

Charter Remedies: §24(1) & (2)

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Once a litigant has established that their *Charter of Rights and Freedoms*' rights have been violated what remedies are available?

Parliament has provided two sections in the *Charter* to address this: §24(1) to guarantee the enforcement of enumerated rights and freedoms; and §24(2) to exclude evidence that would bring the administration of justice into disrepute.

With any law the place to start is with the wording of the section.

It is "*presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose*": of *Tower v. M.N.R.*, [2004] 1 F.C. 183 (F.C.A.) per MALONE J.A. at §§15 – 16.

Enforcement

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

The language of §24(1) is expansive and remedies fashioned under it cannot be distilled into a formula for general application: *R. v. Mills*, [1986] 1 S.C.R. 863.

If an applicant is challenging the constitutionality of the legislation itself, then recourse to s.24 is unnecessary: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; but where the applicant seeks to enforce their Charter rights, then the courts can grant, in appropriate circumstances, offer remedies including: habeas corpus, injunctions, return of seized documents, damages, costs and in the most serious breaches a stay of the proceedings: *R. v. O'Connor*, [1995] 4 S.C.R. 411 at §§75 – 82.

The person claiming that their *Charter* rights have been infringed must apply to "*court of competent jurisdiction*" and claim the relief they seek. Normally, the forum will be the tribunal that has jurisdiction over the person: *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575; the subject matter and have the authority to make the order sought: *R. v. Mills*, [1986] 1 S.C.R. 863; but it may not actually be a court, *per se*: *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504.

Generally, in order to seek a remedy an individual must have "*standing*," which is to say, that it is their Charter rights which have been infringed: *R. v. Edwards*, [1996] 1 S.C.R. 128; but there are exceptions: *R. v. Thompson*, [1990] 2 S.C.R. 1111.

Typically the alleged infringement will have been in the past: *United States of America v. Kwok*, [2001] 1 S.C.R. 532; but in rare circumstances the infringement may be prospective: *Phillips v. Nova Scotia (Westray Mine Inquiry)*, [1995] 2 S.C.R. 97.

The burden of proving – on a balance of probabilities – that the infringement of their *Charter* rights has occurred is with the applicant: *R. v. Collins*, [1987] 1 S.C.R. 265.

Once the applicant has discharged their onus and established the breach it will be for the court to produce the appropriate remedy. Courts act in a manner that is responsive to the protected right and they will fashion a remedy that is effective in remedying the *Charter* violation: *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3.

Charter §24(1) is not used to exclude evidence because of an infringed or denied right or freedom, that is the purpose of *Charter* §24(2); *R. v. Therens*, [1985] 1 S.C.R. 613.

Exclusion Of Evidence

"§24(2) *Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.*"

The Supreme Court of Canada established three (3) criteria for consideration by a court, under §24(2), in deciding whether to exclude evidence: *R. v. Collins*, [1987] 1 S.C.R. 265.

First, will the admission of the evidence affect the fairness of the trial? If yes, then to allow the evidence to be used

would tend to bring the administration of the evidence into disrepute and so it must be excluded, without considering other factors, such as whether the evidence is conscriptive or non-conscriptive: *R. v. Stillman*, [1997] 1 S.C.R. 607.

Second, how serious is the *Charter* violation? In assessing this, the court will consider factors such as bad faith, was it inadvertent or of a merely technical nature, or whether it was deliberate, willful or flagrant, was urgency a factor, whether there were alternative means of obtaining the evidence: *R. v. Therens* (1985), 18 C.C.C. (3d) 481 at §76 (S.C.C.); if the officer(s) failed to follow procedures: *R. v. Law* (2002), 160 C.C.C. (3d) 449 at §38 (S.C.C.); and *R. v. Caslake*, [1998] 1 S.C.R. at §34.

Third, the court must balance the interests of truth with the integrity of the judicial system: *R. v. Simmons*, [1988] 2 S.C.R. 495, at p. 534; or put differently, “*whether the vindication of the specific Charter violation through the exclusion of evidence extracts too great a toll on the truth seeking goal of the criminal trial*”: *R. v. Kitaitchik*, (2002), 161 O.A.C. 169, per Doherty J.A. at §47, as see *R. v. Buhay*, [2003] 1 S.C.R. 631.

In essence, unconstitutionally obtained evidence will not often affect the fairness of the trial, but if admitting it would be to offer judicial condonation of unacceptable police or prosecutorial conduct then it will be excluded: *Collins*, above at §31.

In *R. v. Clayton and Farmer*, released March 18, 2005, as Docket #8470;s C37990-C36722 (Ont. C.A.) per Doherty, J.A. (at §95) introduced another criteria, whether the violation was a result of poorly trained and supervised officers, amounting to an, “*institutional failure to equip officers with the training necessary to perform their duties within the strictures of the Charter*.”

Willful, flagrant or deliberate breaches of an accused's *Charter* rights, in order to obtain incriminating evidence, would usually tend to favour exclusion of the evidence: see *R. v. Genest*, [1989] 1 S.C.R. 59; *R. v. Manninen*, [1987] 1 S.C.R. 1233; and *R. v. Greffe*, [1990] 1 S.C.R. 755.

Conclusion

Most *Charter* applications are made in criminal cases; for the simple reason that although constitutional law tends to be slow, expensive, slow, complex and prone to appeals, an adverse result for an accused is even worse than the litigation.

All such cases are fact driven; the facts are not a mere technicality; rather, they are essential to a proper consideration of *Charter* issues: *R. v. Bain*, [1992] 1 S.C.R. 91 per Gonthier, J. (dissenting).

Since no *Charter* decisions can be made in a factual vacuum: *Hy and Zel's Inc. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675; generalities in such matters are inherently perilous; however, by applying the principles established by case law, to any actual case, lawyers are able to assess the results – on the balance of probabilities.

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