The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference

Volume 25 (2004) Article 1

Charter Remedies and Jurisdiction to Grant Them: The Evolution of Section 24(1) and Section 52(1)

Debra M. McAllister

Charter Remedies and Jurisdiction to Grant Them: The Evolution of Section 24(1) and Section 52(1)

Debra M. McAllister[*]

> Without effective remedies, the law becomes an empty symbol; full of sound and fury but signifying nothing…
>
> Chief Justice Beverley M. McLachlin[**]

I. INTRODUCTION

A right is only as good as the remedy; this adage is as true of the *Canadian Charter of Rights and Freedoms, 1982*[1] ("the Charter") as it is of any other area of the law. However, many courts and administrative

---

[*] Senior Counsel, Department of Justice Canada, Ontario Regional Office, Toronto. The views expressed in this paper are mine alone; I do not purport to represent, in any way, the views of the Department of Justice or the Government of Canada. I presented a shorter predecessor of this paper entitled "*Doucet-Boudreau* Judicial Enforcement of Court Orders: Confrontation or Cooperation?" at the Osgoode 2003 Constitutional Cases Conference on April 2, 2004. Further, some portions of this article initially appeared in my publications entitled: "*Mackin*: Of Sterile Rules and Real People" (2003) 21 Sup. Ct. L. Rev. (2d) 339; *Taking the Charter to Court: A Practitioners Analysis*, looseleaf (Toronto: Carswell, 1998) c. 16.1, 16.4; "Administrative Tribunals and the *Charter*: A Tale of Form Conquering Substance" [1992] L.S.U.C. Special Lectures 131; and "The Role of Tribunals in Constitutional Adjudication" [1991-1992] 1 N.J.C.L. 25.

[**] Extract from McLachlin C.J., "The Charter: A New Role for the Judiciary?" (1991) 29 Alta. L. Rev. 540 (paper delivered on October 16, 1990, for the Weir Memorial Lecture at the University of Alberta, Edmonton, Alberta). Although McLachlin C.J. was not the Chief Justice when the speech was delivered, I have referred to her throughout this paper by her current designation. All other references to judges are "as they then were"; that is, by their designation at the time they wrote a specific decision or paper.

[1] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

tribunals that routinely deal with Charter issues do not have authority to grant effective remedies for breach of Charter rights. The issue of what remedies are available to rectify a breach of Charter rights, and the question of what bodies have jurisdiction to determine whether the Charter has been infringed, are intertwined and have been controversial and central to Charter litigation from the beginning.

The jurisprudence on many constitutional issues has evolved so quickly since the Charter came into force in 1982, that some rulings in the Supreme Court of Canada's earliest Charter decisions have already been reversed or substantially revised.[2] However, this apparent growth in our understanding of rights can be tested by examining the remedies that have developed, since the remedy is the "bottom line" that matters most to the claimant at the end of the day. In other words, while it is certainly important that the courts have taken an expansive approach to equality rights, this may not matter to an individual who cannot get a remedy that fully and meaningfully vindicates her section 15 rights. The issue addressed in this paper is how far have we come with respect to remedies for breaches of Charter rights? To paraphrase McLachlin C.J., do we have effective remedies? If not, we risk the Charter becoming an empty symbol.

This question cannot be answered without exploring the twin issue of jurisdiction. The two constitutional provisions that deal with both

---

[2] See, for example, *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 S.C.R. 504, [2003] S.C.J. No. 54 [hereinafter "*Martin*"], which made important changes to earlier jurisprudence on the jurisdiction of administrative tribunals to decide Charter issues, and specifically overruled *Cooper v. Canada (Human Rights Commission)* (*sub nom. Bell v. Canada (Human Rights Commission)*), [1996] 3 S.C.R. 854, [1996] S.C.J. No. 115 [hereinafter "*Cooper*"] to the extent of any inconsistency. See also the development of the s. 15(1) test beginning with the 1989 trilogy of *Andrews v. Law Society (British Columbia)*, [1989] 1 S.C.R. 143, [1989] S.C.J. No. 6; *Reference re Workers' Compensation Act, 1983 (Newfoundland)* (*sub nom. Reference re Sections 32 & 34 of the Workers' Compensation Act 1983 (Newfoundland)*), [1989] 1 S.C.R. 922, [1989] S.C.J. No. 35; and *R. v. Turpin*, [1989] 1 S.C.R. 1296, [1989] S.C.J. No. 47; followed by the 1995 trilogy of *Miron v. Trudel*, [1995] 2 S.C.R. 418, [1995] S.C.J. No. 44; *Egan v. Canada*, [1995] 2 S.C.R. 513, [1995] S.C.J. NO. 43 [hereinafter "*Egan*"], and *Thibaudeau v. Canada (sub nom. Thibaudeau v. R.; Thibaudeau v. Minister of National Revenue)*, [1995] 2 S.C.R. 627, [1995] S.C.J. No. 42; and ultimately stabilized in the 1999 decision in *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497, [1999] S.C.J. No. 12.

jurisdiction and remedial authority are section 24(1) of the Charter and section 52(1) of the *Constitution Act, 1982*,[3] which provide as follows:

> 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.
>
> 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.

Not only are jurisdiction and remedies addressed in the same sections of the Constitution; they are bound together in practice. A Charter claimant must consider what remedy is needed, and what forum has jurisdiction to grant that remedy. Conversely, an individual may be required by statute to appear before a court or tribunal that lacks jurisdiction to grant an effective remedy.

The Charter has posed unique challenges for the courts with respect to both their decision-making process and their remedial authority that did not exist before our rights were constitutionally entrenched. These challenges, which impact upon the relationship between the courts and the legislative and executive branches of government, were discussed in McLachlin C.J.'s paper entitled "The Charter: A New Role for the Judiciary,"[4] which was delivered for the Weir Memorial Lecture at the University of Alberta in 1990. I begin with a summary of this paper, and of the academic commentary and case law on the dialogue theory[5] of Charter development, since both provide insight into the relationship between the judiciary and the other branches of government in the Charter era. This is the context within which remedial and jurisdictional issues will be explored.

---

[3] I do not attempt to deal with the entire body of jurisprudence on s. 24(2) of the Charter in this article.

[4] (1991) 29 No. 3 Alta. L. Rev. 540 .

[5] The dialogue theory was first proposed by Hogg & Bushell in an article entitled "The *Charter* Dialogue between Courts and Legislatures (Or Perhaps The *Charter of Rights* Isn't Such a Bad Thing After All)" (1997) 35 Osgoode Hall L.J. 75 [hereinafter "Hogg & Bushell"].

I begin this exploration with a review of the Supreme Court's early decisions that articulated the foundational principles for the interpretation of section 24(1) and section 52(1): *R. v. Big M Drug Mart Ltd.* (1985)[6] and *R. v. Mills* (1986).[7] These cases establish that the Charter does not expand jurisdiction or create remedies. Further, section 52(1) applies when legislation is challenged, while section 24(1) provides personal remedies for government action that infringes Charter rights. I also review the cases which state that a remedy under section 24(1) is not generally available in conjunction with a section 52(1) remedy: *Schachter v. Canada* (1985),[8] *Guimond v. Quebec (Attorney General)* (1996),[9] and *Mackin v. New Brunswick (Minister of Finance)* (*sub nom. Rice v. New Brunswick*) (2002).[10]

Next, I address the guidelines provided by the Supreme Court for granting section 52(1) remedies, which are set out in *Schachter* (1985)[11] and *Vriend v. Alberta* (1998).[12] I also deal with the jurisdiction to grant these remedies, which was considered in a series of cases culminating in *Martin* (2003).[13] Similarly, I explore the principles for granting a remedy under section 24(1) that were established in *Doucet-Boudreau v. Nova Scotia (Minister of Education)* (2003),[14] and jurisdiction under section 24(1) as it has been explained in the case law, particularly *Dunedin* (2001)[15] and *Doucet-Boudreau SCC.*[16]

My thesis is that there have been substantial developments in the principles and guidelines regarding both remedies for breach of Charter rights, and the jurisdiction to grant them. However, we do not yet have a

---

[6] [1985] 1 S.C.R. 295, [1985] S.C.J. No. 17 [hereinafter "*Big M*"].

[7] [1986] 1 S.C.R. 863, [1986] S.C.J. No. 39 [hereinafter "*Mills*"].

[8] [1992] 2 S.C.R. 679, [1992] S.C.J. No. 68 [hereinafter "*Schachter*"].

[9] [1996] 3 S.C.R. 347, [1996] S.C.J. No. 91 [hereinafter "*Guimond*"].

[10] [2002] 1 S.C.R. 405, [2002] S.C.J. No. 13 [hereinafter "*Mackin*"].

[11] *Supra*, note 8.

[12] [1998] 1 S.C.R. 493, [1998] S.C.J. No. 29 [hereinafter "*Vriend*"].

[13] *Supra*, note 2.

[14] [2003] 3 S.C.R. 3, [2003] S.C.J. No. 63 [hereinafter "*Doucet-Boudreau SCC*"]. I have distinguished throughout this paper between the Supreme Court of Canada's decision in *Doucet-Boudreau*, and those of the Nova Scotia Supreme Court and the Nova Scotia Court of Appeal.

[15] *Ontario v. 974649 Ontario Inc*. (*sub nom. R. v. 974649 Ontario Inc.*), [2001] 3 S.C.R. 575, [2001] S.C.J. No. 81 [hereinafter "*Dunedin*"]. See also the companion case of *R. v. Hynes*, [2001] 3 S.C.R. 623, [2001] S.C.J. No. 82.

[16] *Supra*, note 14.

cohesive set of principles that will ensure that a person whose Charter rights have been infringed will be granted a just and appropriate remedy in an expeditious manner. There are gaps in the law, particularly where statutory courts and administrative tribunals are concerned; these bodies may have the duty to abide by and apply the Constitution, but many do not have authority to grant a remedy that will do justice to the claimant. The courts cannot provide a complete solution, since the assignment of jurisdiction is entirely a matter for the legislatures. However, the courts can point out the problem and urge the legislatures to take up the issue in a manner that respects the division of powers among the branches of government as it has developed since the Charter was enacted.[17]

II. THE ROLE OF COURTS UNDER THE CHARTER

Chief Justice McLachlin delivered the Weir Memorial Lecture[18] in 1990, eight years after the Charter came into force.[19] She discussed the fundamental changes the Charter made to the role of Canadian courts, and how the courts might deal with these changes. She addressed the difficulties in the decision-making process that flowed from lack of precedents, the "open-textured" language of the Charter, and the need for value-based decisions. She also considered remedies, and how the courts could enforce the new range of Charter rights and freedoms. In the pre-Charter era there was generally no difficulty enforcing court orders; legal disputes were between individuals, the Crown was supreme, and the courts were seen as an independent emanation of the Crown. However, under the Charter the issues are between individuals and the state, and the concern is how the courts can ensure their orders will be enforced when they decide that legislation or state action is

---

[17] I wish to acknowledge and thank Professor Marilyn Pilkington for this suggestion, which we discussed at the Osgoode 2003 Constitutional Cases Conference on April 2, 2004. Professor Pilkington and I appeared along with Professor Kent Roach on a panel addressing the *Doucet-Boudreau* decision. I would also like to thank Professor Roach for his very helpful comments on recent trends in remedies, particularly the focus on discretion.

[18] *Supra*, note 4.

[19] All provisions of the Charter except s. 15 came into force in 1982. By virtue of s. 32(2) of the Charter, s. 15 came into force three years later, on April 17, 1985.

unconstitutional. "The answer," McLachlin C.J. said, "must be found in respect, tradition and constitutional convention."[20]

Her comments were made against the background of the American constitutional experience. Although there is no express authority for judicial review, the United States Supreme Court developed this power beginning with the landmark decision in *Marbury v. Madison*.[21] When "the Court began taking on an activist approach, particularly when [it] attempted to fashion remedies in civil rights cases, it met resistance and sometimes open defiance from lower courts, the bureaucracy and the executive."[22] The Court's school desegregation decision in *Brown v. Board of Education*[23] provides a vivid example. The bureaucracy was uncooperative, and the government failed to provide the funds needed to implement the decision. Congress, the Senate and state legislatures responded by enacting statutes that complied with the letter but not the substance of the decision, or by passing constitutional amendments. Legislators verbally attacked judges, Congress altered the Court's mandate, and presidents attempted to "stack" the Court with politically aligned appointees.

Some lower courts avoided or defied the Supreme Court's decision. At the opposite extreme, judges responded by "giving detailed, literal orders, virtually taking over the administration of schools or dictating the development of desegregated housing. The result was judge as administrator… making day to day operational decisions in the running of a school — down to what kind of tennis balls to order in one case …"[24] Although the courts ultimately prevailed, a high price was paid in delay, frustration, additional costs, strained relationships between lower courts and the Supreme Court, and hostility between the legislative and judicial branches of government. Chief Justice McLachlin concluded that the verdict on judicial administration was mixed at best, which made it an alternative that Canada should not lightly embrace.

Further, she pointed out that there are fundamental differences between the American and Canadian constitutional systems that should avoid these difficulties. First, Canada's courts have explicit authority to

---

[20] *Supra*, note 4, at 549.
[21] 1 Cranch 137, 2 L.Ed. 60 (1803).
[22] *Supra*, note 4, at 550.
[23] 347 U.S. 483 (1954), 349 U.S. 294 (1955).
[24] *Supra*, note 4, at 552-53.

review legislation and government action, and to grant remedies under section 52 of the *Constitution Act, 1982* and section 24 of the Charter. These powers were granted to the courts by the legislatures, which retained ultimate control through the legislative override in section 33 of the Charter. Another major difference is the tradition of references that permit Parliament or the legislatures to ask a court's advice on legal issues. Although the results are not binding, the Supreme Court's decisions on references have always been followed. Chief Justice McLachlin wrote that this was an example of "a long-standing tradition of communication between the executive and judicial branches"[25] of government.

However, she considered the most significant difference from the United States to be the Canadian tradition of judicial restraint and cooperation between the judiciary and the legislatures. Judicial restraint means that judges normally answer only the question that is directly before them. "Broad sweeping directives have not been part of our judicial history… [The Supreme Court] has generally refrained from activism where it was not necessary to do so."[26] This is based on the division of powers and respect among the branches of government. Professor Hogg explained that "…if a case can be decided on a narrow constitutional ground or a wide ground, the narrow ground is to be preferred… the general idea is that a proper deference to the other branches of government makes it wise for the courts, as far as possible, to frame their decisions in ways that do not intrude gratuitously on the powers of the other branches."[27] Similarly, McLachlin C.J. wrote that our courts "remain concerned not to trench too much on the legislative role." Even though the Court's function under the Charter is necessarily more activist, it maintains "the attitude of judicial restraint and respect for Parliament and the Legislatures."[28]

The underlying concern is that even though the Canadian Constitution does not establish a strict division of powers between the legislative, executive, and judicial branches of government, rules have developed over time to define the jurisdictional boundary between the executive and legislative branches on one hand, and the courts on the

---

[25] *Id.*, at 556.

[26] *Id.*, at 555.

[27] Hogg, *Constitutional Law in Canada*, looseleaf (Scarborough, Ont.: Carswell, 1997) Vol. 2, at 56-21.

[28] *Supra*, note 4, at 555.

other. Before the Charter, Canadian courts had limited authority to strike down laws that were *ultra vires* the powers of the enacting body. Today, they have jurisdiction to review legislation and government activities for compliance with a broad range of fundamental rights and freedoms. The question at the heart of the Weir Memorial Lecture is, what if the courts find a law invalid or hold that government activity is unconstitutional, and the government does nothing to rectify the situation?

To take this concern a step further, it has been argued that the constitutional balance between the courts and the legislatures has shifted; judicial appointees who are not accountable to the electorate have ventured into the domain of the legislatures by striking down laws enacted by democratically chosen representatives of the people. The significance of this issue is reflected in the number of times the Supreme Court has responded to this allegation, beginning with its earliest Charter decisions. The Court has repeatedly stated that Parliament and the legislatures specifically assigned and entrusted adjudication of Charter issues to the judiciary.[29]

For example, the majority in *Vriend*[30] held that our elected representatives made deliberate choices to require the legislative and executive branches to perform their roles in conformity with the Charter. The same representatives made the courts the trustees of Charter rights and freedoms, with explicit authority to interpret these rights, resolve disputes, and declare legislation invalid if it is unconstitutional.[31] However, courts must not "second-guess legislatures and the executives … [or] make value judgments on what they regard as the proper policy choice; this is for the other branches… respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each others' role and the role of the courts."[32]

---

[29] See, for example, *Reference re s. 94(2) of Motor Vehicle Act (British Columbia)* (*sub nom. Reference re Constitutional Question Act (British Columbia)*, [1985] 2 S.C.R. 486, [1985] S.C.J. No. 73, at 497, where Lamer J. stated that the courts had authority to review the content of laws in division of powers cases, and that our elected representatives "extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility."

[30] *Supra*, note 12. The government argued that the Court was interfering with the legislature's choice not to include sexual orientation in the provincial human rights legislation.

[31] *Id.*

[32] *Id.*, at 564-65, para. 136.

This relationship between the courts and the legislatures was described by Professor Hogg and Allison Bushell as a dialogue[33] in their 1997 study of cases where laws were struck down by the Supreme Court for Charter violations. They concluded that, "[i]n the majority of cases, the Court's ruling was followed by new legislation that accomplished the same legislative objective but with some new civil libertarian safeguards to accommodate the Court's ruling."[34] They described this pattern as a dialogue, meaning that "ss. 1 and 33 of the *Charter* … usually allow room for a legislative reaction to a Court decision, and a legislative reaction is indeed usually forthcoming."[35] Professor Hogg argues that judicial review under the Charter is not incompatible with democracy, which requires more than simple majoritarian rule. "In a flourishing democracy, the rights of individuals and minorities should be respected even against the wishes of a majority,"[36] and the public dialogue that follows a court decision usually leads to a valid law with better rights protection.

The dialogue theory has been adopted by the Supreme Court. The majority in *Vriend* held that "the *Charter* has given rise to a more dynamic interaction among the branches of governance"[37] which enhances the democratic process. "In reviewing legislative enactments and executive decisions to ensure constitutional validity, the courts speak to the legislative and executive branches … most of the legislation held not to pass constitutional muster has been followed by new legislation designed to accomplish similar objectives … By doing this, the legislature responds to the courts; hence the dialogue among the branches."[38] Each branch is accountable to the other through this process, which has enhanced democratic values.[39] Further, the judicial branch must observe

---

[33] Hogg & Bushell, *supra*, note 5.

[34] Hogg, "Dialogue and Democracy" in McAllister & Dodek, eds., *The Charter at Twenty: Law and Practice 2002* (Toronto: Ontario Bar Association, 2003) 483, at 487.

[35] *Id.*

[36] *Id.*, at 483. This point was also made in *R. v. Mills*, [1999] 3 S.C.R. 668, [1999] S.C.J. No. 68, at para. 58.

[37] *Supra*, note 12, at 565, para. 138.

[38] *Id.*

[39] *Id.*, at 566-67, paras. 139-42.

the boundaries of its institutional competence, and defer to legislatures in areas where they are better able to make policy decisions.[40]

As McLachlin C.J. stated in the Weir Memorial Lecture, the courts must necessarily be more activist under the Charter. That activism was especially evident in cases where the Supreme Court ordered governments to rectify underinclusive laws[41] and to expand health care programs.[42] It was also apparent in *Dunmore* (2001)[43] where the Court struck down legislation that repealed a law which brought historically excluded workers into the labour relations regime. In response to decisions like this, legislatures have enacted new laws that achieve the same purpose, with added safeguards to protect Charter rights as interpreted by the courts. This dialogue relationship builds upon the tradition of judicial restraint and respect for the division of powers among the branches of government. It forms the essential context within which to consider remedies in Charter cases and the jurisdiction to grant them, especially the question whether Canadian courts should issue

---

[40] *M. v. H.*, [1999] 2 S.C.R. 3, at paras. 78-79, [1999] S.C.J. No. 23. See also *R. v. Mills*, *supra*, note 36, at para. 55.

[41] The clearest example is *Vriend*, *supra*, note 12, at 567-79, paras. 145-79, where Alberta repeatedly declined to add sexual orientation to the proscribed grounds of discrimination in its comprehensive anti-discrimination law. Indeed, the Alberta government indicated that it would not pass legislation to add sexual orientation to its human rights code, since the issue would be resolved through litigation. The Supreme Court, *id.*, at 575-76, para. 171, took this as "an express invitation for the courts to read sexual orientation into the [Act]" if its exclusion violated the Charter.

[42] See *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, [1997] S.C.J. No. 86 [hereinafter "*Eldridge*"], where the province failed to provide funding for sign language interpreters for deaf persons receiving medical services. See also the British Columbia Court of Appeal decision in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)* 2002 BCCA 538, leave to appeal to S.C.C. granted (2003), 224 D.L.R. (4th) vi, [2002] B.C.J. No. 2258, where the Court ordered the province to fund a particular type of therapy for children with autism.

[43] See *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, [2001] S.C.J. No. 87, where the majority held that to make freedom to organize meaningful, s. 2(d) may impose a positive obligation on the state to extend labour relations legislation to include unprotected groups where the excluded groups establish that they could not otherwise organize effectively. The minimum requirement in this case was to give agricultural workers the statutory freedom to organize under the *Labour Relations Act, 1995*, S.O. 1995, c. 1, and the protections that were essential for the meaningful exercise of the freedom to organize.

administrative injunctions similar to those granted by American courts in civil rights cases.[44]

III. Basic Principles for Interpreting Section 24(1) and Section 52(1)

The basic principles for interpretation of section 52(1) and section 24(1) were set out in *R. v. Big M Drug Mart Ltd.*[45] and *R. v. Mills*,[46] which were decided in 1985 and 1986 respectively. Both cases involved the jurisdiction of provincial criminal courts to grant remedies for breach of Charter rights. In *Big M*, a company was charged with selling goods in violation of Sunday closing legislation. The Provincial Court judge who presided at trial held the statute was unconstitutional, partly on the basis that it violated freedom of religion. In *Mills*, the issue was whether a Provincial Court judge sitting on a preliminary inquiry was a court of competent jurisdiction for the purpose of granting a stay of proceedings to remedy the breach of the accused's right to be tried within a reasonable time.

The first significant point drawn from these decisions is found in *Mills*, where McIntyre J. commented that the jurisdiction of Canadian courts is fixed by the legislatures and Parliament, and is wholly outside the reach of the courts themselves. Since there are no jurisdictional provisions or remedies prescribed in the *Constitution Act, 1982*, McIntyre J. concluded that the Charter "was not intended to turn the Canadian legal system upside down. What is required rather is that it be fitted into the existing scheme of Canadian legal procedure. There is no need for special procedures and rules to give it full and adequate effect."[47] He added that "… s. 24(1) does not create courts of competent jurisdiction, but merely vests additional powers in courts which are already found to be competent independently of the Charter."[48]

The second basic principle that emerges from these early decisions is set out in the majority decision of Dickson J. in *Big M*. He granted a

---

[44] The appropriate roles of courts and legislatures was explored in greater detail in *Doucet-Boudreau SCC*, *supra*, note 14, a point to which I will return later in this paper.

[45] *Supra*, note 6.

[46] *Supra*, note 7.

[47] *Id.*, at 952-53.

[48] *Id.*, at 960.

declaration under section 52(1) that the Sunday closing legislation was invalid, and dismissed the charges under section 24(1). He held that while section 24(1) establishes a remedy for individuals whose Charter rights have been infringed, there is no need to resort to this provision if legislation is challenged. Section 52 "sets out the fundamental principle … that the Constitution is supreme. The undoubted corollary … is that no one can be convicted of an offence under an unconstitutional law…"[49] While the Provincial Court could not grant a declaration of invalidity under section 24(1), it could rely on the principle of supremacy of the Constitution set out in section 52(1) and dismiss charges laid under an unconstitutional law.

The third principle regarding the interpretation of these provisions is articulated in *Mills*. The accused did not challenge legislation; rather, the actions of government officials resulted in the breach of his right to trial within a reasonable time. Consequently, section 52(1) was not engaged, since there was no legislation that could be inconsistent with the Constitution of Canada, and the accused had to rely on section 24(1) for a remedy. Justice McIntyre stated that "… a court is competent if it has jurisdiction, conferred by statute, over the person and the subject matter in question and, in addition, has authority to make the order sought."[50] Therefore, if there is no challenge to legislation, section 24(1) will govern, and the test in *Mills* of jurisdiction over the person and the subject matter, as well as authority to grant the order sought, will apply.

In summary, *Big M* and *Mills* establish that the Charter does not expand jurisdiction or create remedies, and that Charter issues must be raised within the existing legal framework. Secondly, section 52(1) codifies the principle that laws which are inconsistent with the Constitution are invalid. It applies when legislation is challenged, and when an accused is charged under an invalid law. Third, section 24(1) provides personal remedies for government action that infringes Charter-protected rights. This provision must be relied upon when there is no legislation at issue. To qualify as a section 24(1) court of competent

---

[49] *Supra*, note 6, at 313. This approach to criminal charges under unconstitutional legislation was established before the Charter was enacted. See, for example, *R. v. Boggs (sub nom. R. v. Akey)*, [1981] 1 S.C.R. 49 and *R. v. Westendorp*, [1983] 1 S.C.R. 43.

[50] *Mills*, *supra*, note 7, at 960. Justice McIntyre adopted the Ontario Court of Appeal's approach in *R. v. Morgentaler* (1984), 41 C.R. (3d) 262, at 271 (Ont. C.A.). The other judges agreed. See Lamer J., at 890 and La Forest J., at 971.

jurisdiction, the decision maker must have authority over the person and the subject matter, as well as power to grant the remedy sought.

IV. THE RELATIONSHIP BETWEEN SECTION 24(1) AND SECTION 52(1)

While these early statements provided a starting point for the interpretation of section 52(1) and section 24(1), the relationship between these provisions was not clarified until the Supreme Court's decision in *Schachter*[51] was released in 1992. The Court held that a remedy under section 24(1) is not generally available in conjunction with a section 52(1) remedy.[52] The subsequent decisions in *Guimond* (1996)[53] and *Mackin* (2002)[54] established that concurrent remedies under these provisions will be available only where the government conduct amounts to bad faith or abuse of process. The Supreme Court recently commented on this line of authorities in *R. v. Demers*.[55]

Schachter was a challenge to the maternity and parental benefits available under the unemployment insurance regime. The legislation provided maternity benefits for biological mothers, and parental benefits for adoptive fathers or mothers, but no comparable benefits for biological fathers. The trial judge found the legislation violated section 15(1) equality rights, and issued a suspended declaration under section 24(1), that biological and adoptive parents were entitled to the same benefits. The legislation was amended before the appeal was heard in the Supreme Court, to provide parental benefits for biological parents on the same basis as adoptive parents, but for a reduced period of time. The sole issue was the remedies available for breach of Charter rights, particularly whether courts could rectify a constitutional defect by reading words into invalid legislation.

Chief Justice Lamer, writing for the majority, enumerated the remedies that are available under section 52(1), and articulated a method for determining which remedy to grant in a particular case; these aspects of

---

[51] *Supra*, note 8.

[52] The Court also set out guidelines for applying s. 52(1), which are addressed later in this paper.

[53] *Supra*, note 9.

[54] *Supra*, note 10.

[55] 2004 SCC 46, [2004] S.C.J. No. 43, released June 30, 2004 [hereinafter "*Demers*'].

the judgment are discussed below. He also held that a section 24(1) remedy may be available when section 52 is not engaged because the legislation is valid, but action taken under the law infringes a person's Charter rights.[56] He added that a personal remedy under section 24(1) "will rarely be available in conjunction with an action under s. 52 … Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, that will be the end of the matter. No retroactive s. 24 remedy will be available."[57] Further, if a declaration of invalidity is temporarily suspended, a section 24 remedy generally will not be granted because it would duplicate the relief flowing from the suspended declaration.

This issue was touched upon in the Supreme Court's 1996 decision in *Guimond*. The plaintiff commenced a class action seeking a declaration that a law was invalid under section 52, and damages for breach of the constitutional rights of persons who had been sentenced to imprisonment for regulatory offences under the legislation when they failed to pay fines. Justice Gonthier, writing for the unanimous Court, relied on the common law principle that the Crown is not liable for damages arising from the enactment of laws which are later found to be unconstitutional.[58] He added that "[a]lthough it cannot be said that damages can never be obtained following a declaration of constitutional invalidity, it is true, as a general rule, that an action for damages under s. 24(1) of the Charter cannot be coupled with a declaratory action for invalidity under s. 52 of the *Constitution Act, 1982*."[59] The claim for damages in this case was based on a bare allegation of constitutional invalidity, which did not warrant a departure from the general rule.

The relationship between section 24(1) and section 52(1) was addressed at greater length in the Supreme Court's decision in *Mackin*[60] released in 2002. Justice Gonthier, writing for the majority, declared

---

[56] *Supra*, note 8, at 719. See also *Eldridge*, *supra*, note 42, at 643-44, para. 20.

[57] *Schachter*, *id*., at 720.

[58] *Supra*, note 9, at para. 15. The classic statements of the common law principle are set out in *Welbridge Holdings Ltd. v. Winnipeg (City)*, [1971] S.C.R. 957 [hereinafter "*Welbridge*"] and *Central Canada Potash Co. v. Saskatchewan*, [1979] 1 S.C.R. 42 [hereinafter "*Central Canada Potash*"]. Justice Gonthier found in *Guimond* that the "claim of right" defence to tort claims applied equally to claims made under s. 24(1) of the Charter.

[59] *Guimond*, *id*., at para. 19.

[60] *Supra*, note 10.

legislation invalid on the basis that it infringed judicial independence by eliminating the office of supernumerary judges in the Provincial Courts of New Brunswick, and replacing them with a panel of retired judges. He rejected the plaintiffs' claim for damages under section 24(1) of the Charter, based on the general public law rule that "absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional."[61] Put another way, "[i]nvalidity of governmental action, without more, clearly should not be a basis for liability for harm caused by the action."[62]

Justice Gonthier relied on *Guimond* for the proposition that since the Charter was enacted, a plaintiff could theoretically seek compensatory and punitive damages under section 24(1) of the Charter.[63] However, the common law doctrine of limited immunity created a balance between constitutional rights and effective government. He concluded that laws must be given their full force and effect until they are declared invalid, and damages may be awarded only if government conduct under such laws is clearly wrong, in bad faith, or an abuse of power.[64] While he could not completely rule out the possibility of damages being awarded following a declaration of invalidity, he held that as a general matter "an action for damages brought under s. 24(1) of the Charter cannot be combined with an action for a declaration of invalidity based on s. 52 of the *Constitution Act, 1982*."[65]

There was no evidence to suggest that when the government eliminated the office of supernumerary judge, it "acted negligently, in bad faith or by abusing its powers,"[66] or that it "displayed negligence, bad faith or wilful blindness with respect to its constitutional

---

[61] *Id.*, at para. 78, citing *Welbridge* and *Central Canada Potash*, both *supra*, note 58.

[62] *Mackin*, *id.*, citing Davis, *Administrative Law Treatise*, vol. 3 (1958) at 487. Justice Gonthier also relied on an administrative law text by Dussault & Borgeat, *Administrative Law: A Treatise*, 2d ed. (Toronto: Carswell, 1990) Vol. 5, at 177, which states that a legislature "cannot be held liable for anything it does in exercising its legislative powers. The law is the source of duty [and] it is hard to imagine that [a legislature] can as the lawmaker be held accountable for harm caused to an individual following the enactment of legislation."

[63] *Mackin*, *id.*, at para. 79.

[64] *Id.*, citing *Crown Trust Co. v. Ontario* (1986), 26 D.L.R. (4th) 41 (Ont. Div. Ct.).

[65] *Mackin*, *id.*, at para. 81.

[66] *Id.*, at para. 82.

obligations…"[67] The legislation came into force more than two years before the Supreme Court's decision in the *Provincial Court Judges Reference*[68] substantially changed the law on institutional independence of the judiciary. The failure of the Minister of Justice to refer the Bill[69] to a legislative Committee, as he had promised, had "no probative value as to whether … the legislation was enacted wrongly, for ulterior motives or with knowledge of its unconstitutionality."[70] Consequently, the claimants were not entitled to damages under section 24(1) in addition to a declaration of invalidity under section 52(1).

The Supreme Court commented on this line of authorities in its June 2004 decision in *Demers*.[71] The Court held that the regime established in Part XX.1 of the *Criminal Code*[72] for dealing with accused persons found unfit to stand trial violated the section 7 *Charter* rights of persons who were permanently unfit, since they would continue to be subject to the criminal process until they either became fit for trial or the Crown failed to establish a *prima facie* case against them. The law was overly broad since it restricted the liberty of accused persons even if there was no evidence that their capacity would be recovered or that they posed a significant threat to public safety.[73]

The Court held that the appropriate remedy was a declaration of invalidity under section 52(1), suspended for 12 months.[74] They found that under *Schachter*, no retroactive remedy is available under section 24 when legislation is declared unconstitutional and immediately struck. Further, when a section 52 declaration of invalidity is temporarily suspended, a section 24 remedy is not available since it would give the declaration retroactive effect. If the remedy is reading down or reading

---

[67] *Id.*

[68] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, [1997] S.C.J. No. 75 [hereinafter "*Provincial Judges Reference*"].

[69] Bill 7, *Act to Amend the Provincial Court Act*, S.N.B. 1995, c. 6.

[70] *Supra*, note 10, at para. 83.

[71] *Supra*, note 55. Justices Iacobucci and Bastarache wrote on behalf of eight judges. Justice LeBel wrote separate reasons concurring with the majority's decision on s. 7 of the Charter, but reaching a different result on the division of powers issue.

[72] R.S.C. 1985, c. C-46. The provisions that were challenged were ss. 672.33, 672.54 and 672.81(1) of the *Code*.

[73] *Demers, supra*, note 55, at paras. 41-43, 52, 55.

[74] *Id.*, at para. 56.

in, a section 24 remedy would duplicate the section 52 relief.[75] The Court found that *Schachter* "precludes courts from granting a s. 24(1) individual remedy during the period of suspended invalidity."[76]

It observed that while this rule has generally been applied in cases involving pecuniary liability, the underlying rationale is that so long as the government acts in good faith and without abusing its power, it will not be held liable when a law is subsequently found to be unconstitutional. However, the Court added that "[a]lthough the rule in *Schachter* … precludes courts from combining retroactive remedies under s. 24(1) with s. 52 remedies, it does not stop courts from awarding *prospective* remedies under s. 24(1) in conjunction with s. 52 remedies."[77] Therefore, if the challenged provisions were not amended within 12 months, permanently unfit accused persons who did not pose a significant threat to public safety could apply for a stay of proceedings under section 24(1) to quash the criminal charges and release them from indefinite criminal proceedings.

To summarize, under *Schachter*, *Guimond* and *Mackin*, a section 24(1) remedy will rarely be available in conjunction with a remedy under section 52(1). The underlying rationale is the common law principle that governments that act in good faith will not be held liable under a statute that is later found to be unconstitutional. A section 24(1) remedy will only be available in conjunction with a ruling that a law is invalid under section 52(1) if the legislature's conduct when it passed the law amounted to negligence, bad faith or an abuse of power, was clearly wrong, or displayed an unreasonable attitude or an ulterior motive. Failure to anticipate changes in the legal understanding of a constitutional right will not suffice, nor will failure to fulfil a promise to refer a proposed law to Committee.[78] However, according to *Demers*, this line of authorities does not prevent a court from granting a prospective remedy under section 24(1) in conjunction with a section 52 remedy, provided that the section 24 remedy takes effect after any suspension of the section 52 declaration has expired.

---

[75] *Id*., at para. 61.

[76] *Id*., at para. 62.

[77] *Id*., at para. 63.

[78] See McAllister, "*Mackin*: Of Sterile Rules and Real People" (2003), 21 Sup. Ct. L. Rev. (2d) 339, for a more complete discussion of these principles.

V. GUIDELINES FOR GRANTING REMEDIES UNDER SECTION 52(1)

1. *Schachter*

Having covered the basic principles for interpreting section 24(1) and section 52(1) and the relationship between these provisions, I now turn to the guidelines that have been established by the Supreme Court for granting remedies, beginning with section 52(1). As noted above, these principles were initially set out in *Schachter*,[79] and they were further developed in *Vriend*.[80] In *Schachter*, Lamer C.J. held that the remedies available under section 52(1) include striking down, with or without a temporary suspension of the declaration of invalidity, reading down or reading in.[81] The two guiding principles for determining the appropriate remedy are respect for the role of the legislators and respect for the purposes of the Charter.[82]

Chief Justice Lamer also established a method for choosing a section 52 remedy. The first step is to define the extent of the inconsistency. If there is a broadly defined inconsistency, the court may have to strike down the entire statute, whereas a narrowly defined inconsistency may be remedied by striking down, severing, or reading in. The second step is for the court to choose between severance and reading in, taking into account the following factors: remedial precision; the need to avoid interfering with the legislative objective; whether the changes in the law would be so substantial that it would not be safe to assume the legislature would have passed it; and the significance or longstanding nature of the remaining portion. The third step in choosing a remedy is to decide whether to temporarily suspend the declaration of invalidity to give the legislature an opportunity to address the problem. This is appropriate where striking down creates a danger to the public or threatens the rule of law, and where striking down an underinclusive law would mean that no one would receive benefits.

When this method was applied in *Schachter*, Lamer C.J. concluded that the underinclusive maternity and parental benefits regime violated

---

79 *Supra*, note 8.
80 *Supra*, note 12.
81 *Supra*, note 8, at 695.
82 *Id.*, at 700. See also *R. v. Sharpe*, [2001] 1 S.C.R. 45, [2001] S.C.J. No. 3, at para. 114.

the claimant's section 15 right to equal benefit of the law. Striking down the regime would deprive everyone of benefits. The legislative objective of parental benefits could not be ascertained from the text, nor had it been clarified through section 1 evidence. Both factors weighed against reading in parental benefits for biological fathers. In addition, reading in a much larger group than those already covered would have substantially intruded upon the legislature's function. Therefore, the majority concluded that the appropriate remedy was to declare the legislation invalid, and temporarily suspend the declaration.

2. *Vriend*

The central conclusion in *Schachter* was that reading in constituted a legitimate remedy under section 52. In *Vriend*[83] the law on reading in was more finely tuned. Although *Schachter* established that one of the twin guiding principles for determining the remedy was respect for the role of the legislators, the majority in *Vriend* held that reading in may be appropriate even if the legislature has made a deliberate choice to the contrary. The difficulty was that Alberta persistently refused to add sexual orientation to the prohibited grounds of discrimination in its human rights legislation, which meant that the claimants were challenging an intentional legislative omission. One of the judges in the Alberta Court of Appeal[84] held that reading in was never appropriate where a legislative omission was a deliberate choice, and that the appropriate remedy if the law was invalid was to leave it to the government to remedy the constitutional defect.

The majority in the Supreme Court did not agree. Justice Iacobucci, writing for the majority with respect to the appropriate remedy,[85] read sexual orientation into the Act effective immediately. This remedy would enhance the purpose of the Act as a whole, which was to recognize and protect the inherent dignity and inalienable rights of individuals by eliminating discriminatory practices.[86] Further, there was no risk of

---

[83] *Supra*, note 12.

[84] (1996), 181 A.R. 16, 132 D.L.R. (4th) 595 (C.A.).

[85] Justices Cory and Iacobucci released joint reasons for the majority, in which Cory J. dealt with standing, the application of the Charter, and the breach of s. 15(1), while Iacobucci J. dealt with s. 1, the appropriate remedy, and the disposition.

[86] *Supra*, note 12, at 569, para. 150.

harmful unintended consequences to private parties or public funds, and the mechanisms for dealing with discrimination were already in place and did not require significant adjustment.

Justice Iacobucci acknowledged that whenever a statute is found unconstitutional, there will be some interference with legislative intent, whether the court reads provisions into the law or strikes it down.[87] The closest a court can come to respecting legislative intent is to determine what the legislature would likely have done if it had known that its measures were unconstitutional. The legislature's choice of means will be treated as a bar to reading in only where the means are so central to the legislative objective, and so integral to the statutory scheme, that the legislature would not have enacted the law without them.[88] The exclusion of sexual orientation was not so central to the aims of the legislature, or so integral to the statutory scheme, that it would rather have sacrificed the Act than include sexual orientation.

Indeed, the Alberta government responded to a recommendation to add sexual orientation to the Act by stating that this issue would be dealt with by the courts, which Iacobucci J. took as an invitation for the courts to read sexual orientation into the Act if its exclusion violated the Charter. He also noted that "a democracy requires that legislators take into account the interests of majorities and minorities alike… Where the interests of a minority have been denied consideration, especially where that group has historically been the target of prejudice and discrimination … judicial intervention is warranted to correct a democratic process that has acted improperly."[89] Further, even when a court reads provisions into an unconstitutional law, the legislature has options. It can pass a new law which it believes will withstand Charter challenge, or it may engage "the ultimate 'parliamentary safeguard' "[90] by exercising the legislative override in section 33 of the Charter.

---

[87] *Id.*, at 574, para. 166.

[88] *Id.*, at 574-75, para. 167.

[89] *Id.*, at 577, para. 176. Note that, as discussed above, the majority in *Vriend* specifically adopted the Hogg and Bushell dialogue theory of Charter development.

[90] *Id.*, at 578, para. 178.

3. Summary

In summary, *Schachter* established that the remedies available under section 52(1) include striking down — with or without a temporary suspension — reading down or reading in. The guiding principles are respect for the role of the legislature and for the purposes of the Charter. The three steps in identifying the section 52 remedy are: (1) define the extent of the inconsistency; (2) choose between severance and reading in, taking into account remedial precision, non-interference with the legislative objective, how substantially the legislation would change, and the significance of the remaining portion; and (3) decide whether to temporarily suspend the declaration of invalidity, depending on whether striking down would create a public danger, threaten the rule of law, or deprive everyone of underinclusive benefits. *Vriend* added that a court may correct an unconstitutional legislative omission by reading in an excluded group, even if the legislature explicitly refused to do so.

VI. Jurisdiction to Grant Remedies Under Section 52(1)

1. Statutory Criminal Courts

The issue of jurisdiction to grant remedies under section 52(1) has most often arisen when the decision maker was a provincial criminal court or an administrative tribunal, since they have no inherent jurisdiction and their authority depends entirely upon statute. The starting point is *Big M* and *Mills,* both of which involved provincial criminal courts. In *Big M*,[91] a company was charged with selling goods in violation of Sunday closing legislation. The Supreme Court held that while a Provincial Court judge presiding at trial could not grant a declaration of invalidity under section 24(1), it could rely on the principle of constitutional supremacy in section 52(1) to dismiss charges since no one can be convicted under an invalid law. Indeed, provincial courts already had authority to determine whether the law under which a charge was laid was *ultra vires*.[92] Justice Dickson added that "[i]f a court or tribunal finds any statute to be inconsistent with the Constitution, the overriding

---

[91] *Supra*, note 6.

[92] *Id.*, at 313-14. This principle is set out in *R. v. Westendorp*, *supra*, note 49.

effect of … s. 52(1), is to give the Court not only the power, but the duty, to regard the inconsistent statute, to the extent of the inconsistency, as being no longer 'of force or effect'."[93]

In *Mills*,[94] the question was whether a Provincial Court judge presiding at a preliminary inquiry could order a stay of proceedings to remedy a breach of the accused's section 11(b) Charter right to be tried within a reasonable time. The Charter breach resulted from the actions of government officials, and section 52 did not apply since there was no challenge to legislation. All members of the Court agreed that a preliminary inquiry is not a court of competent jurisdiction within the meaning of section 24(1), since that judge's sole function is to decide whether there is enough evidence to commit the accused for trial.[95] The judge has no authority to acquit, convict, impose a penalty, grant a remedy, or determine whether an accused's Charter rights have been infringed.[96] Therefore, the issue of delay had to be heard by the trial judge.[97]

2. Introduction to Administrative Tribunals

The more difficult issue is the jurisdiction of administrative tribunals to determine Charter challenges. Both courts and administrative tribunals are bound by the Constitution, and must conduct their proceedings in

---

[93] *Big M*, *id.* at 353; see also *R. v. Jones*, [1986] 2 S.C.R. 284, [1986] S.C.J. No. 56, at 307, *per* La Forest J. to the effect that someone who believes a law is unconstitutional need not bring an action to challenge the law, but can simply wait to be charged under the statute and raise the Charter violation in defence.

[94] *Supra*, note 7.

[95] *Id.*, *per* Lamer J., at 889 and La Forest J., at 970.

[96] *Id.*, *per* McIntyre J., at 954. This decision was affirmed in *R. v. Rahey*, [1987] 1 S.C.R. 588, [1987] S.C.J. No. 23 [hereinafter "*Rahey*"], and *R. v. Smith*, [1989] 2 S.C.R. 1120, [1989] S.C.J. No. 119 [hereinafter "*Smith*"], both of which involved complaints of delay. See also *R. v. Seaboyer (sub nom. R. v. Gayme)*, [1991] 2 S.C.R. 577, [1991] S.C.J. No. 62 [hereinafter "*Seaboyer*"], in which the majority held that preliminary inquiry judges do not have jurisdiction to determine the constitutional validity of legislation.

[97] This aspect of the decision is explored below under jurisdiction to grant s. 24(1) remedies. Despite this apparently limited constitutional authority, the Court emphasized in its 1997 decision in the *Provincial Judges Reference*, *supra*, note 68, at 85-87, paras. 127-29, that provincial criminal courts play a critical role in enforcing the provisions and protecting the values of the Constitution. They enforce s. 52, exercise remedial powers under s. 24, police the division of powers, and make decisions on the rights of aboriginal peoples under s. 35(1) of the *Constitution Act, 1982*. This increased role flows in part from a legislative policy of granting greater jurisdiction to provincial courts.

accordance with the requirements of the Charter. However, the Supreme Court held in one of its earliest Charter decisions — *Dolphin Delivery* (1986)[98] — that a court order is not a form of government action which is subject to Charter scrutiny. The Court held three years later in *Slaight Communications Inc. v. Davidson* (1989)[99] that an administrative tribunal's orders are not subject to the same treatment as court orders. The majority[100] held that the Charter applied to the order of an adjudicator because he was appointed under federal legislation, and all of his powers were derived from statute. Legislation that confers an imprecise discretion must not be interpreted so as to allow Charter rights to be infringed. Consequently, administrative bodies that have statutory authority to exercise such discretion exceed their jurisdiction if they make orders that infringe Charter rights.[101]

The more complex question was whether administrative tribunals could determine Charter challenges to their enabling legislation. The answer required a careful balancing of the practical advantages and disadvantages of decision makers other than courts determining Charter issues. Before the Charter was enacted, tribunals had authority to construe their enabling legislation, and to determine other questions of law that were necessary to dispose of all matters in issue in cases properly before them.[102] This included authority to decide whether a matter was within federal or provincial legislative competence, and therefore within the tribunal's constitutional mandate.[103] Charter challenges to enabling legislation could be considered a natural extension of this function.

---

[98] See *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580*, [1986] 2 S.C.R. 573, [1986] S.C.J. No. 75.

[99] [1989] 1 S.C.R. 1038, [1989] S.C.J. No. 45 [hereinafter "*Slaight*"].

[100] Justice Lamer wrote for the majority with respect to the positive order requiring the employer to write a letter of recommendation containing specific facts. He held this order infringed the employer's rights under s. 2(b), but was justified under s. 1. Chief Justice Dickson wrote the majority reasons on the negative order prohibiting the employer from responding to inquiries other than with the letter, which he found also infringed s. 2(b) but was saved by s. 1.

[101] *Supra*, note 99, at 1077-78. Although the adjudicator's order in *Slaight* limited the employer's freedom of expression, the limitation constituted a reasonable limit under s. 1. See *Slaight*, *id.*, at 1080-81.

[102] See, for example, *Taylor & Son Ltd. v. Barnett*, [1953] 1 All E.R. 843 (C.A.), and *McLeod v. Egan*, [1975] 1 S.C.R. 517.

[103] See, for example, *Windsor Airline Limousine Service Ltd. v. Ontario Taxi Assn., Local 1688*, (1980), 30 O.R. (2d) 732 (Div. Ct.).

Some bodies, like labour tribunals, had considerable expertise with adjudicative functions, and were well-placed to compile the factual record and analyze competing policy concerns. Further, people who were required to appear before tribunals would have their constitutional rights respected without the expense and delay of separate court proceedings, and administrative decision makers would be forced to consider Charter values.

The disadvantages of having administrative tribunals decide in constitutional questions included the fact that these bodies had features of both the executive and judicial branches of government,[104] as well as varying levels of legal expertise and functions that ranged from purely administrative to quasi-judicial in nature. There were procedural problems that could have resulted in inadequate evidence, and there were no formal mechanisms for involving the Attorneys General. Most importantly, administrative tribunals were conceived as specialist bodies to relieve over-burdened courts and provide accessible, inexpensive, and swift justice.[105] Requiring them to decide Charter challenges could potentially "go against the raison d'être of administrative tribunals — specialization, simple rules of evidence and procedure, speedy decisions."[106]

3. The 1990-1991 Trilogy

Ultimately, the question was whether justice would be better served if tribunals made the initial determination of constitutional challenges.[107]

---

[104] Indeed, the American approach was to entirely exclude administrative bodies from this type of decision-making. However, our system of government is not based on a rigid separation of powers like the United States Constitution, and nothing in the Canadian Constitution apart from ss. 96 to 100 of the *Constitution Act, 1867* precludes legislators from conferring judicial decision-making authority on bodies other than courts. See *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, [1990] S.C.J. No. 124, at 599-605 [S.C.R.] [hereinafter "*Douglas College*"], and *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, [1991] S.C.J. No. 42, at 15 [S.C.R.] [hereinafter "*Cuddy Chicks*"].

[105] See McAllister, "Administrative Tribunals and the *Charter*: A Tale of Form Conquering Substance" [1992] L.S.U.C. Special Lectures 131, at 131-32, for a more complete discussion of these issues.

[106] *Douglas College*, *supra*, note 104, at 602.

[107] *Cuddy Chicks*, *supra*, note 104, at 18.

This question was explored in a series of Supreme Court decisions beginning in 1990 with *Douglas/Kwantlen Faculty Assn. v. Douglas College*,[108] followed six months later in the 1991 companion cases of *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*[109] and *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*.[110] In both *Douglas College* and *Cuddy Chicks*, the legislation explicitly conferred jurisdiction on the tribunals to decide questions of law, whereas in *Tétreault-Gadoury* there was no such explicit authority. Justice La Forest wrote the majority reasons in these cases.

In *Douglas College* the question was whether an arbitrator could decide if a mandatory retirement clause in a collective agreement violated section 15 of the Charter. The arbitrator had authority to interpret and apply the provisions of the collective agreement, and the labour legislation gave him power to interpret and apply laws intended to regulate the employment relationship. Justice La Forest held that a tribunal performing its statutory function is "entitled not only to construe the relevant legislation but to determine whether that legislation was validly enacted."[111] He reasoned that a tribunal must respect the principle of constitutional supremacy set out in section 52(1); if it finds that a law it is supposed to apply is invalid, "it is bound to treat it as having no force or effect."[112] However, if the claimant seeks a remedy under section 24(1), the *Mills* rule applies, and the tribunal must have statutory authority over the subject matter and the parties, as well as authority to grant the remedy sought.[113] Justice La Forest concluded that the arbitrator had jurisdiction over the parties, authority to deal with the Charter challenge since the statute conferred power to interpret and apply laws intended to regulate employment relationships which included the Charter,[114] and power to grant a remedy like reinstatement if the mandatory retirement clause was unconstitutional.[115]

---

[108] *Douglas College*, *supra*, note 104.
[109] *Cuddy Chicks*, *supra*, note 104.
[110] [1991] 2 S.C.R. 22, [1991] S.C.J. No. 41 [hereinafter "*Tétreault-Gadoury*"].
[111] *Douglas College*, *supra*, note 104, at 594.
[112] *Id.*
[113] *Id.*, at 594-95.
[114] *Id.*, at 596.
[115] *Id.*, at 598.

Six months later in *Cuddy Chicks* a union applied to the Labour Relations Board for certification of agricultural workers. Since this group was excluded from the legislative regime, the union also challenged the exclusion as a Charter violation. The majority held that a tribunal must have jurisdiction that is expressly or impliedly conferred by statute over the parties, the subject matter, and the remedy sought in order to entertain constitutional challenges. The subject matter was a Charter challenge to a provision of the Board's enabling legislation, and the remedy of certification could be granted only if the statutory exclusion was held to be unconstitutional. Authority to apply the Charter had to be found in the Board's enabling legislation.

Justice La Forest adopted the proposition in *Douglas College* that "… an administrative tribunal which has been conferred the power to interpret law holds a concomitant power to determine whether that law is constitutionally valid."[116] He added that "the relevant inquiry is … whether the legislature intended to confer on the tribunal the power to interpret and apply the Charter."[117] Since the Board had express statutory jurisdiction to determine all questions of fact or law in any matter before it, and any legal questions relating to its jurisdiction, it also had authority to determine the constitutional validity of the challenged provision, and to grant a remedy which required it to treat the provision as having no force or effect.[118] However, in both *Douglas College* and *Cuddy Chicks*, La Forest J. cautioned that no curial deference will be extended to decisions made by administrative tribunals regarding constitutional challenges. In *Cuddy Chicks* he added that a tribunal cannot issue a formal declaration of invalidity; its ruling on a Charter issue is not binding and only applies to the matter in which it is raised.[119]

The companion case decided at the same time as *Cuddy Chicks* was *Tétreault-Gadoury*,[120] which differed in that the legislation established three administrative bodies, and did not explicitly confer authority to decide questions of law on two of these tribunals. The Canada Employment and Immigration Commission denied the claimant's application for unemployment insurance benefits since the legislation disqualified

---

[116] *Cuddy Chicks*, *supra*, note 104, at 13-14.
[117] *Id.*, at 14-15.
[118] *Id.*, at 18-19.
[119] *Id.*, at 15.
[120] *Supra*, note 110.

persons over the age of 65.[121] The claimant appealed to a Board of Referees, arguing that the statutory disqualification violated her section 15 equality rights. When the Board upheld the Commission's decision and declined to rule on the Charter issue, the claimant bypassed the second level administrative appeal to an Umpire, and went directly to judicial review in the Federal Court of Appeal.

As in the previous cases, section 24(1) was not engaged since the claimant challenged the constitutional validity of the tribunal's enabling legislation and sought relief under section 52(1). Justice La Forest reiterated that jurisdiction to decide constitutional issues must be found in the tribunal's constituent statute. While its express mandate is normally the most important factor, other factors must be considered if the legislature has not spoken on the Board's authority to decide legal issues.[122] There were two factors which indicated that Parliament intended the Umpire, and not the Board, to have jurisdiction to decide Charter challenges. First, the Umpire had jurisdiction to decide any question of law or fact necessary for the disposition of an appeal.[123] Second, the *Regulations*[124] contemplated an Umpire finding a provision of the Act unconstitutional. Failure to confer similar powers on the Board was unlikely to have been a legislative oversight.[125]

Justice La Forest also examined the statutory scheme and compared the three administrative bodies. The Commission, at one end of the spectrum, was responsible for making all initial decisions on entitlement. Given the volume of claims, it could not have discharged its function if it also had to determine Charter issues. Umpires, at the opposite end, were Federal Court judges with the specialized legal training and experience necessary to adjudicate constitutional challenges. Umpires had an adjudicative function, and were in a better position to hear and resolve constitutional issues without creating delay in the administrative system than the Commission, whose primary function was fact finding.[126]

---

[121] *Unemployment Insurance Act, 1971*, S.C. 1970-71-72, c. 48, s. 96 [now *Employment Insurance Act*, S.C. 1996, c. 23].

[122] *Supra*, note 110, at 34.

[123] This authority was found in s. 96 of the Act [now s. 112].

[124] *Unemployment Insurance Regulations*, C.R.C., c. 1576, s. 70(4) [now *Employment Insurance Regulations*, SOR/96-332].

[125] *Supra*, note 110, at 33.

[126] *Id.*, at 36-37.

Boards of Referees fell somewhere in between. Even though they were capable of dealing with Charter issues, this could not outweigh Parliament's intent to confer this authority on the Umpire. The practical advantages of having a tribunal make an initial ruling on Charter issues were preserved because the Umpire was a relatively accessible administrative body outside the court system.[127]

4. The *Cooper* Decision (1996)

The *Tétreault-Gadoury* approach was refined in *Cooper v. Canada (Human Rights Commission)*.[128] The question was whether the Canadian Human Rights Commission, or a tribunal appointed by the Commission to investigate a complaint, had authority to determine constitutional challenges to its constituent legislation — the *Canadian Human Rights Act* (the CHRA).[129] The Commission had authority to administer the CHRA, and to deal with complaints of discriminatory practices. When it received a complaint, the Commission would appoint an investigator to look into the matter and report findings. It could then appoint a tribunal to inquire into the complaint and grant a remedy.[130] Decisions of the Commission and the tribunal were subject to judicial review.

The complainants in *Cooper* were airline pilots who challenged the mandatory retirement clause in their collective agreement on the basis of age discrimination. However, the CHRA provided that termination of employment at the normal retirement age for similar positions did not constitute a discriminatory practice. The investigator recommended dismissal of the complaints, and the Commission decided that an inquiry was not warranted.[131] Since the CHRA did not expressly confer a general power to decide questions of law on either the Commission or a

---

[127] *Id.*, at 35-36.

[128] *Supra*, note 2.

[129] R.S.C. 1985, c. H-6.

[130] *Supra*, note 2, at para. 49.

[131] *Id.*, at para. 44. Justice La Forest rejected the argument that the Commission had a limited power to consider the constitutional validity of its enabling legislation as a screening function. He held that "[t]here is no middle ground;" either the challenged provision was valid or it was not.

tribunal appointed by the Commission, the question became whether Parliament implicitly granted this jurisdiction.[132]

Justice La Forest held that it was appropriate to take practical matters into account in making this determination. For example, the tribunal's composition and structure, its expertise, and its procedure and appeal routes provide an insight into the mandate which the legislature conferred on the administrative tribunal. Further, "there may be pragmatic and functional policy concerns that argue for or against the tribunal having constitutional competence, though such concerns can never supplant the intention of the legislature."[133] Justice La Forest concluded that nothing in the scheme of the Act implied that either the Commission or the tribunal had the authority to entertain constitutional challenges to the CHRA.

The Commission was not an adjudicative body; it fulfilled a screening function analogous to that of a judge at a preliminary inquiry. It received complaints, assessed the sufficiency of the evidence, and determined whether an inquiry by a tribunal was warranted, but not whether the complaint was made out.[134] The Commission's explicit authority to interpret and apply its enabling statute did not imply that it had jurisdiction to decide constitutional challenges, since every administrative body has this power. Further, its authority to determine whether it had jurisdiction over a complaint was conceptually different from reviewing jurisdictional provisions for compliance with the Charter. As La Forest J. put it, "[t]he former represents an application of Parliament's intent as reflected in the Act while the latter involves ignoring that intent."[135]

He concluded that Parliament did not intend that the Commission would have power to consider questions of law. Further, there were limited practical advantages to having it address challenges to the CHRA. The Commission was not an adjudicative body with special expertise in questions of law or procedural mechanisms like rules of evidence. Its function of dealing with human rights complaints would

---

[132] As in the previous decisions, there was no need to determine whether the Commission or tribunal constituted a court of competent jurisdiction within the meaning of s. 24(1) of the Charter.

[133] *Supra*, note 2, at para. 47.

[134] *Id.*, at para. 53.

[135] *Id.*, at para. 57.

have been disrupted if it had to address complex constitutional issues.[136] In any event, its decision on a Charter issue would probably be reviewed in the Federal Court, and it would have been more efficient to commence court proceedings where the issue could be fully canvassed and resolved.

A tribunal appointed by the Commission had authority to inquire into a complaint and determine if it was substantiated, which was primarily a fact-finding inquiry. It was implicit in the scheme of the Act that the tribunal had a general power to deal with questions of law, including interpretation of the CHRA and other statutes, division of powers questions, the validity of a ground of discrimination under the CHRA, and possibly Charter arguments on the constitutional validity of the remedies available in a particular case.[137] However, as a practical matter the tribunal did not have special legal expertise or formal evidentiary rules, its decisions were subject to judicial review, and the time required to dispose of constitutional issues would defeat its primary purpose of efficient and timely adjudication of human rights complaints.[138] Justice La Forest concluded that "… while a tribunal may have jurisdiction to consider general legal and constitutional questions, logic demands that it has no ability to question the constitutional validity of a limiting provision of the Act."[139]

5. The Rules Restated in *Martin*

The decision in *Cooper* appeared to substantially narrow the range of tribunals that may have had implied jurisdiction to determine Charter challenges to their enabling legislation under the 1990-1991 trilogy. The practical considerations taken into account in *Cooper*, particularly whether the tribunal had an adjudicative function or specialized legal expertise, would have undermined the authority of most administrative decision makers to hear Charter challenges. Further, the distinction drawn between general legal questions and constitutional issues was

---

[136] *Id.*, at para. 61.
[137] *Id.*, at para. 64.
[138] *Id.*, at para. 65.
[139] *Id.*, at para. 66.

inconsistent with the decisions in *Douglas College*, *Cuddy Chicks*, and *Tétreault-Gadoury*.

Ultimately, the Supreme Court restated the law in *Nova Scotia (Workers' Compensation Board) v. Martin*,[140] released in October 2003. The claimants challenged provisions that excluded chronic pain syndrome from the provincial general workers' compensation system, and replaced it with a four-week work conditioning program after which no benefits were available.[141] The Workers' Compensation Board ("the Board") made the initial decisions denying entitlement, and the Workers' Compensation Appeals Tribunal ("the Appeal Tribunal") heard the appeals. The claimants argued before the Appeal Tribunal that the legislation infringed their equality rights. The Appeal Tribunal affirmed that it had jurisdiction to apply the Charter, and held that the challenged provisions were unconstitutional.[142]

Justice Gonthier, writing for the unanimous Court, held that these provisions violated section 15 of the Charter, and could not be saved under section 1. He also reappraised and restated the rules concerning the jurisdiction of administrative tribunals to apply the Charter, holding that "[a]dministrative tribunals which have jurisdiction — whether explicit or implied — to decide questions of law arising under a legislative provision are presumed to have concomitant jurisdiction to decide the constitutional validity of that provision. This presumption may only be rebutted by showing that the legislature clearly intended to exclude Charter issues from the tribunal's authority over questions of law."[143] He also explicitly stated that the majority reasons in *Cooper* could no longer be relied upon to the extent that they were inconsistent with the approach in *Martin*.[144]

---

[140] *Supra*, note 2.

[141] The legislation was the *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, as amended by S.N.S. 1999, c. 1 ("the Act") and the *Functional Restoration (Multi-Faceted Pain Services) Program Regulations*, N.S. Reg. 57/96 ("the Regulations").

[142] The Nova Scotia Court of Appeal reversed the decision, holding that the Appeals Tribunal did not have jurisdiction to consider the constitutional validity of the Act, and that the challenged provisions did not violate s. 15(1) of the Charter. See (2000), 188 N.S.R. (2d) 330 (C.A.).

[143] *Supra*, note 2, at para. 3.

[144] *Id.* See also para. 47. Justice Gonthier commented that the same result would have been reached in *Cooper* under the restated rules in *Martin*, based on the finding that the

The legislation at issue in *Martin* expressly conferred authority on the Appeal Tribunal to decide questions of law, and this explicit jurisdiction was presumed to include authority to consider the constitutional validity of its constituent legislation. The presumption was not rebutted; there was no clear implication in the Act that the legislature intended to exclude Charter issues from the Appeal Tribunal's authority to decide questions of law.[145]

Justice Gonthier restated the policy reasons set out in the 1990-1991 trilogy for permitting administrative tribunals to determine constitutional challenges to their enabling statutes. The most important is that the Constitution is the supreme law of Canada, and inconsistent laws are invalid. The invalidity arises by operation of section 52(1), not from a declaration of a court. In principle, a provision that is inconsistent with the Constitution is invalid from the moment it is enacted. Thus, "by virtue of s. 52(1), the question of constitutional validity inheres in every legislative enactment. Courts may not apply invalid laws, and the same obligation applies to every level and branch of government, including the administrative organs of the state."[146]

The second reason that tribunals should hear Charter challenges is that they have expertise in their field, including a thorough understanding of the legislative scheme, the practical constraints and the consequences of a remedy, which makes their record and findings valuable to a reviewing court.[147] Third, allowing administrative tribunals to decide Charter issues does not undermine the role of the courts as final arbiters of constitutional validity since these decisions are subject to judicial review on a correctness standard.[148] Fourth, tribunals have limited authority to grant constitutional remedies; they cannot make general declarations of invalidity and their findings that provisions are invalid do not bind future decision makers. A binding precedent that legislation is invalid can only be obtained through a declaration from a court.[149]

Commission had no express or implied authority to decide questions of law arising under the challenged provision.

[145] *Id.*, at para. 4.

[146] *Id.*, at para. 28.

[147] *Id.*, at para. 30, citing *Cuddy Chicks*, *supra*, note 104, at 16-17, to the effect that a tribunal can analyze competing policy concerns and compile a cogent record.

[148] *Martin*, *id.*, at para. 31, citing *Cuddy Chicks*, *id.*, at 17.

[149] *Martin*, *id.*

Since tribunals are creatures of statute, their jurisdiction to entertain Charter issues must be found in their enabling legislation, and it must extend to the subject matter, the parties, and the remedy sought.[150] The central question is whether the tribunal has jurisdiction to rule on the constitutional validity of the challenged provision.[151] To answer this question the court applies the presumption, based on the principle of constitutional supremacy, that all legal decisions must take into account the supreme law of the land. Generally, an administrative tribunal that has the power to interpret a law has concomitant power to determine whether that law is constitutionally valid.[152] The corollary is that people are entitled to assert their constitutional rights in the most accessible forum, without commencing parallel court proceedings.[153] Many tribunals have exclusive initial jurisdiction over a matter, and forcing Charter issues into the courts would divide the proceedings, and make them longer and more expensive.[154]

The issue is not whether the legislature intended that the tribunal apply the Charter, and suggestions to that effect in previous cases such as *Cooper* must be ignored. The legislative intent approach is artificial since many statutes were enacted before the Charter came into force, and it is not compatible with the principle that the question of constitutional validity inheres in every law by virtue of section 52(1) of the *Constitution Act, 1867*.[155]

The correct question is "whether the empowering legislation implicitly or explicitly grants to the tribunal the jurisdiction to interpret or decide *any* question of law. If it does, then the tribunal will be presumed to have the concomitant jurisdiction to interpret or decide that question in light of the Charter, unless the legislator has removed that power from the tribunal… In other words, the power to decide a question of

---

[150] *Id.*, at para. 33, citing *Douglas College*, *supra*, note 104, at 595; *Cuddy Chicks*, *supra*, note 104, at 14-15.

[151] *Martin*, *id.*, at para. 34, citing *Douglas College*, *id.*, at 596; *Cuddy Chicks*, *id.*, at 15.

[152] *Martin*, *id.*, at para. 28. See also para. 34, citing *Cuddy Chicks*, *id.*, at 13; and *Cooper*, *supra*, note 2, at para. 46.

[153] *Martin*, *id.*, at para. 29, citing *Douglas College*, *supra*, note 104, at 603-604.

[154] *Martin*, *id.*, citing McLachlin C.J. in dissent in *Cooper*, *supra*, note 2, at para. 70; and the majority in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, [1995] S.C.J. No. 59, to the effect that more people's rights are determined by tribunals than courts, and all tribunals that decide legal issues must conform with the Charter.

[155] *Martin*, *id.*, at paras. 35, 48.

law is the power to decide by applying only valid laws."[156] There need not be a broad grant of jurisdiction to decide all questions of law that arise before a tribunal. It is sufficient if the legislature confers power "to decide questions of law arising under the challenged provision, and that the constitutional question relate[s] to that provision."[157] As Gonthier J. put it, the "Charter is not invoked as a separate subject matter; rather, it is a controlling norm in decisions over matters within the tribunal's jurisdiction."[158]

If there is no explicit grant, the court must decide "whether the legislator intended to confer upon the tribunal implied jurisdiction to decide questions of law arising under the challenged provision."[159] The court must look at the statute as a whole and consider relevant factors which include: the tribunal's statutory mandate, and whether the ability to decide questions of law is necessary to fulfill this mandate; the interaction of the tribunal with other parts of the administrative system; whether the tribunal is adjudicative in nature; and practical considerations that include the tribunal's capacity to consider questions of law.

However, practical considerations cannot override a clear implication in the statute, particularly where lack of authority to decide questions of law would undermine the tribunal's capacity to fulfill its mandate. If the tribunal has implied jurisdiction to decide questions of law arising under a legislative provision, it also has jurisdiction to determine the constitutional validity of that provision.[160] Further, there is no distinction between "general" and "limited" questions of law; an administrative tribunal either will or will not have power to decide legal

---

[156] *Id.*, at para. 36 (emphasis in original). See also para. 48 where the test is summarized.

[157] *Id.*, at paras. 37, 40.

[158] *Id.*, at para. 39. Justice Gonthier noted that in *Douglas College*, *supra*, note 104, the Court found that an arbitration board could apply the Charter to the collective agreement because the *Labour Code* [R.S.B.C. 1979, c. 212; now *Labour Relations Code*, R.S.B.C. 1996, c. 244] conferred authority to interpret and apply any Act that regulated employment relationships, and the Charter was such an Act. Justice Gonthier held the better rationale was that the board had jurisdiction to decide questions of law under the collective agreement, and the agreement constituted "law" within the meaning of s. 52(1) of the *Constitution Act*, *1982*.

[159] *Martin*, *id.*, at paras. 41, 48.

[160] *Id.*

issues.[161] If a tribunal does have this power, it can go beyond the enabling statute and decide issues of common law or statutory interpretation and Charter challenges that arise in cases properly before it.[162] A tribunal need not be adjudicative in nature to find implicit jurisdiction.[163]

Once the presumption has been raised that a tribunal has jurisdiction to decide Charter issues, the burden is on the party challenging the tribunal's jurisdiction to establish that the presumption has been rebutted. The presumption "may only be rebutted by an explicit withdrawal of authority to decide constitutional questions or by a clear implication to the same effect, arising from the statute itself rather than from external considerations. The question … is whether an examination of the statutory provisions clearly leads to the conclusion that the legislature intended to exclude the Charter, or … a category of questions of law encompassing the Charter, from the scope of the questions of law to be addressed by the tribunal."[164]

For example, if a statute expressly confers jurisdiction on another administrative body to consider Charter issues or complex legal questions that are difficult or time-consuming, and it provides a procedure that allows these issues to be efficiently directed to that body, this could clearly imply that the legislature did not intend for the tribunal to decide constitutional questions. Further, a tribunal's practical capacity may be relevant in determining the scope of its implicit authority to decide legal questions, but these concerns alone generally will not be enough to rebut the presumption.[165] Justice Gonthier declined to express an opinion on the constitutional validity of a provision that creates procedural barriers

---

[161] *Id.*, at para. 47; Gonthier J. took exception to the suggestion in *Cooper*, *supra*, note 2, that a distinction between general and limited questions of law is relevant to a tribunal's jurisdiction to decide Charter questions.

[162] *Martin*, *id.*, at para. 45; see, for example, *McLeod v. Egan*, *supra*, note 102; *Taylor & Son Ltd. v. Barnett*, *supra*, note 102; *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)* (*sub nom. A.C.T.R.A. v. Canadian Broadcasting Corp.*), [1995] 1 S.C.R. 157, [1995] S.C.J. No. 4.

[163] *Martin*, *id.*, at paras. 47, 57.

[164] *Id.*, at paras. 42, 48.

[165] *Id.*, at paras. 43, 48. This is another departure from the *Cooper* decision. Justice Gonthier held that lower court cases which suggest otherwise were erroneous. This included *Bell Canada v. Canada (Human Rights Commission)*, [2001] 2 F.C. 392, [2002] F.C.J. No. 1747 (T.D.), rev'd on other grounds, [2001] 3 F.C. 481 (C.A.); and *Canada (Minister of Citizenship & Immigration) v. Reynolds* (1997), 139 F.T.R. 315, as well as the Court of Appeal's decision in this case.

for claimants asserting their rights in a timely and effective manner; for example, by removing Charter jurisdiction of a tribunal without providing an effective alternative forum.[166]

When he applied this test in *Martin*, Gonthier J. concluded that the Appeal Tribunal had jurisdiction to decide Charter issues since it had explicit statutory authority to determine questions of law. The Act provided that the Appeal Tribunal could "confirm, vary or reverse the decision of a hearing officer,"[167] exercising the authority conferred on the Board to "determine all questions of fact and law." Other provisions confirmed that the legislature intended to give the Tribunal authority to decide legal issues. These included a right of appeal to the Court of Appeal "on any question of law,"[168] which suggested that the Appeal Tribunal could make an initial determination on these questions. The presumption of authority was not rebutted since there was no clear implication in the Act that the legislature intended to exclude the Charter from the Appeal Tribunal's authority.

Even if there had been no express grant of authority, Gonthier J. found the Appeal Tribunal had implied power to decide questions of law. First, this authority was necessary for the Tribunal to effectively fulfill its mandate. Inability to decide such questions would have seriously impeded its work and threatened access to a forum that could decide all aspects of an injured worker's case. This implied jurisdiction extended to other questions of statutory interpretation and common law.[169]

Second, the Appeal Tribunal was adjudicative in nature and fully capable of deciding Charter issues. It was under the supervision of the Minister of Justice, and independent of the Board, which was supervised by the Minister of Labour. The Appeal Tribunal established its own rules of procedure, and could consider all relevant evidence and extend time limits. Its members had the powers, privileges, and immunities of a

---

[166] *Martin*, *id.*, at para. 44.

[167] Section 252(1) of the Act provided that the Appeal Tribunal "may confirm, vary or reverse the decision of a hearing officer" exercising the authority conferred on the Board by s. 185(1) of the Act to "determine all questions of fact and law arising pursuant to this Part." Section 185(1) was almost identical to the provision at issue in *Cuddy Chicks.*

[168] Section 256(1).

[169] *Supra*, note 2, at para. 52.

commissioner appointed under the *Public Inquiries Act*,[170] and all appeal commissioners were lawyers.[171] However, Gonthier J. emphasized that a legislature can express its intention in a statutory scheme to give a non-adjudicative body authority to decide questions of law;[172] "the adjudicative or non-adjudicative character of a tribunal is not dispositive."[173]

Third, the Attorney General could intervene in any proceedings raising constitutional questions,[174] which relieved private parties and administrative agencies of the burden of defending legislation.[175] Fourth, the backlog of cases at the Appeal Tribunal was a practical consideration that had little weight in the face of the clear legislative intent to confer power to decide questions of law. There was no suggestion that multiple Charter challenges caused or contributed to the backlog. Further, permitting the Appeal Tribunal to apply the Charter gave courts the benefit of a full record established by a specialized tribunal, and permitted workers to have their Charter rights recognized relatively quickly in an accessible and inexpensive forum.[176]

The Court concluded that the presumption that the Appeals Tribunal had jurisdiction to apply the Charter was not rebutted by anything in the Act. Provisions that permitted the Board of Directors to review appeals raising issues of law and general policy did not undermine the tribunal's authority to decide Charter challenges. The Directors' power to suspend an appeal for one year to permit them to adopt a policy response to issues was not sufficient to clearly rebut the presumption.[177]

The provision of the Act that conferred explicit jurisdiction on the Appeal Tribunal to decide questions of law[178] also applied to the Workers' Compensation Board, which suggested that it had the same jurisdiction without respect to Charter challenges. The Board submitted that it did not have the resources or expertise to deal with numerous Charter cases, and that this would compromise its efficiency and timeliness in

---

[170] R.S.N.S. 1989, c. 372.
[171] *Supra*, note 2, at para. 53.
[172] *Id.*, at para. 54.
[173] *Id.*, at para. 57.
[174] This authority was under the *Constitutional Questions Act*, R.S.N.S. 1989, c. 89.
[175] *Supra*, note 2, at para. 55, citing *Cuddy Chicks*, *supra*, note 104, at 17-18.
[176] *Martin*, *id.*, at para. 56.
[177] *Id.*, at paras. 58-61.
[178] Section 185(1).

handling a large volume of compensation cases. However, these practical considerations could not override the clear expression of legislative intent in the statute. The Act also permitted the Board to refer complex issues to the Appeal Tribunal or to the courts as a matter of administrative convenience. Justice Gonthier held that since this approach preserved an administrative process which avoided parallel proceedings in the courts, the Board would not infringe its duty to consider the constitutional validity of the Act by referring cases to the Appeal Tribunal.[179]

6. *Martin* Applied in the *Paul* Decision

The test in *Martin* was applied in the companion case of *Paul v. British Columbia (Forest Appeals Commission)*.[180] The issue was whether the provincial Forest Appeals Commission ("the Commission") had jurisdiction to determine aboriginal rights issues that were raised in defence to charges of cutting Crown timber in violation of the British Columbia *Forest Practices Code* ("the Code").[181] Mr. Paul was a registered Indian who argued that he had an aboriginal right to cut timber to use for renovating his home. The District Manager and the Administrative Review Panel found against him. He then appealed to the Commission, which held that it had jurisdiction to decide the aboriginal rights issue. Paul challenged this decision, partly on the basis that a provincial tribunal would be encroaching upon a matter within exclusive federal competence.

Justice Bastarache, for the unanimous Court, held that British Columbia had legislative authority to confer jurisdiction on an administrative tribunal to consider questions of aboriginal rights in carrying out its provincial mandate. The Code was a valid provincial law in relation to the development, conservation and management of forestry resources. It applied to Indians so long as it only had incidental effects upon the "core of Indianness" (which is a matter within federal jurisdiction), and

---

[179] *Martin*, *supra*, note 2, at paras. 62-65. There was no need for a conclusion that either the Board or the Appeal Tribunal lacked jurisdiction to apply the Charter. Further, there was no need to decide whether the Appeal Tribunal was a court of competent jurisdiction for the purposes of s. 24(1) of the Charter, since the remedy sought was pursuant to s. 52(1) of the *Constitution Act, 1867*.

[180] [2003] 2 S.C.R. 585 [hereinafter "*Paul*"].

[181] *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159, s. 96.

it did not contravene section 35 of the *Constitution Act, 1982*.[182] The doctrine of interjurisdictional immunity did not apply since the Commission's function was adjudicative and there was no provincial legislation that indirectly regulated federal matters.[183]

The Court rejected arguments that remedial powers are the key to determining jurisdiction,[184] since *Tétreault-Gadoury*[185] recognized "that the power to find a statutory provision of no effect, by virtue of s. 52(1) … is distinct from the remedial power to invoke s. 24(1) of the Charter. … In other words, an inferior court's remedial powers are not determinative of its jurisdiction to hear and determine constitutional issues."[186] In any event, section 24(1) was not engaged in this case, since section 35 is not part of the Charter, and decisions dealing with section 24(1) courts do not apply outside that unique context.[187]

The Court concluded that administrative tribunals must take into account all applicable federal and provincial legal rules in applying their constituent legislation; otherwise, they would have grave difficulty fulfilling their responsibilities.[188] A board could not respect the constitutional division of powers if it was unable to take the boundary between provincial and federal authority into account.[189] Further, both federal and provincial governments must respect section 35 aboriginal rights unless an infringement of the right can be justified. Therefore, the provinces must be able to confer authority on their administrative tribunals to take aboriginal rights into account.[190]

---

[182] *Supra*, note 180, at paras. 11, 14.

[183] *Id.* See paras. 15 and 19 where the Court held that if the Code provisions indirectly regulated matters within federal competence by trenching upon the core of Indianness, the doctrine of interjurisdictional immunity would have required that the Code be read down so it would not apply to Indians, citing *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, [1998] S.C.J. No. 84, at para. 81; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, [1997] S.C.J. No. 108, at para. 181; and *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism & Culture)*, [2002] 2 S.C.R. 146, [2002] S.C.J. No. 33, at para. 75.

[184] This argument was based on *Dunedin* and *Hynes*, both *supra*, note 15.

[185] *Supra*, note 110, at 31.

[186] *Paul*, *supra*, note 180, at para. 40.

[187] *Id.*

[188] *Id.*, at para. 23.

[189] *Id.* Indeed, many tribunals routinely make decisions regarding matters within the competence of the other legislature, pursuant to an express statutory mandate or in the course of a preliminary determination.

[190] *Id.*, at paras. 24-25.

The effect of this ruling was that Indians charged under the Code would initially raise their aboriginal rights defences before the Commission instead of the superior court.[191] The Commission would apply constitutional or federal laws in the same way as a provincial court when it incidentally determines a question of aboriginal rights.[192] This outcome was consistent with the principle that individuals should be able to enforce their constitutionally protected rights as early as possible in the administrative process.[193]

Justice Bastarache also held that the procedural right to raise a defence of aboriginal rights at first instance does not go to the core of Indianness, and therefore does not intrude upon federal jurisdiction.[194] The Commission's decisions differ from both extinguishment of a right and legislation relating to Indians or aboriginal rights.[195] First, adjudicators do not create, amend, or extinguish aboriginal rights; they make findings on the basis of the evidence about the existence or extinguishment of the right.[196] Second, the Commission cannot make a declaration as to the validity of a law. Its constitutional decisions are not legally binding, they do not become authoritative common law over time, and they are subject to review on a correctness standard.[197]

The Court found there was no basis upon which to distinguish the power to determine section 35 questions from the power to decide any other constitutional question. Aboriginal rights are not reserved to superior courts, they do not constitute a federal enclave, nor are they more complex or difficult than other issues. Tribunals have fact finding processes, and their less stringent evidentiary rules may be more conducive to fully airing an aboriginal rights issue.[198] Further, Bastarache J. was not convinced that there was either a rationale or a process that would

---

[191] *Id.*, at paras. 6, 18.

[192] *Id.*, at para. 21, citing *Ontario (Attorney General) v. Pembina Exploration Canada Ltd.*, [1989] 1 S.C.R. 206, [1989] S.C.J. No. 9.

[193] *Paul*, *id.*, at para. 32.

[194] *Id.*, at para. 33.

[195] *Id.*, at para. 28.

[196] *Id.*, at para. 29.

[197] *Id.*, at para. 31, citing *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322, [1998] S.C.J. No. 27, at para. 40; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, [1995] S.C.J. No. 1, at para. 23; *Douglas College*, *supra*, note 104.

[198] *Paul*, *id.*, at paras. 36-38.

appropriately distinguish between simple aboriginal law questions that could be resolved by administrative tribunals, and more complex issues that should be decided by courts.[199]

The Court adopted the approach set out in *Martin* as the correct method for determining whether an administrative tribunal has jurisdiction to decide constitutional questions.[200] In particular, "the principle of constitutional supremacy … leads to a presumption that all legal decisions will take into account the supreme law of the land [and that] the power to decide a question of law is the power to decide by applying only valid laws."[201] Justice Bastarache summarized the test as follows:

> The essential question is whether the empowering legislation implicitly or explicitly grants to the tribunal the jurisdiction to interpret or decide any question of law. If it does, the tribunal will be presumed to have the concomitant jurisdiction to interpret or decide that question in light of s. 35 or any other relevant constitutional provision. Practical considerations will generally not suffice to rebut the presumption that arises from authority to decide questions of law. This is not to say, however, that practical considerations cannot be taken into consideration in determining … the most appropriate way of handling a particular dispute where more than one option is available.[202]

The Code permitted a party to "make submissions as to facts, law and jurisdiction," and to appeal on a question of law. Under the test in *Martin*, this meant that the Commission had the power to decide questions of law, including aboriginal rights that arose incidentally to forestry matters, and nothing in the Code clearly rebutted this presumption.[203] Therefore, the Commission had jurisdiction to hear and decide Paul's defence of his aboriginal right to harvest logs.[204] Alternatively, Paul could apply to the Superior Court for a declaration of his aboriginal rights.

---

[199] *Id.*, at para. 37.
[200] *Id.*, at paras. 8, 39.
[201] *Id.*, at para. 39, citing *Martin*, *supra*, note 2, at para. 36.
[202] *Paul*, *id.* at para. 39.
[203] *Id.*, at para. 41. See s. 131(8) and s. 141(1) of the Code.
[204] *Id.*, at paras. 8, 43-45. Even if the Administrative Review Panel had no jurisdiction to address such questions, the Commission was not restricted to issues considered by the Panel.

7. Summary

Most questions with respect to jurisdiction under section 52(1) of the *Constitution Act, 1982* have arisen in the context of statutory criminal courts and administrative tribunals, since their authority is drawn entirely from statute. The starting point is *Big M*, in which the Supreme Court held that even though a Provincial Court judge presiding at trial cannot declare a law invalid, it can dismiss charges if it finds that the law under which a charge was laid is unconstitutional.

Like courts, administrative tribunals are bound by the Constitution, and must conduct their proceedings in accordance with the requirements of the Charter. Unlike courts, their orders are subject to Charter scrutiny; administrative bodies exercising imprecise statutory discretion exceed their jurisdiction if they make orders that infringe Charter rights. Further, an administrative tribunal may have authority to entertain Charter challenges to its enabling legislation. The Supreme Court initially addressed this question in the 1990-1991 trilogy of *Douglas College*, *Cuddy Chicks*, and *Tétreault-Gadoury*, in which an arbitrator, a labour board, and an *Unemployment Insurance Act* Umpire were found to have jurisdiction to determine Charter challenges.

These cases established the foundation for the current guidelines, particularly the principle that a tribunal need not be a court of competent jurisdiction within the meaning of section 24(1) to have authority to decide Charter challenges. A tribunal with jurisdiction over the parties and the subject matter, and authority to grant the remedy sought, has authority under section 52(1) to determine Charter challenges to its constituent legislation. In order to have jurisdiction over the subject matter of a Charter challenge, the tribunal must have express or implied authority to determine questions of law. However, the tribunal cannot grant a declaration of invalidity, and no curial deference will be extended to its constitutional decisions.

The issue was reconsidered in 1996 in *Cooper*, where the majority held that neither the Canadian Human Rights Commission nor a Tribunal appointed by the Commission had authority to decide Charter challenges. The majority held that the central question was whether the legislature intended that the tribunal could apply the Charter, which was ascertained by focusing on practical considerations like the adjudicative nature of the tribunal, and by distinguishing between types of legal questions. *Cooper* appeared to be at odds with the 1990-1991 trilogy,

which turned on authority to decide legal issues. Further, the practical considerations that were taken into account would have excluded most administrative decision makers.

The guidelines crystallized in the *Martin* decision in 2003, where both the Workers' Compensation Commission and the Appeal Tribunal were found to have explicit jurisdiction to decide Charter issues. *Martin* overruled *Cooper* to the extent of the inconsistency between the two judgments. Administrative tribunals with either explicit or implied jurisdiction to interpret or decide any question of law under a legislative provision, are now presumed to have the concomitant jurisdiction to decide the constitutional validity of that provision. The suggestions in *Cooper* that the issue is whether the legislature intended the tribunal to apply the Charter must be ignored.

If there is no explicit grant of authority to decide legal questions, the court must decide whether the legislature intended to confer implied jurisdiction by looking to the statute as a whole. Relevant factors include the tribunal's statutory mandate, and whether authority to decide questions of law is necessary to effectively fulfill this mandate; the interaction of the tribunal with other elements of the administrative system; whether the tribunal is adjudicative in nature; and practical considerations including its capacity to consider legal questions.

However, practical considerations cannot override a clear implication in the statute itself, and the adjudicative nature of the tribunal is not determinative. If a tribunal has authority to decide questions of law, it can go beyond the enabling statute and decide issues of common law, statutory interpretation, and Charter challenges. The burden is on the party challenging the tribunal's jurisdiction to establish that the presumption has been rebutted by showing that the legislature clearly intended to exclude Charter issues from the questions of law to be addressed.

The decision in *Paul* builds upon *Martin* by making it clear that tribunals with authority to consider legal questions must take into account all applicable federal and provincial legal rules in applying their constituent legislation. Thus, the Forest Appeals Commission had authority to hear and determine the defence of aboriginal rights.

VII. GUIDELINES FOR GRANTING REMEDIES UNDER SECTION 24(1)

1. Introduction

Guidelines for granting remedies under section 24(1) have developed more slowly than those for section 52(1) remedies. The starting point is the Supreme Court's decision in *Mills* (1986).[205] As noted above, the issue was whether a preliminary inquiry court could grant a stay of proceedings to remedy the breach of the accused's right to be tried within a reasonable time. Justice McIntyre held that the Charter did not create courts of competent jurisdiction; section 24(1) simply vests additional powers in courts which are already competent independent of the Charter, because they have jurisdiction over the person and the subject matter, and authority to make the order sought.[206]

Justice McIntyre also considered the remedies available under section 24(1), which simply provides that the court may issue such remedy as it considers "appropriate and just in the circumstances." He stated that it "is difficult to imagine language which could give the court a wider and less fettered discretion. It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion."[207] For example, no court can say that a stay of proceedings will always be the appropriate remedy in a particular type of case; "the circumstances will be infinitely variable from case to case and the remedy will vary with the circumstances."[208] The section 24(1) remedy will also depend on the statutory or inherent jurisdiction of the court or tribunal.

Since remedies are both discretionary and variable, it has taken some time to develop guidelines for the interpretation and application of section 24(1). The most helpful Supreme Court decision is *Doucet-Boudreau*,[209] released in November of 2003. The Court also considered

---

[205] *Supra*, note 7.
[206] *Id.*, at 960. See also Lamer J., at 890 and La Forest J., at 971.
[207] *Id.*, at 965.
[208] *Id.*, at 965-66.
[209] *Supra*, note 14.

this issue in *Dunedin*,[210] which was released two years earlier in December 2001.

2. *Dunedin*

The issue in *Dunedin* was whether a justice of the peace, sitting as a trial judge under the *Provincial Offences Act*, had authority to order costs against the Crown for breaching the accused's Charter right to full disclosure of evidence.[211] Chief Justice McLachlin, writing for the unanimous Court, began with the *Mills* criteria that a section 24(1) court must have jurisdiction over the person and the subject matter, and authority to grant the remedy sought. She added four related propositions that inform the interpretation of section 24(1).

First, the provision must be given a broad and purposive, or large and liberal interpretation. Indeed, "the language of this provision appears to confer the widest possible discretion on a court to craft remedies for violations of *Charter* rights… [that] should not be frustrated by a '[n]arrow and technical' reading …"[212] Second, section 24(1) "must be interpreted in a manner that provides a full, effective and meaningful remedy for Charter violations."[213] Third, section 24(1) and section 24(2) must be read harmoniously together, and the phrase "court of competent jurisdiction" must be interpreted in a way that produces just and workable results under both provisions.[214] Fourth, these provisions should not be read so broadly that they confer authority that courts and tribunals were never intended to have.[215] As stated in *Mills*, the jurisdiction of courts and tribunals is fixed by the legislatures, not by judges.

Chief Justice McLachlin added that the "framers of the *Charter* did not intend to erase the constitutional distinctions between different types of courts, nor to intrude on legislative powers more than necessary to

---

[210] *Supra*, note 15.

[211] *Provincial Offences Act*, R.S.O. 1990, c. P.33. See also the companion case of *Hynes*, *supra*, note 15, which applied the test set out in *Dunedin*. The majority held that a judge sitting at a preliminary inquiry did not have jurisdiction under s. 24(2) to exclude statements obtained in breach of the accused's Charter rights.

[212] *Supra*, note 15, at para. 18, citing *Law Society (Upper Canada) v. Skapinker*, [1984] 1 S.C.R. 357, at 366.

[213] *Dunedin*, *id*., at para. 19.

[214] *Id.*, at para. 21.

[215] *Id.*, at para. 22.

achieve the aims of the *Charter*."[216] A court interpreting section 24 must "achieve a broad, purposive interpretation that facilitates direct access to appropriate and just *Charter* remedies … while respecting the structure and practice of the existing court system and the exclusive role of Parliament and the legislatures in prescribing the jurisdiction of courts and tribunals."[217] She then articulated a "functional and structural" approach for determining if a statutory court or administrative tribunal has jurisdiction to grant the remedy sought, which is addressed below.

3. *Doucet-Boudreau*

(a) The Facts

The most helpful case on the application of section 24(1), *Doucet-Boudreau*,[218] involved a Nova Scotia Supreme Court Judge who ordered the provincial government to use its best efforts to provide secondary level French language programs and educational facilities by specified dates.[219] The sole issue before the Supreme Court of Canada was whether he had jurisdiction under section 24(1) of the Charter to hear periodic reports on the government's progress toward fulfilling this order. The reporting requirement raised the very issues addressed in McLachlin C.J.'s Weir Memorial Lecture. In the course of dealing with these issues, the Court developed guidelines for granting section 24(1) remedies.

The claimants were Francophone parents[220] who had lobbied the government throughout the 1990s to enforce their Charter-protected French language education rights. In 1996, the government created a French school board and announced that new French schools would be built. However, construction never began, and the projects were officially put on hold in 1999 when the province was undergoing financial

---

[216] *Id.*, at para. 23.

[217] *Id.*, at para. 24.

[218] *Supra*, note 14.

[219] The trial judge's decision is reported at *Doucet-Boudreau v. Nova Scotia (Department of Education)* (2000), 185 N.S.R. (2d) 246 (S.C.), released June 19, 2000 [hereinafter "*Doucet-Boudreau NSSC*"].

[220] A Federation that monitored educational rights of Acadian and Francophone students in Nova Scotia was a co-applicant in this case.

difficulties, and there was divided public opinion regarding the need for French schools and programs. The litigation was commenced in 1998, as the last resort of frustrated Francophone parents who were watching the assimilation of their children in violation of their section 23 Charter rights that had been entrenched, but not enforced, for 16 years.[221]

In his decision released in June 2000, LeBlanc J. found that the real issue between the parties was the date on which French language programs and facilities would be implemented.[222] The government did not challenge entitlement; "[i]t simply delayed fulfilling its obligations despite reports that assimilation was reaching critical levels."[223] It failed to give sufficient priority to the fact that Charter rights were at stake,[224] and that the purpose of minority language education is to help prevent further assimilation and preserve French language and culture.

The trial judge disposed of the application in a three-part order, and did not reserve judgment on any issue.[225] First, he made a declaration that the claimants' section 23 rights had been breached, since the province did not fulfill its obligation to take positive steps to provide substantive equality in education for the children of the linguistic minority where numbers warranted.[226] Second, he held that they were entitled to publicly funded secondary level French language programs and educational facilities without unreasonable delay,[227] and issued a mandatory injunction ordering the government to use its best efforts to comply by specified dates, which ranged from September 2000 to September 2001 depending on location.[228]

The third component of the order was a requirement that the parties appear before the trial judge periodically to report on the progress of the government's efforts to comply with his "best efforts" order. This

---

[221] Justice Freeman commented on this issue in dissent at para. 75 of the Court of Appeal's decision: *Doucet-Boudreau v. Nova Scotia (Department of Education)* (2001), 194 N.S.R. (2d) 323 (C.A.), released June 26, 2001 [hereinafter "*Doucet-Boudreau CA*"].

[222] *Doucet-Boudreau NSSC*, *supra*, note 219, at paras. 197-98; *Doucet-Boudreau SCC*, *supra*, note 14, at para. 5.

[223] *Doucet-Boudreau NSSC*, *id.*, at para. 199.

[224] *Id.*, at para. 204.

[225] The trial judge addressed costs, *id.*, at para. 245, by requesting the respondents' submissions within 30 days.

[226] *Id.*, at paras. 220-22.

[227] *Id.*, at paras. 194-95.

[228] *Id.*, at paras. 231-43.

provision was added in response to the claimants' request that the trial judge retain jurisdiction for the period required for compliance, in order to avoid becoming *functus officio*.[229] The final order simply stated that "[t]he Court shall retain jurisdiction to hear reports from the Respondents respecting the Respondents' compliance with this Order. The Respondents shall report to this Court on … such … date as the Court may determine."[230] The trial judge scheduled the first appearance for the month after the decision was released and stated "at that time the respondents will report on the status of their efforts."[231] The order did not contain any details regarding the form and content of the reports, the evidence required or the procedure that would be followed. Since there were no fresh proceedings to enforce the order, there were no established parameters under the rules of practice.

Nonetheless, five reporting sessions were held over the nine-month period following the decision. Justice LeBlanc required an official from the Department of Education to appear at each session, and to file an affidavit that described the government's progress in complying with his mandatory order. Cross-examinations were permitted, as were rebuttal affidavits. The matters covered included the type of construction of the school facilities, whether new facilities would be built or existing buildings would be renovated, and details such as the type of ventilation system that would be used.[232] The order was similar in many ways to the structural injunctions issued by American courts, and considered by McLachlin C.J. in the Weir Memorial Lecture. The majority in the Court of Appeal described the trial judge's role as that of a referee or administrator, while the dissenting judge[233] called it "mediation on an impressive scale…"[234] in which the judge made no orders, but presided while the parties worked out compromises. The province objected throughout that the trial judge had no jurisdiction since he was *functus*

---

[229] In the initial application, the claimants requested that the Court maintain its jurisdiction during any period for compliance with a Court order. At the end of the hearing, the claimants made the broader request that the trial judge retain jurisdiction in order to avoid becoming *functus officio*.

[230] *Doucet-Boudreau CA*, *supra*, note 221, at para. 8, *per* Flinn J.A. for the majority.

[231] *Doucet-Boudreau NSSC*, *supra*, note 219, at para. 245.

[232] *Doucet-Boudreau CA*, *supra*, note 221, at para. 16.

[233] Justice Freeman.

[234] *Doucet-Boudreau CA*, *supra*, note 221, at para. 78.

officio,[235] while LeBlanc J. maintained that he had authority to require reports pursuant to section 24(1) of the Charter.[236]

The reporting order achieved what the Court set out to do; it ensured prompt compliance to reduce the risk that minority language education rights would be forever lost because of additional procedural delays.[237] For example, after a nine-month delay, the province called for tenders eight days before the first reporting session, and ensured that a construction schedule was in place for the hearing.[238] By the time the last meeting was held in March of 2001, there had been enough progress that the main issue under consideration was whether any more reporting sessions were needed.[239] Most deadlines were met, and when the Court of Appeal rendered its decision in June 2001, the final school building required to fulfill the order was being renovated.

(b) The Court of Appeal

The government appealed the reporting requirement, challenging the authority of LeBlanc J. to remain seized of the matter after he rendered judgment. It argued that under the common law doctrine of *functus officio*, the trial judge had no jurisdiction to retain authority over the implementation of his own order, to rehear the matter, or to continue hearings. Further, the Nova Scotia Supreme Court could not reopen a final decision because the power to rehear was vested in the Court of Appeal under the *Judicature Act*.[240] The government also argued that if the authority to retain jurisdiction did exist, the courts ought to exercise judicial restraint and avoid making orders that require ongoing

---

[235] *Id.*, at para. 15.

[236] *Id.*, at para. 25.

[237] *Doucet-Boudreau SCC*, *supra*, note 14, at para. 67.

[238] *Id.*, at para. 127.

[239] *Doucet-Boudreau CA*, *supra*, note 221, at paras. 78-79. The trial judge scheduled one more meeting for August 2001, which was not held since the Court of Appeal's decision was released in June 2001.

[240] In dissent, Freeman J.A. described the government's argument, *id*., at paras. 65-67. The *functus officio* rule is cited in *Chandler v. Assn. of Architects (Alberta)* (1989), 62 D.L.R. (4th) 577, at 595 (S.C.C.); and in *Grillas v. Canada (Minister of Manpower & Immigration)* (1971), 23 D.L.R. (3d) 1, at 10 (S.C.C.). It derives from the English Court of Appeal decision *In Re St. Nazaire Co.* (1879), 12 Ch. D. 88.

supervision.[241] The main concern appeared to be that the reporting process had no form or focus when compared to an application to enforce a court order. As for the Charter, the government argued that when trial judges grant remedies under section 24(1), they cannot enlarge their jurisdiction by holding reporting hearings. The claimants asserted that these hearings were within the authority of a superior court to craft a remedy under section 24(1).[242]

It is some measure of the amount of disagreement over the reporting order that it was struck down by the Court of Appeal by a two-one majority, but was reinstated by a five-four majority in the Supreme Court of Canada. The two appellate courts, and the majority and dissenting judges within each court, reached diametrically opposed conclusions. A total of six appeal judges[243] supported the reporting order while six[244] opposed it. The competing approaches are illustrated in the majority and dissenting reasons in the Court of Appeal.

Justice Flinn, writing for the majority, held that once trial judges decide the issues between the parties and make orders that dispose of all matters under reserve, they do not have jurisdiction to remain seized of the case in order to determine whether the government complies with their decisions.[245] He found that "the Charter does not extend the jurisdiction of these courts from a procedural point of view … Ordering a remedy is one thing. Providing for its enforcement is quite another …"[246] Justice Flinn agreed with McLachlin C.J.'s comments in the Weir Memorial Lecture, that American constitutional practices should not be

---

[241] *Doucet-Boudreau CA*, *id.*, at para. 71.

[242] The Court of Appeal's decision was rendered in June 2001, and pre-dated the *Dunedin* decision, which was released in December 2001.

[243] One judge in the NSCA, plus five judges in the SCC.

[244] Two judges in the NSCA, plus four judges in the SCC.

[245] *Doucet-Boudreau CA*, *supra*, note 221, at paras. 19-22, 29-36. The cases cited in support of the order, and rejected by Flinn J.A., were: *Reference re Language Rights Under S. 23 of Manitoba Act*, [1985] 1 S.C.R. 721; *Société des Acadiens du Nouveau-Brunswick Inc. v. Minority Language School Board No. 50* (1983), 51 N.B.R. (2d) 219; *Marchand v. Simcoe County Board of Education* (1986), 29 D.L.R. (4th) 596 (Ont. H.C.); *Marchand v. Simcoe County Board of Education (No. 2)* (1987), 44 D.L.R. (4th) 171 (Ont. H.C.); *Lavoie v. Nova Scotia (Attorney General)* (1988), 47 D.L.R. (4th) 586 (N.S.T.D.); and *Assoc. des parents francophones (Columbie-Britannique) v. British Columbia* (1996), 139 D.L.R. (4th) 356 (B.C.S.C.), and (1999), 167 D.L.R. (4th) 534 (B.C.S.C.).

[246] *Doucet-Boudreau CA*, *id*., at para. 39, relying on *Mills*, *supra*, note 7.

lightly adopted in Canada,[247] and that our courts should avoid confrontation with governments through judicial restraint and mutual deference and cooperation.[248] He concluded that Canadian courts should "assume that government will comply with Charter remedies which the courts order."[249] The reporting hearings were unnecessary since there was no evidence that the government would fail to comply, and the claimants could have commenced fresh proceedings to enforce the order.[250]

Justice Freeman, in dissent, wrote that the reporting order was "an exemplary remedy"[251] and "a pragmatic approach to getting the job done expeditiously,"[252] virtually on time, and with minimum inconvenience and unnecessary cost. It contained a "creative blending"[253] of a declaration of Charter rights, a mandatory injunction, and a mediation mechanism that gave life to section 23 Charter rights.[254] The trial judge's order was not final, and he was not *functus*, until supervision of the mandatory injunction was complete. He "was entitled to keep his judgment from becoming final, and to remain seized with jurisdiction, by the simple expedient of declaring that he was doing so."[255] Justice Freeman rejected the argument that courts should not make orders requiring ongoing supervision, since parties can always apply to the courts for enforcement of an order.[256] The case could have dragged on if the claimants had to bring fresh proceedings every time the government appeared not to be using its best efforts, and delay could have undermined section 23 rights since continued assimilation could have reduced the number of students below that required to exercise section 23 rights. Further, section 23 imposes positive obligations on governments, which will bring

---

[247] *Doucet-Boudreau CA*, *id.*, at paras. 41-49, citing McLachlin C.J., *supra*, note 4, at 554-55, 558-59.

[248] Justice Flinn also wrote that the reporting order could have impaired the harmonious relationship between the courts and the other branches of government: *Doucet-Boudreau CA*, *id.*, at para. 51.

[249] *Id.*, at para. 50.

[250] *Id.*

[251] *Id.*, at para. 84.

[252] *Id.*, at para. 74.

[253] *Id.*, at para. 70.

[254] *Id.*

[255] *Id.*

[256] *Id.*, at para. 74.

will bring the courts, parties, and educational institutions into ongoing relationships.[257]

(c) The Supreme Court of Canada

The case was moot by the time it reached the Supreme Court of Canada, since all the schools had been built by then. Nonetheless, all members of the Court agreed that the case should be heard.[258] Ultimately, the reporting order was upheld by a narrow margin of five to four judges. Justices Iacobucci and Arbour wrote joint reasons for the majority which included McLachlin C.J.,[259] while LeBel and Deschamps JJ. wrote joint reasons on behalf of the dissenting judges.[260]

The majority emphasized the need for a generous and expansive interpretation of Charter remedies, rather than a narrow or technical approach that could undermine the full benefit and protection of Charter rights.[261] They relied on McLachlin C.J.'s reasons in *Dunedin*[262] for the proposition that section 24(1) must be interpreted in a broad and purposive manner because it is a vital part of the Charter, it is a remedial provision, and its language confers broad discretion to craft remedies. A purposive approach is necessary since a right is only as meaningful as the remedy for its breach. This approach requires that: "First, the purpose of the right being protected must be promoted: courts must craft *responsive* remedies. Second, the purpose of the remedies provision must be promoted: courts must craft *effective* remedies."[263]

---

[257] *Id.*, at paras. 82-83, citing *Mahe v. Alberta*, [1990] 1 S.C.R. 342, [1990] S.C.J. No. 19, at 365 [S.C.R.], *per* Dickson C.J. [hereinafter "*Mahe*"], and Bastarache, *Education Rights of Provincial Official Language Minorities*, 2d ed. (Toronto: Carswell, 1989), at 704.

[258] *Doucet-Boudreau SCC*, *supra*, note 14. The majority found at paras. 17-22 that the factors set out in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at 353-65, [1989] S.C.J. No. 14 favoured hearing the matter. There was a continuing adversarial context, the case raised important issues regarding the jurisdiction of superior courts to order remedies in Charter cases, and the issue fell squarely within the expertise and traditional role of the judiciary. The dissenting judges agreed at para. 95.

[259] Justices Gonthier and Bastarache concurred.

[260] Justices Major and Binnie concurred.

[261] *Doucet-Boudreau SCC*, *supra*, note 14, at paras. 23-24, citing *R. v. Gamble*, [1988] 2 S.C.R. 595; *R. v. Sarson*, [1996] 2 S.C.R. 223, [1988] S.C.J. No. 87; and *Dunedin*, *supra*, note 15.

[262] *Doucet-Boudreau SCC*, *id.*, at para. 24, citing *Dunedin*, *id.*, at para. 18.

[263] *Doucet-Boudreau SCC*, *id.*, at para. 25 (emphasis in original).

The majority and the dissenting judges agreed on the purpose and scope of the rights at stake.[264] Section 23 is a means to preserve and promote French and English language and culture by ensuring each language flourishes in provinces where it is not that of the majority.[265] It was also designed to correct past injustice by halting erosion and actively promoting minority official languages. This is a distinctively Canadian provision that imposes positive obligations on governments to provide resources, pass legislation, and develop institutional structures.[266]

These rights are particularly vulnerable to government inaction or delay, since assimilation can increase to the point where the numbers no longer warrant minority language education. Therefore, the "affirmative promise contained in s. 23 of the *Charter* and the critical need for timely compliance will sometimes require courts to order affirmative remedies to guarantee that language rights are meaningfully, and therefore necessarily promptly, protected."[267]

(d) The Dissenting Reasons

While there was broad agreement on section 23 rights, the dissenting judges held that the reporting order itself was void for three reasons. First, it was inconsistent with the principles of procedural fairness.[268] Since there are penalties for failure to comply with injunctions, the parties must be given proper notice of their obligations. The reporting order in this case failed to specify the nature, content, or format of the reports, or the procedural guidelines for the hearings.[269]

The second reason the dissentients found the order void was that a court which purports to oversee implementation of a final order is acting when its jurisdiction is exhausted, in breach of the *functus officio*

---

[264] *Id.*, at paras. 91-147.

[265] *Id.*, at para. 26, citing *Mahe*, *supra*, note 257, at 362, and *Reference re Public Schools Act (Manitoba) s. 79(3), (4) and (7)*, [1993] 1 S.C.R. 839, [1993] S.C.J. No. 26, at 849-50 [S.C.R.].

[266] *Doucet-Boudreau SCC*, *id.*, at para. 27.

[267] *Id.*, at para. 29.

[268] *Id.*, at para. 96.

[269] *Id.*, at paras. 97-104.

doctrine.[270] *Functus officio* means that a court has no jurisdiction to reopen or amend a final decision, unless there has been an error in drafting the judgment or in expressing the intention of the court. The underlying rationale is that "there must be finality to a proceeding to ensure procedural fairness and the integrity of the judicial system."[271] The dissenting judges found the reporting requirement changed the final order when the trial judge was *functus*.

The third reason they opposed the order was that a court overseeing or supervising implementation of its final order is attempting to extend its jurisdiction beyond its proper role, and is in breach of the separation of powers principle.[272] They held that while there is no formal division of powers between the judicial, legislative, and executive branches of government, the separation of powers is entrenched in our Constitution.[273] There is a clear distinction between the courts on one hand, and the closely intertwined legislative and executive branches on the other.[274] Cooperation and mutual respect between the branches are at the core of the Canadian constitutional order.[275]

The dissentients held that the separation of powers protects the independence of the judiciary and permits it to discharge its duties,[276] which are to declare what the law is, contribute to its development, and provide relief for breach of claimants' rights.[277] However, once a court issues a remedy under section 24(1), it should exercise restraint and presume that the government will act with reasonable diligence and in good faith to rectify the Charter defect, given our tradition of government compliance with judicial interpretations of the law and court

---

[270] *Id.*, at para. 105.

[271] *Id.*, at para. 114, citing Sopinka J. in *Chandler v. Assn. of Architects (Alberta)*, *supra*, note 240, at 861-62.

[272] *Doucet-Boudreau SCC*, *id.*, at paras. 105, 117.

[273] *Id.*, at para. 107.

[274] *Id.*, at para. 108, citing *Provincial Judges Reference*, *supra*, note 68, and *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, [1985] S.C.J. No. 71, at 469-70 [S.C.R.].

[275] *Doucet-Boudreau SCC*, *id.*, at para. 121, citing *Vriend*, *supra*, note 12. The dissentients relied on McLachlin C.J.'s comments in the Weir Memorial Lecture, *supra*, note 4, regarding the tradition of judicial restraint, cooperation among the branches of government, and the importance of institutional legitimacy.

[276] *Doucet-Boudreau SCC*, *id.*, at para. 108, citing *Provincial Judges Reference*, *supra*, note 68, and *Mackin*, *supra*, note 10.

[277] *Doucet-Boudreau SCC*, *id.*, at para. 106.

orders. The executive should retain autonomy to choose among policy alternatives that conform to the Charter.[278] An injunction might be necessary[279] if it is the only way to vindicate a claimant's rights, or if a government has upset the constitutional balance by ignoring less intrusive judicial measures. Otherwise, "increased judicial intervention in public administration will rarely be appropriate."[280]

In the dissenting judges' view, there were alternatives such as expedited contempt proceedings before another judge,[281] and there was no suggestion that the government ignored less intrusive judicial measures.[282] Instead, the trial judge assumed a supervisory and administrative function that properly belonged to the executive[283] and was beyond the institutional capacity of the judiciary.[284] Further, if the reporting hearings were intended to put pressure on the government, they constituted political activity which is the function of the opposition party, not the courts.[285] A construction deadline with the possibility of a contempt order would have provided as much incentive as the reporting hearings, without politicizing the relationship between the courts and the executive.[286] The dissent concluded that the remedy was not appropriate and just since it was inconsistent with basic legal principles and constitutional doctrines.[287]

---

[278] *Id.*, at paras. 123-24. Indeed, the courts have acknowledged that the legislatures and executive are in the best position to make these choices.

[279] *Id.*, at para. 134.

[280] *Id.*, at para. 140.

[281] *Id.*, at paras. 136-37, citing *Dunedin*, *supra*, note 15, at para. 22. Note that the dissenting judges opined at para. 138 that it was difficult to imagine any circumstances in which breach of a party's right to notice would assist in the vindication of the other party's Charter rights.

[282] The dissenting judges found that the government did not know what its obligations were under s. 23 of the Charter, although the trial judge explicitly found that the real issue was when s. 23 requirements would be satisfied.

[283] *Doucet-Boudreau SCC*, *supra*, note 14, at para. 111.

[284] *Id.*, at paras. 110, 120, citing *Eldridge*, *supra*, note 42, at para. 96.

[285] *Doucet-Boudreau SCC*, *id.*, at para. 128.

[286] *Id.*, at paras. 130-33, 143, citing *Provincial Judges Reference*, *supra*, note 68, at paras. 139-40. As the dissenting judges put it at para. 132, "[i]f the reporting hearings were intended to hold 'the Province's feet to the fire', the character of the relationship between the judiciary and the executive was improperly altered…."

[287] *Doucet-Boudreau SCC*, *id.*, at paras. 145, 147, citing *Mills*, *supra*, note 7, at 952-53.

(e) The Majority's Decision

The majority concluded that the trial judge's reporting order meaningfully protected and implemented the claimants' section 23 rights while maintaining respect for the executive and legislative branches of government.[288] Like the dissenting judges, they identified the key issue as the proper role of courts. They took note of the Canadian tradition and fundamental constitutional value of governments and private parties voluntarily complying with court orders. This is especially important when the courts must ensure that governments comply with the Constitution, while observing the functional separation between the branches of government.[289] The majority held that courts must be sensitive to their role, "and not fashion remedies which usurp the role of the other branches of governance by taking on tasks to which other persons or bodies are better suited."[290] However, "the boundaries of the courts' proper role … cannot be reduced to a simple test or formula; it will vary according to the right at issue and the context of each case."[291]

The majority found that the nature and extent of the remedies available under section 24(1) may be limited by the wording of the provision, which must be read in harmony with the rest of the Constitution, and by other constitutional provisions.[292] A section 24(1) remedy is available for government inaction, such as the failure to mobilize resources to provide section 23 school facilities in a timely manner.[293] The language of section 24(1) confers a broad and unfettered discretion that cannot be reduced to a formula that is binding in all cases. Nor can this discretion be pre-empted or reduced by courts of appeal.[294] A party challenging a Charter remedy granted by a section 96 court must establish that the remedy is not appropriate and just in the circumstances.

---

[288] *Doucet-Boudreau SCC*, *id.* at para. 37.

[289] *Id.*, at paras. 31-33.

[290] *Id.*, at para. 34. As the majority put it at para. 36, judicial "[d]eference ends … where the constitutional rights … begin," and cited McLachlin C.J. in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, [1995] S.C.J. No. 68, at para. 136 [S.C.R.].

[291] *Doucet-Boudreau SCC*, *id.*, at para. 36.

[292] *Id.*, at para. 42. For example, a court could not make an order under s. 24(1) requiring a provincial government to do something that is beyond its constitutional authority.

[293] *Id.*, at para. 43.

[294] *Id.*, at para. 50, citing McIntyre J. in *Mills*, *supra*, note 7, at 965, and McLachlin C.J. in *Dunedin*, *supra*, note 15, at para. 18.

Unlike the dissenting judges, the majority held that since the remedial power of the superior courts under section 24(1) is part of the Constitution, which is the supreme law of Canada, it cannot be strictly limited by statutory or common law rules or principles such as judicial restraint, the dialogue theory, or the doctrine of *functus officio*. "[J]udicial restraint and metaphors such as 'dialogue' must not be elevated to the level of strict constitutional rules to which the words of s. 24 can be subordinated."[295] However, these sources may be helpful in choosing a section 24 remedy insofar as they express principles that are relevant to what is appropriate and just in the circumstances.[296] The court in a particular case must give meaning to these words. It must exercise its discretion on the basis of the nature of the right, the nature of the infringement, the facts of the case, and the relevant legal principles.[297] The court should also take into account five broad considerations in determining what remedy to grant.

- First, the remedy must meaningfully vindicate the claimant's Charter rights taking into account the nature of the right and the claimant's situation. It "must be relevant to the experience of the claimant and must address the circumstances in which the right was infringed or denied."[298]
- Second, the remedy must be legitimate for a court in a constitutional democracy. It must respect the division of authority between the branches of government. The "courts must not … depart unduly or unnecessarily from their role of adjudicating disputes and granting remedies that address the matter of those disputes."[299]
- Third, the remedy must be "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."[300] The capacity and competence of courts can be partly inferred from their tasks, procedures, and precedents.

---

[295] *Doucet-Boudreau SCC*, *id.*, at para. 53.
[296] *Id.*, at para. 51.
[297] *Id.*, at para. 52.
[298] *Id.*, at para. 55.
[299] *Id.*, at para. 56.
[300] *Id.*, at para. 57.

- Fourth, the remedy must not only vindicate the right of the claimant; it must also be fair to the party against whom it is made. It "should not impose substantial hardships that are unrelated to securing the right."[301]
- Finally, "the judicial approach to remedies must remain flexible and responsive to the needs of a given case."[302] Section 24 is part of a constitutional scheme to vindicate fundamental Charter rights, and its evolution may require novel and creative approaches that depart from traditional and historical practice.

The majority concluded that the trial judge properly took into account the factual circumstances in exercising his remedial discretion. His reporting order satisfied the first guideline by meaningfully vindicating the claimants' section 23 Charter rights in a context of serious rates of assimilation that could further endanger linguistic rights, and a history of government delay in providing French language education. If there had not been reporting hearings, the claimants would have had to commence a new court proceeding whenever there was an additional delay, which would have taken considerable time and resources from people who had already invested a great deal to enforce their section 23 rights. The majority found the trial judge's pragmatic and expeditious approach was "a creative blending of remedies and processes already known to the courts in order to give life to the right in s. 23."[303]

The trial judge could have granted a declaration of the rights of the parties, but the rationale for such an order is that the government will comply promptly and fully. The general content of section 23 rights had already been settled in previous decisions, and the real issue in this case was the date when the programs and facilities would be implemented.[304] The majority held that "[w]here governments have failed to comply with their well-understood constitutional obligations to take positive action in support of the right in s. 23, the assumption underlying a preference for

---

[301] *Id.*, at para. 58.
[302] *Id.*, at para. 59.
[303] *Id.*, at para. 61.
[304] *Id.*, at paras. 62-63. The majority rejected the suggestion made by the dissenting judges that there was an issue regarding what s. 23 required in this case. See text accompanying footnotes 222-224 above.

declarations may be undermined."[305] The trial judge considered a declaration, and was entitled to conclude it was not appropriate in this case. Further, the majority doubted the government would have been more respectful of contempt proceedings.[306] They concluded it was appropriate to grant the remedy that would lead to prompt compliance, and avoid the risk of additional procedural delay.[307]

With respect to the second guideline, the majority held that the remedy took into account, and did not unduly depart from the role of the courts in a constitutional democracy.[308] The trial judge considered the government's progress, preserved and reinforced its role in providing school facilities without compromising the parents' rights, and built in some flexibility with a "best efforts" clause. The majority stated that "[t]o some extent, the legitimate role of the court *vis-à-vis* various institutions of government will depend on the circumstances."[309] In this case it was appropriate to craft a remedy that vindicated the rights of the parents but left detailed choices of means to the executive. The majority held that courts may clearly grant injunctions against governments, and that the power to do so "is central to s. 24(1) of the *Charter* which envisions more than declarations of rights. Courts do take actions to ensure that rights are enforced, and not merely declared";[310] for example, with contempt proceedings, garnishments, and writs of seizure and sale.

The third guideline was also met; the order was judicial in that it called upon functions and powers known to the courts, which often continue to be involved in the relationship between the parties. Superior courts have taken active managerial roles in exercising the traditional powers of courts of equity, and equitable remedies have been developed to support the litigation process such as Mareva injunctions and Anton Piller orders that preserve evidence and assets before trial. Courts have ongoing jurisdiction and supervisory powers in bankruptcy, receivership, trusts, estates, and family law matters, and where they have ordered

---

[305] *Id.*, at para. 66, discussing *Mahe*, *supra*, note 257, at 393.

[306] *Doucet-Boudreau SCC*, *id.*, as was suggested by the dissenting judges at para. 134.

[307] *Id.*, at para. 67.

[308] *Id.*, at para. 68.

[309] *Id.*, at para. 69.

[310] *Id.*, at para. 70. The dissenting judges found that an injunction against the government was a departure from the law on s. 24(1) remedies at para. 134.

specific performance or issued mandatory injunctions. [311] In addition, the Supreme Court remained seized of the *Manitoba Language Rights Reference* during the implementation of constitutional language rights,[312] and lower courts have retained jurisdiction in section 23 cases.[313]

The majority concluded that "the range of remedial orders available to courts in civil proceedings demonstrates that constitutional remedies involving some degree of ongoing supervision do not represent a radical break with the past practices of courts."[314] Under section 24(1) of the Charter, the flexibility of equitable remedies may be applied to orders requiring governments to vindicate constitutional rights. The reporting order in this case was not inconsistent with the judicial function;[315] the trial judge was hearing evidence and supervising cross-examinations on progress reports, not managing and coordinating construction projects.

The majority also found that while statutory and common law rules cannot pre-empt the remedial discretion conferred by section 24(1), the doctrine of *functus officio* addresses the functions and powers of courts, and is therefore useful in determining whether the order was appropriately judicial.[316] The *functus* doctrine applies when the judge's function

---

[311] *Id.*, at para. 71.

[312] See *Reference re Manitoba Language Rights*, *supra*, note 245; and [1985] 2 S.C.R. 347, [1985] S.C.J. No. 70 (Order No. 1); and [1990] 3 S.C.R. 1417, [1990] S.C.J. No. 142 (Order No. 2); and [1992] 1 S.C.R. 212 (Order No. 3). The dissenting judges took the position in *Doucet-Boudreau SCC*, *id.*, at para. 144, that the trial judge's order was not consistent with the Supreme Court's retention of jurisdiction in *Reference re Manitoba Language Rights*, because the Court sought the government's assistance in fashioning a remedy. In their view, the Court did not purport to supervise compliance or oversee administrative action; instead, it respected the executive's ability to make the necessary policy choices that complied with the Charter.

[313] *Assoc. des parents francophones (Columbie-Britannique) v. British Columbia*, *supra*, note 245, at 380; *Lavoie*, *supra*, note 245, at 593-95; *Société des Acadiens du Nouveau-Brunswick Inc. v. Minority Language School Board No. 50*, *supra*, note 245, at para. 109.

[314] *Doucet-Boudreau SCC*, *supra*, note 14, at para. 73, citing academic commentators Bogart, "'Appropriate and Just': Section 24 of the Canadian Charter of Rights and Freedoms and the Question of Judicial Legitimacy" (1986) 10 Dalhousie L.J. 81, at 92-94; Gillespie, "Charter Remedies: The Structural Injunction" (1989-90) 11 Advocates' Q. 190, at 217-18; Roach, *Constitutional Remedies in Canada* (Aurora, Ont.: Canada Law Book, 1994), at paras. 13.50-13.80; Sharpe, *Injunctions and Specific Performance*, 2d ed. (Aurora, Ont.: Canada Law Book, 1992), at paras. 1.260-1.490.

[315] *Doucet-Boudreau SCC*, *id*., at para. 74.

[316] *Id.*, at para. 75.

has been exhausted, to ensure finality so that litigants have a stable base for an appeal. The majority found that the trial judge was not *functus* in this case. While he retained jurisdiction to hear progress reports, he did not retain authority to alter the final disposition on the scope and violation of section 23 rights or to modify the injunction,[317] so he did not undermine the stable base from which to appeal.[318] Further, rules of practice allow courts to vary their orders or provide additional relief to make them effective without undermining the right to appeal,[319] and nothing in the *Judicature Act* prevented the trial judge from hearing reports on the implementation of an order.[320]

With respect to the fourth guideline, the majority found that the reporting order was not unfair to the government. It was not so vaguely worded as to make it invalid. While the trial judge could have provided more guidance regarding what the parties could expect in the reporting hearings, his order was not incomprehensible or impossible to follow.[321] It clearly communicated that the government had to attend at court to report on the status of its efforts to provide the facilities and programs ordered at trial. However, the majority noted that similar orders in future cases should be more explicit and detailed with respect to the jurisdiction retained by the trial judge and the procedure to be followed at reporting hearings. They noted that an alternative is to specify a timetable and permit the government to seek variation if it is appropriate and just.[322]

The fifth guideline — that courts must issue responsive remedies which guarantee full and meaningful protection of Charter rights — may require novel remedies, especially for the enforcement of section 23 rights. A superior court may issue any remedy it considers appropriate and just in the circumstances, but it should bear in mind its role as a constitutional arbiter and the limits of its institutional capacity. "Reviewing courts, for their part, must show considerable deference to trial judges' choice of remedy, and should refrain from using hindsight to perfect a remedy. A reviewing court should only interfere where the trial

---

[317] *Id.*, at para. 76.
[318] *Id.*, at paras. 76-80.
[319] *Id.*, at para. 81.
[320] *Id.*, at para. 82.
[321] *Id.*, at para. 83.
[322] *Id.*, at para. 85.

judge has committed an error of law or principle."[323] The claimants were awarded full costs on a solicitor-client basis throughout, including those of the reporting hearings, since they had been consistently denied their Charter rights by a province that was fully aware of the content of those rights.[324]

4. Summary

There has been little guidance on the interpretation of section 24(1). The leading cases are the Supreme Court's decisions in *Mills* (1986),[325] *Dunedin* (2001),[326] and *Doucet-Boudreau SCC* (2003).[327] Justice McIntyre held in *Mills* that the language of section 24(1) gives the courts a wide and unfettered discretion, which cannot be reduced to a binding formula that applies in all cases, or pre-empted by appellate courts. The remedy will vary depending on the facts and circumstances of the case, and the jurisdiction of the court or tribunal.

In *Dunedin*, McLachlin C.J. added four propositions that inform the interpretation of section 24(1). First, this provision must be given a broad and purposive, or large and liberal interpretation. Second, it must be interpreted to provide full, effective, and meaningful remedies for Charter violations. Third, section 24(1) and section 24(2) must be read together, and a "court of competent jurisdiction" must be interpreted to produce just and workable results for both provisions. Fourth, these provisions should not be read so as to confer authority that courts and tribunals were never intended to have; courts must facilitate direct access to appropriate and just remedies while respecting their existing structure and practice, and without intruding upon legislative powers.

Doucet-Boudreau went further, since the trial judge appeared to invade legislative and executive authority by requiring progress reports on the province's efforts to fulfill his order to provide French language educational programs and facilities. The order raised the spectre of the American structural or administrative injunctions referred to in McLachlin

---

[323] *Id.*, at para. 87.
[324] *Id.*, at para. 90.
[325] *Supra*, note 7.
[326] *Supra*, note 15.
[327] *Supra*, note 14.

C.J.'s Weir Memorial Lecture; the trial judge was involved in the construction of schools, down to the choice of ventilation systems. The government argued that the order was procedurally unfair since it did not provide sufficient notice of what was required at the reporting hearings, the trial judge had no jurisdiction to hear reports because he was *functus officio*, and the Court breached the constitutional division of powers by intruding upon the enforcement functions of the legislative and executive branches of government.

The majority upheld the trial judge's reporting order. They found that the words "appropriate and just" must be given a broad, liberal, and flexible interpretation that promotes Charter rights and the purposes of section 24(1) by crafting responsive and effective remedies. Further, the principles of procedural fairness and judicial restraint, the doctrine of *functus officio*, and the dialogue theory cannot be raised to the level of constitutional principles that limit the interpretation of the section 24(1) remedial authority of a provincial superior court. However, the courts must be sensitive to their role under the Constitution, and not issue orders that usurp the functions of the executive and legislative branches of government.

The majority in *Doucet-Boudreau* set out five broad guidelines that a court must keep in mind when it is issuing a remedy under section 24(1) of the Charter. First, the remedy must vindicate the breach of Charter rights. Second, the court must be mindful of its traditional constitutional role. Third, the remedy must be a judicial remedy. Fourth, it must be fair to the respondent. Fifth, remedies must remain flexible and responsive to the issues. The majority concluded that the reporting order was a creative blend of remedies and processes that were known to the courts and gave life to the claimants' section 23 rights.

VIII. Jurisdiction to Grant Remedies Under Section 24(1)

1. The Early Decisions

Historically, superior courts had original jurisdiction to hear all cases regardless of the subject matter, while local courts had only the authority specifically conferred upon them by statute, and were subject

to review by superior courts if they exceeded their express jurisdiction. This structure continues today with the added constitutional restraint of section 96 of the *Constitution Act, 1867*.[328] The question is which of these statutory and superior courts qualify as courts of competent jurisdiction for the purpose of granting an appropriate and just remedy under section 24(1) for the breach of Charter rights arising from government action?

The starting point is McIntyre J.'s statement in *Mills*,[329] that "… a court is competent if it has jurisdiction, conferred by statute, over the person and the subject matter in question and, in addition, has authority to make the order sought."[330] In that case, a preliminary inquiry was not a court of competent jurisdiction for the purpose of granting a remedy under section 24(1). The judge's sole function was to decide whether there was sufficient evidence to warrant committal for trial,[331] and the Court had no jurisdiction to acquit, convict, impose a penalty, grant a remedy, or hear and determine questions regarding infringement of Charter rights.[332] Therefore, the Court could not address the section 11(b) Charter issue, which had to be heard by the trial judge.

The Supreme Court also held in *Mills* that the trial court is usually the court of competent jurisdiction for the purposes of section 24(1) because it has jurisdiction, independent of the Charter, over the person and the subject, as well as authority to grant a full range of criminal law remedies. The trial judge also has an extensive factual basis upon which to decide a Charter issue.[333] In addition, a superior court has concurrent original jurisdiction to remedy Charter breaches, and discretion to decline to exercise that jurisdiction. This is the appropriate court to address Charter issues where an accused person has not made an election and no trial court has been established, or where the trial judge caused the violation of the constitutional right.[334]

---

[328] I do not address the jurisdiction of the Federal Court in this paper.

[329] *Supra*, note 7.

[330] *Id.*, at 960. As noted above, McIntyre J. adopted the Ontario Court of Appeal's approach in *R. v. Morgentaler*, *supra*, note 50, at 271, and the other members of the Court agreed. See Lamer J., at 890 and La Forest J., at 971.

[331] *Mills*, *id.*, Lamer J., at 889 and La Forest J., at 970.

[332] *Id.*, McIntyre J., at 954.

[333] *Id.*, McIntyre J., at 955, Lamer J., at 903-904, and La Forest J., at 971.

[334] *Id.*, Lamer J., at 904, McIntyre J. at 956, and La Forest J., at 972. Justice McIntyre stated, at 956, that this concurrent original jurisdiction is found in the provisions of the

The circumstances in which an accused should apply to the superior court were addressed in *Rahey* and in *Smith*,[335] both of which involved complaints of delay. In *Rahey*, a Provincial Court judge heard evidence and the accused's application for a directed verdict. He then adjourned for eleven months and rendered judgment only after the Crown and the accused applied separately to the superior court for relief. Justice Lamer, writing for the majority in the Supreme Court, repeated that a trial court is generally the appropriate forum in which to seek a remedy under section 24(1), although superior courts have concurrent jurisdiction.

Further, superior courts should not exercise jurisdiction unless they are better suited to assess the claim and grant a remedy in a particular case; for example, where no trial court has been established and a remedy is needed on a timely basis, and where the lower court process infringes the accused's Charter rights.[336] In *Rahey* the superior court properly exercised jurisdiction because the trial judge was responsible for the delay.

The superior court also properly agreed to hear an application for a stay of proceedings in *Smith*, since the accused's preliminary inquiry had been delayed for eleven months, and was scheduled to begin in another four months. The unanimous Supreme Court reiterated that trial judges generally should deal with section 11(b) Charter violations. However, the superior court was the appropriate forum in this case, since the preliminary hearing judge was not a court of competent jurisdiction under section 24(1). If the accused had been committed for trial at the preliminary inquiry, further delay would have ensued before a trial judge could have addressed the issue.[337]

Criminal Code, R.S.C. 1970, c. C-34; now R.S.C. 1985, c. C-46 which embody the essential historical features of the original Court of Kings's Bench in England.

[335] Both *supra*, note 96.

[336] *Rahey*, *id.*, at 603-604. The burden is on the claimant to establish that the application is appropriate for the superior court's consideration.

[337] See also *Seaboyer*, *supra*, note 96, in which the majority held that preliminary inquiry judges do not have jurisdiction to determine the constitutional validity of legislation because the *Criminal Code* does not authorize them to deal with constitutional questions.

2. Administrative Tribunals under Section 24(1)

The approach in *Mills* has been applied to administrative tribunals that have exclusive initial jurisdiction with respect to particular matters. For example, in *Weber v. Ontario Hydro*,[338] an employee filed grievances under a collective agreement, and commenced an action in the superior court claiming damages and a declaration for breach of Charter rights. Justice McLachlin, for the majority, held that the arbitrator satisfied the *Mills* test and constituted a court of competent jurisdiction under section 24(1) of the Charter; he had jurisdiction over the parties and the dispute under the collective agreement, as well as power to apply the law including the Charter, and he had authority to award damages and a declaration. Therefore, he had exclusive jurisdiction over all aspects of the dispute, and the court could not entertain a parallel action.[339]

However, the Supreme Court found that the National Parole Board was not a section 24 court in *Mooring v. Canada (National Parole Board)*.[340] An inmate who had been released from prison on mandatory supervision was charged with several offences. Even though the charges were stayed, the Board revoked his statutory release. Justice Sopinka, for the majority, concluded that the Board was not a court of competent jurisdiction for the purpose of excluding evidence, given its structure and function, as well as the language of its constituent statute.[341] The Board did not act in a judicial or quasi-judicial manner. Its members did not have to be legally trained, and it held inquisitorial hearings where counsel served a limited function. Its process was substantially different from that of a traditional court; for example, the rules of proof and evidence did not apply, and the Board did not have authority to issue subpoenas. Further, the enabling statute[342] conferred a broad mandate to take all available relevant information into account, particularly factors concerning the protection of society. Therefore, "… neither the Board

---

[338] *Supra*, note 154.

[339] *Id.*, at paras. 55-56. See also para. 67, where the majority held that if a remedy was required that was beyond the arbitrators' authority, his jurisdiction was subject to the residual discretionary power of a court of inherent jurisdiction to grant remedies that a statutory tribunal could not grant.

[340] [1996] 1 S.C.R. 75, [1996] S.C.J. No. 10.

[341] *Id.*, at para. 24.

[342] *Corrections and Conditional Release Act*, S.C. 1992, c. 20.

itself nor the proceedings … [were] designed to engage in the balancing of factors that s. 24(2) demands."[343]

3. The Functional and Structural Test in *Dunedin*

The jurisdiction of statutory criminal courts was considered in the companion cases of *Hynes* and *Dunedin*.[344] The lead decision is *Dunedin*, in which McLachlin C.J. concluded on behalf of the unanimous Court that a justice of the peace presiding at a trial under the *Provincial Offences Act* (POA) had authority to order legal costs against the Crown for breaching the accused's Charter rights by failing to make full disclosure of evidence. The starting point was the *Mills* test, that a section 24 court must have jurisdiction with respect to the subject matter, the person, and the remedy sought.[345] Chief Justice McLachlin added a "functional and structural" approach for determining if a statutory court or administrative tribunal has jurisdiction to grant the remedy sought.

The central question "is whether the legislator endowed the court or tribunal with the power to pronounce on *Charter* rights and to grant the remedy sought for the breach of these rights."[346] Statutory bodies have only the remedial powers that are expressly or impliedly granted to them by their enabling legislation.[347] Since most courts and tribunals were established before the Charter was enacted, they generally will not have express power to grant Charter remedies.[348] Consequently, the question becomes whether the court or tribunal is an appropriate forum for ordering the Charter remedy given its function and structure. "If so, it can reasonably be inferred … that the legislature intended the court or tribunal

---

[343] *Supra*, note 340, at para. 26.

[344] Both *supra*, note 15. These cases were released on December 6, 2001.

[345] Chief Justice McLachlin found that there are four related propositions which inform the interpretation of s. 24(1), as discussed in text accompanying footnotes 212-215 above. Essentially, s. 24(1) and s. 24(2) must be read harmoniously together, and be given a broad interpretation that facilitates access to an effective remedy, while respecting the existing court structure and the role of the legislatures in prescribing jurisdiction.

[346] *Dunedin*, *supra*, note 15, at para. 25.

[347] *Id.*, at para. 26, citing *R. v. Doyle*, [1977] 1 S.C.R. 597, at 602; Macauley & Sprague, *Practice and Procedure Before Administrative Tribunals*, looseleaf (Toronto: Carswell, 1988), Vol. 3, at 23-17 *et seq*.

[348] *Dunedin*, *id.*, at para. 27.

to have this remedy at its disposal when confronted with *Charter* violations that arise in the course of its proceedings."[349]

Put another way, if the legislature confers a function on a decision maker that engages Charter issues, and it provides the decision maker with procedures and processes that are capable of resolving these issues in a fair and just manner, the presumption is that the legislature intended the decision maker to exercise this power.[350] The question is "whether the court or tribunal … is suited to grant the remedy sought under s. 24 in light of its *function and structure*."[351] This requires a contextual assessment, and the weight of the relevant factors will vary depending on the circumstances.

The function refers to the decision maker's purpose or mandate. "First, what is the court or tribunal's function within the legislative scheme? Would jurisdiction to order the remedy … frustrate or enhance this role? How essential is the power to grant the remedy … to the effective and efficient functioning of the court or tribunal? Second, what is the function of the court or tribunal in the broader legal system? Is it more appropriate that a different forum redress the violation of *Charter* rights?"[352]

The structure of the decision maker deals with the compatibility of the institution and its processes with the remedy sought under section 24. The following operational factors may be salient depending upon the remedy sought: "…whether the proceedings are judicial or quasi-judicial; the role of counsel; the applicability or otherwise of traditional rules of proof and evidence; whether the court or tribunal can issue subpoenas; whether evidence is offered under oath; the expertise and training of the decision-maker; and the institutional experience of the court or tribunal with the remedy in question … the workload of the court or tribunal, the time constraints it operates under, [and] its ability to compile an adequate record for a reviewing court…"[353]

The question comes down to whether the legislature has given the decision maker the tools that are needed to fashion the remedy sought under section 24 in a just, fair and consistent manner, without under-

---

[349] *Id.*, at para. 35.
[350] *Id.*, at para. 36. See also para. 75.
[351] *Id.*, at para. 43 (emphasis in original).
[352] *Id.*, at para. 44.
[353] *Id.*, at para. 45.

mining its ability to perform its function.[354] Administrative tribunals raise difficult issues since their structure and functions vary widely. Consequently, a tribunal's constituent statute must be carefully reviewed, particularly with respect to the power to grant remedies.[355] Another critical factor is whether the tribunal has the necessary safeguards that permit it to make fair and informed decisions on Charter rights, and to award remedies for breach of these rights.[356]

Chief Justice McLachlin found that the functional and structural approach was consistent with the authorities — particularly *Mills*, *Weber*,[357] and *Mooring*[358] — which were dominated by the concern for function and structure.[359] It was also consistent with the pre-*Martin* test for whether administrative tribunals had authority to entertain challenges to their constituent legislation under section 52(1),[360] and with the principles underlying section 24 in that it balanced meaningful access to Charter relief with deference to the role of the legislatures.[361] "Whether … the legislature intended to exclude a particular remedial power is determined by reference to the function the legislature has asked the tribunal to perform and the powers and processes with which it has furnished it."[362]

Chief Justice McLachlin concluded that provincial offences courts have jurisdiction to award costs under section 24(1) as a remedy for breach of the Charter right to timely disclosure. They are quasi-criminal

---

[354] *Id.*

[355] *Id.*, at paras. 65-66. See also paras. 70-71 where McLachlin C.J. stated that a statutory court or tribunal has both the powers expressly conferred by its enabling legislation and the implied powers that are required as a matter of practical necessity to effectively and efficiently perform its intended functions. See *Bell Canada v. Canada (Canadian Radio-Television & Telecommunications Commission*), [1989] 1 S.C.R. 1722, [1989] S.C.J. No. 68; *Reference re National Energy Board Act*, [1986] 3 F.C. 275, [1986] F.C.J. No. 423 (C.A.); and *Interprovincial Pipe Line Ltd. v. Canada (National Energy Board)*, [1978] 1 F.C. 601 (C.A.).

[356] *Dunedin*, *id.*, at para. 67.

[357] *Supra*, note 154.

[358] *Supra*, note 340.

[359] *Dunedin*, *supra*, note 15, at para. 68.

[360] The test was whether the legislature intended to give the tribunal the power to interpret and apply the Charter, which could be implied from the structure of the enabling legislation, the powers and functions of the tribunal, and the context in which it operated.

[361] *Dunedin*, *supra*, note 15, at para. 74.

[362] *Id.*, at para. 75.

courts that have the necessary information to craft a remedy, and a full complement of criminal law remedial powers. Judicial standards, processes, and evidentiary rules apply at the hearing, and the decisions are subject to appeal. There is also a direct connection between cost awards for untimely disclosure and the function of a provincial offences court. If the procedure was bifurcated and costs were left to a superior court, the Charter claimant might be deprived of any remedy at all.[363]

The functional and structural test set out in *Dunedin* was applied in the companion case of *Hynes*.[364] Chief Justice McLachlin, writing for a five-judge majority, held that a preliminary inquiry judge did not have authority under section 24(2) to exclude statements obtained in violation of the accused's Charter rights. *Mills* held that a preliminary inquiry serves a limited screening function and that the presiding judge does not have jurisdiction to order a stay of proceedings, consider Charter questions, or grant Charter remedies including exclusion of evidence.[365]

Nevertheless, the majority reconsidered the issue under the functional and structural test in *Dunedin*, which was summarized as follows. The starting point for identifying a court of competent jurisdiction is the *Mills* test; the decision maker must have jurisdiction over the person and the subject matter, as well as authority to grant the remedy sought. With respect to remedial authority, the "question in all cases is whether … the legislature intended to empower the court or tribunal to make rulings on *Charter* violations that arise incidentally to their proceedings, and to grant the remedy sought as a remedy for such violations."[366] If the legislation does not expressly confer authority to grant remedies for Charter infringements, the court must consider whether the decision maker is suited to grant the remedy given its function and structure.[367]

Since the *Criminal Code* does not expressly confer authority on preliminary inquiry courts to grant remedies under section 24, the question became whether the court was suited to grant the remedy of excluding evidence in light of its function and structure. The primary function of a preliminary inquiry court is to decide whether there is enough evidence

---

[363] *Id.*, at paras. 77-98.

[364] *Supra*, note 15.

[365] *Id.*, at paras. 17-22, citing McIntyre J. in *Mills*, *supra*, note 7, at 954-55, and La Forest J., at 970-71. This view was affirmed in *Seaboyer*, *supra*, note 96, at 638-39.

[366] *Id.*, at para. 26.

[367] *Id.*, at para. 27.

to commit the accused for trial. Its ancillary function, which has developed over time, is discovery of the Crown's case.[368] Its structure, processes, and evidentiary rules are similar to those of a trial court, and involuntary statements may be excluded at the preliminary inquiry under the common law confessions rule.

However, a preliminary inquiry court does not have the powers of a trial court. In particular, the judge has no authority to grant remedies or to exclude evidence under the Charter. The majority held that to confer this authority would change the role of the preliminary inquiry from an expeditious preliminary screening process to a forum for trying Charter issues with the attendant costs and delays. The exclusion of involuntary statements is a limited and discrete inquiry, whereas a decision to exclude evidence under section 24(2) is based on the full factual context and the impact of the decision on the fairness of the trial and the administration of justice. The majority concluded that Parliament intended Charter issues to be resolved at trial when all the relevant circumstances can be weighed by the judge.[369]

4. *Doucet-Boudreau*

The most recent Supreme Court pronouncement on courts of competent jurisdiction under section 24 of the Charter is found in *Doucet-Boudreau*.[370] As noted above, the primary issue was whether a superior court judge could retain jurisdiction under section 24(1) of the Charter to hear periodic progress reports on efforts to fulfill his order requiring the province to provide French programs and educational facilities by specified dates. There was no issue of unconstitutional legislation, or of government action; rather, the problem was government

---

[368] *Id.*, at paras. 30-31.

[369] *Id.*, at paras. 37-50; note that Major J., for the dissenting judges Iacobucci, Binnie, and Arbour JJ., reached the opposite conclusion. In his view, *Mills* should have been overruled to the extent that it prevented exclusion of evidence under s. 24(2) by preliminary inquiry judges. He considered the s. 24 inquiry to be similar to voluntariness issues, and based on the same factors and rationale for exclusion. In his view, the discovery function of the preliminary inquiry is appropriate for making the determination to exclude evidence under s. 24. Further, there was no basis for concerns about costs and delay; indeed, it was wasteful not to have these decisions made at this level where Charter issues routinely arise.

[370] *Supra*, note 14.

inaction through failure to mobilize resources and provide school facilities in a timely manner.

The majority held that a remedy is available under section 24(1) for government inaction, as well as for government action that breaches Charter rights.[371] Section 24(1) guarantees that there will always be a court of competent jurisdiction to hear and grant a remedy to a person whose Charter rights have been infringed. The default court is the provincial superior court established by section 96 of the *Constitution Act, 1867*. Nothing in section 96, or in the jurisprudence describing the functions of section 96 courts, limits the inherent jurisdiction of the superior courts or the statutory jurisdiction that can be conferred on them.[372] Nor did the decisions in *Mills* and *Dunedin* have any impact, since they dealt with the jurisdiction of administrative tribunals or judges acting under statutory authority, where the issue is what power the legislator intended the tribunal to have under the Charter given the tribunal's function and structure.[373] The *Mills* test does not apply to section 96 superior courts since they were not created by statute, and they always "retain 'constant, complete, and concurrent jurisdiction' to issue remedies under s. 24(1)."[374]

5. Summary

Section 24(1) guarantees that there will always be a court of competent jurisdiction to hear and grant a remedy to a person whose Charter rights have been infringed. The question of whether a particular decision maker has authority to grant a remedy under section 24(1) is especially

---

[371] *Id.*, at para. 43.

[372] *Id.*, at paras. 45-46. This body of law establishes the principle that core superior court jurisdiction cannot be transferred exclusively to provincial courts or administrative tribunals. See, for example, *Reference re Residential Tenancies Act (Ontario), 1979*, [1981] 1 S.C.R. 714.

[373] *Doucet-Boudreau SCC*, *id.*, at para. 48.

[374] *Id.*, at para. 49, citing *Mills*, *supra*, note 7, at 892, 956; *Rahey*, *supra*, note 96, at 603-604; and *Smith*, *supra*, note 96, at 1129-30. See also *Paul*, *supra*, note 180, at para. 40, where the Court held that *Tétreault-Gadoury*, *supra*, note 110, at para. 31, recognized "that the power to find a statutory provision of no effect, by virtue of s. 52(1)… is distinct from the remedial power to invoke s. 24(1) … In other words, an inferior court's remedial powers are not determinative of its jurisdiction to hear and determine constitutional issues." However, the case is of limited assistance since it involved s. 35 aboriginal rights, which are not part of the Charter, so that s. 24(1) was not engaged.

sensitive where statutory criminal courts and administrative tribunals are concerned. A section 24 remedy is available for government inaction as well as for government action that breaches Charter rights.

The *Mills* test is the starting point; a court of competent jurisdiction within the meaning of section 24 must have jurisdiction, independent of the Charter, over the person and the subject matter, and authority to make the order sought. In *Dunedin* the Court articulated a "functional and structural" approach for determining if a decision maker has jurisdiction to grant a section 24 remedy. If legislation does not expressly confer authority to grant remedies for Charter infringements, the court must consider whether the decision maker is suited to grant the remedy sought in light of its function and structure.

"Function" refers to the decision maker's mandate or role, including its function within the legal system, whether power to grant a section 24 remedy would undermine that role, and whether there is a more appropriate forum to remedy Charter violations. "Structure" refers to whether the decision maker and its operational processes are compatible with granting the remedy sought, taking into account the features of a judicial or quasi-judicial body. In essence, the question is whether the legislature has given the court or tribunal the tools that are necessary to craft the remedy sought in a just, fair, and consistent manner without undermining its ability to perform its function.

Preliminary inquiry courts do not meet these requirements because of their limited statutory jurisdiction. However, a trial court, including a provincial offences court, does qualify as a section 24 court. The default court is the provincial superior court which has concurrent original jurisdiction to remedy Charter breaches, and discretion to decline to exercise that jurisdiction. The *Mills* test does not apply to section 96 superior courts since they are courts of inherent jurisdiction that were not created by statute, and they always retain constant, complete, and concurrent jurisdiction to issue remedies under section 24(1). A superior court should generally leave Charter issues to the trial court in the criminal process, unless no trial court has been established, or the trial court itself is responsible for the violation of the accused's Charter rights.

IX. CONCLUSION

In her 1990 Weir Memorial Lecture, McLachlin C.J. discussed the institutional challenges that courts faced in exercising their authority under the Charter. When it came to remedies, the question was how the courts could ensure their orders would be enforced. What would happen if a court found that a law was unconstitutional or that government action infringed a person's Charter rights, and the government did nothing to respond? One answer in the United States was that courts issued structural injunctions to enforce civil rights, and became public administrators in the process. Chief Justice McLachlin cautioned against this solution, given the pitched battle that ensued between the American judiciary and the other branches of government.

In her view, the Canadian answer was to be found in the tradition of judicial restraint, and in continued cooperation and mutual respect between the courts and governments. The Court maintained from the beginning that it has explicit authority to make decisions regarding the Charter, but it will not overstep its institutional competence by second-guessing policy decisions that governments are better able to make. For their part, legislatures have reacted to court decisions striking down legislation, by enacting new laws that achieve the same objective, but with added safeguards that protect Charter rights as interpreted by the courts. This is the essence of the dialogue theory, which provided a working model of the relationship between the judiciary and legislatures under the Charter built on democratic principles and the traditions identified by the Chief Justice.

There is little controversy over the remedial powers and jurisdiction of provincial superior courts, but the reality is that most of Canada's legal business takes place before statutory courts and administrative tribunals that have only the authority conferred upon them by legislation. These decision makers come in all shapes and sizes, with varying mandates and vastly different levels of expertise. No matter what statutory authority the court or tribunal may have, the same policy concern arises: Charter rights belong to the people of Canada, and the people must be permitted to rely on these rights and raise them at the earliest possible stage of legal proceedings.

This is the context or background against which we must consider how much progress Canadian courts have made with respect to remedies for breach of Charter rights. Remedies are not simply a procedural issue

for litigation counsel; they are a litmus test for our progress under the Charter as a whole. Elegant theories of substantive rights achieve little if we do not have adequate remedies to enforce them. As McLachlin C.J. said, "[w]ithout effective remedies, the law becomes an empty symbol; full of sound and fury but signifying nothing."[375]

When section 52(1) and section 24(1) were introduced in 1982, it appeared that section 52(1) simply stated the principle of constitutional supremacy, while section 24(1) provided for remedies without specifying what they would be or which bodies could grant them. However, section 52(1) was quickly interpreted as authority for bodies that were clearly not courts of competent jurisdiction to address Charter issues. The range of remedies that are available under section 52(1) was established fairly early in the *Schachter* decision. However, it took considerable time, and some deviations in direction, to arrive at the *Martin* guidelines for determining which bodies have jurisdiction to make decisions under section 52(1).

It has taken longer to develop general principles and guidelines under section 24(1). The principle that a section 24(1) court must have jurisdiction over the person, the subject matter, and the remedy was established in the *Mills* decision in 1986, but it did not provide much assistance. Some progress was made with the "functional and structural approach" set out in *Dunedin* in 2001, but the most significant advances were not made until the *Doucet-Boudreau* decision was released late in 2003.

Two conclusions become apparent. First, Canadian remedial jurisprudence has moved to a point where superior courts may issue structural injunctions without the conflict that was experienced in the United States. The reporting order in *Doucet-Boudreau* requiring progress reports on the government's efforts to fulfill the trial judge's order mirrored the American remedies addressed by Chief Justice McLachlin in 1990. In effect, the trial judge was involved in the construction of schools, right down to the choice of ventilation systems. The order worked through voluntary compliance, even though the government believed that the trial judge did not have jurisdiction to make the order. Programs and schools were delivered on schedule, and a long overdue promise to give life to section 23 minority language rights was fulfilled.

---

[375] *Supra*, note 4, at 548.

In her Weir Memorial Lecture, McLachlin C.J. said there "can be no doubt that the *Charter* poses new and unprecedented problems for the courts … in fashioning remedies which will at once be effective and respectful of the powers of other branches of government. We can follow the route of confrontation, which has so often prevailed in the United States. Or we can continue down the road of mutual deference and cooperation between the judiciary and the legislatures upon which we seem to have embarked … my hope lies with the latter."[376] As it turns out, her words were prophetic. The concept of judicial restraint and the tradition of mutual deference and cooperation have evolved in the fourteen years since this lecture was delivered, but they remain the key to the decision in *Doucet-Boudreau*.

The second conclusion which emerges from this discussion is that we do not yet have a cohesive set of jurisdictional principles and remedial guidelines which will ensure that a person whose Charter rights have been infringed will be granted a just and appropriate remedy in an expeditious manner. While there have been substantial developments in this area, especially in the past year, there are gaps in the law. In particular, statutory courts and administrative tribunals that have the duty to abide by and apply the Constitution do not have the authority to grant remedies that will do justice to a claimant. Consequently, decision makers that routinely deal with Charter issues cannot provide adequate relief, and claimants must either look to another forum for redress or go without. The courts cannot provide a complete solution since the legislatures have exclusive authority to assign the jurisdiction of courts and tribunals. However, the courts can point out the problem and urge the legislatures to take up the issue in a manner that respects the division of powers among the branches of government.

---

[376] *Id.*, at 559.