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I. INTRODUCTION

> The *Charter* guarantees the fundamental rights and freedoms of all Canadians. It does this through two kinds of provisions. The first are provisions describing the rights and freedoms guaranteed. The second are provisions providing remedies or sanctions for breaches of these rights. …[1]

Litigation under the Charter[2] has been preoccupied with the content of the guaranteed rights and freedoms. Remedies have usually taken a back seat. That is understandable, since the question of remedy is reached only once an infringement of a right or freedom has been established.[3] However, litigation under the Charter should not be mistaken for academic debate. The pursuit of a remedy lies at the heart of every Charter case. Only a remedy can give substance to a right or freedom that is found to have been infringed.

Remedies required the attention of the Supreme Court of Canada in a half dozen Charter decisions handed down over the past year. Those decisions treat a wide variety of issues arising under both of the remedial provisions, subsection 24(1) of the Charter and subsection 52(1) of the *Constitution Act, 1982*. They tend to confirm the existing jurisprudence and to exhibit a cautious approach to Charter remedies, an approach under which the court's remedy should respect the institutional role of the legislature.

II. COURT OF COMPETENT JURISDICTION

In a pair of cases decided in 2001 the Supreme Court of Canada returned to the question of how to determine whether a tribunal is a "court of competent jurisdiction" within the meaning of subsection 24(1) of the Charter. That sub-

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1 *R. v. 974649 Ontario Inc.*, 2001 SCC 81, para. 14 (*per* McLachlin C.J., for the Court). This decision is known as the *Dunedin Construction* case.

2 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

3 The exception, of course, is interlocutory relief, such as a stay of enforcement of legislation being challenged under the Charter.

section confers a right to seek a remedy from a court of competent jurisdiction.[4] In *Mills v. R.* and subsequent cases the Court had established a three-pronged test to identify a court of competent jurisdiction: the tribunal must possess, independently of the Charter, jurisdiction over the person, over the subject matter, and over the remedy.[5] In its 2001 decisions, the Court confirms the three-pronged test and goes on to elaborate the method for determining whether the third prong is met, namely whether the tribunal has the jurisdiction to grant the remedy sought. The Court adopts and applies a "functional and structural" approach to determining the competence of a tribunal to grant Charter remedies.

The first case of the pair is *R. v. 974649 Ontario Inc.*, referred to as the *Dunedin Construction* case.[6] The issue was whether a justice of the peace exercising trial jurisdiction under provincial offences legislation could award costs against the Crown for failure to make disclosure in violation of the Charter. The Ontario Court of Appeal held that the narrow statutory jurisdiction of the provincial offences court to award costs against the Crown in certain limited circumstances was sufficient to establish jurisdiction to make an award of costs for a Charter breach. The Supreme Court of Canada upheld that decision, but upon different reasoning. Chief Justice McLachlin, for the Court, rejects the "type of" approach under which a tribunal may issue Charter remedies similar in type to the remedies it is empowered by statute to issue.[7] Instead the Chief Justice finds jurisdiction to award costs by examining the function and structure of the tribunal in question as a criminal trial court.

After identifying the propositions as to the interpretation of subsection 24(1) that emerge from the Court's previous decisions, the Chief Justice summarizes:

> …the task of the court in interpreting s. 24 of the *Charter* is to achieve a broad, purposive interpretation that facilitates direct access to appropriate and just *Charter* remedies under ss. 24(1) and (2), 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.[8]

The challenge is to reconcile the conflict inherent in subsection 24(1). The provision promises convenient, effective and creative Charter remedies. How-

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[4] As to the right to a remedy, see *Nelles v. Ontario*, [1989] 2 S.C.R. 170, at 196 (*per* Lamer J.); *Mills v. R.*, [1986] 1 S.C.R. 863, at 881 (*per* Lamer J., dissenting).

[5] [1986] 1 S.C.R. 863, at 890. See also *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, para. 63 (*per* McLachlin J.), and *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75, para. 22 (*per* La Forest J.).

[6] *Supra*, note 1.

[7] *Id.*, paras. 30-34.

[8] *Id.*, para. 24.

ever, it seeks to deliver those remedies within a system of courts and tribunals established, for the most part, without contemplation of the Charter. There is a sense of trying to fit a square peg into a round hole. The solution appears to lie in making the hole a little bit bigger, that is, allowing the existing system to better accommodate Charter remedies.

The focus of the analysis remains the statutory jurisdiction of the tribunal. Chief Justice McLachlin puts the issue in this way:

> Whether a court or tribunal enjoys the "power to grant the remedy sought" is, first and foremost, a matter of discerning the intention of Parliament or the Legislature. The governing question in every case 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.[9]

In the rare case, the grant of remedial power may be express. Indeed, the Court dealt with such a case earlier in the year, when it considered the scope of the Charter jurisdiction conferred upon extradition judges by the explicit terms of the *Extradition Act*.[10] Much more commonly, the search is for an implied legislative grant of remedial power. That search, the Chief Justice explains, is to be conducted by way of a functional and structural approach.

The functional and structural approach is founded upon the presumption that the legislature intended a tribunal to resolve Charter issues where the tribunal is suited to do so by virtue of its function and structure.[11] The presumption arises because the legislature is taken to have intended to integrate Charter rights and remedies into the existing jurisdictional scheme.[12] The function of the particular tribunal, its purpose or mandate, should be evaluated to determine whether it is practical and appropriate to have the tribunal resolve Charter issues arising in relation to its operations. The structure of the tribunal should be evaluated to determine whether it possesses the expertise, resources and procedural tools necessary to resolve Charter issues effectively.[13] These analyses are conducted against the possibility that there may be a more appropriate forum, most likely a superior court, to remedy the Charter infringement.

Applying the functional and structural approach to the situation in *Dunedin Construction* McLachlin C.J. finds that the provincial offences court, as a quasi-criminal court, functions much as a criminal court does and has a similar structure. Therefore, the provincial offences court should be assumed to possess

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9 *Id*., para. 25.
10 R.S.C. 1985, c. E-23, in *United States v. Kwok*, [2001] 1 S.C.R. 532.
11 *Supra*, note 1, paras. 31, 42.
12 *Id*., paras. 37-41.
13 *Id*., paras. 43-46.

the power that criminal courts possess to impose awards of costs against the Crown.

At first blush, the adoption of the functional and structural approach appears likely to broaden the range of tribunals providing Charter remedies. That may well be the case for tribunals that act as quasi-criminal trial courts. The practicality of having such trial courts deal with Charter issues seems irresistible. However, the result of the functional and structural approach for other types of tribunals is less obvious. Administrative tribunals are characterized by a diversity of functions and structures. Chief Justice McLachlin suggests that the enabling statute may have a more prominent role to play in assessing an administrative tribunal's jurisdiction to grant Charter remedies.[14] While it may be assumed that the legislature intended a criminal trial court to possess a fairly standard set of remedial powers, no similar assumption can be safely applied to the wide variety of administrative tribunals.

Chief Justice McLachlin recognizes that a critical factor in the analysis of an administrative tribunal's jurisdiction may be "the presence or absence of safeguards necessary to permit the tribunal to give fair and informed decisions on Charter rights and award remedies for their breach."[15] While not mentioned by the Chief Justice, one of the necessary safeguards is likely the institutional independence of the tribunal. Earlier in 2001, the Supreme Court confirmed that it was up to the legislature to determine the degree of independence afforded an administrative tribunal.[16] That degree of independence may well be a sound indicator of the legislature's intention as to the Charter jurisdiction of the tribunal. Where the legislature has created a tribunal that possesses little or no institutional independence, it is difficult to assume that the legislature intended that tribunal to decide claims for Charter remedies.

Much dust will have to settle before the effect of the functional and structural test on the jurisdiction of administrative tribunals becomes apparent. The test may prove easier to describe than to apply, particularly in the context of administrative tribunals. That has been the case with the somewhat analogous "pragmatic and functional" approach to determining the standard for judicial review of administrative tribunals, in respect of which litigation has been unrelenting.[17] The first application of the new test to an administrative tribunal may

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[14] *Id.*, paras. 64-66.

[15] *Id.*, para. 67.

[16] *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781.

[17] The pragmatic and functional approach was articulated in *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. U.E.S., local 298* (*sub nom. U.E.S., Local 298 v. Bibeault*), [1988] 2 S.C.R. 1048. Since that decision, there have been over 30 considerations of the issue by the Supreme Court of Canada.

come in the context of subsection 52(1) of the *Constitution Act, 1982*. In *Dunedin Construction* McLachlin C.J. suggests that the test of a tribunal's power to consider issues under subsection 52(1) is also functional and structural in nature.[18] This is an issue that divided the Supreme Court when it last considered the issue in *Cooper v. Canada (Human Rights Commission)*.[19] The Court will have the opportunity in the near future to revisit the issue and to consider whether the functional and structural approach should be extended to subsection 52(1).[20]

The Supreme Court did not have to wait for its first opportunity to apply the freshly-minted test in a criminal law context. The same day as *Dunedin Construction*, the Court handed down its decision in *R. v. Hynes*.[21] The Court applied the functional and structural approach, but split five to four as to the result.

The issue in *Hynes* was whether the judge conducting a preliminary inquiry under the *Criminal Code* was a court of competent jurisdiction for the purpose of excluding evidence under subsection 24(2) of the Charter. The existing jurisprudence, notably *Mills v. R.*[22] and *R. v. Seaboyer*,[23] suggested that the preliminary inquiry judge was not a court of competent jurisdiction. Chief Justice McLachlin, for the majority in *Hynes*, finds that the functional and structural test leads to the same conclusion.[24] The functional aspect of the test appears to have been determinative. The preliminary hearing judge performs a pre-trial screening process and generally is without authority to grant remedies. Exercising jurisdiction under section 24 of the Charter could transform the preliminary inquiry, turning it into a forum for trying Charter breaches, thereby complicating and lengthening the hearings. The trial judge is better equipped to resolve the subsection 24(2) issues and, unlike the preliminary inquiry judge, is subject to correction on appeal.

Mr. Justice Major, for the minority, accepts the functional and structural test, but rejects the majority's application of it. The most telling factor for Major J. appears to be the existing jurisdiction of the preliminary inquiry judge to exclude evidence on common law grounds.[25] Given it is within the preliminary inquiry judge's function to determine the admissibility of statements for com-

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[18] *Supra*, note 1, paras. 72-73.

[19] [1996] 3 S.C.R. 854.

[20] *Martin v. Nova Scotia (Workers' Compensation Board)*, [2001] S.C.C.A. No. 22 (QL); granting leave to appeal from (2000), 192 D.L.R. (4th) 611 (N.S. C.A.).

[21] 2001 SCC 82.

[22] *Supra*, note 4, at 954-55 (*per* McIntyre J.) and at 970-71 (*per* LaForest J.).

[23] [1991] 2 S.C.R. 577, at 637-39 (*per* McLachlin J.).

[24] *Supra*, note 21, paras. 30-49.

[25] *Id.*, paras. 74-76, 95-96.

mon law purposes, Major J. asks how can Parliament not be taken to have intended that the preliminary inquiry judge make such determinations for Charter purposes.

Hynes shows that it will not always be easy to characterize the function of the tribunal in question. That is what divides the Court. The minority do not share the majority's characterization of the preliminary inquiry as principally a screening process. The minority place greater emphasis on the discovery function, in respect of which the preliminary inquiry judge's determination as to the admission and exclusion of evidence takes on greater importance.

The characterization of a tribunal's function and the evaluation of its structure will depend primarily upon an analysis of the legislation under which the tribunal operates. However, the analysis will not be entirely statutory. The functional and structural approach analysis will extend to the tribunal's practices and resources and to the practical role of its decision-making.[26] That analysis may well require evidentiary support.

In principle, the legislature has the final word as to whether a court or an administrative tribunal has the jurisdiction to issue remedies under subsection 24(1) of the Charter. Indeed, the legislature may go so far as to confer that jurisdiction on a tribunal at the expense of the provincial superior court.[27] The functional and structural approach acknowledges the legislature's primary role, but proceeds to provide some flexibility in accommodating Charter claims within the existing system of courts and administrative tribunals. In *Dunedin Construction* and *Hynes*, much as in *Mills* 15 years earlier, the Court exhibits cautious respect for the existing institutional arrangements.

III. REPAIRING LEGISLATION

It has been 10 years since the Supreme Court of Canada in *Schachter v. Canada*[28] laid out the remedial options available where legislation is found to infringe the Charter. *Schachter* established that not only could infringing legislation be struck down, it could be repaired by severance, reading down or reading in. All these options received some consideration by the Supreme Court in 2001.

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[26] *Supra*, note 1, para. 46.

[27] Consider *Weber v. Ontario Hydro*, *supra*, note 5, where the jurisdiction of the provincial superior court to entertain an action for damages for breach of the Charter was held to be ousted by the arbitration clause in a collective agreement.

[28] [1992] 2 S.C.R. 679.

The Supreme Court was faced with a choice between reading down and striking down in *R. v. Ruzic*.[29] At issue was section 17 of the *Criminal Code*,[30] which defined when the defence of duress would be available. The Court found that the restrictions placed on the defence of duress by section 17 infringed section 7 of the Charter. Faced with this, the Crown invited the Court to read the offending restrictions out of section 17 in order to avoid the section being declared invalid.

The Court acknowledges the option of reading down and appears to be prepared to consider its application in a case where the impugned legislative provision offends the Charter not because it is over-inclusive, but because it is drawn too narrowly. There is no reason why reading down should be restricted to cases of over-inclusion. The underlying principle is that a provision capable of more than one interpretation should be given the interpretation that is constitutional.[31] That principle should apply whether the interpretation that avoids conflict with the Charter is narrower or broader than the competing interpretation.

In *Ruzic*, reading down is rejected because the impugned provision does not admit an interpretation that would meet the requirements of section 7 of the Charter.[32] Mr. Justice LeBel, for the Court, concludes:

> The appellant's attempts at reading down s. 17, in order to save it, would amount to amending it to bring it in line with the common law rules. This interpretation badly strains the text of the provision and may become one more argument against upholding its validity.[33]

This illustrates the inherent limit on reading down as a technique to avoid invalidity. It is available only where there is a reasonable competing interpretation that is constitutional.[34]

The rejection of reading down in *Ruzic* was made easier because the common law was waiting to take the place of the invalid section 17. The common law defence of duress had never been completely displaced by section 17 and had continued to develop in a way that met the Charter concerns. Striking down section 17 did not leave accused persons without a defence, because the common law would be available.

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[29] [2001] 1 S.C.R. 687.

[30] R.S.C. 1985, c. C-46.

[31] *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at 1078 (*per* Lamer J.); *R. v. Mills*, [1999] 3 S.C.R. 668, para. 22 (*per* McLachlin and Iacobucci JJ.).

[32] *Supra*, note 29, para. 54.

[33] *Id.*, para. 89.

[34] *Law Society of British Columbia v. Mangat*, 2001 SCC 67, para. 66.

Striking down was seen as an unattractive option in *R. v. Sharpe*.[35] At issue was the offence of possession of child pornography.[36] The majority in the Supreme Court found that the impugned provision offended paragraph 2(*b*) of the Charter and could not be completely saved under section 1. The provision failed the section 1 analysis because it was overbroad in two respects.[37] Nevertheless, the majority declined to hold the provision to be invalid. They chose instead to repair the defects in the impugned provision by reading in exceptions in order to avoid the overbreadth.

Reading in was identified in *Schachter* as a legitimate remedial option, albeit one to be used only in the clearest of cases.[38] The Supreme Court has employed reading in exceptionally, in order to remedy under-inclusiveness.[39] However, in cases of over-inclusiveness, the Court has preferred to leave it to legislators to come up with an alternative to the invalid provisions.[40] In *Sharpe*, the Court was not prepared to leave the remedy to the legislators. Striking down the provision in its entirety appeared disproportionate. Chief Justice McLachlin, for the majority, states:

> …The difficulty with this remedy is that it nullifies a law that is valid in most of its applications. Until Parliament can pass another law, the evil targeted goes unremedied. Why, one might well ask, should a law that is substantially constitutional be struck down simply because the accused can point to a hypothetical application that is far removed from his own case which might not be constitutional?[41]

The majority concludes that the preferred course is to repair the impugned provision by reading in the exceptions necessary to meet the Charter's requirements. Reading in is available because the majority is able to "identify a distinct provision that can be read into the existing legislation to preserve its constitutional balance."[42] The majority proceeds to draft exception clauses to

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[35] [2001] 1 S.C.R. 45.

[36] *Criminal Code*, *supra*, note 30, s. 163.1(4).

[37] *Supra*, note 35, para. 110.

[38] *Supra*, note 28, at 718 (*per* Lamer C.J.) and at 728-29 (*per* LaForest J.).

[39] *Miron v. Trudel*, [1995] 2 S.C.R. 418, paras. 176-180 (*per* McLachlin J.); *Vriend v. Alberta*, [1998] 1 S.C.R. 493, para. 144 *ff*. (*per* Cory and Iacobucci JJ.).

[40] *Hunter v. Southam Inc. (sub nom. Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.)*, [1984] 2 S.C.R. 145, at 168-69 (*per* Dickson J.); *Rocket v. Royal College of Dental Surgeons (Ontario)*, [1990] 2 S.C.R. 232, at 252 (*per* McLachlin J.); *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, para. 86.

[41] *Supra*, note 35, para. 111. Constitutional exemption is also rejected: *id.*, para. 113.

[42] *Id.*, para. 115.

respond to the defects that had been identified with some precision during the section 1 analysis of the impugned provision.[43]

Reading in the exception clauses is considered appropriate because it will further Parliament's objective in enacting the child pornography scheme. The exception clauses will preclude the operation of the legislation only in the situations most remote from the overall objective of protecting children. The "force of the statute" will not be undermined.[44] Chief Justice McLachlin suggested that the exception clauses are the sort of provision that Parliament would have adopted had it known the limitations of the Charter.[45]

Reading in could be used in *Sharpe* because the remedy was simple and obvious. The Charter defects were narrow and could be easily targeted by fairly straightforward exception clauses. The redrafting was minimal. There appeared to be no real choices to be made as to how to meet the constitutional requirements. It was not a case where the selection from a range of alternatives needed to be left to Parliament. Seen this way, *Sharpe* does not represent a bold, new use of reading in. Rather, it fits within the Court's established approach of resorting to reading in only in the obvious and exceptional case.

The choices that would need to be made discouraged judicial repair of the legislation in *Dunmore v. Ontario (Attorney General)*.[46] At issue was the exclusion of agricultural workers from Ontario's statutory labour relations regime. The failure to provide some protection against unfair labour practices was held to infringe freedom of association under paragraph 2(*d*) of the Charter and not to be saved by section 1. The remedy was to strike down the clause that excluded agricultural workers from the general collective bargaining regime, but to suspend the declaration of invalidity for 18 months.[47]

The Court in *Dunmore* prefers not to choose a replacement regime. Mr. Justice Bastarache, for the majority, identifies certain minimum requirements that are essential to afford protection to agricultural workers so that they may exercise their freedom to form and maintain associations. The choices as to how to provide those minimum protections and as to whether to go further to provide agricultural workers with a more comprehensive labour relations regime are left to the legislature.[48]

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[43] This is consistent with the admonition in *Schachter*, *supra*, note 28, at 702-05, that the first step in choosing a remedy is to define the extent of the inconsistency of the impugned legislation and the Charter, usually by way of the section 1 analysis.

[44] *Supra*, note 35, para. 122.

[45] *Id.*, paras. 124-25.

[46] 2001 SCC 94.

[47] *Id.*, para. 66 (*per* Bastarache J., for the majority).

[48] *Id.*, para. 68.

At first blush, striking the exclusion clause, thereby entitling agricultural workers to the full scheme of collective bargaining rights, appears to be a fairly aggressive remedy. However, in this case, providing no regime whatsoever was not an alternative. The very point of the Charter analysis was that there had to be some statutory protection of the agricultural workers' freedom to associate. A remedy that left no regime in place would be no remedy at all. Even then, the Court was prepared to tolerate that situation for a period of 18 months to allow the legislature to act.

As *Dunmore* shows, the Supreme Court is reluctant to make choices that are legitimately within the sphere of the legislature. There are sound reasons for this reluctance. The legislature may possess the superior means to identify and evaluate the options, and to consult with the persons affected.[49] The selection from among the options that meet Charter standards could be distorted if any one of those options has received judicial endorsement. Therefore, the Court will usually leave the choice, even on a temporary basis, to the legislature. The exception will be made in the case where the choice appears obvious to the Court. The identification of the obvious choice may prove easier in criminal cases such as *Sharpe*, where the Court possesses confidence in its expertise. It may also prove easier where the Court is invited by the Crown to make the choice.[50] At the end of the day, it will be a matter of whether the Court is persuaded that the choice is so obvious that there really is no real choice to be made at all.

IV. TEMPORARY VALIDITY

Dunmore v. Ontario (Attorney General),[51] discussed in the preceding section, is an example of suspension being used to temper the effect of a declaration of invalidity. In that case, the legislature was allowed 18 months to come up with amendments. If it failed to do so, the full collective bargaining scheme would become available to agricultural workers. The period of temporary validity would allow the legislature to exercise its institutional role to provide the necessary statutory scheme.

Suspension of declarations of invalidity was originally conceived as a means to avoid a legal vacuum during the hiatus before the legislature could react and

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[49] *Rocket v. Royal College of Dental Surgeons (Ontario)*, *supra*, note 40, at 253; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, paras. 119-121.

[50] Consider *Baron v. R.*, [1993] 1 S.C.R. 416, at 454, where Sopinka J. was not prepared to consider reading down the impugned legislation in the absence of a submission by the Crown that reading down would constitute a lesser intrusion into the role of the legislature.

[51] *Supra*, note 46. See also, in a similar vein, *R. v. Advance Cutting and Coring Ltd.*, 2001 SCC 70, para. 52 (*per* Bastarache J., dissenting).

replace the invalid legislation.[52] It has continued to be used in such situations. A recent example is *R. v. Guignard*,[53] where a zoning by-law that offended paragraph 2(*b*) of the Charter was permitted to remain in force for six months in order to avoid a legal vacuum as to land use planning.[54]

Despite the caution expressed in *Schachter v. Canada* that suspension of declaration of invalidity is not intended to solve the problem of judicial intrusion upon the legislature's role,[55] the remedy does appear to be serving that purpose. *Dunmore* is an example. It echoes the Court's decision in *Corbiere v. Canada (Minister of Indian Affairs and Northern Development)*,[56] where a suspension of the declaration of invalidity was seen to be a means to allow consultation with affected groups within a democratic process.[57]

Temporary validity may well have a dual purpose. That appears to have been the case in *Mackin v. New Brunswick (Minister of Finance)*,[58] where the Court held that legislation abolishing the system of supernumerary judges violated the constitutional guarantee of judicial independence. The declaration of invalidity was suspended to avoid the legal vacuum that would result, but also because:

> …it is not appropriate for this Court to dictate the approach that should be taken in order to rectify the situation. Since there is more than one way to do so, it is the government's task to determine which approach it prefers. …[59]

Given the dual purposes that may be served by temporary validity, it is somewhat surprising that the possibility of a suspended declaration of invalidity was not seriously considered in *R. v. Sharpe*. As discussed in the preceding section, the majority in that case rejects a declaration of invalidity as the appropriate remedy. The majority is concerned that "the evil targeted" by the impugned legislation would go unremedied until Parliament could pass another law.[60] However, that problem could be avoided if Parliament were afforded a period of temporary validity within which to pass a law that would fully meet Charter requirements. Temporary validity would appear to be tolerable where the defects in the existing law are, as in *Sharpe*, hypothetical and peripheral.

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[52] *Reference re Language Rights under s. 23 of Manitoba Act, 1870 and s. 133 of Constitution Act, 1867 (sub nom. Reference re Manitoba Language Rights)*, [1985] 1 S.C.R. 721, at 758, 767.

[53] 2002 SCC 14.

[54] *Id.*, para. 32.

[55] *Supra*, note 28, at 715-17.

[56] *Supra*, note 49.

[57] *Id.*, paras. 116-18. See also *M. v. H.*, [1999] 2 S.C.R. 3, para. 146 (*per* Iacobucci J.).

[58] 2002 SCC 13.

[59] *Id.*, para. 77 (*per* Gonthier J., for the majority).

[60] *Supra*, note 35, para. 111.

The approach taken in *Sharpe* does accord with the view of Lamer C.J. expressed in *Schachter*, that:

> …reading in is much preferable [to a delayed declaration of invalidity] where it is appropriate, since it immediately reconciles the legislation in question with the requirements of the *Charter*.[61]

Consistent with this approach, McLachlin C.J. in *Sharpe*, having found reading in to be appropriate, sees no need to consider the alternative of temporary validity of the impugned section of the *Criminal Code*. There is no substantial comparative evaluation of the relative merits of the remedial alternatives. That sort of analysis is dismissed as unnecessary.[62]

In recent years, the Court has employed temporary validity as a means of achieving Charter compliance while respecting the role of the legislature.[63] The remedy appeared to be escaping its restriction in *Schachter* to cases where an immediate declaration of invalidity would produce unacceptable effects on the public. *Dunmore* and *Mackin* are consistent with the more flexible use of the temporary validity, while *Sharpe* seems to return to the orthodoxy of *Schachter*. *Sharpe* may prove to be the exception. It will be difficult to resist evaluating remedies on a comparative basis and to resist including in that comparison not only an immediate declaration of invalidity, but a declaration coupled with a temporary suspension.

V. DAMAGES

In 1994 the Supreme Court of Canada observed that the law concerning the awarding of damages in Charter cases was in an uncertain state.[64] Not much has changed since.

The issue that came before the Supreme Court in 2001 was the availability of damages where a law is determined to be unconstitutional. The case was *Mackin v. New Brunswick (Minister of Finance)*, discussed in the preceding section.[65] The plaintiffs sought not only a declaration that the provincial legislation eliminating the system of supernumerary judges was unconstitutional, but

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[61] *Supra*, note 28, at 716.

[62] *Supra*, note 35, para. 114.

[63] Consider *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083; *M. v. H.*, *supra*, note 57; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, *supra*, note 49.

[64] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at 342 (*per* Sopinka and Cory JJ., for the Court). See also *143471 Canada Inc. v. Quebec (Attorney General)*, [1994] 2 S.C.R. 339, at 359 (*per* La Forest J.).

[65] *Supra*, note 58.

also damages for the violation of judicial independence. The trial judge dismissed the claim for damages, concluding that there is no right of action for damages for the enactment of a law subsequently declared unconstitutional.[66] The New Brunswick Court of Appeal disagreed. Mr. Justice Ryan, for the majority, stated:

> …it is inconceivable that the executive and legislative branches of government were oblivious to their assaults upon the third branch and its impact upon the independence of that entity. They manifestly and gravely disregarded the limits of their discretionary powers. In the context that I advance, neither negligence nor intention is requisite to found liability for damages. They are relevant but not conditions. Damages should follow and it matters nought whether there is good faith or bad faith on the part of the executive branch, the legislative branch or the two in concert.[67]

On appeal to the Supreme Court, the claim for damages was dismissed. Mr. Justice Gonthier, for the majority, deals with the claim for damages both under subsection 24(1) of the Charter and under the ordinary law of civil liability.[68] As to the former, he confirms that a declaration that a law is invalid under the Charter will not, as a rule, give rise to an action for damages under subsection 24(1). Relying on *Schachter v. Canada*,[69] Mr. Justice Gonthier states:

> In short, although it cannot be asserted that damages may never be obtained following a declaration of unconstitutionality, it is true that, as a rule, 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*.[70]

He concludes that the plaintiffs are not entitled to damages merely because the legislation at issue has been found to be unconstitutional.[71]

The result in *Mackin* is consistent with the approach to remedies in *Guimond v. Quebec (Attorney General)*,[72] where a bare allegation of unconstitutionality was held not to be a sufficient basis for a claim in damages under subsection 24(1) of the Charter.[73] It is also consistent with the observation by McLachlin C.J. in the *Dunedin Construction* case:

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[66] *Mackin v. New Brunswick (Minister of Finance)* (1998), 21 C.P.C. (4th) 29, paras. 56-59 (N.B. Q.B.).

[67] *Rice v. New Brunswick* (1999), 181 D.L.R. (4th) 643, at para. 55 (N.B. C.A.). The *Mackin* and *Rice* cases were heard together with the reasons in one applying to the other.

[68] *Supra*, note 58, paras. 78-82.

[69] *Supra*, note 28, at 720.

[70] *Supra*, note 58, para. 81.

[71] *Id.*, para. 82.

[72] [1996] 3 S.C.R. 347.

[73] *Id.*, para. 19.

> … If a law is inconsistent with the *Charter*, s. 52 of the *Constitution Act, 1982* provides that it is invalid to the extent of the inconsistency. On the other hand, if a government action is inconsistent with the *Charter*, s. 24 provides remedies for the inconsistency.[74] [emphasis in the original]

In *Mackin*, Gonthier J. considers the possibility of government action that was inconsistent with the Charter. He finds no evidence to suggest that the government of New Brunswick acted negligently, in bad faith or by abusing its powers, or that the government had knowledge that eliminating the office of supernumerary judge was unconstitutional.[75] Neither subsection 24(1) of the Charter nor the general law of civil liability provide for liability on the part of the government or its officials simply because a law is invalid. Mr. Justice Gonthier explains:

> …if they act in good faith and without abusing their power under prevailing law and only subsequently are their acts found to be unconstitutional, they will not be liable. Otherwise, the effectiveness and efficiency of government action would be excessively constrained. Laws must be given their full force and effect as long as they are not declared invalid. Thus it is only in the event of conduct that is clearly wrong, in bad faith or an abuse of power that damages may be awarded.[76]

The above statement is fairly conventional. However, there is one peculiarity. That is the reference to liability for conduct that is "clearly wrong." The phrase appears more than once in describing the sort of conduct that may attract liability where a law is subsequently declared to be unconstitutional.[77] It is unclear whether "clearly wrong" is intended to import liability where there is neither bad faith nor an abuse of power. The phrase may merely be another way of expressing the element of intentional infliction of harm with knowledge of lack of legal authority that is inherent in bad faith and abuse of power.[78]

Mr. Justice Gonthier speaks of legislative bodies enjoying a "limited immunity" against actions based upon the invalidity of legislation.[79] Perhaps this limited immunity, with its possibility of liability for bad faith or abuse of power, applies only to municipal legislative bodies or the like, as considered in *Welbridge Holdings Ltd. v. Winnipeg (City)*.[80] That interpretation seems rea-

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[74] *R. v. 974649 Ontario Inc.*, *supra*, note 1, para. 14.

[75] *Supra*, note 58, para. 82.

[76] *Id.*, para. 79.

[77] See also, *id.*, para. 78. In French, "clairement fautive".

[78] Consider *Odhavji Estate v. Woodhouse* (2000), 52 O.R. (3d) 181 (C.A.); leave to appeal granted [2001] S.C.C.A. No. 75 (QL), concerning the intentional element in the tort of abuse of public office.

[79] *Supra*, note 58, para. 78.

[80] [1971] S.C.R. 957.

sonable given Gonthier J.'s apparent approval in *Mackin*,[81] as in *Guimond*,[82] of a passage from Dussault and Borgeat, *Administrative Law: A Treatise*, to the effect that Parliament or a legislature cannot be held liable for anything they do in the exercise of their legislative powers. It would seem that the day of actions against Parliament for bad faith in enacting legislation has not yet arrived.

Finally, it should be noted that the dismissal of the damages claim does not mean that the decision in *Mackin* will not have financial consequences. Despite the suspension of the declaration of invalidity, the plaintiffs are entitled to take advantage of the finding of unconstitutionality of the legislation which did away with their supernumerary status.[83] They may be able to claim a statutory entitlement to the salary and benefits they would have been paid but for the abolition of their supernumerary status by the unconstitutional legislation.

VI. CONCLUSION

The dichotomy of remedies under subsection 24(1) of the Charter and subsection 52(1) of the *Constitution Act, 1982* continues. The Court's decisions concerning subsection 24(1) represent a re-affirmation of existing principles, with some hint of future development of the concept of court of competent jurisdiction as the functional and structural approach takes hold. The Court's decisions concerning subsection 52(1) reflect the intimate connection between remedies and the substantive issues of the compliance of legislation with Charter requirements. Common to the decisions concerning both subsection 24(1) and subsection 52(1) is a caution in the exercise of remedial power so as to avoid any unnecessary interference with the role of the legislature.

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[81] *Supra*, note 58, para. 78.
[82] *Supra*, note 72, para. 14.
[83] *Supra*, note 58, paras. 75-76.