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Enforcement
Recours

Enforcement of the Charter — Subsections 24(1) and 52(1)

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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 process[2] 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

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[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,

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[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

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[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;

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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

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[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

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[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 …
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> 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.
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> 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.
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> 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.
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> 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]

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[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

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[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

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[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

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[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

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[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 3.970*ff*.

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.

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[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

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[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 Quebec[42] 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

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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 context[50] and laws that restricted third party spending and advertising during elections.[51]

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[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

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[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.).

Aboriginal[55] 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

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[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.

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[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

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[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

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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

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[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 sanction[73] 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

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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 law [77] 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]

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[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 rights[84] or those observing a religious Sabbath other than Sunday.[85] Such

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[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

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[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. 1400*ff*. (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

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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 offences[91] 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 *Tétrault-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.

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[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]

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[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

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[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 *Schachte*r 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 legislatures[111] 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.

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[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

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[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. 1400*ff*. 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.

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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

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[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 collected[124] 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

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[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.

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[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

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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]

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[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 applicants[138] 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

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[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

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[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. Jedynack*, [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

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[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 Charter[153] 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

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[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

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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

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[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, reaffirming 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.

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[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

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[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*

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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

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[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

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[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.

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[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 precedential[184] 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

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[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

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[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* case[190] 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

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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 compecompetency 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

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[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 1[198] 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

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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

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[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

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[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.

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[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.

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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

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[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).