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CONSTITUTIONAL REMEDIES IN CANADA

THIRD EDITION

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Dear Subscriber:

This release contains chapters ten to fourteen of a completely revised third edition. Each chapter has been re-written to reflect developments in remedies since the first edition was published in 1994 and the second edition was published in 2013.

Chapter 10 has been rewritten to take account of how in more recent cases, the Supreme Court has added a fourth part to the test in *R. v. Grant*, 2009 SCC 32. This fourth part examines the overall balance between the cases for exclusion or admission of the unconstitutionally obtained evidence. This fourth part of the s. 24(2) test presents some of the same challenges of balancing conflicting values that are also found in other parts of the jurisprudence of constitutional remedies.

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Chapter 11 deals with the growing jurisprudence on Charter damage claims and costs orders. The discussion of class actions has been expanded to take account of the increased willingness of courts to certify class actions seeking Charter damages. On the one hand, this appropriately recognizes that issues of underlying violations, justification and what is required to vindicate the Charter and deter Charter violations will often raise common issues. On the other hand, the proliferation of Charter damage class actions raise questions about the low quantum often awarded for individual violations (including in class actions) and how effective and meaningful the damages remedy is even when aggregated by class actions. This chapter also explores Charter costs jurisprudence while suggesting that linkages could still be made with the jurisprudence governing public interest standing and mootness especially as it relates to concerns about legality and access to justice.

Chapter 12 is new. It combines previous chapters that dealt with declarations and injunctions separately. This has been done to emphasize that these remedies are often alternative remedies. This chapter also examines an intermediate remedy between declarations and injunctions that I have called the declaration plus. The Supreme Court's decision in *Ontario (Attorney General) v. Restoule*, 2024 SCC 27 provides an example of the declaration plus which recognizes that a declaration that ends the court's involvement in the case may in some contexts be inadequate. The plus in the declaration plus can include all of the court's remedial powers provided they are exercised in a purposive and principled manner including the retention of jurisdiction. Unfortunately, trial judges remain reluctant to follow the majority decision in *Doucet-Boudreau v. Nova Scotia (Department of Education)*, 2003 SCC 62 and retain jurisdiction despite the effectiveness of the remedy in that case and the approval of that remedy by the majority of the Supreme Court.

Chapter 13 deals with the broad range of s. 52(1) remedies. *Ontario (Attorney General) v. G*, 2020 SCC 38 and *R. v. Albashir*, 2021 SCC 48 provide helpful principles to govern the use of suspended declarations of invalidity and affirm the ability of courts to order purposive exemptions from the period of suspension so as to minimize harms that the suspended declaration of invalidity cause to Charter rights. One continuing challenging issue is the appropriate time period for a suspended declaration of invalidity.

Chapter 14 examines remedies available for the violation of Aboriginal and Treaty rights under s. 35 of the *Constitution Act, 1982* and related concepts such as the Crown's duty to consult and duty to act honourably. It continues to raise concerns that violations of the Crown's duty to consult do not always result in remedies that compensate for past harms caused by breach of the duty to consult and do not always provide adequate guidance to ensure that the duty to consult is honourably discharged. There is still a role for interlocutory injunctions. The declaration plus might also play a constructive

role. The Court in both *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 and *Ontario (Attorney General) v. Restoule*, 2024 SCC 27 has made clear that courts can draw on their full range of remedial powers and use creative remedies to remedy a proven s. 35 violation. The Court's decision in *Québec (Procureur général) c. Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39 also affirms that damages for breaches of the honour of the Crown will require constitutional remedies that attempt to achieve "reconciliatory justice" as distinct from private law concepts of corrective justice. In that case, the Court provided the damage remedy requested by the First Nation which was more generous than would have been available simply for a breach of the private law.

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