Remedies

What is a Remedy?

A remedy, in the constitutional context, is an action that a court can order to rectify a constitutional violation. As former Chief Justice McLachlin put it, "remedies make things better. They heal wounds. They put things right. Remedies allow us to mend our wounds as we carry on — as individuals and as a society."[1]

There are three sections of the *Constitution Act, 1982* that empower courts to grant remedies for constitutional violations:

1. Section 24(1) empowers courts to grant remedies for government action that violates the *Canadian Charter of Rights and Freedoms* (sections 1-34 of the *Constitution Act, 1982*).[2]

2. Section 24(2) empowers courts to exclude evidence from legal proceedings if it was obtained by violating the *Charter*.

3. Section 52(1) specifically addresses laws, rather than government actions, that violate *any* section of the Constitution (not just the *Charter*). Under this section, courts can declare laws that violate the Constitution invalid, or "of no force or effect."[3]

Although these three sections generally address different situations, they can still work together to remedy a constitutional problem. For example, a court may issue a suspended declaration of invalidity under section 52(1) *and* award a 24(1) remedy to the individual whose rights were infringed.[4] In this case, the individual who brought the action challenging the law could receive an exemption from the law until the declaration of invalidity comes into effect.

Section 24(1)

Section 24(1) of the Constitution states that, "[a]nyone 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."[5] Thus, section 24(1) remedies are specifically for cases where government action has infringed upon someone's *Charter* rights.

Various civil and criminal remedies are available under section 24(1). A common type of remedy in civil proceedings is damages, which compensates a claimant for any personal loss they suffered as a result of a *Charter* violation. In criminal proceedings, potential remedies include disclosure orders, calling additional witnesses, and declarations of mistrial.

Anyone can apply for a remedy under section 24(1) if their *Charter* rights have been violated, or if it is likely that their *Charter* rights will be violated in the future.[6] To receive a section 24(1) remedy, the claimant will need to show, on a balance of probabilities, that

their *Charter* rights have been, or will be, violated.[7]

Section 24(2)

Section 24(2) of the *Constitution Act, 1982* states that, "[w]here, in proceedings under section (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."[8]

This section aims to remedy situations where law enforcement has obtained evidence in a way that unjustifiably infringes an accused person's *Charter* rights. However, a section 24(2) remedy will not be applied automatically. Rather, the accused must submit an application to the court and must show, on a balance of probabilities, that one of their *Charter* rights was violated.

If a court concludes that evidence *was* obtained in a way that violated the *Charter*, the final test for determining whether the evidence should be excluded under section 24(2) involves asking whether the admission of the evidence would "bring the administration of justice into disrepute."[10] In *R v Grant*, three factors were considered to make this determination:

1. The seriousness of the *Charter*-infringing state conduct.

2. The impact of the breach on the *Charter*-protected interests of the accused.

3. Society's interest in the adjudication of the case on its merits.[11]

Section 52(1)

Section 52(1) of the *Constitution Act, 1982* is also known as the "supremacy clause." It states that, "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." This means that all legislation must be consistent with the Constitution — not just the *Charter* or the *Constitution Act, 1982*, which are only parts of Canada's Constitution. If a law is found to be inconsistent with any section of the Constitution, a court can remedy the inconsistency by striking down the law (as in *Big M Drug Mart*, for example[12]). Alternatively, a court can respond to the inconsistency by:

Reading Down: When a law is ambiguous enough to allow for constitutional and unconstitutional interpretations, courts can stipulate that the constitutionally permissible interpretation should be adopted.[13] This allows the law to remain valid while ensuring that it isn't applied in a way that violates the Constitution.

Reading In: This involves adding new words to the law to make it compliant with the Constitution. This is typically used where a law has an unjustifiably discriminatory or exclusionary effect. For example, in *Schachter v Canada*, the law was underinclusive. Mothers and adoptive parents could take parental leave from work, but biological fathers

were unable to take paternity leave. Although the Supreme Court of Canada ultimately chose a different remedy, it considered "reading in" as a possible remedy, which would have meant recognizing the right of biological fathers to obtain the same benefits as adoptive parents and biological mothers.[14]

Severance: This occurs when a court finds only certain words of a law to be of no force of effect. In such cases, the court "severs" the unconstitutional words and removes them from the law.

Suspending a Section 52(1) Remedy

Typically, a section 52(1) remedy applies immediately because there is public interest in protecting *Charter* rights and constitutional values. However, a court can delay declaring a law unconstitutional if there are compelling reasons for doing so. For example, a court may suspend a declaration of invalidity if an immediate declaration would pose a danger to public safety,[15] or deprive people of the benefits intended by the law.[16]

[1] Kent Roach, *Constitutional Remedies in Canada*, 2nd ed (Thomson Reuters, 2013) (loose-leaf updated 2021, release 2), ch 3 at 3:1.

[2] *R v 974649 Ontario Inc*, 2001 SCC 81.

[3] *Schachter v Canada*, [1992] 2 SCR 679, 93 DLR (4th) 1 [*Schachter*].

[4] *Ontario (AG) v G*, 2020 SCC 38 at paras 145-152.

[5] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 24(1) (*Constitution Act, 1982*).

[6] *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 at para 51, 177 DLR (4th) 124.

[7] *R v Collins*, [1987] 1 SCR 265 at page 277, 38 DLR (4th) 508 [*Collins*].

[8] *Constitution Act, 1982*, *supra* note 5, s 24(2).

[9] *Collins*, *supra* note 8.

[10] *R v Grant*, 2009 SCC 32.

[11] *Ibid* at para 71.

[12] *R v Big M Drug Mart*, [1985] 1 SCR 295 at 355-356, 18 DLR (4th) 321.

[13] *R v Smith*, 2015 SCC 34 at para 31.

[14] *Schachter*, *supra* note 3.

[15] *R v Swain*, [1991] 1 SCR 933, 125 NR 1.

[16] *Schachter*, *supra* note 3.