

Remedies: ss. 24(1) and 52

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The text of the sections

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

The text of the sections

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

Overview

- 1. The sections do different things and have different rules – it matters whether you are operating under s. 24(1) or 52.**
- 2. Each section gives you a menu of possible remedies. Lots of things on the two menus.**

Overview

- 3. What you choose from the menu is discretionary matter based on the facts before you. But the Supreme Court has set out guidelines that you must take into account when exercising your discretion.**

Overview

- 4. This is rapidly developing area with many recent developments. Until now, not much thought given to remedies. Remedies is poised to be a jurisprudential growth area.**

Differences: s. 24(1) -- s. 52

1. To what constitutional infringements do they apply?

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- **Section 24(1): only to breaches of *Charter* rights**
 - wording: “Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied”
- **Section 52: to the whole Constitution**

Differences: s. 24(1) -- s. 52

2. Who may request a remedy?

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- **Section 24(1): applies only to people whose rights have been infringed**
-wording: “Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied...”

2. Who may request a remedy?

- **Section 52: applies to people whose rights have been infringed AND those invoking the rights of third parties (e.g., *Big M Drug Mart*)**

Differences:

s. 24(1) -- s. 52?

- 3. Generally directed at different things.**

3. Generally directed at different things

Section 52: legislation

Section 24(1): actions of government

Differences: s. 24(1) -- s. 52?

4. Who may award the remedy?

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- **Section 24(1) remedies may be granted by “courts of competent jurisdiction”**
- **What about administrative tribunals? Are they “courts of competent jurisdiction”?**
This is determined by the structural / functional test: *R. v. 974649 Ontario*, [2001] 3 S.C.R. 575.

4. Who may award the remedy?

- **Section 52 remedies – no limit is found in the text of s. 52**
- **Test: may be granted by any body with the explicit or implicit power to determine questions of law: *Nova Scotia (Workers' Compensation Board) v. Martin*; *Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 S.C.R. 504**

Differences: s. 24(1) -- s. 52

5. Type of remedy available.

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- **Section 52: a law inconsistent with Constitution is of no force or effect**
- **Remedial objective: grant remedies that give effect to that**

5. Type of remedy available

- **Section 24(1) – “just and appropriate remedies” – that’s the remedial objective.**
- **Test: the five fold test in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3**

**The remedial menu:
what sort of remedies?**

Section 52 remedies: what's on the menu?

Section 52 remedies: what's on the menu?

Nullification

**(declaration of invalidity;
striking down)**

Section 52 remedies: what's on the menu?

**Suspend the nullification
(suspending the declaration
of invalidity)**

Section 52 remedies: what's on the menu?

**Severance / reading in
(blue-pencilling unconstitutional
words / subsections; writing
words in)**

Section 52 Remedies: what's on the menu?

Reading down

**(interpreting down a provision
that could have an
unconstitutional interpretation)**

Section 52 Remedies: what's on the menu?

Constitutional exemption

(create an exemption from a statute in order to prevent a constitutional violation)

Strongly discouraged, maybe unavailable in all circumstances? See *R. v. Ferguson*, 2008 SCC 6.

Section 24(1) Remedies: what's on the menu?

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- **“Appropriate and just remedy” is the standard**
- **This is a broad standard.**

Section 24(1) Remedies: what's on the menu?

**Discretionary decision-making in this area:
often difficult to point to consistent
approaches.**

Example: contrast *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 with *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3

Section 24(1) Remedies: what's on the menu?

- **BUT – recent decision gives clear principles for the exercise of discretion under s. 24(1)**
- **Test for “appropriate and just” remedies and design of remedies under s. 24(1): *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3 at paras. 55-59.**

Section 24(1) Remedies:

***Doucet-Boudreau* test**

- 1. Meaningful remedy for the plaintiff / applicant.**
 - The remedy must be “meaningful” by “[taking] account of the nature of the right that has been violated and the situation of the claimant”, being “relevant to the experience of the claimant” and addressing “the circumstances in which the right was infringed or denied”. A remedy that is “ineffective” or “smothered in procedural delays and difficulties” is not a “meaningful vindication of the right” and therefore not appropriate and just. (para. 55)**

Section 24(1) Remedies: ***Doucet-Boudreau* test**

2. Fairness to the defendant/respondent.

- **The remedy must be “fair to the party against whom the order is made” by not imposing “substantial hardships that are unrelated to securing the right”.
(para. 58)**

Section 24(1) Remedies:

***Doucet-Boudreau* test**

3. Democratic concerns.

- **The remedy “must employ means that are legitimate within the framework of our constitutional democracy”, respecting “the relationships with and separation of functions among the legislature, the executive and the judiciary”. While courts may “touch on functions that are principally assigned to the executive”, they may not “depart unduly or unnecessarily from their role of adjudicating disputes and granting remedies that address the matter of those disputes”. (para. 56)**

Section 24(1) Remedies:

***Doucet-Boudreau* test**

4. Institutional capability.

- The remedy must “invoke “the function and powers of a court”. A court should not “leap into the kinds of decisions and functions for which its design and expertise are manifestly unsuited”. Guidance on this “can be inferred, in part, from the tasks with which they are normally charged and for which they have developed procedures and precedent”. (para. 57)**

Section 24(1) Remedies: ***Doucet-Boudreau* test**

5. Openmindedness, flexibility and evolution.

- **While historical remedial practice is important, “tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand”, so the lack of precedent is not a bar. A court must “remain flexible and responsive to the needs of a given case”. (para. 59)**

Section 24(1) Remedies: what's on the menu?

- **Declarations**

- **Preference for declarations: a “declaration, as opposed to some kind of injunctive relief, is the appropriate remedy in this case because there are myriad options available to the government that may rectify the unconstitutionality of the current system. It is not this Court’s role to dictate how this is to be accomplished.” *Eldridge v. B.C.*, [1997] 3 S.C.R. 624 at para. 96.**

Section 24(1) Remedies: what's on the menu?

- **Suspended declarations: e.g., *R. v. Brydges*, [1990] 1 S.C.R. 190, *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350.**
- **Permanent injunctive relief**

Section 24(1) Remedies: what's on the menu?

- **Mandatory orders**
(and declarations akin to mandatory orders)
- **How far to go? How intrusive? How much detail in the order?**

Section 24(1) Remedies: what's on the menu?

- **Ongoing supervision**
- ***Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3**
- **The problem of fair procedures**
- **How to integrate with existing civil procedures**

Section 24(1) Remedies: what's on the menu?

- **Interim remedies: interim costs**

Section 24(1) Remedies: interim costs

- ***British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371:** Where a *Charter* challenger is impecunious, has established a *prima facie* violation of the *Charter* and “special circumstances” exist, the Court has a “narrow” jurisdiction to make an award of interim costs in a constitutional challenge in civil court.

Section 24(1) Remedies: interim costs

- **A tough test: *Little Sisters Book and Art Emporium v. Commissioner of Customs and Revenue and Minister of National Revenue*, [2007] 1 S.C.R. 38.**

Section 24(1) Remedies: costs at end of trial

- **Costs (s. 24(1) and further support in rules of court (civil))**

Section 24(1) Remedies: what's on the menu?

- **Interim remedies: interlocutory stays of provisions, decisions or orders**

Section 24(1) Remedies: **interlocutory stays of provisions, decisions or orders**

- **Like private law injunctions –**
- **Test: serious issue to be tried; claimant will suffer irreparable harm; balance of convenience in the claimant's favour**

Section 24(1) Remedies: interlocutory stays

- **But with a big difference –**
- **Public interest considerations come to bear in the balance of convenience and are very significant**
- **Especially in “suspension cases” as opposed to “exemption cases”**

See *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311

Section 24(1) Remedies: interlocutory stays

When a stay is sought, whether it is granted or not, if there is some evidence of irreparable harm, courts will do their best to expedite the case.

Section 24(1) Remedies: what's on the menu?

- **Damages**

Section 24(1) Remedies: Damages

- Damages for invalid laws:
- special *mens rea* for Charter damages; emerging doctrine of “qualified immunity”: *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405; *Canada (Attorney General) v. Hislop*, 2007 SCC 10

Section 24(1) Remedies: Damages

- ***Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405:**
“Thus it is only in the event of conduct that is clearly wrong, in bad faith or an abuse of power that damages may be awarded.” (para. 79)

Section 24(1) Remedies: Damages

- ***Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405:**

Government did not act “...negligently, in bad faith or by abusing its powers”. It did not display “negligence, bad faith or wilful blindness with respect to its constitutional obligations”. (para. 82)

Section 24(1) Remedies: Damages

- ***Canada (Attorney General) v. Hislop*, 2007 SCC 10:**
 - **“bad faith, unreasonable reliance or conduct that is clearly wrong” (para. 117)**
 - **discussion as well of “fairness to litigants” and “respecting Parliament’s role” (paras. 109-117)**

Section 24(1) Remedies: Damages

- **clearly wrong, in bad faith or an abuse of power**
- **negligent, in bad faith, abuse of power**
- **negligent, bad faith or wilful blindness with respect to its constitutional obligations**
- **bad faith, unreasonable reliance or conduct that is clearly wrong; also role of Parliament and fairness to litigants**

Section 24(1) Remedies: Damages

- **Final observations:**
 - **overall consistency with *Doucet-Boudreau*, though the case and 24(1) is not mentioned**
 - **the emerging doctrine of what the SCC in *Hislop* calls “qualified immunity” is being explored**

Section 24(1) Remedies: Damages

- **Damages for unconstitutional decision-making or unconstitutional actions (not enactment of laws)**
- **For example, decisions of administrative tribunals that violate the *Charter*; or damages for damaging police searches**

Section 24(1) Remedies: Damages

**Damages against officials (e.g. police) –
no invalid legislation:**

**Unresolved under s. 24(1): contrasting
approaches across the country.**

Section 24(1) Remedies: Damages

- **measure of damages: see *Auton (Guardian ad litem of) v. British Columbia*** (2000) 80 C.R.R.(3d) 333 (B.C.S.C.) aff'd, (2002), 220 D.L.R. (4th) 411, rev'd [2004] 3 S.C.R. 657
- **compensatory damages; exemplary damages; punitive damages**
- **symbolic damages**

Section 24(1) Remedies: Damages

- often nominal: *Ayangma v. Prince Edward Island* (2000), 194 Nfld and P.E.I.R 254 (P.E.I.S.C.T.D.) (\$7,500 in damages); *Delude v. Canada* (2000), 264 N.R.1 (Fed. C.A.) (\$10,000 in moral damages)

Section 24(1) Remedies: Damages

- but not necessarily nominal: *Proulx v. Attorney General*, [2001] 3 S.C.R. 9 as a harbinger of the future?

Section 24(1) Remedies: Damages

- **to what extent does private law on consequential damages, remoteness, foreseeability, mitigation, reversal of burdens apply to Charter damages cases?**
- **answer unknown**

Section 24(1) remedies: The criminal context

- remedies for abuse of process and other misconduct (e.g., non-disclosure): *R. v. Taillefer*; *R. v. Duguay*, [2003] 3 S.C.R. 307
- appointment / funding of counsel in appropriate circumstances: *R. v. Fisher*, [1997] S.J. No. 530 (Q.B.); *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.)

Section 24(1) remedies: The criminal context

- **exclusion of evidence:**
- **s. 24(1) is a “...discrete source of a court’s power to exclude such evidence” that applies where the obtaining of the evidence was not against the *Charter* but the admission of the evidence would render the trial unfair.**

See *R. v. White*, [1999] 2 S.C.R. 417; *R. v. Hape* (2007), 220 C.C.C. (3d) 161 (S.C.C.)

Section 24(1) remedies: The criminal context

- **costs against the Crown: rare (*R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575) but liberalization in the future in light of *Doucet-Boudreau*?**

Section 24(1) remedies: The criminal context

Reduction of sentence?

**Contrasting approaches across the
country.**

Section 24(1) Remedies: what's on the menu?

- **Others?**

(*Doucet-Boudreau* is an invitation to be creative)

Section 24(1) remedies: Procedural Issues

- **Bifurcation of issues: separate remedial hearing? See *Auton (Guardian ad litem of) v. British Columbia (Minister of Health)*, [2000] B.C.J. No. 1547 (S.C.) (finding on liability); [2001] B.C.J. No. 215 (S.C.) (finding on remedy).**

Private causes of action against government actors

- **These are not displaced – if they exist on the facts, they may be asserted.**

Private causes of action against government actors

- Operational negligence: *Ryan v. Victoria (City)*, *Hill v. Hamilton-Wentworth Regional Police Services Board*
- Abuse of public office: *Odhavji Estate v. Woodhouse*,
- Malicious prosecution: *Proulx v. Quebec (Attorney General)*
- Bad faith decision-making: *Gershman v. Manitoba (Vegetable Producers' Marketing Board)*
- Restitutionary recovery (to recover payments made under unconstitutional statutes): *Kingstreet Investments Ltd. v. New Brunswick (Finance)*

The good news...

The discretionary nature of remedies means that you will *usually* enjoy deference by appellate courts unless a significant error in principle is present.