate judicial responsibilities with respect to the enforcement of the Constitution. The court’s remedy of a declaration of invalidity will eventually take place should new and constitutional legislation not be enacted. There is a danger that negotiations and consultations may replicate power imbalances between the affected parties that are supposed to be redressed at least partially by the provision of constitutional rights and remedies. Those occupying lands and the government do not come to the bargaining table with equal power. Courts may apply a deferential standard to governments when evaluating the outcomes of negotiation. They may penalize applicants who perhaps for good reason have become frustrated with consultation and walk away from a table that they do not think will produce a fair result.

The engagement/negotiation issue has been discussed in some of the American literature surrounding public interest litigation. Abram Chayes laid the intellectual foundations for public interest litigation when he described an emerging form of public law litigation where relief was

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*, at para. 48.

¹⁹⁰ *Port Elizabeth Municipality v. Various Occupiers*, 2005 (1) SA 217 (S.A. C.C.).

¹⁹¹ *Occupiers of 51 Olivia Road, Berea Township v. City of Johannesburg*, 2008 (3) SA 208 (S.A. C.C.).

¹⁹² *Corbiere*, *supra*, note 112.

negotiated between the parties and ratified by the court as opposed to a received tradition when relief was imposed by the judge and deduced from the scope of the violation.¹⁹³ Professor Chayes' account was empirically accurate and the trend to negotiation has, if anything, accelerated in the United States with the increased use of consent decrees to resolve complex institutional cases. The move towards negotiation and consent has powerful supporters both from within the alternative dispute movement and from those concerned that courts may lack institutional competency to resolve complex and polycentric matters.

At the same time, an emphasis on negotiation may diminish the court's primary obligation to ensure constitutional compliance and to provide meaningful and effective remedies for constitutional violations. Two years after Professor Chayes wrote his pioneering study of public law litigation that stressed the importance of negotiated relief, Owen Fiss wrote a landmark article that agreed that public law litigation was necessary, but raised concerns that the judge's desire to be efficacious had the potential to threaten the objectivity and autonomy of judicial reasoning.¹⁹⁴ Professor Fiss went on to become a leading critic of the move towards mediation and alternative dispute resolution on the basis that it avoided judgment and could replicate power imbalances.¹⁹⁵ There is much wisdom in Professor Fiss's warnings and they are especially relevant in the Canadian context where courts have clear constitutional duties to strike unconstitutional laws down and provide appropriate and just remedies.

How can the divide between negotiation and engagement and justice and judicial determination and enforcement of rights be bridged? In my view, courts should be encouraged to deal with individual and blatant cases of injustices even if they are prepared to defer more complex and polycentric issues to a process of engagement, negotiation or legislative reform. One example would be for the court to allow periods for negotiation patterned after the suspended declaration of invalidity cases, but at the same time, remained seized of the dispute and be willing to make tailored remedial orders to prevent irreparable harm and blatant injustice during this time. Courts may well feel more comfortable in preventing discrete acts that will frustrate overall negotiation and impose irreparable

¹⁹³ Abram Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89 Harv. L. Rev. 1291.

¹⁹⁴ Owen Fiss, "Foreword: The Forms of Justice" (1978) 93 Harv. L. Rev. 1.

¹⁹⁵ Owen Fiss, "Against Settlement" (1984) 93 Yale L.J. 1073.

harm than in dealing with complex polycentric issues that can be subject to negotiation. That said, the risk of power imbalance and the sacrifice of rights remains a reality in such a process and one that courts have a special obligation to guard against. Another approach supported by both *Doucet-Boudreau* and the declaration plus approach in Omar Khadr's follow on litigation, is for courts to allow governments to make remedial proposals subject to adversarial challenge in court. This provides a more public and transparent alternative to behind the scenes negotiation especially if following those precedents the court makes clear that it retains the discretion to order the appropriate and just remedy after having heard both sides.

3. The Challenges of Balancing Interests, Proportionality and Costs

A constant theme in the remedial jurisprudence is the need for courts to balance all the affected interests when devising constitutional remedies. Interlocutory remedies will not be ordered unless the balance of convenience favours them. Final remedies, such as damages and injunctions, must be fair to all parties and take into consideration an open-ended list of countervailing factors that may adversely affect governments.¹⁹⁶ Governments also can justify remedies such as suspended declarations of invalidity and prospective relief when necessary to prevent hardship.¹⁹⁷ Governments can argue that costs are both a reason for limiting Charter rights under section 1¹⁹⁸ and a reason for limiting remedies.

In *Schachter*,¹⁹⁹ the Court indicated that costs could be considered when deciding whether to extend or nullify under-inclusive legislation. In that case, the greater costs of extending parental leave benefits to the much larger group of biological parents as compared to the smaller group of adoptive parents was a reason for nullifying the law (subject to a suspended declaration of invalidity) as opposed to extending the law. To my

¹⁹⁶ *Doucet-Boudreau*, *supra*, note 12; *Ward*, *supra*, note 18.

¹⁹⁷ *Manitoba Language Reference*, *supra*, note 5; *Schachter*, *supra*, note 12; *Hislop*, *supra*, note 25.

¹⁹⁸ *Newfoundland (Treasury Board) v. NAPE*, [2004] S.C.J. No. 61, [2004] 3 S.C.R. 381 (S.C.C.). the Supreme Court held that the government was justified in foregoing a \$24 million equal pay arrears payments to nurses as part of a fiscal austerity program that saw cuts in hospital beds, public medical coverage, lay-offs of public sector workers and wage freezes for public sector workers. This case is a reminder that courts will often defer to governments in their ability to manage the distribution of resources to competing groups.

¹⁹⁹ *Supra*, note 12.

mind this decision made some sense, albeit more because of concerns about whether the equality rights of biological parents were really ever violated by a program designed to satisfy the unique needs of adoptive parents. Even though the Court indicated that nullification was appropriate, Parliament actually extended the benefits to cover both biological and adoptive parents, albeit at a reduced level of benefits.

Costs reared their head in an even blunter way in the 2007 *Hislop*²⁰⁰ decision. In that case, same-sex couples claimed retroactive survivor benefits back to 1985 (the year equality rights came into force). The Court held that the government has justified a departure from the normal rule of full retroactive relief because until 1999, the government had reasonably relied on legal opinions and cases that had denied same-sex couples the same benefits provided to heterosexual couples. The Court expressed concerns that a fully retroactive remedy would interfere with the government's role in distributing limited public resources, despite arguments by the applicants that the pension scheme though administered by the government was largely self-funding and that many of them had been paying into the pension scheme since before 1985. The Court was also convinced that its approach would still be fair to the applicants who would receive some remedy.

The balancing of affected interests and even the consideration of the costs of various remedies may be inevitable, but courts have an obligation to justify even the exercise of remedial discretion. When the government raises costs as a reason for limiting Charter rights under section 1, it bears the burden of justification. The burden is less clear at the remedial stage. In my view, governments should bear the burden of demonstrating that the costs or administrative problems of a proposed remedy are excessive. There is some support for such an approach in the *Ward* case. It contemplates that governments have to demonstrate that a remedy justified by the applicant as necessary to compensate, vindicate, or deter will nevertheless harm effective governance. The Court in that case also contemplated that courts can issue a less drastic remedy if the remedy would be a more proportionate means that equally satisfies the relevant remedial purpose. For example, it indicated that a declaration was sufficient in *Ward* to compensate, vindicate and deter an unconstitutional seizure of the plaintiff's car but that damages were required to satisfy these

²⁰⁰ *Supra*, note 25.

remedial purposes with respect to an unconstitutional strip search.²⁰¹ Consistent with section 1 jurisprudence on proportionality, governments should be able to demonstrate that remedies are being limited for legitimate and important interests that are not simply objections to either rights or remedies. They should also show that the limit on remedies is rationally connected and necessary to achieve the objective. Finally, there should be an appropriate overall balance between limiting remedies for important objectives and ensuring that some remedies are provided. Judges should not hesitate to order a justified and manageable remedy simply because it will require governments to spend money though at the same time, they should not impose disproportionate or unnecessary costs on governments.

4. Should Delay Be Ignored or Managed?

Just as meaningful and effective remedies will often not be costless, so too will they often not be immediate. This raises the issue of how courts should approach delay in providing remedies. The *Manitoba Language Reference*²⁰² is a good example of the Supreme Court recognizing the reality of delay and managing the delay. In 1985, the Court found that laws enacted in that province since 1890 were unconstitutional because they were not enacted in both French and English. In the Court's first suspended declaration of invalidity case, it held that the laws would remain valid for the minimum time necessary to translate the laws. The Supreme Court retained jurisdiction and was still deciding questions about the translation of regulations and hearing progress reports in 1992.

There is much to be said for retention of jurisdiction as a means to manage delay and to ensure that prompt steps are taken to ensure compliance with the Constitution. Progress reports can also be made transparent and subject to adversarial challenges by the parties, publicity outside of court, and questioning by the court. At the same time, this approach is not without problems. It condones a state of affairs that has

²⁰¹ On the role that proportionality analysis can play as a remedial principle both with respect to remedial choice and the justification of limits on remedies because of other compelling interests, see Roach, *Constitutional Remedies*, *supra*, note 2, at 3.970-3.1090.

²⁰² *Supra*, note 5, and supplementary orders and decisions at *Order: Manitoba Language Rights*, [1985] S.C.J. No. 70, [1985] 2 S.C.R. 347 (S.C.C.); *Re Manitoba Language Rights Order*, [1990] S.C.J. No. 142, [1990] 3 S.C.R. 1417 (S.C.C.); *Reference re Manitoba Language Rights*, [1992] S.C.J. No. 2, [1992] 1 S.C.R. 212 (S.C.C.).

been judged by the Court to be unconstitutional. The government's priorities in managing delay may not be the same as those who are supposed to be the beneficiaries of the judgment. Returning to the *Manitoba Language Rights* case, it is far from clear that the translation of old laws into French best served the interest of the Francophone minority in that province. There had actually been failed discussion of a constitutional amendment that would relieve Manitoba from the burden of translating its old laws in exchange for a contemporary guarantee that the provincial government would provide French language services. An immediate declaration of invalidity or even one with a short (and unrealistic) period of suspension might have forced agreement on a constitutional amendment that would have provided more assistance to the minority in resisting linguistic assimilation.

One possible way of bridging some of the dilemmas of delay is to provide for interim remedies within the period of delay. In this way, courts could take steps to ensure that people do not suffer irreparable harm during the period of delay. The Supreme Court effectively did this in *Swain*²⁰³ and *Bain*²⁰⁴ when it indicated that it would suspend a declaration of invalidity, courts could respond to abuses of the unconstitutional legislation during the period of suspended invalidity. Similarly an exemption from a suspended declaration of invalidity was contemplated in a recent case dealing with assisted suicide.²⁰⁵ Although Parliament should have an opportunity to regulate and limit assisted suicide, successful Charter applicants should not be denied a remedy and forced to endure an agonizing death during the period of the suspension.

Courts can and should do more to ensure that successful Charter applicants and others are not subject to irreparable harm during the period of delay, but delay may be a reality in systemic cases where effective and meaningful remedies require governmental action. The South African Constitutional Court took a somewhat similar approach in its first housing right case, *Grootboom*,²⁰⁶ by ruling that an eviction was unconstitutional even while it issued more general declaratory relief that effectively contemplated some period of delay in progressive realization of housing

²⁰³ *Supra*, note 107.

²⁰⁴ *Supra*, note 113.

²⁰⁵ But, for a recent example of an exemption being granted from the period of suspension to provide a litigant with an effective remedy, see *Carter*, BCSC, *supra*, note 87.

²⁰⁶ *Government of the Republic of South Africa v. Grootboom*, 2001 (1) SA 46, at para. 88 (S.A. C.C.).

rights. The court may be justified in taking corrective action during the period of delay or suspended declaration of invalidity on the basis that the government has already violated the Constitution and the normal remedy of an immediate declaration of invalidity is not being provided.

Delay in granting remedies should, like other limits on remedies, be justified. *Hislop* reaffirms the long-standing norm of immediate retroactive remedies while also recognizing the need for the government to justify any departure from the right to an immediate remedy. That said, more robust and systemic rights will not be realized overnight. It is noteworthy that dissenting judges in *Gosselin v. Quebec (Attorney General)*,²⁰⁷ the social welfare case, proposed an 18-month suspended declaration of invalidity to allow Quebec to respond rather than impose immediate remedies. Even in the *Chaoulli v. Quebec (Attorney General)* health care case,²⁰⁸ the Court, after the release of its judgment, suspended its judgment for 12 months to allow the Quebec legislature to take steps to impose new regulation on private insurance. Delay in remedies can be justified, but it should be carefully managed by the courts to ensure that Charter applicants and others adversely affected by the delay do not suffer irreparable harm.

5. Dialogue and Confrontation

Although dialogue between courts and legislatures is generally seen as a matter to be determined under sections 1 and 33 of the Charter, it is also a feature of remedial decision-making. Canadian courts have pioneered the use of the suspended declaration of invalidity, which encourages dialogue by giving Parliament an opportunity to pre-empt the often blunt remedy of a declaration of invalidity with a range of constitutional responses. Such a remedy is respectful of the role of the legislature because it does not attempt to force legislation and it recognizes the legitimate role of the legislature both in making policy choices that are not dictated by the Charter and in selecting among multiple ways to comply with the Charter. It also does not compromise judicial functions by forcing the court to engage in negotiations or to become involved in the legislative or political process. The judicial remedy of a declaration of invalidity will take effect should the legislature not enact new legislation.

²⁰⁷ [2005] S.C.J. No. 15, [2005] 1 S.C.R. 238 (S.C.C.).

²⁰⁸ [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791 (S.C.C.).

Any challenge to the new legislation would have to be started before a court of competent jurisdiction and decided on its merits.

Canadian courts have also used general declarations to facilitate a form of dialogue between the court and the executive. General declarations are based on assumptions that governments have a legitimate role in deciding the precise means of complying with the Charter. The executive will have expertise about the remedial details. Declarations are based on an assumption that governments will comply promptly and in good faith. Indeed, the Supreme Court has observed:

Fortunately Canada has had a remarkable history of compliance with court decisions by private parties and by all institutions of government. That history of compliance has become a fundamentally cherished value of our constitutional democracy; we must never take it for granted but always be careful to respect and protect its importance, otherwise the seeds of tyranny can take root.²⁰⁹

The Court has recognized that even in cases where the Court concludes that more immediate and forceful remedies are appropriate and just that courts must rely on governments to comply with their judgments because “courts have no physical or economic means to enforce their judgments. Ultimately, courts depend on both the executive and the citizenry to recognize and abide by their judgments”.²¹⁰

There are some cases where courts should pursue a more active remedial response even at the risk of some confrontation with the government and some risk that they will be criticized for exceeding the proper or traditional role of the judiciary. One example that should never be ignored is the unanimous decision of the Supreme Court to retain jurisdiction and ensure that Manitoba complied with its bilingualism obligations after having defied them for almost a century. The fact that the Court retained jurisdiction over the case for seven years and issued supplementary decisions about the extent of Manitoba’s constitutional obligations provides an important precedent for remedial activism.²¹¹ The Court in that case determined that although an immediate declaration of invalidity would be administratively more convenient for the Court it would create a legal vacuum in Manitoba that would harm social interests in the rule of law.

²⁰⁹ *Doucet-Boudreau*, *supra*, note 12, at para. 32.

²¹⁰ *Id.*, at para. 31.

²¹¹ *Manitoba Language Reference*, *supra*, note 5.

There are other examples of remedial activism. In *Doucet-Boudreau*,²¹² the entire Court was agreed that it could order injunctions against the government and if necessary enforce them with contempt in order to ensure that the rights of the linguistic minority were respected. The Court split on the appropriateness of the trial judge's approach which in some respects was moderate because it simply ordered the government to make best efforts and then to report to the Court on progress that could be monitored in hearings attended by the parties and conducted in a judicial manner. One lower court judge in a recent case retained jurisdiction to ensure that a Canadian citizen who had experienced a long series of delay was issued the necessary documents to allow him to return to Canada.²¹³ Finally, the Court has in the *Insite* case ordered the Minister of Health to issue an exemption on the basis that this was the only constitutional choice on the facts of the case and that a delay could result in more litigation.²¹⁴ All of these cases suggest that courts have many tools in their remedial arsenal. Although there are still good grounds to assume that governments will comply with declarations, there may be cases where stronger and more immediate remedies can be justified.

VII. CONCLUSION

Constitutional remedies serve multiple purposes and are bounded by multiple constraints. Sometimes a focus on repairing the past will be appropriate and sometimes the focus must be on achieving compliance, perhaps with some delay, in the future. Courts can devise remedies that explicitly require positive governmental action and the spending of funds, but sometimes even negative remedies in individual cases may have systemic effects that require such governmental actions. Sometimes general declarations will be appropriate and can end the court's involvement in the dispute, but sometimes more specific orders and the retention of jurisdiction will be necessary. Sometimes remedies can achieve immediate justice by compensating those who have suffered a broad range of harm and vindicating rights, but sometimes remedies will have

²¹² *Doucet-Boudreau*, *supra*, note 12.

²¹³ *Abdelrazik v. Canada (Minister of Foreign Affairs)*, [2009] F.C.J. No. 656, [2010] 1 F.C.R. 267 (F.C.).

²¹⁴ *Insite*, *supra*, note 33.

to contemplate some degree of delay. Sometimes the government can justify departures from the norm of full, immediate and retroactive relief for the harms caused by the Charter violation. Remedial choice depends on the particular context of the violation.

Remedies are often a site for second order balancing between rights and competing social interests, but the importance of vindicating rights and repairing established violations should never be forgotten. Governments should have to justify limits on remedies in a manner consistent with proportionality principles. Cases such as *Hislop* and *Ward* are helpful in this regard, as they seem to contemplate a mini section 1 process to justify limits on constitutional remedies. Specifically, governments have an opportunity under these cases to argue that fully retroactive remedies and damages will harm good governance. Governments can similarly justify the use of suspended declarations of invalidity in cases where an immediate declaration will cause harm.

In some cases, the parties should have an opportunity to consult and perhaps agree on a remedy that can be enforced by the court, but courts should be careful that such negotiations do not replicate power imbalances or abdicate the ultimate judicial responsibility for the remedy. Delay in achieving compliance with the Constitution will sometimes be inevitable, but courts have responsibilities to minimize delay and to prevent irreparable harm during the period of delay. They should avoid the excesses of the “all deliberate speed”²¹⁵ era where school desegregation in the United States was delayed for decades. They should not be afraid to render and enforce final judgments including mandatory orders.

²¹⁵ *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1955).

Tab 18

EXAMPLES OF GENERAL STATUTORY IMMUNITY CLAUSES IN ALL CANADIAN JURISDICTIONS

NB: The examples below were selected to cover both wide geographical scope and to demonstrate that the general “protection from action” clauses at issue cover a wide range of government actors and government actions. These are only examples of the dozens of statutes found in a brief survey of each jurisdiction’s statute books.

ALBERTA

Alberta Health Act, S.A. 2010, c. A-19.5

Liability

11. No action lies against the Minister, the Crown in right of Alberta, the Health Advocate or any employee or agent of any of them for anything done or omitted to be done by that person in good faith while carrying out that person’s duties or exercising that person’s powers under this Act or the regulations.

SASKATCHEWAN

The Oil and Gas Conservation Act, R.S.S. 1978, c. O-2

Non-liability of board

7.9 No action lies or shall be instituted against the board, a member of the board or an officer, employee or agent of the board for any loss or damage suffered by a person by reason of anything in good faith done, caused, permitted or authorized to be done, attempted to be done or omitted to be done, by any of them, pursuant to or in the exercise of or supposed exercise of any power conferred by this Act or the regulations or in the carrying out or supposed carrying out of any order made pursuant to this Act or any duty imposed by this Act or the regulations.

MANITOBA

The Correctional Services Act, C.C.S.M. c. C230

No liability

58(1) No action lies against the government, the minister or the commissioner, or any staff member, contractor, volunteer or other person acting under the direction of the commissioner, for anything done or omitted to be done in good faith in the administration of this Act or in the discharge of any powers or duties that under this Act are intended or authorized to be executed or performed.

Loi sur les services correctionnels, C.P.L.M. c. C230

Immunité

58(1) Aucune action ne peut être intentée contre le gouvernement, le ministre, le commissaire, un membre du personnel, un entrepreneur, un bénévole ou toute autre personne qui agit en conformité avec les directives du commissaire, en raison de tout geste — acte ou omission — accompli de bonne foi dans le cadre de l'application de la présente loi ou dans l'exécution des fonctions qui lui sont confiées ou qui sont censées lui être confiées sous son régime.

ONTARIO

Civil Remedies Act, 2001, S.O. 2001, c. 28

Protection from liability

20(1) No action or other proceeding may be commenced against the Attorney General, the Crown in right of Ontario or any person acting on behalf of, assisting or providing information to the Attorney General or the Crown in right of Ontario in respect of the commencement or conduct in good faith of a proceeding under this Act or in respect of the enforcement in good faith of an order made under this Act.

QUÉBEC

Loi sur les valeurs mobilières, R.L.R.Q. c. V-1.1

283. L'Autorité, un membre de son personnel, un agent commis par elle ou une personne exerçant un pouvoir délégué ne peut être poursuivi en justice en raison d'un acte officiel accompli de bonne foi dans l'exercice de ses fonctions.

BRITISH COLUMBIA

Nisga'a Final Agreement Act, R.S.B.C. 1999, c. 2, Chapter 20

24. No action lies or may be instituted against the Enrolment Appeal Board, or any member of the Enrolment Appeal Board, for anything said or done, or omitted to be said or done, in good faith in the performance, or intended performance, of a duty or in the exercise or intended exercise of a power under this Chapter.

NEW BRUNSWICK

Pension Benefits Act, S.N.B. 1987, c. P-5.1

100.1(5) No action for damages or other proceedings shall be taken against the Province, the Minister, or a person designated to act on behalf of the Minister with respect to anything done or purported to be done, or with respect to anything omitted in respect of a regulation with retroactive effect, either before or after the coming into force of this section.

Loi sur les prestations de pension, LN-B 1987, c. P-5.1

100.1(5) Est irrecevable l'action en dommages-intérêts ou toute autre instance introduite contre la province, le Ministre ou une personne désignée pour le représenter relativement à une chose faite ou présumée avoir été faite ou relativement à quelque chose qui a été omise relativement à un règlement ayant un effet rétroactif, que cela se soit produit avant ou après l'entrée en vigueur du présent article.

NOVA SCOTIA

Building Code Act, R.S.N.S. 1989, c. 46

No action

27. No action or proceeding lies against the Crown, a municipality or a servant or agent thereof for any matter or thing done or omitted to be done by them in good faith and with reasonable care in exercising their powers or carrying out their duties under this Act or the regulations. R.S., c. 46, s. 27.

PRINCE EDWARD ISLAND

Community Care Facilities and Nursing Homes Act, R.S.P.E.I. 1988, c C-13

Liability

6. (2) No action lies against the Board or its members for anything done in good faith in exercise of its functions.

NEWFOUNDLAND AND LABRADOR

Public Utilities Act, R.S.N.L. 1990, c. P-47

6. (13) An action or other proceeding does not lie against the board or a member, officer or employee of the board for anything done or omitted to be done in good faith in the course of carrying out its or his or her duties under this Act.

CANADA

Bank of Canada Act, R.S.C. 1985, c. B-2

No liability if in good faith

30.1 No action lies against Her Majesty, the Minister, any officer, employee or director of the Bank or any person acting under the direction of the Governor for anything done or omitted to be done in good faith in the administration or discharge of any powers or duties that under this Act are intended or authorized to be executed or performed.