

# REMEDIES

# Thinking about remedies for *Charter* breaches

- What remedies are available?
- How do we determine what remedy is appropriate in a given case?
- What's the proper role of the Court?

## *Constitution Act 1982, s. 24(2)*

“(2) Where, in proceedings under subsection (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 the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.”

## *Constitution Act 1982, s. 24(1)*

“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.”

# Examples of 24(1) remedies

- Damages
- Injunctions
- Mandatory Orders
- Exemptions

## *Constitution Act 1982, s. 52(1)*

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

(AKA the Supremacy Clause)

# Section 52(1) remedies

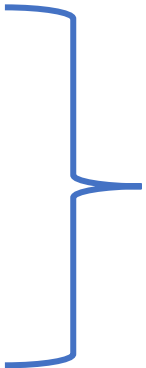
(1) Declaration of invalidity

(2) Reading in

(3) Reading down

(4) Severance

(5) Suspend declaration of invalidity



Justice Karakatsanis in *Ontario v G*,  
2020 SCC 38 calls these “tailored  
remedies”

# (1) Declaration of invalidity

- “Striking down” law
- Either entire provision or entire law declared invalid



# (1) Declaration of invalidity - Example

- *R v Morgentaler*, [1988] 1 SCR 30
- *Charter* challenge to “Therapeutic Abortion Committee” regime found in s. 251 of the *Criminal Code*
- Violates s. 7 (Right to Life, Liberty and Security of the Person)
- Remedy = strike down “Therapeutic Abortion Committee” regime and abortion prohibition

# Section 52(1) remedies

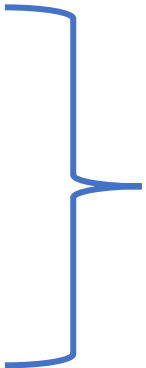
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## (2) Reading in

- “[R]eading in is when a court broadens the grasp of legislation by declaring an implied limitation on its scope to be without force or effect.” (G at para 113)

## (2) Reading in – Example

- *Vriend v Alberta*, [1998] 1 SCR 493
- Alberta's *Human Rights Code* doesn't include "sexual orientation" in its list of protected grounds
- Violates s. 15 equality rights
- Remedy = read "sexual orientation" into the *Human Rights Code*

### (3) Reading down

- “Reading down is when a court limits the reach of legislation by declaring it to be of no force and effect to a precisely defined extent” (G at para 113)

### (3) Reading down – Example

- *R. v. Appulonappa*, 2015 SCC 59
- S. 117 of the *Immigration and Refugee Protection Act* prohibits individuals from helping people come into Canada in violation of the *IRPA*
- “the preferable remedy is to read down s. 117 as not applicable to persons who give humanitarian, mutual or family assistance. This remedy reconciles ... s. 117 with the requirements of the *Charter* while leaving the prohibition on human smuggling...” (at para 85)

## (4) Severance

“Severance is when a court declares certain words to be of no force or effect, thereby achieving the same effects as reading down or reading in, depending on whether the severed portion serves to limit or broaden the legislation’s reach. Severance is appropriate where the offending portion is set out explicitly in the words of the legislation.” (G at para 113)

## (4) Severance - Example

- *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11
- Section 2(b) (freedom of expression) challenge to the *Human Rights Code*
- Remedy = *Saskatchewan Human Rights Code*, s. 14(1)(b)
  - Prohibition on publishing or displaying any representation “that exposes or tends to expose to hatred, ~~ridicules,~~ ~~belittles or otherwise affronts the dignity of~~ any person or class of persons on the basis of a prohibited ground”



# Principles guiding choice of remedy under 52

- G's 4 "remedial principles":

"A. Charter rights should be safeguarded through effective remedies.

B. The public has an interest in the constitutional compliance of legislation.

C. The public is entitled to the benefit of legislation.

D. Courts and legislatures play different institutional roles."

## (5) Suspended declaration of invalidity

- Declaration of invalidity takes place later
- Time determined by judge – has been anywhere from 4 to 18 months
- Originating case: *Re Manitoba Language Rights*, [1985] 1 SCR 721

## (5) Suspended declaration of invalidity

- In G, Justice Karakatsanis adopted a balancing approach to the grant of suspensions
- She observed that suspensions should be “rare” (133)
- Exemptions will often be available during the suspension (see also *R. v. Albashir*, 2021 SCC 48)