

7-1-1992

Emergency Judicial Relief for Human Rights Violations in Canada and Argentina

René Provost

Follow this and additional works at: <http://repository.law.miami.edu/umialr>



Part of the [Human Rights Law Commons](#)

Recommended Citation

René Provost, *Emergency Judicial Relief for Human Rights Violations in Canada and Argentina*, 23 U. Miami Inter-Am. L. Rev. 693 (1992)

Available at: <http://repository.law.miami.edu/umialr/vol23/iss3/7>

This Article is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Inter-American Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

EMERGENCY JUDICIAL RELIEF FOR HUMAN RIGHTS VIOLATIONS IN CANADA AND ARGENTINA

RENÉ PROVOST*

I. INTRODUCTION	694
II. THE LATIN-AMERICAN AMPARO EXPERIENCE	699
A. <i>Preliminary Considerations</i>	699
B. <i>The Development of Amparo in Mexico</i>	701
1. The Early Development of Amparo	701
2. The Nature and Components of the Mexican Amparo	703
a. The Liberty Amparo (amparo de libertad)	705
b. The Constitutionality Amparo (amparo contra leyes)	705
c. The Judicial or "Cassation" Amparo	706
d. The Administrative Amparo (amparo como contencioso-administrativo)	707
e. The Agrarian Amparo (amparo en materia agraria, ejidal y comunal)	707
C. <i>The Argentine Amparo</i>	708
1. Development of Amparo in Argentina	709
2. General Principles of Amparo	712
a. Acts Giving Rise to Amparo	713
b. Procedural Considerations	715
c. The Amparo Judgment	716
III. RELEVANCE OF AMPARO FOR CANADIAN CONSTITUTIONAL LAW	719
A. <i>Preliminary Considerations</i>	719
B. <i>Judicial Interpretation of Section 24(1) of the Charter</i>	721

* LL.B. 1988, Université de Montréal; LL.M. 1991 U.C. Berkeley; Doctor of Philosophy Candidate, University of Oxford. Adjunct Lecturer of International Law, Lehigh University (1991). I wish to warmly thank Alejandro Garro, Stephan Reisenfeld, and Shauna Van Praagh for their helpful comments and suggestions which have greatly enriched the article. Finally, I wish to acknowledge the Social Sciences and Humanities Research Council of Canada for its generous financial support.

1.	<i>R. v. Mills</i> : Initial Treatment of Section 24(1)	722
	a. Availability and Jurisdiction	723
	b. Procedural Considerations	725
2.	Subsequent Interpretations of Section 24(1) of the Charter	728
	a. <i>R. v. Rahey</i>	728
	b. <i>R. v. Gamble</i>	730
C.	<i>The Need for Further Development of the Law of Section 24(1)</i>	732
	1. General Trend	732
	2. Inadequacy of Pre-Charter Remedies	736
	a. Crown Immunity	736
	b. Discretionary Nature of Remedies	738
	c. Statutory Limitations	739
	d. Effectiveness	740
D.	<i>Criteria for Applications Pursuant to Section 24(1)</i>	742
	1. Acts Giving Rise to a Charter Application	743
	a. Parties to the Application	743
	b. Nature of the Violation	747
	2. Procedural Considerations	749
	a. Supplementary Character and Exhaustion of Remedies	749
	b. Court of Competent Jurisdiction	751
	3. Judgment on a Charter Application	753
	a. Declarations of Unconstitutionality	753
	b. Appropriate and Just Remedy	755
IV.	CONCLUSION	759

Quand je vais dans un pays, je n'examine pas s'il y a de bonnes lois, mais si on exécute celles qui y sont, car il y a de bonnes lois partout.¹

I. INTRODUCTION

Constitutionalism in Canada and Argentina has been strongly influenced by the United States. However, as all three constitu-

1. Montesquieu, quoted in Bernard Laprade, *Le droit à un remède utile: La présentation du thème*, in VUES CANADIENNES ET EUROPEENNES DES DROITS ET LIBERTÉS 223 (Gérald-A. Beaudoin ed., 1989).

tional regimes were born out of idiosyncratic circumstances parallels among them can be misleading. In particular, the civil law tradition present in Argentina must be distinguished from the common law roots of the U.S. and Canadian systems.²

In the area of constitutional remedies, surprisingly perhaps, Argentine courts have proved themselves to be as inventive as their common law counterparts. The most striking example of this judicial activism is the creation of the writ of amparo designed to provide judicial protection from human rights violations. Canadian courts, on the other hand, have been very reluctant to arrogate powers not specifically granted to them by Parliament. Only lately have they adopted a more aggressive stance following the inception in 1982 of the Canadian Charter of Rights and Freedoms (Charter).³ Despite the presence of a broad remedial provision in Section 24(1) of the Charter, Canadian courts have been slow to create protective mechanisms comparable to amparo which would provide fast and simple enforcement of fundamental human rights. Traditional remedies such as injunctions and mandamus were developed in a different context involving private rights rather than constitutionally entrenched public rights, and thus suffer from limitations making them ill-equipped to fully give life to the supreme law of the land. Nevertheless, courts in Canada are hesitant to abandon these remedies, which for centuries have stood as a bulwark protecting individuals from the tyranny of the state. This article attempts to lay the foundation for a much-needed constitutional remedy under the Charter. It does so by borrowing from the Argentine amparo the elements that are both compatible with and necessary to the full implementation of constitutional guarantees in Canada.

The introduction in 1982 of the Canadian Charter provided the judiciary with a new constitutional instrument with broad powers over many aspects of Canadian life. While sustained attention was given to the main body of the Charter's substantive rights, relatively little consideration was given to the remedy provision of that instrument. Section 24 of the Charter, regarding enforcement, provides that:

2. Canadian private law is part civil law (in Québec) and part common law (in the rest of Canada). Canadian public law, on the other hand, is wholly rooted in the public law of England.

3. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms) [hereinafter Charter].

(1) Anyone whose rights and 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.

(2) Where, in the 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.⁴

The first paragraph of that provision, the main object of the present study, was included in the Charter to ensure that the unfortunate experience of the Canadian Bill of Rights⁵ would not be repeated.

The shortcomings of the Canadian Bill of Rights are illustrated by the decision of the Supreme Court of Canada in *Hogan v. The Queen*.⁶ In this action, the Court found that although there had been a denial of the accused's right to counsel, there was no remedial provision available to exclude the illegally obtained evidence, and that it did not lie within the province of the courts to create one. The timid approach of the Canadian Supreme Court led to "that vain thing of a right without a remedy."⁷ This deficiency was one of the main concerns leading to the inclusion of Section 24 in the Charter.⁸

The need for an explicit remedial provision to avoid situations

4. The French text reads:

(1) Toute personne victime de violation ou de négation des droits et libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

(2) Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des éléments de preuve ont été obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente charte, ces éléments de preuve sont écartés s'il est établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice.

Charter, pt. I, §§ 24(1), 24(2). The French and English text provided here are both regarded as official versions of the law. Both have played an important role in the interpretation of the provision by Canadian courts.

5. Canadian Bill of Rights, R.S.C., app. III (1985), 8 & 9 Eliz. 2, ch.44 (Can.).

6. [1975] 2 S.C.R. 754 (Can.).

7. *Ashby v. White*, 92 Eng. Rep. 126, 136 (K.B. 1703) (Holt, C.J., dissenting).

8. For an interesting analysis of the various stages in the development of section 24, see A. Anne McLellan & Bruce P. Elman, *The Enforcement of the Canadian Charter of Rights and Freedoms: An Analysis of Section 24*, 21 ALBERTA L. REV [ALTA. L. REV.] 205, 206-08 (1983).

such as the one in *Hogan* was not in any sense novel to the law of human rights at the international level. The Charter follows in the line of various regional and international human rights instruments adopted after the Second World War, themselves inspired by the past experiences of countries such as the United States, the United Kingdom, and France.⁹ Specifically, Section 24 of the Charter derives more or less directly from Article 8 of the Universal Declaration of Human Rights, providing that: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by the law."¹⁰ Similar provisions can be found in most major international or regional human rights agreements, including Article 2(3) of the International Covenant on Civil and Political Rights,¹¹ Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,¹² Article 18 of the

9. This ancestry was recognized by the Supreme Court of Canada in *in re Public Service Employees Act (Alta.)*, [1987] 1 S.C.R. 313, 348 (Can.); *Slaight Communications, Inc. v. Davidson*, [1989] 1 S.C.R. 1038, 1056-57 (Can.). See also ANNE F. BAYEFSKY, INTERNATIONAL HUMAN RIGHTS—USE IN CANADIAN CHARTER OF RIGHTS AND FREEDOMS LITIGATION 122 (1992); M. Le Bel, *L'interprétation de la Charte canadienne des droits et libertés au regard du droit international des droits de la personne—Critique de la démarche suivie par la Cour suprême du Canada*, 48 REVUE DU BARREAU [R. DU B.] 743, 756 (1988).

10. Universal Declaration of Human Rights, art. 8, G.A. Res. 217A, U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc., A/810, (1948).

11. Article 2(3) provides:

(3) Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibility of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

International Convention on Civil and Political Rights, art. 2(3), G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966).

12. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 13, 213 U.N.T.S. 221. [hereinafter European Convention]. Article 13 provides: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in official capacity." *Id.*

This provision was strongly influenced by the text of the Universal Declaration of Human Rights as well as by the Draft of Article 13 of the International Covenant. See Jean F. Flauss, *Le droit à un recours effectif: l'article 13 de la Convention européenne des droits de l'homme dans la jurisprudence de la Commission et de la Cour*, in VUES CANADIENNES ET EUROPEENNES DES DROITS ET LIBERTÉS 258-59 (Gérald-A. Beaudoin ed., 1989).

American Declaration of the Rights and Duties of Man,¹³ and Article 25 of the American Convention on Human Rights.¹⁴

The Charter derives generally from a worldwide movement towards the codification of human rights. More precisely, the origin of Section 24(1) can be traced to Article 8 of the Universal Declaration of Human Rights. Article 8 was itself directly influenced by Article 18 of the American Declaration of the Rights and Duties of Man, adopted in Bogota while the Universal Declaration was being drafted. Both provisions came into existence through amendments advocated by the Mexican delegation, and constitute nothing more than a reflection of the right of amparo, well known at that time in Mexico and in a number of other Latin-American countries. It was, in the words of a justice of the Mexican Federal Supreme Court, one piece of Mexico's self-attributed "task of conveying to the world's legal heritage that institution which, as a shield of human dignity, her own painful history conceived."¹⁵

13. American Declaration of the Rights and Duties of Man, May 2, 1948, OEA/Ser.L/V/II.23/Doc.21/Rev.6 (English 1979), reprinted in 43 AM. J. INT'L L. (Doc. Supp.) 133 (1949).

Article 18 states that "Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights." *Id.* at 136.

14. American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 69, reprinted in 9 I.L.M. 673 (1970). Article 25 provides:

1. Everyone has the right to simple and prompt recourse, or any other effective recourse to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this convention, even though such violation may have been committed by persons acting in the course of their official duties.
2. The State Parties undertake:
 - a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
 - b. to develop the possibilities of judicial remedy; and
 - c. to ensure that the competent authorities shall enforce such remedies when granted.

Though these international agreements are not the main topic of the present study, it is interesting to note that the Supreme Court of Canada stated in *in re Public Service Employees Act (Alta.)*, [1987] 1 S.C.R. 313 (Can.), that the Charter was to be presumed to grant a protection at least equal to those treaties ratified by Canada, and that the various sources of international law are to be considered "relevant and persuasive for interpretation of the Charter's provision." *Id.* at 348-49. See also Le Bel, *supra* note 9 *passim*.

15. Felipe T. Ramírez, *The International Expansion of the Mexican Amparo*, 1 INTER-AM. L. REV. 163, 166 (1959). For a detailed account of the amendment procedure leading to the adoption of Article 8 of the Universal Declaration and the role played by the Mexican delegation, see PIERRE MERTENS, *LE DROIT DE RECOURS EFFECTIF DEVANT LES INSTANCES NATIONALES EN CAS DE VIOLATION D'UN DROIT DE L'HOMME* 19-26 (1973); see also Héctor Fix Zamudio, *The Writ of Amparo in Latin-America*, 13 LAW. AM. 361, 363 (1981).

Inspired by the amparo's indirect parentage of Section 24(1) of the Charter, this article examines the nature of amparo from a Canadian perspective, concentrating particularly on the law of the Argentine amparo. It assesses the state of Canada's constitutional remedies with respect to Section 24(1) of the Charter and ultimately proposes a procedural framework for applications made pursuant to that provision while keeping the Argentine amparo as an inspirational background.

II. THE LATIN-AMERICAN AMPARO EXPERIENCE

A. *Preliminary Considerations*

An issue demanding primary attention, while not directly related to the law of amparo itself, but instead to the social and political context in which it exists, is that of chronic political instability and undue influence at the highest level of many Latin-American judicial systems. It would not be an uncommon reaction to wholly dismiss the Latin-American law of amparo based on a paternalistic fear that the caudillos would not allow for the development of a sound legal theory in the area of public law. Such a response is by no means devoid of a basis in reality. For example, scholars relate that between 1935 and 1975, there were in Latin America more than one hundred successful coups and manifold more unsuccessful ones¹⁶ and that by 1975 the twenty Latin-American republics had had an aggregate of 246 constitutions, for an average of more than twelve per country.¹⁷

These considerations, however, are more in the nature of caveats to be kept in mind during a study of the Latin-American amparo, rather than sufficient reasons to abstain from undertaking such an exercise. Professor Barker discusses this matter in a recent article and offers a threefold answer to the objection of sceptics.¹⁸ First, many Latin-American countries have enjoyed prolonged periods of constitutional stability. Indeed, among others Argentina

16. KENNETH L. KARST & KEITH S. ROSENN, *LAW AND DEVELOPMENT IN LATIN AMERICA* 183-222 (Latin American Studies Series No. 28, 1975).

17. RUSSEL FITZGIBBON, *LATIN-AMERICAN CONSTITUTIONS: TEXTUAL CITATIONS* 3 (1974), discussed in Keith S. Rosenn, *Judicial Review in Latin America*, 35 OHIO ST. L.J. 785 (1974). For a more recent account of constitutionalism in Latin America, see Keith S. Rosenn, *The Success of Constitutionalism in the United States and Its Failure in Latin America: An Explanation*, 22 U. MIAMI INTER-AM. L. REV. 1 (1990).

18. Robert S. Barker, *Constitutionalism in the Americas: A Bicentennial Perspective*, 49 U. PITT. L. REV. 891, 893-95 (1988).

experienced seventy years of uninterrupted constitutional government.¹⁹ Secondly, many courts have fervently remained independent-minded even in times of political unrest. These courts have continued to apply the law despite authoritarian rulers, demonstrating that "constitutions do not necessarily disappear when dictators come to power."²⁰ Thirdly, there is a pervasive tendency among Latin-American lawyers and judges to consider dictatorships as unfortunate exceptions and to regard the constitution as merely suspended.²¹ These conclusions are persuasive, particularly with respect to Argentina, which will be the main country of reference for this article's study of amparo.²² Further, it must be remarked that a nation's judiciary cannot be expected to uphold the constitution by itself. Such a task depends largely on the executive branch of government, and particularly on the police, which must enforce whatever decision the courts render. In this regard, a clear distinction should be made between the recognition of individual rights by the courts and the exercise of those rights, which may not be allowed by the Executive. As one Brazilian judge remarked, the courts do not have their own "arsenal of shrapnel and torpedoes" to use if the Executive does not comply with judicial decisions.²³ This second stage of enforcement of judicial decisions does not necessarily invalidate new legal theories and developments achieved by the courts, which are the topics of concern of this article.

19. *Id.* at 893; see Rosenn, *The Success of Constitutionalism*, *supra* note 17, at 31 (listing the constitutions of Latin-American and Caribbean nations as of 1990); see generally SUSAN CALVERT & PETER CALVERT, *ARGENTINA: POLITICAL CULTURE AND INSTABILITY* (1989).

20. Barker, *supra* note 18, at 895. Professor Barker cites as an example the Brazilian Supreme Federal Tribunal's decision in *S.A. Metalúrgica Santo Antonio v. Estado de Minas Gerais, Recurso Extraordinario* [R.E.] 68.661, Tribunal Pleno (STF Dec. 3, 1969) (Braz.), where that court refused to recognize the validity of an "Institutional Act," purporting to be superior to the Constitution and severely curtailing the power of judicial review. Barker, *supra* note 18, at 894. The author further cites an Argentine decision similarly refusing to recognize the supra-constitutional character of a revolutionary statute. Barker, *supra* note 18, at 893 (Sánchez Sorondo "Azul y Blanco", [1968] *JURISPRUDENCIA ARGENTINA* [J.A.]. 56 (CSJN 1968) (Arg.), translated in KARST & ROSENN, *supra* note 16, at 220-21).

21. Barker, *supra* note 18, at 895.

22. For further discussion on the question of judicial independence in Mexico and criticism of the political analysis thereof in the United States, see Carl E. Schwarz, *The Mexican Writ of Amparo and Extraordinary Judicial Remedies Against Official Abuse in the United States: A Comparative Analysis* 20-27 (1971) (unpublished Ph.D. thesis, University of California in Santa Barbara, available at U.C. Berkeley Law Library).

23. Nelson Hungria, quoted in INTER-AMER. BAR ASSOC., *PROCEEDINGS OF THE TENTH CONFERENCE* 205, 211 (1957), cited in Rosenn, *Judicial Review in Latin America*, *supra* note 17, at 813-14 n.139.

Before considering the Argentine law of amparo, tribute must be paid to that law's origins in Mexico, "the land of amparo,"²⁴ where the writ first appeared before spreading throughout Latin America.

B. *The Development of Amparo in Mexico*

The writ of amparo, which has been described as "the most Mexican institution of the whole of positive Mexican law,"²⁵ developed in two stages. The first consisted of the initial conception and inclusion of the right of amparo in the Mexican Constitution of 1848. The second brought refinements and complications to amparo in that country.

1. The Early Development of Amparo

Amparo was born out of the Mexican Revolutionary War at the beginning of the nineteenth century. Although Mexico is the birthplace of amparo, the idea of judicial review of government action embodied in this new mechanism was strongly influenced by American thought. The idea was first introduced in Mexico through the Spanish translation of Alexis de Tocqueville's famed work, *Democracy in America*, which became available in Mexico in 1837, a mere three years before the appearance of amparo. The compatibility of the American model with the Mexican legal system is explained in the following terms:

In the first quarter of the nineteenth century, when most of Latin America won its independence, the United States was a young but established country. Like the new nations of Latin America, it had endured a long period of colonial rule under a European monarchy and had fought a successful war against its mother country in the name of liberty. *The affinity created by similar colonial and revolutionary experiences was reinforced by philosophical attitudes prevalent when the Latin-American republics were writing their constitutions.*²⁶

24. ENRIQUE VESCOVI, LOS RECURSOS JUDICIALES Y ADEMÁS MEDIOS IMPUGNATIVOS EN IBEROAMÉRICA 468 (1988).

25. Carlos Echanove Trujillo, *La procédure Mexicaine d'amparo*, 1 REVUE INTERNATIONALE DE DROIT COMPARÉ [R.I.D.C.] 229, 248 (1949)(calling amparo "l'institution la plus mexicaine de tout le droit mexicain"). On the Mexican amparo generally, see IGNACIO BURGOA, EL JUICIO DE AMPARO (24th ed. 1988).

26. Barker, *supra* note 18, at 896-97 (emphasis added).

The American influence was by no means an exclusive one, and it has been shown that at least the French, British, and Spanish traditions also played significant roles.²⁷

The first chapter in the story of amparo involves Manuel Crecencio Rejón in 1840. At the time an active politician at the federal level, Rejón decided to return to his native state of Yucatán where a rebellion against the central authority in Mexico City had led to the secession of the state from the rest of Mexico. As the head of the constitutional reform commission, Rejón proposed to include a judicial review procedure in the new supreme law of the state. The aim of the procedure was to give state courts a tool powerful enough to effectively protect individuals against abuses from the state.²⁸ The provision included in the 1841 Yucatán Constitution gave direct jurisdiction to the state's highest court to review the constitutionality of acts of the legislative, executive, and judicial branches of government.

A few years later, in 1846, Rejón went back to Mexico City to participate in the drafting of the new national constitution. He took with him his experience with amparo and proposed its inclusion in the federal constitution, basically along the same lines adopted in the Yucatán state constitution. The main thrust to adopt this new procedure at the federal level came, however, from another politician: Mariano Otero. Largely through Otero's efforts, the procedure was adopted with some modifications, the most important of which were embodied in what came to be known as the "Otero formula," Article 25 of the new Mexican Constitution:

The Courts of the Federation will protect [amparán] any inhabitant of the Republic in his exercise and conservation of those rights conceded to him by the Constitution and the constitutional laws, against all assaults of the Legislative and Executive Branches, on the federal as well as the state levels; such courts will be limited to granting protection in particular cases, over that which shall be revealed by the record of the trial, *without*

27. *Id.* at 901; see also VESCOVI, *supra* note 24, at 471 & n.24; Alberto F. Garay, *Federalism, the Judiciary and Constitutional Adjudication in Argentina: A Comparison with the U.S. Constitutional Model*, 22 U. MIAMI INTER-AM. L. REV. 161 (1991). There are English language publications containing an extensive review of all the possible sources of amparo, including the Greek and Roman antecedents. See RICHARD D. BAKER, *JUDICIAL REVIEW IN MEXICO: A STUDY OF THE AMPARO SUIT* 27-34 (1971); Schwarz, *supra* note 22, at 29-36; Héctor Fix Zamudio, *A Brief Introduction to the Mexican Writ of Amparo*, 9 CAL. W. INT'L L.J. 306, 309-10 (1979).

28. Echanove Trujillo, *supra* note 25, at 236.

*making any general declaration with respect to the law or act which motivates [the complaint].*²⁹

The Mexican Constitution entrusts federal courts, and more specifically the Supreme Federal Court, with the task of applying the national amparo. However, contrary to Rejón's model, Article 25 of the Mexican Constitution provides that amparo does not lie against acts of the Judicial branch. It must also be noted that the prohibition of general declaration of unconstitutionality found in Article 25 conforms both with the civil law tradition and with the wish to avoid clashes between the Judiciary and the other two branches of government.³⁰

The revolutionary Constitution of 1856 further modified the constitutional law of amparo by subjecting judicial decisions to review through amparo, as Rejón's original model had previously done. In 1917, at the inception of the extant Mexican Constitution, the breadth of amparo was again enlarged to permit review on the ground that a judge had wrongly interpreted the law.³¹ This translated into a *de plano* right to appeal any judgment directly to the Federal Supreme Court through amparo, since a losing litigant would rarely fail to argue that the judge has incorrectly interpreted the law.³² Finally, beginning in 1861, various statutes detailing the procedure and limits of the writ of amparo were from time to time enacted pursuant to the Constitution, as found necessary to manage the ever-growing complexity of that body of law.

2. The Nature and Components of the Mexican Amparo

Amparo was conceived as an all-purpose protective mechanism

29. Acta de Reformas del 18 de Mayo de 1847, translated in Schwarz, *supra* note 22, at 38 (emphasis added). As its name suggests, "Acta de Reformas" is an amendment to the Mexican Constitution of 1824.

30. Echanove Trujillo, *supra* note 25, at 242. The concept of stare decisis is foreign to the Civil law tradition, so a judicial declaration of unconstitutionality, valid *erga omnes*, would run contrary to the principle that court decisions do not constitute precedent binding in other cases. Meanwhile, the desire to avoid clashes between the judiciary and other branches of government was inherited from continental Europe where the rules laid out by Montesquieu in *De l'esprit des lois* were strictly applied. Barker, *supra* note 18, at 902-05.

31. Article 14 of the 1914 Mexican Constitution reads in part: "In civil suits the final judgment shall be according to the letter or the juridical interpretation of the law; in the absence of the latter it shall be based on the general principles of law." MEX. CONST. OF 1914 art. 14, translated in Schwarz, *supra* note 22, at 62 (emphasis added).

32. See Echanove Trujillo, *supra* note 25, at 244-45; Fix Zamudio, *supra* note 27, at 313-16.

designed to enforce individual rights against any act or statutory provision originating from a public authority. One of the most striking characteristics of amparo is that it lies directly in the Federal Supreme Court,³³ which accordingly has original jurisdiction to entertain certain amparo claims, called "direct amparo." Recent amendments to the Law of Amparo have resulted in concurrent jurisdiction between the Supreme Court and the federal collegiate circuit courts, which are analogous to the United States circuit courts of appeals. In addition to "direct amparo," there exists an "indirect amparo" whereby the applicant must initially seek redress in the local federal district courts. Whether a claim can be brought as a direct or indirect amparo will depend, as explained below, on its nature. The amparo is brought by the victim or by a representative if the victim is unable to attend. Again, the procedural steps will vary according to the kind of amparo sought, from the most informal oral petition, even by telephone, to a strict written procedure laden with delays.³⁴ Two procedural rules are applied in this respect. First, a defect in the procedure will be corrected *proprio motu* by the court for certain types of amparo when the applicant is indigent, underage, or incapacitated (*suplencia de la deficiencia de la queja*).³⁵ Second, consistent with the civil law's recourse in cassation, appellate courts are generally limited to curing the defects only to the extent that these defects are assigned in the procedure as "errors" and are of a purely legal character (principle of "strict law" or "*derecho estricto*").³⁶ An interlocutory order may be issued if irreparable harm would ensue otherwise, but such an order must always take into consideration the general interests of society.³⁷ The final decision binds only the parties to amparo, but five successive decisions of the Federal Supreme Court or the collegiate circuit courts in agreement on a point of law will create a binding precedent.³⁸

33. The Federal Supreme Court of Mexico is a continental European-type supreme court, divided into four chambers of five judges (*ministros*), sometimes sitting *en banc*. Fix Zamudio, *supra* note 27, at 333-34.

34. Rosenn, *Judicial Review in Latin America*, *supra* note 17, at 797. This will be the case primarily for direct amparo challenges which involve the constitutionality of statutes and which are heard in the Federal Supreme Court.

35. Héctor Fix Zamudio, *La reforma en el derecho de amparo*, in *REFORMA PROCESAL: ESTUDIOS EN MEMORIA DE NICETO ALCALA-ZAMORA Y CASTILLO* 265, 289-90 (1987).

36. This principle of strict law or *stricti juris* is analyzed and criticized at length in BAKER, *supra* note 27, at 185-95.

37. Fix Zamudio, *supra* note 27, at 339-40.

38. *Id.* at 346-47. This rule stems from a statute establishing which decisions will be considered precedents (*jurisprudencia*) in conformity with article 107 of the Mexican Con-

There are five general categories of amparo writs in Mexico. These categories are designed to cover any illegality by any official in any situation, with few explicit exceptions.³⁹

a. The Liberty Amparo (*amparo de libertad*)

This is the original form of amparo, designed to protect individuals against violation of the right to life, liberty, deportation or banishment, as well as some other forms of punishment described in Article 22 of the Mexican Constitution.⁴⁰ Liberty Amparo is an "indirect" form of the writ which must be presented in the federal collegiate circuit courts, leading to a court order suspending the act that impinges upon the right.

b. The Constitutionality Amparo (*amparo contra leyes*)

As its name indicates, this recourse takes the form of an attack on the constitutionality of a statute. This amparo must be subdivided into two classes. The first class, the "action in unconstitutionality" of the law, inspired by the American judicial review proceeding, consists of a frontal attack on the adoption and promulgation of the impugned statute. Similar to the Liberty Amparo, the Constitutionality Amparo is an "indirect amparo" and is thus brought in the local federal district court. The decision of that court may be appealed to the Federal Supreme Court. The Constitutionality Amparo will lie only against self-executing laws, or, in other words, statutes creating duties without the necessity of an intervening act by the Executive.⁴¹ The second class, the "recourse in unconstitutionality," is an incidental attack on the constitutionality of a statute which served as the basis of a judicial decision. This action is provided for by Article 73 of the Constitution, itself directly inspired from Article VI of the United States Constitution, which directs judges to apply the Constitution despite any con-

stitution, a provision by nature most alien to common law thinking. Article 107 of the Mexican Constitution provides: "The law shall specify the terms and cases in which the precedents of the courts of the federal judicial branch are binding, as well as the requirement for their modification." MEX. CONST. art 107.

39. These exceptions deal primarily with expropriation, expulsion of aliens, state of emergency, and "political questions." BAKER, *supra* note 27, at 131-63.

40. These punishments include mutilation, branding, flogging, beating with sticks, torture, excessive fines, and confiscation of property. See Fix Zamudio, *supra* note 27, at 317.

41. BAKER, *supra* note 27, at 167-68; Fix Zamudio, *supra* note 27, at 320-21.

trary law.⁴² The recourse is a direct amparo brought before the Federal Supreme Court or the collegial circuit courts, depending on the subject-matter and the monetary amount in controversy. For both classes of constitutionality amparo, the resulting declaration of unconstitutionality is not *erga omnes*. Rather, its effects extend only to the case at bar.

c. The Judicial or "Cassation" Amparo

This category of amparo, based on Article 14 of the Mexican Constitution, is aimed at the legality and constitutionality of a judicial interpretation.⁴³ Mexican courts have construed this provision to imply that any judicial or quasi-judicial decision can be reviewed through amparo to verify the validity of a point of law. It has thus become a constitutional right to have one's statutory rights decided on the basis of a *valid* judicial interpretation. Amparo suits arising under this rule can be used to challenge the application of any federal or state law by a judicial or administrative body, but only in final decisions or interlocutory decisions which could adversely affect the final outcome.⁴⁴ This class of amparo entrusts the Federal Supreme Court with the task of interpreting all laws. Its jurisdiction, unlike that of the U.S. Supreme Court, is not limited by a "federal question" requirement. This mechanism has thus allowed the Federal Supreme Court of Mexico, in a fashion similar to its Canadian counterpart, to direct the judicial development of Mexican law as a whole. Judicial Amparo is subject to the rigidly applied "strict law" rule described above, so as to allow review only on points of law and to preclude *de novo*

42. Article 73 of the Mexican Constitution reads:

This Constitution, the laws of the Congress of the Union that emanate therefrom and all treaties that have been made and shall be made therewith by the President of the Republic, with the approval of the Senate, shall be the supreme law of the whole Union. The judges of each State shall conform to the said Constitution, the laws and treaties, in spite of any contrary provisions that may appear in the constitution or laws of the states.

MEX. CONST. art. 73, translated in Fix Zamudio, *supra* note 27, at 322, n.76.

Paragraph 2 of Article VI of the United States Constitution provides:

This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or the Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

43. See *supra* note 31 and accompanying text.

44. BAKER, *supra* note 27, at 175-96; Fix Zamudio, *supra* note 27, at 323-25.

decisions. This interpretation of Article 14 of the Mexican Constitution has had the general effect of drowning the Federal Supreme Court with amparo proceedings.⁴⁵

d. The Administrative Amparo (*amparo como contencioso-administrativo*)

Since Mexico lacks a national procedure for the judicial review of administrative action similar to the kinds found in most countries of Anglo-American tradition, individuals whose rights are abused by a final administrative decision may have no remedy other than the writ of amparo. However, all forms of administrative review procedure must be exhausted before recourse to amparo is permitted.⁴⁶ The Administrative Amparo is an indirect amparo which is presented first in a district court for review of points of law only.

e. The Agrarian Amparo (*amparo en materia agraria, ejidal y comunal*)

This is a special amparo designed to protect the small landowners and native Indians and their rights under the agrarian reform laws. The agrarian amparo is generally more lenient towards the petitioner with respect to procedural errors. It is from this class of amparo (and the criminal amparo) that the rule of *suplencia de las deficiencias de la queja* was initially developed allowing courts to cure procedural defects *sua sponte*.⁴⁷

The very wide reach of the Mexican amparo is its strength and, at the same time, its weakness. The writ has succeeded in becoming an instrument that corrects nearly any infringement on individual rights by any branch of government. On the other hand, its availability has also meant a flooding of the Federal Supreme Court with amparo proceedings, particularly after it became possi-

45. See Rosenn, *Judicial Review in Latin America*, *supra* note 17, at 798.

46. There is a system of administrative review similar to the French or German administrative review procedure, but only at the federal level. The *Tribunal fiscal de la Federación* is modelled after the French *Conseil privé* and enjoys general review jurisdiction over all actions of the federal public service. The Tribunal's own decisions are reviewable through amparo. See Fix Zamudio, *supra* note 27, at 325-27.

47. See *supra* note 35 and accompanying text. See also Fix Zamudio, *supra* note 27, at 327-29.

ble to use amparo to challenge judicial decisions.⁴⁸ There has thus been in the last decade an effort to reduce the role of the Federal Supreme Court by giving it discretion to have the collegiate circuit courts hear most cases, while granting leave or certiorari only to those amparo suits involving legal, social, or economic matters of transcending national importance.⁴⁹ A further consequence of the versatility of amparo has been the ease with which it adapts to many different settings. This multiple application of amparo, however, has resulted in complex procedural rules leading to numerous calls for their simplification.⁵⁰ One change that has been introduced is the extension of the rule of *suplencia de las deficiencias de la queja* to cover cases beyond those of agrarian and criminal amparo. The availability and complexity of the amparo procedure have overloaded court dockets, leading to the use of amparo as a dilatory tactic by unscrupulous litigants and lawyers. Reforms in 1984 and 1986 imposed strict fines in order to curb these unethical tactics. Finally, some suggest doing away with the "Otero formula" and allowing the Supreme Court to render general declarations of unconstitutionality.⁵¹

Generally, the law of amparo has transcended the law of judicial review in Mexico, if not Mexican public law as a whole.

C. *The Argentine Amparo*

From Mexico, the institution of amparo spread with unequal rapidity throughout the rest of Latin America. Today, in one form or another, the writ is applied in Bolivia, Chile, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, and Peru.⁵² Two additional countries have substantially de-

48. Over 53,000 amparo suits were filed in the federal district courts alone from December 1969 to December 1970, and in 1968 there was a backlog of more than 20,000 amparo cases in the Mexican Supreme Court. These numbers, however, were significantly reduced by numerous amendments to the Constitution and the Law of Amparo. KARST & ROSENN, *supra* note 16, at 131-32.

49. Section 25 of the Ley Orgánica del Poder Judicial de la Federación, *quoted in* Juventino V. Castro, *La reforma procesal en el juicio de amparo*, in REFORMA PROCESAL, *supra* note 35, at 260. The Second Chamber of the Supreme Court, dealing with administrative questions, has possessed such discretionary power since 1967. In 1983, this discretion was extended to the other chambers dealing with criminal, civil, and labor cases, as well as to the Court sitting *en banc* on constitutional matters. Fix Zamudio, *supra* note 35, at 288-89, 299.

50. Fix Zamudio, *supra* note 35, at 280-83.

51. Fix Zamudio announces this change as inevitable. *Id.* at 297-98.

52. For a brief review of amparo in these countries, see Fix Zamudio, *supra* note 15, at

veloped similar procedures. The first is Brazil with the writ of security (*mandado de segurança*), derived from the writ of habeas corpus and the Mexican amparo.⁵³ The second is Argentina, whose amparo has generated more jurisprudential and legislative writing than any other derivative of the Mexican amparo.⁵⁴ Professor Ves-covi writes of the proliferation of amparo:

*Es decir que se puede afirmar, a manera conclusiva, que el amparo que tuvo su origen en Méjico, se ha difundido en todos los países del área, pero en un análisis comparativo debemos señalar que en esta difusión el instituto no recoge la extensión mejicana. Al contrario, en casi todo los países, se limita a su función natural de protección de las libertades fundamentales por medio de un proceso rápido y eficaz.*⁵⁵

Latin-American countries have thus not merely adopted the Mexican writ, but have adapted it to their own needs, thereby contributing to the development of what is now a truly Latin-American procedure. In view of its particular importance as well as its institutional and legal context, the Argentine Amparo deserves a closer look. The following will thus describe how it came about, and then analyze some of its most striking features, which, as the article will demonstrate, are both interesting and relevant to the Canadian context.

1. Development of Amparo in Argentina

Interestingly enough, as with its evolution in Mexico, amparo in Argentina originated at the provincial level some three decades before it became accepted at the federal constitutional level.⁵⁶ Until the second half of the twentieth century, the only federal recourses available in Argentina were the general action in unconsti-

365-80.

53. Some hispanophone scholars have indeed translated the Portuguese *mandado de segurança* as *mandamiento de amparo* in Spanish. *Id.* at 380. For a discussion of the Brazilian writ of security, see VESCOVI, *supra* note 24, at 489-98.

54. Fix Zamudio, *supra* note 15, at 368.

55. Ves-covi, *supra* note 24, at 474 ("Thus, it can be conclusively stated that amparo, initially developed in Mexico, has now spread throughout [South America]. A comparative analysis reveals, however, that this dissemination did not carry with it the full extension of amparo in Mexico. On the contrary, in nearly every country, amparo was restricted to its natural purpose of protecting fundamental freedoms through fast and effective proceedings.").

56. Amparo appeared in the Constitution of the Province of Santa Fe in 1921. Fix Zamudio, *supra* note 15, at 368.

tutionality (leading to a declaration that a statute was contrary to the supreme law of the land)⁵⁷ and the writ of habeas corpus (enforcing the right to physical liberty). Aware of the expansion of habeas corpus in neighboring Brazil and of the success of amparo in Mexico, many litigants attempted to protect rights other than that of physical liberty through habeas corpus, but to no avail.⁵⁸ Thus, an individual deprived of a right other than physical liberty, was left with the "ordinary course of administrative and judicial proceedings; which was arduous, expensive, and lengthy."⁵⁹

In *Angel Siri*,⁶⁰ the owner and director of a newspaper challenged the order of an undisclosed higher authority which closed his newspaper for no apparent reason. The lower court found that both the freedom of the press and the right to work had been violated, but that habeas corpus could not be granted in such a situation given that the physical liberty of the applicant was not involved. The Supreme Court of Justice reversed the lower court to grant an order directing the police to cease the forced closure of the paper, and in so doing, laid the foundation of the Argentine law of amparo. Simply put, the Court reasoned that even absent a specific provision granting the right to redress, such an accessory right was necessarily implied in the Argentine Constitution:

[I]ndividual guarantees exist and protect individuals by their simple entrenchment in the Constitution and independently of any regulatory statutes Declarations, rights and guarantees are not, as one may be led to believe, mere theoretical formulas Constitutional precepts as well as the institutional experience of the country jointly demand the full enjoyment and exercise of individual guarantees for an effective vigor of the rule of law, and impose upon the country's judges the duty of insuring them.⁶¹

57. This action was introduced in 1863 and was first exercised in 1887. It was largely inspired by the decision of the United States Supreme Court in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). See VESCOVI, *supra* note 24, at 384, 407; Thomas E. Roberts, Note, *The Writ of Amparo: A Remedy to Protect Constitutional Rights in Argentina*, 31 OHIO ST. L.J. 831, 834 (1970).

58. This phase of Argentine jurisprudence is analyzed in GÉRMAN BIDART CAMPOS, *RÉGIMEN LEGAL Y JURISPRUDENCIAL DEL AMPARO* 43-57 (1968); JOSÉ LAZZARINI, *EL JUICIO DE AMPARO* 15-33 (1967).

59. KARST & ROSENN, *supra* note 16, at 161.

60. Judgment of Dec. 27, 1957, *Angel Siri*, CSJN, 239 Fallos de la Corte Suprema de Justicia de la Nación [Fallos] 459 (1958) (Arg.).

61. *Id.* at 463-64.

The Court explained in a later decision⁶² that the legal basis of such a conclusion was to be found in Article 33 of the Argentine Constitution, a provision similar to Section 26 of the Canadian Charter.⁶³ Some commentators have suggested that this sudden departure from a long line of established precedent was linked to the overthrow of the Peron dictatorship three years before, and to the subsequent replacement of many members of the Supreme Court of Justice.⁶⁴

A few months later, the Supreme Court rendered a second landmark decision in the case of *Samuel Kot*,⁶⁵ refining the new law of amparo. In *Kot*, the owner of a textile factory sought to regain access to his plant, illegally occupied by striking workers. The Court's decision expanded the scope of amparo to cover the infringement on fundamental rights stemming from acts of individuals. The Court reasoned:

There is nothing in either the letter or the spirit of the Constitution that might permit the assertion that the protection of "human rights"—so called because they are the basic rights of man—is confined to attacks by official authorities. Neither is there anything to authorize the assertion that an illegal, serious, and open attack against any of the rights that make up liberty in the broad sense, would lack adequate constitutional protection because of the single fact that the attack comes from other private persons or organized groups of individuals.⁶⁶

This constitutes a most significant departure from the principle laid down in the Mexican law of amparo, where the writ will lie only against acts of a public authority.

62. Judgment of Sept. 5, 1958, S.R.L. Samuel Kot, CSJN, 241 Fallos 291 (1958) (Arg.).

63. Article 33 of the Argentine Constitution reads: "The declarations, rights, and guarantees enumerated in this Constitution shall not be construed to deny other rights and guarantees not enumerated, but shall be regarded as stemming from the principle of popular sovereignty and from a republican form of government." CONSTITUCIÓN ARGENTINA [CONST. ARG.] art. 33, translated in Fix Zamudio, *supra* note 15, at 370 n.31.

Section 26 of the Canadian Charter provides: "The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada." CAN. CONST. pt. 1 § 26.

64. See Roberts, *supra* note 57, at 835; Rosenn, *Judicial Review in Latin America*, *supra* note 17, at 801. The decision of the Supreme Court of Justice in *Siri* is discussed in BIDART CAMPOS, *supra* note 58, at 57-70; LAZZARINI, *supra* note 58, at 25-29; NESTOR PEDRO SAGÜÉS, ACCIÓN DE AMPARO 9-11 (2d ed. 1988); Roberto Repetto, *El recurso de Amparo en la nueva interpretación de la Corte suprema de la nación*, [1958-II] J.A. 476 (Arg.).

65. Judgment of Sept. 5, 1958, S.R.L. Samuel Kot, CSJN, 241 Fallos 291 (1958), translated in KARST & ROSENN, *supra* note 16, at 163-65.

66. 241 Fallos 291, translated in KARST & ROSENN, *supra* note 16 at 163-64.

After approximately a decade of purely jurisprudential development of the law of amparo—a highly unusual occurrence in a country of civil law tradition—and following many aborted projects,⁶⁷ the federal legislature enacted statutes to regulate the practice and use of amparo. The most comprehensive piece of legislation on amparo is Law No. 16.986 of October 18, 1966, aimed primarily at the amparo against acts of a public authority.⁶⁸ In addition to answering various procedural questions, Law No. 16.986 declared amparo inapplicable against acts of the judiciary or acts pursuant to the National Defense Law.⁶⁹ Further, and potentially more significantly, the law declared that amparo will not lie where it can lead to a judgment that would “directly or indirectly compromise the regularity, continuity and efficacy of performance of a public service, or to the development of activities essential to the state.”⁷⁰ A year later the federal legislature adopted a second statute governing amparo against acts of private individuals, Law No. 17.454 of September 20, 1967.⁷¹ These statutes did not change much of the existing law of amparo and can rightly be considered primarily as a codification of the judicially developed rules regulating the use of amparo.⁷²

2. General Principles of Amparo

While far from attaining the complexity of its Mexican predecessor, the Argentine law of amparo has given rise to many precise rules governing its application. For the sake of clarity, these can be divided into three groups: (i) rules relating to the act giving rise to the amparo proceedings; (ii) procedural rules; and (iii) rules affecting the decision to be rendered.

67. For a discussion of draft statutes of amparo that were never adopted, see SAGÜÉS, *supra* note 64, at 17-31; Alfredo Orgaz, *La legislación sobre amparo*, 102 LA LEY [L.L.] 1072 (1961).

68. Law No. 16.986 of Oct. 18, 1966, 1967-A A.L.J.A. 500 (Arg.) translated in KARST & ROSENN, *supra* note 16, at 174-76.

69. *Id.* art. 2(b).

70. *Id.* art. 2(c). According to Roberts, *supra* note 57, at 844-45, this provision would in fact be unconstitutional. This opinion is shared by BIDART CAMPOS, *supra* note 58, at 274-75 and SAGÜÉS, *supra* note 64, at 214-29. This exception was in fact interpreted narrowly by the courts. SAGÜÉS, *supra* note 64, at 228-29; Patricia B. Barbado, *Condiciones de admisibilidad de la acción de amparo*, [1991-B] L.L. 565 (1991).

71. Law No. 17.454 of Sept. 20, 1967. This statute enacted article 321 of the Code of Civil and Commercial Procedure, translated in Fix Zamudio, *supra* note 15, at 372 n.38.

72. GÉRMAN BIDART CAMPOS, *TRATADO ELEMENTAL DE DERECHO CONSTITUCIONAL ARGENTINO, TOMO I: EL DERECHO CONSTITUCIONAL DE LA LIBERTAD* 494 (1986).

a. Acts Giving Rise to Amparo

The impugned act may be committed by an individual acting in a private capacity, a group of such people, or an individual acting in any official capacity pursuant to authority stemming from any source.⁷³ The impugned act may be any action, abstention, or omission leading to the infringement of a constitutional right. Two exceptions somewhat limit this generality. First, as mentioned above, acts effected pursuant to the National Defense Law may not be attacked through amparo.⁷⁴ Second, and more significantly, judicial decisions may not be challenged through amparo.⁷⁵ The rationale to this latter rule is ably summarized by Roberts:

A complainant may not institute a separate proceeding seeking amparo from the decision of a judge which he considers arbitrary. The reasoning behind this prohibition is that to permit a judge foreign to a cause to overturn the decision of the judge of another competent court would bring about insecurity and instability in the judicial system. *Amparo is not to be invoked as a substitute for appellate review.*⁷⁶

This does not mean, however, that any final judicial decision will automatically prevent the use of amparo. Amparo may be used to attack the original act, but not the judicial decision itself. In *Kot*,⁷⁷ for example, the owner of the occupied factory first applied to a criminal court to have the striking workers condemned. This was refused both at trial and on appeal on the ground that the workers did not intend to keep the premises. The denial of relief was not construed as an obstacle in the later amparo proceedings.⁷⁸ In addition, the prohibition is aimed at judicial decisions, not at acts performed by the judiciary which are of an administrative rather than a judicial nature.⁷⁹

For amparo to be invoked, the impugned act must trench on a constitutionally protected right other than the right to physical

73. See Angel Siri, 239 Fallos 459 (1958); S.R.L. Samuel Kot, 241 Fallos 291 (1958).

74. Law No. 16.986 art. 2(b); see *supra* notes 69-70 and accompanying text.

75. Law No. 16.986 art. 2(b); see *supra* notes 69-70 and accompanying text.

76. Roberts, *supra* note 57, at 843 (footnotes omitted) (emphasis added); see BIDART CAMPOS, *supra* note 58, at 261-64.

77. 241 Fallos 291.

78. BIDART CAMPOS, *supra* note 58, at 184-86.

79. See BIDART CAMPOS, *supra* note 72, at 499; SAGÜÉS, *supra* note 64, at 204-09; Patricia B. Barbado, *Actos alcanzados por la acción de amparo*, [1991-B] L.L. 592, 601-02 (1991).

liberty, which is enforceable only through habeas corpus.⁸⁰ Further, the damage inflicted upon the victim from the act must be serious, imminent, and irreparable; amparo cannot be used to prevent a future or merely potential infringement.⁸¹ This is also expressed as the need that the damage be real and tangible. In all cases, the infringement or imminent threat thereof must be present at all times during the amparo proceedings, including and up to a final judgment after appeal.⁸²

A special rule applies when the violation takes place in a contractual relationship between the victim and the wrongdoer. In *Rosa Signacore de Galvan v. Manuel Couto*,⁸³ the Supreme Court of Justice refused to remedy the violation suffered by the victim because the case involved the non-fulfillment of a contractual obligation. This broad ruling was later limited and now only prevents amparo in cases where a party seeks to use it to undo a contract or to gain an unfair advantage, and not in any case where a contract is merely present.⁸⁴

The Argentine law of amparo borrowed from the Brazilian *mandado de segurança* the requirement that the illegitimacy, illegality, or arbitrariness of the impugned act must be clear and undisputable without any need for an extensive debate either in law or in fact. This accords with the summary nature of amparo proceedings. The corollary of this rule is that the applicant's right to obtain an amparo must be manifest and uncontestable, or that the application does not require extensive debate on either the law or the facts.⁸⁵ In certain cases, the Supreme Court of Justice has rec-

80. Article 1 of Law No. 16.986, *supra* note 68, translated in KARST & ROSENN, *supra* note 16, at 175.

81. VESCOVI, *supra* note 24, at 477.

82. See Judgment of August 10, 1960, Federación Argentina de Trabajadores de la Imprenta, CSJN, 247 Fallos 468 (1960) (Arg.); BIDART CAMPOS, *supra* note 58 at 313-14; SAGÜÉS, *supra* note 64, at 106-10; VESCOVI, *supra* note 24, at 476-77; Barbado, *supra* note 70, at 588-91.

83. Judgment of May 30, 1960, CSJN, 246 Fallos 380 (1960) (Arg.) translated in KARST & ROSENN, *supra* note 16, at 165-66.

84. BIDART CAMPOS, *supra* note 58, at 270-73. See LAZZARINI, *supra* note 58, at 170-72; SAGÜÉS, *supra* note 64, at 145-47; Barbado, *supra* note 70, at 593.

85. LAZZARINI, *supra* note 58, at 164, describes the principle in the following terms:

El agravio que motiva el amparo debe ser ilegítimo, puesto que el mismo puede producirse en ejercicio de un legítimo derecho, en cuyo caso no será procedente la acción y, además, debe ser manifestó, es decir, claro y categórico, no discutible o dudoso, pues en este último supuesto la cuestión tendrá que examinarse por vía ordinaria.

Id. (emphasis added).

ognized the right to amparo despite the absence of a clear and uncontestable right, where the applicant had a simple, legitimate interest in obtaining the delivery of a writ of amparo.⁸⁶

b. Procedural Considerations

By nature, amparo is essentially a supplementary procedure, meaning that any ordinary procedure providing an effective remedy will be preferred to amparo.⁸⁷ This has given rise to two distinct rules. First, any existing administrative or judicial procedures, such as ordinary defenses or appeals, must be exhausted before the wrong will be deemed liquidated (*utilización de las vías previas*). Second, any judicial review applicable, if adequate, will bar recourse to amparo (*utilización de las vías paralelas o concurrentes*).⁸⁸ The notion of an "adequate" (*idónea*) remedy has been interpreted to mean that the parallel procedure must provide relief rapidly enough to avoid any irreparable harm. Ordinary methods of recourse are often too slow or allow for dilatory maneuvers and, in such circumstances, will not be considered adequate.⁸⁹ Additionally, the courts will not consider a purely illusory recourse as adequate.⁹⁰ On the other hand, inconveniences ordinarily associated with the use of ordinary procedural means will not suffice to open the door to an amparo suit.⁹¹

Amparo is treated as a summary proceeding because one of its main objectives is to provide rapid relief. The law of amparo, being jurisprudentially developed, has no strict set of procedural rules regulating it. The Supreme Court of Justice has decreed that, as

This character of manifest illegality is reviewed at length in SAGÜÉS, *supra* note 64, at 110-35. See Barbado, *supra* note 70, at 570-75, 584-88.

86. See BIDART CAMPOS, *supra* note 58, at 317-18. The author cites the example of a university dean whose office was occupied by students and who obtained an amparo, even though he was not the beneficiary of the right to education he invoked. *Id.*

87. This is codified at Article 2(a) of Law No. 16.986, declaring amparo inadmissible when "[j]udicial or administrative recourses or remedies exist which permit protection of the constitutional right or guarantee at issue." Law 16.986 art. 2(a), *supra* note 68 translated in KARST & ROSENN, *supra* note 16, at 175. See Barbado, *supra* note 70, at 568-70, 575-81.

88. The sometimes vague difference between the two rules is further explained in BIDART CAMPOS, *supra* note 58, at 186-87. See LAZZARINI, *supra* note 58, at 108, 123.

89. See VESCOVI, *supra* note 24, at 478-79.

90. Marcelo Sorondo, CSJN, [1968-IV] J.A. 68 (Arg.); see Barbado, *supra* note 70, at 581-84.

91. Judgment of April 7, 1961, Conrado T. Traverso, CSJN, 249 Fallos 457 (1961) (Arg.); BIDART CAMPOS, *supra* note 58, at 193-94.

the amparo writ is of the same nature as the writ of habeas corpus, the procedure applicable to the latter should apply to the former *mutatis mutandis*.⁹² Some procedural variations result from the nature of the order sought through amparo.⁹³ The statutes enacted in 1967 and 1968 dealt with only a few punctual procedural aspects, such as delays and evidence (Articles 6 to 12 of Law 16.986) and the right to appeal (Article 15), leaving judicial developments for the most part untouched.

Amparo is an adversarial or bilateral procedure. The individual whose personal constitutional rights have been directly infringed must apply for the writ. If the victim is unable to do so for any reason, a representative may apply in the victim's place. The victim may be an artificial or a real person, inasmuch as it enjoys the constitutional right allegedly violated.⁹⁴ The author of the impugned act is, in turn, given an opportunity to present arguments. The impossibility of accurately identifying the author of the impugned act will generally not justify refusing relief in amparo, though cases have indeed denied amparo on that ground.⁹⁵ Finally, any interested third party may intervene in the proceeding.

All national judges are competent to hear motions and to grant relief in amparo, provided they have jurisdiction *ratione loci* and *ratione materiae*.⁹⁶ The Supreme Court of Justice has full jurisdiction to hear any case in amparo. This jurisdiction is normally not original, but rather appellate, contrary to the jurisdiction of the Supreme Court of Mexico.

c. The Amparo Judgment

A final decision in amparo is a hybrid order, part mandamus and part injunction.⁹⁷ Article 2(d) of Law No. 16.986 codified one of amparo's major limitations, declaring it inapplicable when it

92. See BIDART CAMPOS, *supra* note 72, at 495; Orgaz, *supra* note 67, at 1074.

93. See VESCOVI, *supra* note 24, at 483.

94. BIDART CAMPOS, *supra* note 58, at 319-20.

95. VESCOVI, *supra*, note 24, at 481-82; LAZZARINI, *supra* note 58, at 276-79. For example in *Siri*, Judgment of December 27, 1957, 239 Fallos 459 (1958) (Arg.), the author of the order to close down the newspaper was unknown, but the Court nevertheless issued an amparo.

96. Article 4 of Law No. 16.986, *supra* note 68. Jurisdiction over the subject matter (*ratione materiae*) means that national judges will entertain claims against acts of the federal government and state judges will entertain those against the state government. See BIDART CAMPOS, *supra* note 72, at 495-96; VESCOVI, *supra* note 24, at 480-81.

97. See Fix-Zamudio, *supra* note 27, at 344; Roberts, *supra* note 57, at 831.

would require "declaring laws, decrees or ordinances unconstitutional."⁹⁸ The rationale for this rule is that purely declaratory judgments do not exist in Argentine law and that laws are presumed to conform with the Constitution. Amparo's summary proceedings are not viewed as suited for the debate necessary to rebut such a presumption.⁹⁹ As previously noted, Argentina has an action in unconstitutionality allowing any court to declare laws invalid, but, as explained by Bidart Campos, its purpose is to protect the integrity of the Argentine Constitution, as opposed to amparo whose aim is to protect individual rights.¹⁰⁰ This perplexing limitation on the courts' power when issuing an amparo judgment seems to have been adopted directly from Mexican law, where courts are prevented from making general declarations of unconstitutionality in the course of an amparo proceeding (under the so-called "Otero formula").

Argentine law has some exceptions to this prohibition. The first one concerns manifestly unconstitutional laws. In *Carlos J. Outon*,¹⁰¹ a few months after the enactment of Law No. 16.986, the Supreme Court of Justice invalidated a closed-shop decree affecting all maritime workers, holding that:

The admission of this exceptional remedy [amparo] can engender the false belief that any litigious question can be resolved by this route; or worse yet, that via [amparo] it is possible to obtain precipitous declarations of unconstitutionality. Hence, the decisions of this Court have established that, *in principle, the declaration of unconstitutionality in this type of proceeding is improper*

Nevertheless, the principle should not be taken as absolute. Undoubtedly, it will govern the great majority of cases. But when the provisions of a law, decree, or ordinance clearly result in violations of any human rights, the existence of a regulation cannot constitute an obstacle to the immediate reestablishment . . . of the violated fundamental guarantee. Otherwise, an authority could resort to the device of preceding its arbitrary acts or omissions with a prior norm . . . in order to frustrate the possibility of obtaining immediate restitution of the . . . trampled

98. KARST & ROSENN, *supra* note 16, at 175.

99. See SAGUÉS, *supra* note 64, at 242-48; Roberts, *supra* note 57, at 846; Barbado, *supra* note 70, at 584-88.

100. BIDART CAMPOS, *supra* note 58, at 124-27.

101. Judgment of March 29, 1967, Carlos José Outon y Otros, CSJN, 267 Fallos 215 (1967) (Arg.) translated in KARST & ROSENN, *supra* note 16, at 179-81.

right in court.¹⁰²

Argentine courts were reluctant to follow this decision, but the *Outon* approach seems to have prevailed in the last few years.¹⁰³ A general norm (statute, regulation, or executive order) may also be declared invalid, although its letter appears to conform to the Constitution, if it is interpreted and applied in a manner that infringes on fundamental rights.¹⁰⁴ Finally, any decision rendered in amparo that declares a general norm unconstitutional is limited to the case at bar. However, it does carry a measure of *stare decisis*, so that its effects are, in fact, quite close to a general declaration of unconstitutionality.¹⁰⁵

Amparo is an emergency procedure aimed at suspending the effect of an act infringing on the constitutionally protected rights of a person. Its purpose is not the reparation or indemnification of any damage incurred by the illegitimate act. Therefore, amparo suits cannot contain conclusions regarding the monetary redress of the wrongful act's consequences. Further, amparo cannot be used as a means to punish the author of the unconstitutional act, since such punishment is not essential to the suspension of the infringement. Penal or exemplary damages are not compatible with an amparo suit, as they do not meet the previously-discussed conditions of acceptability of the recourse.¹⁰⁶ On the other hand, stiff fines will be levied by the court through contempt proceedings if the amparo order is not complied with immediately. It must be said, though, that in Argentina the decisions of the Supreme Court of Justice are practically always respected by the other two branches of government.¹⁰⁷

Finally, as a corollary to this rule, the final decision on an amparo suit will constitute *res judicata* only as to the amparo suit itself. It will not constitute *res judicata* for any other recourse,

102. 267 Fallos at 218, translated in KARST & ROSENN, *supra* note 16, at 179-80 (emphasis added).

103. Judgment of May 15, 1984, *Arenzon v. Nación Argentina*, CSJN, 306 Fallos 400 (1984) (Arg.). See Eduardo Oteiza, *El juicio de amparo como via idonea para la declaracion de inconstitucionalidad*, [1987-III] J.A. 766 (1987) (Arg.).

104. BIDART CAMPOS, *supra* note 72, at 498.

105. See Alejandro M. Garro, *Eficacia y Autoridad del Precedente Constitucional en America Latina: Las Lecciones del Derecho Comparado*, reprinted in 20 U. MIAMI INTER-AM. L. REV. 473, 480-86 (1989); Rosenn, *Judicial Review in Latin America*, *supra* note 17, at 790.

106. BIDART CAMPOS, *supra* note 58, at 434-37.

107. See Rosenn, *supra* note 17, at 812.

even if, as in an action for damages, the suit flows from the same facts and between the same parties. Further, amparo will not constitute *res judicata* if it is rejected for not meeting one of the conditions requisite for that writ (for example, if a parallel recourse is available) and another procedure is started thereafter.¹⁰⁸

The development of amparo in Argentina has not enjoyed the same overwhelming character as it had in Mexico. The judges who proceeded to fashion the law of amparo did so by cautious progression, not wanting to destabilize the rest of the Argentine legal system. Amparo in Argentina has remained a much more extraordinary remedy than in Mexico, as demonstrated by the fact that the Argentine Supreme Court of Justice heard an average of only 26 amparo suits for each year from 1959 to 1969,¹⁰⁹ as opposed to several thousand amparo cases decided each year by the Supreme Court of Mexico.

III. RELEVANCE OF AMPARO FOR CANADIAN CONSTITUTIONAL LAW

A. *Preliminary Considerations*

The institutional and legal context in which the Argentine amparo developed bears many similarities to that of Canada. The constitutional law theory of both countries has been strongly influenced by U.S. precedents. Argentina, like Canada, has a federal system where legislative power over human rights is shared between the provinces and the central government. Both countries have a federal supreme court with unlimited jurisdiction to entertain claims coming from both the parallel provincial and federal court systems. In both countries, the judicial review of the constitutionality of statutes can be described as "decentralized," that is, the power to declare laws unconstitutional is vested in all courts, not solely in a specifically designated constitutional court.¹¹⁰ Although the Argentine Constitution does not have a specific remedial provision like Section 24(1) of the Charter, it does have a distinct habeas corpus provision, similar to Section 10(c) of the

108. See BIDART CAMPOS, *supra* note 72, at 499; SAGÜÉS, *supra* note 64, at 443-52; VESCOVI, *supra* note 24, at 487-88.

109. Rosenn, *supra* note 17, at 801-02; KARST & ROSENN, *supra* note 16, at 181-82.

110. The distinction between "centralized" and "decentralized" systems was made by MAURO CAPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* 45-68 (1971). It is applied to Latin America and Argentina in particular, in Rosenn, *supra* note 17, at 787-88, where the author points out that a decentralized system is relatively exceptional in Latin American countries. See VESCOVI, *supra* note 24, at 402 ("*systema difuso*").

Charter.¹¹¹ Finally, in creating the amparo in *Angel Siri*, the Argentine Supreme Court of Justice relied on Article 33 of the Argentine Constitution, a provision similar in content to Section 26 of the Canadian Charter.¹¹²

Consideration of the Argentine amparo experience can only be beneficial to the development of the Canadian Charter, which now barely ten years old, is still in its infancy. The law of amparo in Argentina is not merely the product of three decades of development in that country, but rather is the result of a long evolution that started in Mexico in 1848. As such, the Argentine amparo avoided repeating some of the mistakes committed in other countries, while at the same time, benefitted from the positive aspects of similar constitutional remedies throughout Latin America.

In light of the purpose and nature of amparo, the review of Canadian law relating to Section 24 of the Charter will be limited to cases arising outside a pre-existing judicial context--situations where a competent court has not been seized of the contested matter at the time of an application pursuant to Section 24(1) of the Charter. This particular situation has been the subject of extensive scholarly discussion and a multitude of judicial decisions, mostly in the field of criminal law. The most pressing problems in the area of criminal law involve the powers of the justice of the peace presiding over a preliminary inquiry, and those of the trial judge when the offense is being tried by a court, other than a Superior Court pursuant to Section 96 of the Canadian Constitution Act, 1867.¹¹³ In general, courts in criminal matters have responded by directing that any application pursuant to Section 24 of the Charter must be presented to the trial judge.¹¹⁴ Finally, as mentioned in the intro-

111. Section 10(c) of the Charter states that upon arrest or detention everyone has the right "to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful." CAN. CONST. pt. 1, art. 10(c).

Article 18 of the Argentine Constitution reads in part: "Nadie puede ser . . . arestado sino en virtud de orden escrita de autoridad competente . . ." ARG. CONST. art. 18. Though *habeas corpus* is not mentioned nominally, it was found to stem directly from this article. BIDART CAMPOS, *supra* note 72, at 485-90.

112. Both Article 33 of the Argentine Constitution and Section 26 of the Canadian Charter, *see supra* note 63, bear the strong influence of the Ninth Amendment of the United States Constitution.

113. CAN. CONST. (Constitution Act, 1867) § 96. Section 96 provides that the federal government has the power to create "Superior Courts" with exclusive jurisdiction to hear claims on a vast array of matters. Provincial Courts have a much more limited jurisdiction.

114. *Mills v. The Queen*, [1986] 1 S.C.R. 863 (Can.). *See generally* PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 698-703. (1985); Dale Gibson & Scott Gibson, *Enforcement of the Canadian Charter of Rights and Freedoms*, in THE CANADIAN CHARTER OF RIGHTS

duction, this study will focus on the first paragraph of Section 24, rather than on the exclusion of evidence provision contained in the second paragraph, which has also been the subject of repeated academic commentaries and extensive analysis by the Supreme Court of Canada.¹¹⁵

B. *Judicial Interpretation of Section 24(1) of the Charter*

Section 24(1) of the Charter was at its inception a new kind of provision in Canadian constitutional law. For ease of reference, Section 24(1) is reproduced here again:

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.

Canadian judges and lawyers were more familiar with the terms of a provision such as Section 52(1) of the Constitution Act, 1982, which declared the supremacy of the constitution and the inoperability of inconsistent laws, since similar provisions had existed for many years prior to the inception of the new constitution in 1982.¹¹⁶ In the first decision to examine in depth Section 24(1) of

AND FREEDOMS ch.19 (Edward Ratushny & Gérald-A. Beaudoin eds., 2d ed. 1989); Pierre Béliveau, *L'octroi d'une réparation en vertu de l'article 24 de la Charte des droits et libertés*, 67 CAN. BAR REV. 622 (1988); Michael Code, *American Cadillacs or Canadian Compacts: What Is the Correct Criminal Procedure for S.24 Applications Under the Charter of Rights*, 33 CRIM. L.Q. 298 (1990-91); Alan D. Gold, *Charter—"Court of Competent Jurisdiction"*, 26 CRIM. L.Q. 440 (1985-86); McLellan & Elman, *supra* note 8, at 225-50; Kent Roach, *Section 24(1) of the Charter: Strategy and Structure*, 29 CRIM. L.Q. 222 (1986-87); J. Sandy Tse, *Charter Remedies: Procedural Issues*, 69 CRIM. REP. (3d) 129 (1989).

115. *R. v. Therens*, [1985] 1 S.C.R. 613 (Can.); *R. v. Clarkson*, [1986] 1 S.C.R. 383 (Can.); *R. v. Duguay, Murphy and Sevigny*, [1985] 18 DOMINION LAW REPORTS [D.L.R.] (4th) 32, *aff'd* [1989] 1 S.C.R. 93 (Can.); *see generally* Ken Chasse, *Charter Exclusion—Causation, Nexus and Disrepute*, 21 CAN. RIGHTS REP. [C.R.R.] 227 (1986); Kenneth Jull, *Exclusion of Evidence and the Beast of Burden*, 30 CRIM. L.Q. 178 (1987-88); Claude-André Lachance, *L'exclusion de la preuve illégalement obtenue et la Charte*, 62 CAN. BAR REV. 278 (1984); Gérard E. Mitchell, *The Supreme Court of Canada on the Exclusion of Evidence in Criminal Cases Under Section 24 of the Charter*, 30 CRIM. L.Q. 165 (1988); André Morel, *Le droit d'obtenir une réparation en cas de violation de droits constitutionnels*, 18 REVUE JURIDIQUE THÉMIS [R.J.T.] 253 (1984); Michel Proulx, *Redéfinir les rapports de force au procès criminel: L'effet de la règle d'exclusion de l'article 24(2) de la Charte canadienne des droits et libertés*, 20 R.J.T. 109 (1986).

116. CAN. CONST. (Constitution Act, 1982) § 52(1). Section 52(1) provides: "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." *Id.* Similar provisions existed in the Colonial Laws Validity Act, 1865, 28 & 29 Vict., ch. 63 (Eng.), and the Statute of Westminster, 1931, 22 Geo. 5, ch. 4 (Eng.). *See* Operation Dis-

the Charter, the Supreme Court of Canada affirmed the nature of Section 24(1) as a substantive right rather than a mere procedural enforcement provision: "Section 24(1) establishes the right to a remedy as the foundation stone for the effective enforcement of Charter rights."¹¹⁷ As interpreted, the nature of Section 24(1) is similar to that of *amparo*.¹¹⁸ This being said, there has been vast disagreement as to the effect of Section 24(1) on Canadian law and institutions. The relevant jurisprudence of the Supreme Court falls in two stages: first, the landmark decision in *Mills*, and second, the ensuing judgments.

1. *R. v. Mills*: Initial Treatment of Section 24(1)

The decision in *Mills* has already been the object of many academic commentaries. This article, however, offers an analysis from a particular procedural perspective. In *Mills*, the accused brought a motion pursuant to Section 24(1) at the preliminary inquiry of a robbery charge, alleging that his right to be tried within a reasonable time had been infringed, contrary to Section 11(b) of the Charter.¹¹⁹ There ensued a debate as to whether the justice of the peace presiding over that preliminary inquiry was a "court of competent jurisdiction" entitled to grant relief under Section 24(1). The Supreme Court split, with Justice McIntyre writing for the majority which held that the justice of the peace did not have jurisdiction, while Justice Lamer dissented.¹²⁰ Justice La Forest wrote the decisive concurring opinion, agreeing with portions of the dissent, but ultimately siding with the majority.

The purpose of the present study is to examine the procedural aspects of an application made pursuant to Section 24(1) in a situ-

mantle v. R., [1985] 1 S.C.R. 441, 482 (Can.).

117. *Mills*, [1986] 1 S.C.R. at 881 (Lamer J., dissenting). The principle was later reaffirmed by justice Lamer, for the majority that time, in *Nelles v. Ontario*:

The question arises then, whether s. 24(1) of the Charter confers a right to an individual to seek a remedy from a competent court. In my view it does. When a person can demonstrate that one of his Charter rights has been infringed, access to a court of competent jurisdiction to seek a remedy is essential for the vindication of a constitutional wrong.

[1989] 2 S.C.R. 170, 196 (Can.) (emphasis added).

118. Compare BIDART CAMPOS, *supra* note 58, at 338-39 with Charter, section 24(1).

119. Section 11(b) Charter states that "[a]ny person charged with an offense has the right . . . to be tried within a reasonable time."

120. *Mills*, [1986] 1. S.C.R. at 867. Justice Wilson disagreed with Justice Lamer with respect to the application of section 11(b) while accepting *in toto* his exposition on section 24(1). *Id.* at 869.

ation where no court has previously been seized of the matter. Hence, problems such as the continuity of the criminal trial and the right to interlocutory appeal in criminal matters, which were dealt with extensively by the Court in *Mills*, will not be addressed here. Still, general statements of principle provided by the Supreme Court in that case are of some guidance to the topic of this article.

a. Availability and Jurisdiction

While the members of the Court in *Mills* agreed on questions of the availability of a Section 24(1) remedy and on some considerations of jurisdiction, they fundamentally disagreed as to the proper procedural vehicle to be used when applying that provision. Availability and jurisdiction are two elements naturally intertwined, such that the question of availability can also be expressed in jurisdictional terms. In an early application of the Charter, the Québec Court of Appeal held that a journalist cited for *ex facie* contempt of court could not appeal the trial judge's refusal to grant him a jury trial, although the right to a jury trial is entrenched in Section 11(f) of the Charter.¹²¹ The Court of Appeal refused to hear the application on the merits, even though this refusal deprived the accused of his right to a jury trial. In a concurring opinion, Justice Kaufman explained:

It may well be, as the applicant argues, that if, in the circumstances, this court does not consider itself a "court of competent jurisdiction", no other court is competent either, and, in effect, there may be a right without a remedy—a thought repugnant to the law. But that is a matter for the legislator, and even if we were prepared to "innovate," the stark fact remains that, as a statutory tribunal, we are only possessed of those powers which are conferred on us by statute, and that does not include the supervision, save by way of appeal, of the Superior Court and its judges.¹²²

121. *Re Laurendeau and the Queen*, [1984] 4 Dominion Law Reports [D.L.R.] (4th) 702 (Can.). Section 11(f) of the Charter reads:

Any person charged with an offence has the right . . . except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.

Charter, § 11(f).

122. *Re Laurendeau and the Queen*, [1984] 4 D.L.R. (4th) at 708 (emphasis added).

This approach to Section 24(1) throws us back to the Canadian Bill of Rights impasse found in *Hogan v. The Queen*,¹²³ even though Section 24(1) was precisely aimed at preventing such a dilemma.¹²⁴ In *Mills*, both Justice Lamer and Justice La Forest explicitly stated that, since Section 24(1) is a substantive provision conferring a constitutional right, there must *always* be an available court capable of granting relief under that section.¹²⁵ As Justice Lamer explained:

A corollary which flows from [the right to obtain a just and appropriate remedy] is *the fundamental principle that there must always be a court available to grant, not only a remedy, but the remedy which is the appropriate and just one under the circumstances.*¹²⁶

Likewise, Justice La Forest stated that “[t]here must . . . at all times be a court of competent jurisdiction to whom resort can be had when an accused believes his constitutional right to be tried within a reasonable time has been breached.”¹²⁷ This principle has been repeated insistently by the Supreme Court of Canada in a number of cases following *Mills*.¹²⁸

The necessary existence of a court competent to grant relief under Section 24(1) leads naturally to the development of guiding principles allowing litigants to choose the court in which they present such applications. There had been, before the Supreme Court’s decision in *Mills*, a doctrinal debate as to the jurisdictional requirements of a “court of competent jurisdiction.” Most writers and the early case law agreed that a competent court needed to have jurisdiction over the subject matter (*ratione materiae*) and the person (*ratione personae*). There was, however, a disagreement as to whether the court should have a pre-existing power to grant the order sought pursuant to Section 24(1), or if, on the contrary, the court could expand its jurisdiction to add to its powers in that regard.¹²⁹ The Supreme Court in *Mills* ended the debate by unani-

123. [1975] 2 S.C.R. 574 (Can.).

124. See *supra* text accompanying notes 5-8.

125. *Mills*, [1986] 1 S.C.R. at 882 (Lamer J., dissenting), and 976 (La Forest, J. concurring).

126. *Id.* at 882 (Lamer J., dissenting) (emphasis added).

127. *Id.* at 976 (La Forest J., concurring) (emphasis added).

128. See, e.g., *Nelles v. Ontario*, [1989] 2 S.C.R. 170, 195-96 (Can.); *R. v. Gamble*, [1988] 2 S.C.R. 595, 633-34 (Can.); *R. v. Rahey*, [1987] 1 S.C.R. 588, 630 (Can.).

129. See Hogg, *supra* note 114, at 695-97; H. Patrick Glenn, *L'article 24(1) de la Charte canadienne des droits et libertés: La réparation juste et convenable*, in FONDATION

mously agreeing with the former interpretation, which required the court to have initial competence over the remedy.¹³⁰

Finally, both the minority and the majority in *Mills* agreed on a very general level that "the Charter was not enacted in a vacuum"¹³¹ and therefore that existing procedures should not be ignored. The precise significance of such a statement, however, gave rise to widely differing interpretations amongst the justices of the Supreme Court.

b. Procedural Considerations

Mills embodies the fundamental conflict between two competing views of the impact of Section 24(1) and, more generally, of the Charter as a whole. Justice Lamer was prepared to give much greater significance to the inception of the Charter than was Justice McIntyre, who appeared to view the Charter as an addition to, rather than transformation of, Canadian Law.

For Justice McIntyre, Section 24(1) does not attribute new jurisdiction to any court. Courts must therefore attempt to integrate an application made pursuant to that provision into the existing procedural framework. As Justice McIntyre explained:

To begin with, it must be recognized that the jurisdiction of the various courts of Canada is fixed by the Legislatures of the various provinces and by the Parliament of Canada. It is not for the judge to assign jurisdiction in respect of any matters to one court or another. This is wholly beyond the judicial reach The task of the court will simply be to fit the application into the existing jurisdictional scheme of the courts in an effort to provide a direct remedy, as contemplated in s. 24(1). It is important, in my view, that this be borne in mind. *The absence of jurisdictional provisions and directions in the Charter confirms the view that the Charter was not intended to turn the Canadian legal system upside down. What is required rather is that*

PERMANENTE DU BARREAU DU QUÉBEC, APPLICATION DES CHARTES DES DROITS ET LIBERTÉS EN MATIÈRE CIVILE 75, 80-82 (1988); J.C. Levy, *The Invocation of Remedies Under the Charter of Rights and Freedoms: Some Procedural Considerations*, 13 MANITOBA L.J. 523, 537-39 (1983); Marilyn Pilkington, *Monetary Redress for Charter Infringement*, in CHARTER LITIGATION 307, 323 (Robert J. Sharpe ed., 1987); Jeffrey Sack et al., *Where to Go and How to Get There: Questions of Forum and Form in Charter Litigation*, in CHARTER CASES 143, 152-54 (Gérald-A. Beaudoin ed., 1987).

130. [1986] 1 S.C.R. at 883, 955.

131. This sentence can be found in both Justice Lamer's dissenting opinion and Justice McIntyre's majority opinion. *Id.* at 882, 956.

*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.*¹³²

Thus the rules must be bent, but not disregarded, to accommodate the courts' new duty under the Charter. This should be done, wrote Justice McIntyre, with existing procedural vehicles, such as the right to appeal and the prerogative writs. At the same time, however, he denied that the Charter may have created new rights to appeal or that an infringement of constitutionally guaranteed rights by an administrative body would imply that it exceeded its jurisdiction.¹³³ Considering the limited scope of the statutory right to appeal and the patchwork of privative clauses protecting the decisions of administrative bodies, except those involving an excess of jurisdiction,¹³⁴ the question of how an effective remedy may be granted while respecting the principles laid down by Justice McIntyre becomes difficult to answer. Indeed, one may get the impression from a discussion later in the opinion that Justice McIntyre considers Section 24(1) to grant the right to have a well-founded complaint remedied, but not to have one's alleged complaint verified.¹³⁵ Justice McIntyre's views seem to be deeply influenced by the particular context of criminal pre-trial procedure which may bring the prosecution to a definite halt after a summary procedure, and should not be extended to cover all situations where a claim may arise pursuant to 24(1) of the Charter.

Justice Lamer took a different approach. He viewed the Charter as a fundamental innovation in Canadian law, even as applied to procedural matters. For him, it would be vain to hope that the integration of the new Charter remedies could be accomplished simply. Rather, one should expect that, up to a point, complica-

132. *Id.* at 952-53 (emphasis added).

133. *Id.* at 958-60 (no right to appeal), 964-65 (no jurisdictional error).

134. *See infra* text accompanying notes 175-78 and 191-93.

135. Justice McIntyre wrote:

It is argued that these applications [under section 24(1)] deal with fundamental rights and freedoms and accordingly should have priority. *This argument rests, in my view, on two fallacies. The first is the assumption implicit in the argument that the claimant is entitled to a remedy.* The second is that allowing an interlocutory appeal will get a remedy for him more quickly than the ordinary process of the court.

It must be remembered that everyone who claims Charter relief will not necessarily get what he seeks. There will be successful claims and unsuccessful claims, and in respect of each claim the question of breach of the right and entitlement to relief will have to be dealt with.

[1986] 1 S.C.R. at 963 (emphasis added).

tions of the legal system will ensue. Legislatures may very well want to enact statutes to regulate this new procedure, but in the meantime, procedural roadblocks must not stand in the way of effective enforcement of the Charter.¹³⁶ Justice Lamer agreed with Justice McIntyre's opinion that the Charter does not usually create a new right to appeal and that an act impinging on Charter rights will not necessarily constitute a jurisdictional error.¹³⁷ For Justice Lamer however, Section 24(1) introduced a *sui generis* remedy, distinct from appeal or prerogative writs by virtue of "the unique character of a constitutional remedy."¹³⁸ This remedy has no other basis than Section 24(1) itself. When the impugned act is a bona fide jurisdictional error, a prerogative writ and a Charter remedy may be used. If both are used, the writ is subsumed into the Charter remedy, so that the aggregate of remedies becomes available through a single procedure.¹³⁹ Thus,

[R]egardless of whether the superior court is exercising its jurisdiction on a s. 24(1) application or on a prerogative writ application, and whether it is in the same, or in distinct proceedings, when the allegations are of a violation that vitiates the court's jurisdiction, as is the case for a violation of s. 11(b), it should act as if both routes had been taken and deal with both aspects at the same time. *This simplified procedure will provide access to a full panoply of available remedies within the one hearing, thereby saving time and expense.*¹⁴⁰

The expansion of existing powers through this Charter remedy will not be without limitations. Justice Lamer drew an impenetrable border between powers belonging to courts of criminal jurisdiction and those of courts of civil jurisdiction.¹⁴¹

Justice La Forest agreed with Justice McIntyre's conclusion that the magistrate presiding over the preliminary inquiry was not a court of competent jurisdiction under Section 24(1) of the Charter. Of the more general principles applicable to that provision, Justice La Forest's position appears ambivalently drawn from the reasoning of both Justice Lamer and Justice McIntyre. While rejecting the need for a parallel Charter remedy, Justice La Forest

136. *Id.* at 898-99, 905 (Lamer J., dissenting).

137. *Id.* at 897, 899-901 (Lamer J., dissenting).

138. *Id.* at 893 (Lamer J., dissenting).

139. *Id.* at 897-99, 901-02 (Lamer J., dissenting).

140. *Id.* at 898-99 (Lamer J., dissenting) (emphasis added).

141. *Id.* at 884-90 (Lamer J., dissenting).

acknowledged that situations may arise requiring the creation of innovative remedies, but he failed to detail the procedure to be followed in such cases.¹⁴²

The Supreme Court's very cautious approach in *Mills* left Canadian law, with respect to the procedural aspects of Section 24(1) of the Charter, in a state of uncertainty, leading some commentators to take a dyspeptic view of the substantive future of the provision.¹⁴³

2. Subsequent Interpretations of Section 24(1) of the Charter

The ensuing decisions of the Supreme Court on the meaning to be accorded to Section 24(1) of the Charter lessened the uncertainty but failed to clearly articulate the standards applicable to that provision. While Section 24(1) was invoked by litigants in a great many cases, it was more thoroughly discussed in two Supreme Court decisions: *R. v. Rahey*¹⁴⁴ and *R. v. Gamble*.¹⁴⁵

a. *R. v. Rahey*

In *R. v. Rahey*, decided only one year after *Mills*, the Supreme Court was once again faced with an application under Section 24(1) alleging that the accused's constitutional right to a trial within a reasonable time had been denied (art. 11(b) of the Charter).¹⁴⁶ The Court split on all sides.¹⁴⁷ Of particular interest for our present purpose is Justice Wilson's discussion of Section 24(1).

142. Justice La Forest stated:

It should be obvious from the foregoing remarks that I am sympathetic to the view that Charter remedies should, in general, be accorded within the normal procedural context in which an issue arises. *I do not believe s. 24 of the Charter requires the wholesale invention of a parallel system for the administration of Charter rights over and above the machinery already available for the administration of justice.*

Nonetheless, it is the Charter that governs, and if the ordinary procedures fail to meet the requirements of the Charter fully, then a means must be found to give it life.

Id. at 971-72 (La Forest J., concurring) (emphasis added).

143. See Raynold Langlois, *A la défense de l'article 24*, in *VUES CANADIENNES ET EUROPÉENES DES DROITS ET LIBERTÉS* 246-47 (Gérald-A. Beaudoin ed., 1989).

144. [1987] 1 S.C.R. 588 (Can.).

145. [1988] 2 S.C.R. 595 (Can.).

146. [1987] 1 S.R.C. 588 (Can.).

147. *Id.* Justice Chouinard did not participate in the decision, and the eight remaining justices formed four groups of two, none of whom dissented.

Justice Wilson submitted that courts presented with a claim based on Section 24(1) should strive to tailor the remedy to the infringement of the constitutional right. The extent of the judge's discretion to forge a remedy which is "just and appropriate in the circumstances" was set out as follows:

What is an appropriate remedy for the violation of one right may not be appropriate for the violation of another. Accordingly, s. 24(1) is necessarily expressed so as to confer on a court of competent jurisdiction a broad discretion as to remedies. *The remedy or remedies, as the case may be, must be tailored to the particular right which has been violated. This does not mean, however, that all remedies are available for the violation of all rights. For the violation of some rights only one remedy may be available. For the violation of others a choice of remedies may be available.*¹⁴⁸

Wilson concluded that, in the case of a violation of the right to a speedy trial, the sole remedy available was to quash the indictment. Further, Justice Wilson insisted that the court's discretion does not extend further than the nature of the remedy and certainly does not cover the existence of the violation (a question of law), or the very right to a remedy.¹⁴⁹ She noted that "it is rights that are guaranteed under the *Charter*, not remedies."¹⁵⁰ One should not take this to mean that there is no right to have Charter rights enforced through a remedy, since this is, of course, the very substantive right entrenched in Section 24(1), but rather that no entitlement to a *specific* remedy exists, since the choice of remedy falls within the judge's discretion under Section 24(1). These are fundamental principles stemming not only from the wording of Section 24(1) of the Charter, but also from the general purpose of that provision—to ensure that any person whose constitutional rights have been violated has a right to redress through an effective remedy.

Justice La Forest wrote the other opinion in *Rahey* which discussed the substance of Section 24(1) at some length. He took an approach somewhat similar to that of Justice Wilson, but insisted on the flexibility of the process set out in Section 24(1). He rejects

148. *Id.* at 619-20 (Wilson J.) (emphasis added).

149. *Id.* at 620. Justice Wilson explained: "I do not doubt that more than one remedy may be available for the violation of some rights but the discretion of the court is confined to the remedy." *Id.*

150. *Id.* at 621.

the notion that there can be only one appropriate and just remedy for the denial of the right to a speedy trial, arguing instead that the remedy must suit the particular circumstances of the case.¹⁵¹ Noting that the accused had been criticized for not having taken a writ of mandamus when he believed that he was being denied his constitutional right to a speedy trial, Justice La Forest found that this had no impact whatsoever on the accused's right under Section 24(1):

In general, there is no reason why an accused should be barred from appropriate constitutional relief by the existence of a prerogative writ. *Mandamus is by definition a limited remedy, and therefore too narrow a recourse for a person who believes that his Charter rights have been infringed and that he is accordingly entitled to the full range of remedies provided by s. 24(1).* Furthermore if, as I have indicated, the accused's rights had arguably been infringed to such a degree that they could only be remedied by dismissal of the charges, mandamus would not only be an overly narrow remedy, but an inappropriate one.¹⁵²

Given the fact that Justice La Forest had rejected the necessity to create a "parallel system for the administration of Charter rights" in *Mills*,¹⁵³ his opinion in *Rahey* constitutes a clear progression towards the idea that Section 24(1) of the Charter requires its own procedural vehicle. According to the above passage by Justice La Forest, and consistent with Justice Lamer's opinion in *Mills*,¹⁵⁴ such a procedural vehicle would encompass all pre-existing remedies available through prerogative writs.

b. *R. v. Gamble*

In *R. v. Gamble*,¹⁵⁵ the applicant presented a motion pursuant to Section 24(1) of the Charter, in addition to writs of certiorari and habeas corpus. She alleged that because she would not be eligible for parole for twenty-five years, she had been deprived of her right to liberty in contravention of the principles of fundamental justice and Section 7 of the Charter.¹⁵⁶ The majority of the Court

151. *Id.* at 638-39, 648 (La Forest J.).

152. *Id.* at 631 (emphasis added).

153. *Mills*, [1986] 1 S.C.R. at 971.

154. *Id.* at 898-99 (Lamer J., dissenting).

155. [1988] 2 S.C.R. 595 (Can.).

156. Section 7 of the Charter provides: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the

found in favor of the applicant. A dissenting opinion by Chief Justice Dickson focused on the question of retrospective application of Section 7 of the Charter, thus avoiding considerations related to Section 24(1). Writing for the majority, Justice Wilson furthered the principles she had laid down in *Rahey* and stated that courts should adopt a purposive approach when applying Section 24(1) of the Charter.¹⁵⁷ After acknowledging Justice La Forest's statement in *Mills* relating to the absence of a "parallel system," she insisted on the need for procedural flexibility under Section 24(1) and emphasized that an application pursuant to that provision should remain unaffected by limitations particular to a writ which may be joined thereto.¹⁵⁸ Justice Wilson then adopted the procedural principles set out by Justice Lamer in *Mills*.¹⁵⁹ She also quoted and adopted the following passage from a decision of the Ontario High Court:

Having held above that this court is a "court of competent jurisdiction" with respect to this application and being confronted, in this application, by an assertion that a corporate accused's right, guaranteed by the Charter, had been or was about to be denied, am I to apply the ordinary rules as to the circumstances in which certiorari will lie in respect of a preliminary enquiry? *In my view, the situation is quite different where a Charter remedy is invoked. The application could have been brought expressly pursuant to s. 24(1) of the Charter without any reference to certiorari or to prohibition as such.* It is convenient in situations like these for the applications to be made and discussed, and for orders to be made, in the terms and language of the traditional remedies and means of review, but *a right of application conferred by s. 24(1) of the Charter is not to be cut down by limitations placed upon the exercise of discretionary powers or prerogative remedies in non-Charter situations.*¹⁶⁰

The approach by the Canadian Supreme Court in *Gamble* clearly

principles of fundamental justice."

157. The Supreme Court of Canada has adopted a purposive approach to interpreting the Charter of Rights generally. Under a purposive or teleological approach, the purpose of the provisions serve as a guide in the delineation of the rights entrenched. A purposive approach is to be differentiated from a textual approach, whereby the wording of the provisions is the sole guide to the content of the rights, and from an original intent approach, whereby rights protected are those so intended by the drafters.

158. [1988] 2 S.C.R. 595, 635, 638 & 640.

159. [1986] 1 S.C.R. at 894-905 (Lamer J., dissenting).

160. *Re Arrigo and the Queen*, 29 Can. Crim. Cases (3d) 77, 84 (1986) (emphasis added). This opinion was rendered three weeks before the Supreme Court's decision in *Mills* was made public.

curtails the generality of Justice La Forest's rejection in *Mills* of the need to create an independent remedy pursuant to Section 24(1) of the Charter.

Although it has touched on questions relating to applications pursuant to Section 24(1) of the Charter, the Supreme Court of Canada has not, since its 1988 decision in *Gamble*, discussed the existence of a Charter application distinct from any other procedure. The state of Canadian law with respect to Section 24(1) of the Charter, with its vague procedural principles, provides insufficient guidance to lower courts in the exercise of their jurisdiction under the provision. The Supreme Court's treatment of Section 24(1) appears to be still evolving, and the examined cases would therefore represent only a transitional period in the slow and difficult integration of Section 24(1) into the Canadian legal system. The hesitancy of Canadian courts to affirm that this provision enlarges their jurisdiction probably indicates that they would prefer to share the Charter's impact with the legislative branch of government. But the hopes that the legislature would enact a statutory scheme to accommodate applications pursuant to Section 24(1) have remained unanswered, so that courts are still left on their own to delineate the procedural rules applicable to such applications.

C. *The Need for Further Development of the Law of Section 24(1)*

The procedural aspect of Section 24(1) stands now as a hybrid proceeding, consisting of half-ordinary or extraordinary remedy (e.g. appeal, defense, or injunction, mandamus) and half-*sui generis* Charter remedy. This is inadequate for two reasons: First, it underlines a trend toward distorting non-Charter remedies, and second, it allows the shortcomings of both ordinary and extraordinary remedies to be introduced in the context of Section 24(1) of the Charter.

1. General Trend

There is considerable debate among scholars as to whether the pre-Charter ordinary and extraordinary remedies can adequately ensure the full and effective enforcement of a constitutional right, without requiring the creation of a so-called "parallel route." Certain academics answer in the affirmative and deny the existence of

a "Charter writ" stemming directly from Section 24(1).¹⁶¹ This position conforms with the narrow view of Section 24(1) adopted by Justices McIntyre and La Forest in *Mills* that the Charter creates no new remedies and that applications pursuant to Section 24(1) must follow existing procedures.¹⁶² The proponents of this position agree that it entails the necessary adaptation of prerogative writs and ordinary remedies to permit innovative uses that meet the particular requirements of the Charter.¹⁶³ In fact, this adaptation requirement also appears in Justice Lamer's approach in *Mills*, which was later adopted by the majority in *Gamble*,¹⁶⁴ even though Justice Lamer views Section 24(1) as creating a distinguishable remedy. Justice Lamer sees both writ and Charter remedies as coalescing into an indistinguishable procedure, even when one or the other has not been invoked specifically, so that the writ may acquire qualities properly belonging to the Charter remedy and vice versa. Both approaches adopted by the majority and the dissent in *Mills* lead, it would seem, to the danger warned of by Justice Lamer:

*We should not distort our prerogative writs, which have been developed in Canadian law and procedure over time, to become ipso facto instruments of review under the Charter. The use of such an expanded notion of jurisdictional error would unnecessarily alter the prerogative writ process beyond recognition.*¹⁶⁵

Despite this warning, the courts seem to have given little thought to the distorting effect that this transformation would have on both ordinary and extraordinary remedies.

Two equally unattractive long-term repercussions may result from an approach striving to adapt pre-Charter remedies to meet Charter requirements. The first possibility is that the law of remedies evolving after the Charter will radically depart from pre-Charter law. New remedial principles developed to meet the Charter's requirements will alter the law of remedies as a whole, and thereafter be applied in non-Charter contexts. In view of the extreme caution shown by the Supreme Court of Canada in applying the Charter's remedial provisions, it is highly doubtful that the high court

161. See Gibson & Gibson, *supra* note 114, at 540; 4 RENÉ DUSSAULT & LOUIS BORGEAT, ADMINISTRATIVE LAW 410 (1990).

162. [1986] 1 S.C.R. at 950-53, 971-72.

163. *Gamble*, [1988] 2 S.C.R. at 640; see DUSSAULT & BORGEAT *supra* note 161, at 410.

164. [1988] 2 S.C.R. at 640-41.

165. [1986] 1 S.C.R. at 897 (Lamer J., dissenting) (emphasis added).

would consider this a desirable effect. Such an approach would introduce into Canadian administrative law modifications that are foreign to that body of law.

The second possible result of the "adaptation" approach is that, on the contrary, there will be no confusion between principles developed under the Charter as to writs and other remedies, but that these special Charter rules will apply only to an alleged violation of a constitutional right. Aside from being unlikely, such compartmentalization of writs depending on the nature of the underlying right would in fact be no better than the first scenario primarily because complication of both administrative and constitutional law would ensue. There would be rules for "mandamus" and rules for "Charter mandamus," and so forth, for all ordinary and extraordinary remedies.¹⁶⁶ The task of distinguishing which rule belongs to which mandamus, for example, would prove to be complicated, if not extremely difficult. Further, a litigant who believes that one of his or her Charter rights has been violated would have to choose carefully between a "Charter mandamus" and a "Charter injunction," and so on, since the denial of the existence of a single remedy inevitably implies differences in the purpose and effect of the multiple remedies available under Section 24(1).

We are, with either of these scenarios, quite far indeed from the wish expressed by the Supreme Court of Canada that the enforcement of Charter rights through Section 24(1) be achieved through a "simplified procedure"¹⁶⁷ allowing the applicant a "reasonable measure of flexibility" in framing a claim.¹⁶⁸ In fashioning the law of Section 24(1), courts should bear in mind the advice given by Justice Lamer in *Mills*:

The rights guaranteed under the Charter are varied. As a result, their enforcement will, to some extent, be similarly varied. *In determining from which court remedies may be sought and the procedure to be followed we should strive to achieve uniformity but must accept that there will, of necessity, be some variation, if not always as a matter of law, at least in practice.*¹⁶⁹

After nearly a decade of Charter application, Justice Lamer's ad-

166. Indeed, Hogg, in the latest edition of his book on Crown liability, has special sub-headings entitled "Constitutional Injunction" and "Constitutional Mandamus." PETER W. HOGG, *LIABILITY OF THE CROWN* 26, 34-35 (2d ed. 1989).

167. *Mills*, [1986] 1 S.C.R. at 899 (Lamer J., dissenting).

168. *Gamble*, [1988] 2 S.C.R. at 638.

169. [1986] 1 S.C.R. at 883 (emphasis added).

vice must be taken to heart; uniformity should be one of the guiding factors in the development of Charter remedies. As he points out, differences are inevitable, but they should be kept to a minimum. Such differences should arise, not from purely procedural considerations stemming from the use of pre-Charter remedies, but from the varying nature of substantive rights enforced through Section 24(1) of the Charter. There already exist various movements in administrative law to simplify the law of writs and ordinary remedies,¹⁷⁰ but the comment of Professors Pépin and Ouellette about judicial review remains sadly true in most Canadian provinces and at the federal level:

Malheureusement, la multiplicité de ces modes d'exercice est une source de difficultés tant pour l'administré que pour son avocat; l'exercice de pouvoir de surveillance donne lieu trop souvent à de complexes débats qui se situent au seul niveau de leur recevabilité; l'administré intéressé peut voir son recours rejeté uniquement parce qu'il n'a pas utilisé le recours approprié pour solliciter l'intervention du juge. . . . La complexité des procédés de mise en oeuvre du pouvoir de surveillance atténué, de beaucoup, les vertus du contrôle judiciaire que les tribunaux exercent sur l'activité administrative.¹⁷¹

Insisting on dressing an application under Section 24(1) of the Charter in the cloak of a pre-Charter remedy will not only bring into constitutional law the problems described by Pépin and Ouellette but also perpetuate anachronistic distinctions among the various remedies.¹⁷² The utilization of a unique, all-encompassing

170. Statutes have been enacted in Australia (Administrative Decisions (Judicial Review) Act (1977)); British Columbia (Judicial Review Procedure Act, R.S.B.C. (1979) ch. 209); England (Rules of the Supreme Court, Order 53, as amend.); New Zealand (Judicial Amendment Act, 1972); and Ontario (Judicial Review Procedure Act, R.S.O. (1980) ch. 224 (Can.); Statutory Powers Procedures Procedure Act, R.S.O. (1980) ch. 484 (Can.). In England, for example, since 1978 a unique procedure allows the invocation of mandamus, certiorari, prohibition, injunction and declaratory action. J.L. Lambert, *Reform of the Public Law Remedies in England*, 56 CAN. BAR REV. 668 (1978).

171. GILLES PÉPIN & YVES OUELLETTE, *PRINCIPES DE CONTENTIEUX ADMINISTRATIF* 293-94 (1982)(emphasis added) ("Unfortunately, the great number of procedural vehicles creates difficulties for both the individuals and their lawyers; too often, judicial review proceedings lead to debates exclusively centered on whether the matter was properly brought to the court's attention; in fact, the individual's claim may be rejected for the sole reason that an inadequate procedure was used to bring it to the court's attention *The complexity of judicial review proceedings greatly lessens the value of judicial control of administrative action.*"); see also DUSSAULT & BERGEAT, *supra* note 161, at 410-11; DAVID JONES & ANN DE VILLARS, *PRINCIPLES OF ADMINISTRATIVE LAW* 401-11 (1985).

172. In fact, the stated purpose of statutory amendments that simplify administrative law remedies seems eminently suitable to the judicial development of section 24(1) of the

Charter application, on the other hand, would constitute a purposive approach to Charter remedies, similar to the one adopted by the Supreme Court of Canada in *R. v. Gamble*.¹⁷³

2. Inadequacy of Pre-Charter Remedies

While it is beyond the scope of this paper to examine all the possible shortcomings of ordinary and extraordinary remedies as applied to Section 24(1) of the Charter, a quick review of the most striking inadequacies is appropriate to complete the argument developed above and fully illustrate the necessity of a single Charter application.

a. Crown Immunity

The first and foremost difficulty raised by prerogative writs and ordinary remedies, and especially injunctions, is their unavailability against the Crown. The general common law rule is that the Crown is immune from the application of both ordinary laws and many ordinary and extraordinary remedies.¹⁷⁴ Statutes enacted before the inception of the Charter have largely left intact the Crown's immunity to many extraordinary remedies.¹⁷⁵ The result-

Charter:

Instead of forms of application to compel, prohibit or set aside the exercise of statutory powers, there should be a single application to the courts in which all the relief obtainable under any of the existing remedies would be available, without the technical complexities, provoking much legalistic debate, which often obstruct, delay and sometimes defeat a decision on the merits.

Explanatory note accompanying the Ontario Judicial Review Procedure Act, R.S.O. Ch. 224 (1980) (Can.), cited in PÉPIN & OUELLETTE, *supra* note 171, at 297.

173. [1988] 2 S.C.R. at 642.

174. See *Centre d'information et d'animation communautaire v. R.*, [1984] 2 F.C. 866 (Fed. C.A.)(Can.); *Grand Council of the Crees (Quebec) v. R.*, [1982] 1 F.C. 599 (Fed. C.A.) (Can.).

Section 17 of the Canada Interpretation Act, R.S.C. ch. I-21 (1985) (Can.), codifies a formulation of that rule: "No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogative in any manner, except as mentioned or referred to in the enactment."

See also DUSSAULT & BORGEAT, *supra* note 161, at 442; JONES & DE VILLARS, *supra* note 171, at 393-94; BARRY L. STRAYER, *THE CANADIAN CONSTITUTION AND THE COURTS* 117-21 (3d ed. 1988); David Sgayias, *Enforcing the Charter: Civil Remedies* 55-58 (Dep't of Justice of Canada, Ottawa, November 1990) (on file with the *University of Miami Inter-American Law Review*).

175. There are statutes in every Canadian province prohibiting injunctions and specific performance against the Crown. See ROBERT J. SHARPE, *INJUNCTIONS AND SPECIFIC PERFORMANCE* 172-73 (1983); STRAYER, *supra* note 174, at 121-26.

ing problem is obvious given that, as Canadian law now stands, the Charter applies only against the Crown.¹⁷⁶ In the case of injunctions, it has been admitted that a Crown servant will be amenable to injunctive relief if the impugned act was *ultra vires*.¹⁷⁷ However, as already seen, the Supreme Court of Canada in *Mills* rejected the idea that any act trenching on a constitutionally protected right will necessarily be *ultra vires*.¹⁷⁸ This implies that traditional non-Charter injunctions would not be available against the Crown in many cases where a Charter right has been violated. However, the Supreme Court did not appear to consider traditional Crown immunity to a certain remedy to be a decisive obstacle. For example, in *Operation Dismantle*,¹⁷⁹ the Supreme Court found that the Royal Prerogative's traditional immunity did not limit the Court in its power to review Cabinet decisions. Similarly, in the non-Charter constitutional case *Air Canada v. Attorney-General of British Columbia*,¹⁸⁰ the Supreme Court issued a mandamus against the Province so that a suit challenging the constitutionality of a tax could commence. An interesting perspective on Crown immunity under the Charter appears in the Federal Court decision of *Lévesque v. Attorney General of Canada*,¹⁸¹ where Justice Rouleau stated:

If the *Canadian Charter of Rights and Freedoms*, which is part of the Constitution of Canada, is the supreme law of the coun-

176. There is still much confusion about the precise meaning of section 32(1) of the Charter, providing:

This Charter applies

- (a) to the Parliament and Government of Canada in respect to all matters within the authority of Parliament including all matters relating to the Yukon Territories and the Northwest Territories; and
- (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Generally, it has been interpreted to deny that the Charter may be applied to private relationships without any intervening state action. See R.W.D.S.U., *Local 580 v. Dolphin Delivery Limited*, [1986] 2 S.C.R. 573 (Can.); see also DUSSAULT & BORGEAT, *supra* note 161, at 55-73; Roger Tassé, *Application of the Canadian Charter of Rights and Freedoms*, in THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS, *supra* note 114, at 97-101.

177. See *Conseil des Ports Nationaux v. Langelier*, [1969] S.C.R. 60, 73-75 (Can.); see also SHARPE, *supra* note 175, at 170-78; Janice J. Tokar, *Administrative Law: Injunctive Relief Against the Crown*, 15 MANITOBA L.J. 97 (1985).

178. [1986] 1 S.C.R. at 964-65. *Id.* at 897 (Lamer J., dissenting). Both Justices McIntyre and Lamer are apparently of the opinion that a constitutional violation will not render, per se, the impugned act *ultra-vires*.

179. *Operation Dismantle v. R.*, [1985] 1 S.C.R. 441, 455 (Can.). *Id.* at 463-64 (Wilson J., dissenting).

180. [1986] 2 S.C.R. 539 (Can.).

181. [1986] 2 F.C. 287 (Fed. Ct. T.D.) (Can.).

try, it applies to everyone, including the Crown or a Minister acting in his capacity as a representative of the Crown. Accordingly, a fortiori, *the Crown or one of its representatives cannot take refuge in any kind of declinatory exception or rule of immunity derived from the common law so as to avoid giving effect to the Charter.*¹⁸²

In that case, a writ of mandamus was issued against the Chief Electoral Officer to draw up an election list of prisoners. More recently, the Supreme Court of Canada found that absolute prosecutorial immunity impinged on the right to an appropriate and just remedy afforded by Section 24(1). The Court therefore lifted the immunity, authorizing a claim for damages by a claimant who had been improperly accused of murder.¹⁸³ These cases illustrate the inadequacy of existing common law and statutory rules on Crown immunity and the willingness of Canadian courts to create a special regime of limited Crown immunity with respect to enforcement of Charter rights.

b. Discretionary Nature of Remedies

As shown earlier, Section 24(1) of the Charter confers a constitutional right to obtain a remedy, thereby insuring the vindication of rights provided by the Charter. The entitlement to a remedy "appropriate and just in the circumstances" is therefore not subject to the judge's discretion.¹⁸⁴ This stands in contrast to the fundamentally discretionary nature of prerogative writs and injunction.¹⁸⁵ These discretionary remedies may be refused for a number of reasons, including the conduct of the applicant—waiver or acquiescence, unreasonable delays, unclean hands—futility, availability of alternative remedies, and infra-jurisdictional errors of law that are not patently unreasonable.¹⁸⁶ It has been suggested that, when a writ or an injunction is used in conjunction with Section 24(1) of the Charter, the remedy is discretionary above and beyond the fact that it must be "just and reasonable."¹⁸⁷ A better view,

182. *Id.* at 296-97 (emphasis added).

183. *Nelles v. Ontario*, [1989] 2 S.C.R. 170 (Can.); see *New Brunswick Broadcasting Co. v. Nova Scotia*, [1991] 80 D.L.R. (4th) 11 (N.S.C.A.) (immunity of provincial legislature cannot bar enforcement of the Charter); HOGG, *supra* note 166, at 26, 35; Sgayias, *supra* note 174, at 55-58, 67.

184. See *R. v. Rahey*, [1987] 1 S.C.R. at 618-22.

185. See JONES & DE VILLARS, *supra* note 171, at 372-75, 391.

186. *Id.*; see also DUSSAULT & BERGEAT, *supra* note 161, at 410-97.

187. Prerogative relief is discretionary; doubly so, in fact, because, in addition to

however, would be that the constitutional nature of the Section 24(1) remedy necessarily transcends any discretion which the judge may possess at common law. It seems difficult to defend the position that the judge would suddenly have wider discretion just because the applicant used a writ in addition to the Charter remedy. Once the violation of a Charter right has been proven, the applicant has an irreducible right to redress in the form of an "appropriate and just" remedy. At the stage of devising such an appropriate and just remedy, and at that stage only, the judge enjoys an unfettered discretion, entitling the judge to consider factors such as the public interest.¹⁸⁸ A remedy deleterious to the public interest would clearly be inappropriate. Thus, the discretionary nature of prerogative writs and injunctions at common law constitutes a further barrier to the possibility of using such remedies pursuant to Section 24(1) of the Charter without significantly affecting their characteristics.

c. Statutory Limitations

Prerogative writs and many ordinary remedies, such as injunctions, are governed by provincial and federal statutes, which, for the most part, were enacted prior to the inception of the Charter in 1982. These statutes contain limitations on the use of extraordinary remedies and injunctions, and the constitutionality of these restrictions is subject to exacting scrutiny under Section 1 of the Charter.¹⁸⁹ Limitations upon ordinary rights may not necessarily be reasonable when applied to constitutional rights, and thus the use of prerogative writs and injunctions in the context of Section

the general discretion bestowed by the "appropriate and just" provision of Section 24(1), the prerogative remedies are inherently discretionary—available only where, in the court's opinion, exceptional circumstances justify their use.

Being an equitable remedy, injunction is inherently discretionary, quite apart from the "appropriate and just" requirement of section 24(1).

Gibson & Gibson, *supra* note 114, at 811, 815.

188. *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, 146 (Can.).

189. Section 1 of the Charter provides that: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

The Supreme Court of Canada articulated the components of the test under that provision in *R. v. Oakes*, [1986] 1 S.C.R. 103, 105-06 (Can.). For an interesting analysis of the progression of the *Oakes* test, see Errol P. Mendes, *In Search of a Theory of Social Justice: The Supreme Court Reconceives the Oakes Test*, 24 R.J.T. 1 (1990).

24(1) of the Charter may lead to the invalidation of legislation.¹⁹⁰

Apart from this difficulty, statutory limitations also raise the issue of privative clauses which prohibit recourse to writs as well as to injunctions. The Supreme Court of Canada has established that the provinces cannot enact a privative clause precluding judicial review in the case of an administrative body acting *ultra vires*.¹⁹¹ Because most privative clauses are found at the provincial level, particularly in Québec where they are systematically inserted in legislation governing administrative bodies, courts will be constantly confronted with the task of classifying errors as jurisdictional or not jurisdictional to decide whether the administrative body has acted *ultra-vires*. In *Mills*, the Supreme Court clearly rejected the concept that a Charter violation would necessarily entail loss of jurisdiction. As Justice McIntyre stated: "In my view, the fact that a Charter right has been infringed does not in itself give rise to jurisdictional error, and I see no basis for the characterization of some Charter violations as jurisdictional while others are not."¹⁹² Indeed, as one author astutely remarked: "[T]he concept of jurisdiction can be manipulated so that the errors which a court wants to review become jurisdictional errors."¹⁹³ The need to rely on such a Procrustean bed to obtain a remedy pursuant to Section 24(1) appears antithetical to the substantive right to redress provided by that provision.

d. Effectiveness

The question of effectiveness refers specifically to declaratory actions and motions, an attractive common law alternative to injunction since injunction generally does not lie against the Crown.¹⁹⁴ While such a description may be accurate in a non-constitutional context, considering that the Crown rarely disregards a declaratory decision even though it may be unenforceable, its validity in the constitutional context of Section 24(1) of the Charter

190. See, for instance, the discussion of the uncertain constitutionality of the statutory provision mandating notice to the Attorney Generals of any constitutional challenge of any laws, *infra* note 246 and accompanying text.

191. *Crevier v. Québec, (A.G.)* [1981] 2 S.C.R. 220 (Can.); *Québec (A.G.) v. Farrah*, [1978] 2 S.C.R. 638 (Can.); see generally DUSSAULT & BORGEAT, *supra* note 161, at 44-46, 73-147; JONES & DE VILLARS, *supra* note 171, at 419-26.

192. *Mills*, [1986] 1 S.C.R. at 965. *Id.* at 879 (Lamer J., dissenting).

193. Roach, *supra* note 114, at 250.

194. SHARPE, *supra* note 175, at 173; Tokar, *supra* note 177, at 98.

must be questioned. First, a declaratory action does not provide interim relief since "there is no such 'animal' as an interim declaration."¹⁹⁵ More fundamentally, there are difficulties in defining a declaratory decision as an "appropriate and just" remedy, given its unenforceability. In order to be appropriate and just, a remedy must be effective in ensuring actual redress of the Charter violation. Such a concept is found in Article 13 of the European Convention on Human Rights,¹⁹⁶ and the European Court of Human Rights has held that the power to render a binding decision and the power to enforce it are essential parts of any effective remedy.¹⁹⁷ The same elements are also present in the notion of an "appropriate and just" remedy under the Charter. The same is also found in Article 2(3)(c) of the International Covenant on Civil and Political Rights, which provides that "the competent authorities shall enforce such remedy when granted."¹⁹⁸ As noted previously, the Supreme Court has declared that the Charter is presumed to grant a protection at least equal to that provided by international treaties ratified by Canada.¹⁹⁹ Surely, a hollow remedy such as a non-enforceable constitutional declaration may be considered equivalent to no remedy at all. This is not to say that declarations will never be appropriate and just, but rather that they will not always be a constitutionally adequate alternative to a more forceful judicial order.²⁰⁰

195. Tokar, *supra* note 177, at 98. The importance of interlocutory relief in Charter litigation is underlined by the fact that an injunction, which can be granted on an interlocutory basis, has been a preferred remedy in Charter litigation. Jamie Cassels, *An Inconvenient Balance: The Injunction as a Charter Remedy*, in *REMEDIES: ISSUES AND PERSPECTIVES* 271, 277-79 (Jeffrey Berryman ed., 1991).

196. See European Convention, *supra* note 12.

197. *Silver v. United Kingdom*, 5 Eur. H.R. Rep. 347, 381-82 (1983); see Plattform "Arzte für das Leben", 139 Eur. Ct. H.R. (ser. A) at 29 (1988); MERTENS, *supra* note 15, at 78-88; Karel Vasak, *L'Application des droits de l'homme et des libertés fondamentales par les juridictions nationales*, in *DROIT COMMUNAUTAIRE ET DROIT NATIONAL—SEMAINE DE BRUGES 1965*, at 336, 337-38 (1965); Jacques Velu, *Les voies de droit ouvertes aux individus devant les instances nationales en cas de violation de la Convention européenne des droits de l'homme*, in *LES RECOURS DES INDIVIDUS DEVANT LES INSTANCES NATIONALES EN CAS DE VIOLATION DU DROIT EUROPÉEN* 187, 198 (1978).

198. International Covenant, *supra* note 11.

199. See *supra* note 14; see also H. Scott Fairley, *Private Law Remedial Principles and the Charter: Can the Old Dog Wag this New Tail?* in *REMEDIES: ISSUES AND PERSPECTIVE* 313, 324 (Jeffrey Berryman ed., 1991).

200. This is verified by judicial decisions applying section 24(1): "Five years of Charter litigation reveal that a simple declaration of invalidity will frequently not provide a remedy that is 'appropriate and just.' Moreover, if simple declarations of validity or invalidity were all that was intended, s. 24 would not have been enacted." Brian Morgan, *Charter Remedies: The Civil Side After the First Five Years*, in *CHARTER ISSUES IN CIVIL CASES* 47, 48

While many more illustrations of the inadequacies of ordinary and extraordinary remedies could be found, the foregoing observations and analysis give some indication of the extensive procedural modifications necessary to satisfy the requirements of Section 24(1) of the Charter. This may explain the progression of the Supreme Court's jurisprudence in this regard, which has evolved from a single writ system without any specific Charter remedy in *Mills*, to a declaration in *Gamble* that other remedies are superfluous to Charter applications and that they may be disregarded when applying for redress pursuant to Section 24(1). The next logical step in this progression seems to be the adoption of a single application procedure under that provision. Such a unified procedure would resemble the amparo examined in the first part of this study. The following therefore draws a picture of what this single application procedure would look like under the Canadian Charter, using as inspiration the Argentine amparo.

D. Criteria for Applications Pursuant to Section 24(1)

The remedial challenge posed by Section 24(1) of the Charter will, in the oft-cited words of then Justice Dickson, "offer a test of the creativity of the legal mind."²⁰¹ In exercising this creativity to fashion a recourse under Section 24(1) of the Charter, Canadian courts should strive to instill the three fundamental qualities of the Argentine amparo in creating a remedy that is fast, simple, and effective.²⁰² The following comment by Roberts relating to amparo can be applied directly to the context of Section 24(1) of the Charter:

The protection of individual rights demands a judicial system which affords effective remedies. Damage to fundamental human rights often cannot be adequately restored by submission of a complaint to the ordinary legal processes, which are typically dilatory. Extraordinary remedies, providing rapid judicial relief, are needed.²⁰³

The balance of this article thus attempts to define criteria for a Section 24(1) application that meet these demands while con-

(Neil Finklestein & Brian Macleod Rogers eds., 1988).

201. Brian Dickson, *The Public Responsibility of Lawyers*, 13 MANITOBA L.J. 175, 187 (1983).

202. See VESCOVI, *supra* note 24, at 483.

203. Roberts, *supra* note 57, at 832.

forming to the precepts governing Canadian constitutional law. It will be restricted to the parameters set out earlier, thereby focusing only on situations arising when a court of competent jurisdiction has not already been seized of the matter. Similarly, it will be limited to non-criminal matters so as to avoid dealing with the very particular concerns of criminal law.

In Argentina, in the absence of legislation, the procedure regulating amparo was directly derived from that of habeas corpus.²⁰⁴ It is not suggested here that the Argentine example should be followed in that respect, since Canada's legal resources in the area of remedies are much richer than were Argentina's at the time amparo was developed. Instead, elements of the proposed procedure should be drawn from existing vehicles available in all areas of the law. In elaborating the procedural criteria for a Charter application, the same basic divisions used earlier to describe the Argentine amparo will be adopted: (i) acts giving rise to a Charter application, (ii) procedural considerations, and (iii) elements regarding the resulting judgment. The term Charter "application" is used here to signal clearly that this procedure does not take the form of an ordinary action, but rather resembles a summary proceeding akin to motions or applications for writs and ordinary remedies.

1. Acts Giving Rise to a Charter Application

The first elements to be examined are the identity of the parties and the nature of the violation giving rise to an application under Section 24(1) of the Charter.

a. Parties to the Application

THE APPLICANT. As was the case for amparo in Argentina, any person whose Charter rights have been personally and directly infringed can apply for a motion pursuant to Section 24(1). The victim will normally appear personally in court but, if that should be impossible for any valid reason not necessarily related to the constitutional violation, a representative may apply on the victim's behalf. As with habeas corpus, strict formalities should be required to establish the authority of the third party acting in the applicant's name. Normal procedural rules that prevent pleading through a

204. See *supra* note 93 and accompanying text.

third party should not stand in the way of the overriding public interest in enforcing constitutional rights.²⁰⁵

Whether or not corporations can make applications pursuant to Section 24(1) of the Charter is still unclear. The Supreme Court of Canada has clearly stated that a corporation may raise as a defense in penal proceedings the inconsistency of a statute with a provision of the Charter, even if the Charter right does not extend to corporations. For instance, the Court in *R. v. Big M Drug Mart* allowed a corporation to challenge a Sunday closing statute on freedom of religion grounds, despite the fact that corporations do not enjoy freedom of religion.²⁰⁶ This does not decide the question, however, because a declaration of invalidity of a statute is not a "remedy" proper to Section 24(1), but rather the effect of the supremacy of the Constitution as provided by Article 52 of the Constitution Act, 1982. Courts have applied a different test with respect to remedies proper to Section 24(1), whereby a corporation will be denied the right to an appropriate and just remedy if it does not itself enjoy the violated Charter right. In a recent decision, *Commission des école fransaskoise Inc. v. Saskatchewan*, the Saskatchewan Court of Appeal rejected a Section 24(1) application by a corporate interest group seeking a mandatory order against the Provincial government to enforce the right to minority language education guaranteed by Section 23 of the Charter.²⁰⁷ The court of appeal reasoned straightforwardly that "[o]nly those persons whose Charter rights have been violated are entitled to a remedy under s.24. A corporation has no s.23 rights and therefore cannot apply for a s.24 remedy based on a s.23 right."²⁰⁸ The question of availability of Section 24(1) remedies to corporations therefore depends on the much larger problem of the entitlement of corporations to substantive Charter rights, a matter still very much unresolved which lies beyond the scope of this study. Alternatively, corporations could attempt to base their claim for a Section 24(1) remedy on a public or related interest, a point discussed below.²⁰⁹

The question of group application also poses a delicate problem. Whenever possible, a representative empowered by specific

205. See DALE GIBSON, *THE LAW OF THE CHARTER: GENERAL PRINCIPLES* 266-67 (1986); Gibson & Gibson, *supra* note 114, at 789.

206. [1985] 1 S.C.R. 295, 313 (Can.); see also *Irwin Toys Inc. v. Québec*, [1989] 1 S.C.R. 927, 1001-04.

207. 81 D.L.R. (4th) 88 (Sask. C.A. 1992)

208. *Id.* at 97.

209. See *infra* notes 214-15 and accompanying text.

powers of attorney should be designated to apply for a motion in the name of the whole group. As far as class actions are concerned, the violation generally, if not always, stems from either a single act or from multiple acts based on a single law, such that a single motion to have the act or law declared unconstitutional would suffice to provide redress.²¹⁰ This is one situation where a mere declaration can constitute an "appropriate and just" remedy since an individualized remedy will usually not be required.²¹¹ If, however, the violation does call for individual remedies, then an *application* pursuant to Section 24(1) of the Charter would not be appropriate to start a "constitutional class action," just as a private law class action would be unavailable through such a procedure.²¹² This aspect of Charter applications suggests that damages cannot be obtained through a Charter application, be it single or multiple, but only through an action.²¹³ Notwithstanding such an inference, "Charter class actions" should be permissible, but they should take the longer, more painstaking road of an ordinary action because the summary application proceedings are not suited to deal with the associated demands.

The issue of whether a person who neither claims personal infringement of a Charter right nor claims to represent such a person, but rather applies for a Section 24(1) remedy on the basis of a related or public interest, is a more difficult question. While the Argentine Supreme Court has found that an application for amparo may be made by a person with a substantial interest, the situation is not as clear in Canada. The jurisprudence of Canada's Supreme Court with respect to public standing has evolved in the last twenty years to become more lenient. Generally, public standing rests on the presence of (i) a serious question to be answered by the courts, (ii) a plaintiff with a genuine interest, and (iii) the

210. See Glenn, *supra* note 129, at 90-91; Robert J. Sharpe, *Injunctions and the Charter*, 22 OSGOODE HALL L.J. 473, 479-80 (1984). For a discussion of class actions through amparo proceedings in Argentina, see Augusto M. Morello, *El amparo colectivo*, [1985-II] J.A. 723 (Arg.).

211. For example, the right to have one's children receive their instruction in English or French, entrenched in section 23 of the Charter, can be enforced by a single application for the benefit of the whole community, since schools are not created for a single child. Sharpe, *supra* note 210, at 480.

212. This is exemplified by articles 1002-10 of the Québec Code of Civil Procedure (R.S.Q., c. C-25), largely inspired from the American legislation on class actions (Rule 23 of the Federal Rules of Civil Procedure), subjecting the initiation of a class action to a prior judicial authorization, obtainable by application.

213. For a discussion of the possibility to seek, through an application, damages in compensation for a Charter violation see *infra* notes 262-65 and accompanying text.

absence of a plaintiff with a clearer interest.²¹⁴ In dealing with Charter litigation, courts have shown themselves to be flexible, particularly in the absence of a potential claimant who is better positioned than the applicant.²¹⁵

THE RESPONDENT. Since the Charter is directed exclusively towards the government, the legislature, and other public or semi-public institutions, these bodies will always constitute the respondent in a Charter application. The inability to identify the precise individual involved in the constitutional violation should not deter a court from granting a remedy pursuant to Section 24(1). As Canadian law now stands, the Charter may not be invoked against purely private acts of individuals, and therefore, some element of state action must be present. The law is presently unclear regarding the possibility of importing to Canada the complicated doctrine of state action elaborated in the United States, and such a question is beyond the scope of the present study. In this respect Charter applications differ greatly from amparo since the latter can be invoked against any public or private act trenching on a constitutionally protected right.²¹⁶

INTERVENORS. The rule with respect to intervenors must involve a balancing between the public aspect of the Charter rights at stake in Section 24(1) applications and the need to keep the procedure simple and fast. This balancing is best left to the judge's discretion because such matters will vary considerably from case to case. Courts generally have adopted a liberal approach toward intervention in Charter cases, where decisions are liable to affect many who are not parties to the proceedings. If an organization or individual appears genuinely interested in the decision and may bring special knowledge or expertise regarding the matter at hand, authorization to intervene will be granted.²¹⁷

214. *Canada v. Finlay*, [1986] 2 S.C.R. 607 (Can.); *Canada v. Borowski*, [1981] 2 S.C.R. 575 (Can.); *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265 (Can.); *Thorson v. Canada*, [1975] 1 S.C.R. 138 (Can.).

215. See *Canadian Council of Churches v. Canada*, 46 C.R.R. 290, 297-301 (Fed. C.A. 1990) (Can.); *Energy Probe v. Canada*, 40 C.R.R. 303, 324 (Ont. C.A. 1989); see also George W. Adams, *Remedial and Procedural Issues Arising from the Charter of Rights and Freedoms*, 13 QUEEN'S L.J. 301, 321-22 (1988) (finding the Canadian jurisprudence more liberal than the U.S. in this respect); DUSSAULT & BERGEAT, *supra* note 161, at 413-35; GIBSON, *supra* note 205, at 267-71; Gibson & Gibson, *supra* note 114, at 786-94; Michael J. Murphy, *L'intérêt à poursuivre en vertu du paragraphe 24(1) de la Charte canadienne des droits et libertés*, 35 U. NEW BRUNSWICK L.J. 188 (1986) (Can.).

216. *Kot*, 241 Fallos 291 (1958) (Arg.).

217. See *Rothmans, Benson and Hedges v. Canada*, 45 C.R.R. 382, 388 (Fed. C.A.

b. Nature of the Violation

Any act or omission, voluntary or involuntary, leading to the infringement of a Charter right will open the door to an application under Section 24(1). The "failure to act" aspect is particularly important, since it underlines the fact that the Charter imposes positive duties on the government and the legislature. The right to obtain certain services from the government, for example, imposes a positive duty on the executive.²¹⁸ The infringement of the Charter right must be either actual or threatened and, thus, cannot be merely eventual or possible. In *R. v. Operation Dismantle*,²¹⁹ the Supreme Court of Canada implied that the violation need not necessarily have taken place by the time the application is made: "[T]hey must at least be able to establish a threat of violation, if not an actual violation, of their rights under the Charter."²²⁰ The Court in *R. v. Vermette*,²²¹ stated the rule more clearly, finding that an accused could present an application pursuant to Section 24(1) to stop an unfair trial that had not yet started.²²² On the other hand, the Court rejected purely hypothetical violations as valid grounds for a Charter application.

Charter applications may be used to enforce any of the rights contained in the Charter. Somewhat surprisingly, the Supreme Court in *R. v. Gamble*²²³ appears to have included habeas corpus within those rights. Habeas corpus would therefore not be a separate application directly under Section 10(c) of the Charter, but would be subject to the same rules as other Section 24(1) applications. Though technically different than the Argentine procedure,

1989); Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd., 2 C.R.R. (2d) 327 (Ont. H.C. 1990); DUSSAULT & BERGEAT, *supra* note 161, at 427-30; GIBSON, *supra* note 205, at 271-75; STRAYER, *supra* note 174, at 195-97; Kenneth P. Swan, *Intervention and Amicus Curia Status in Charter Litigation*, in CHARTER LITIGATION, *supra* note 129, at 27-44; Jilian Welsh, *No Room at the Top: Interest Groups, Intervenors and Charter Litigation in the Supreme Court of Canada*, 43 U. TORONTO FAC. L. REV. 204 (1985).

218. Section 20 of the Charter gives the right to receive government services in both English and French.

219. [1985] 1 S.R.C. 441 (Can.).

220. *Id.* at 450. See also Béliveau, *supra* note 114, at 623; Gibson & Gibson, *supra* note 114, at 794-98.

221. [1988] 1 S.C.R. 985 (Can.).

222. *Id.* at 992 ("[S]ection 24(1) applies not only in the case of an actual interference with the guaranteed rights, but also when an apprehension of such an interference at a future trial can be established by the applicant."). See also Tyler v. Canada, 4 C.R.R. (2d) 348, 360-62 (Fed. C.A. 1990); Burke v. R., 29 C.R.R. 1, 4 (P.E.I. S.C. 1986).

223. [1988] 2 S.C.R. at 642.

this approach to Charter applications accords with the principle recognized there that habeas corpus is but a particular application of amparo.²²⁴ Finally, the Argentine rule that amparo cannot undo a contract does not have any application in the Canadian context.²²⁵ The Charter is not directed towards individuals but rather towards the state, and the mere presence of a contract between an individual and the state should not deter the court from granting relief under Section 24(1) if the applicant's constitutional rights have been violated.

The most important limitation to the Argentine amparo is the prohibition of its use to challenge judicial decisions.²²⁶ This limitation, however, falls beyond the parameters of this study since it does not apply to situations where a court is not yet seized of the matter. Suffice it to note that there probably exists a similar Canadian prohibition, given that the Supreme Court has repeatedly said that applications pursuant to Section 24(1) do not offer a new appeal route.²²⁷ However, as in Argentina, the prohibition is but a general rule since some rights in the Charter, specifically those included in Sections 11 to 14, can be violated only by courts.²²⁸ Therefore, the rule is not absolute and some right to challenge a judicial decision probably exists under Section 24(1) of the Charter.²²⁹

Finally, the Argentine requirement that the illegitimacy of the act appear indisputable from the allegation is not readily applicable to the Canadian law of applications under Section 24(1) of the Charter. In Argentina, this rule was tied to the principle that amparo could not be used to declare general norms unconstitutional. An act would be found manifestly illegitimate only if it was not based on a statute or regulation, and was therefore amenable to amparo.²³⁰ No such limitation on general declarations of unconstitutionality exists in Canada. On the contrary, declarations are

224. *Orgaz*, *supra* note 67, at 1074, writes: "[E]l recurso de amparo constituye el género y el de hábeas corpus sólo una especie dentro de este género."

225. *See supra* notes 83-84 and accompanying text.

226. *See supra* notes 75-79 and accompanying text.

227. *See, e.g.*, *R. v. Meltzer*, [1989] 1 S.C.R. 1764, 1773-75; *Mills*, [1986] 1 S.C.R. at 958-65; *id.* at 899-903 (Lamer, J., dissenting), 978 (La Forest, J., concurring).

228. These include the right to a fair and public trial by an independent and impartial tribunal (pt. I § 11(d)), the right to trial by jury (pt. I, § 11(f)) and the right against self-incrimination (pt. I, § 13).

229. *See Béliveau*, *supra* note 114, at 636-37.

230. Law No. 16.986 of Oct. 18, 1966, art. 2(d), 1967-A A.L.J.A. 500 (Art.); *see* BIDART CAMPOS, *supra* note 58, at 249-50.

mandated by Section 52(1) of the Constitution Act, 1982. Nevertheless, Canadian courts have been reluctant, based on a simple application, to hear cases raising difficult factual questions. The questions need not be tied to the violation. Instead, they will often relate to the rationality test under Section 1 of the Charter, whereby limitations on constitutional rights may be justified by social and political evidence. The Supreme Court of Canada has stated that a full action is more appropriate than an application, since the latter is necessarily limited.²³¹ Care should be taken, however, so that this limitation is not erected as a permanent barrier against prompt enforcement of human rights violations in Canada.

2. Procedural Considerations

Elements of pure procedure, not affecting substantive rights, concern first the rules of the supplementary character and exhaustion of internal remedies as applied to Charter applications and second, the definition of a "court of competent jurisdiction."²³²

a. Supplementary Character and Exhaustion of Remedies

The allegedly supplementary character of Charter applications was previously discussed with regard to prerogative writs, declaratory judgments, and injunctions. It was shown that these remedies cannot be considered acceptable alternatives to a motion under Section 24(1) of the Charter. Consequently, Charter applications bear no supplementary relation to other remedies, and an applicant cannot be reproached for not having used these remedies. As Justice La Forest remarked in *Rahey*: "In general, there is no reason why an accused should be barred from appropriate constitutional relief by the existence of a prerogative writ."²³³ This approach significantly simplifies the incorporation of Section 24(1)

231. *Danson v. Ontario*, 50 C.R.R. 59, 70 (S.C.C. 1990) (Can.); *Wilson v. R.*, 30 C.R.R. 156, 158 (Man. C.A. 1987) (Can.).

232. The impact of specific rules of courts regarding applications falls beyond the scope of this analysis, given that its aim is to assess what is constitutionally required, rather than procedurally permissible. For a review of how existing court rules accommodate Charter applications, see Sack et al., *supra* note 129, at 147 (reviewing rules in common law provinces); see also Michel Robert, *Aperçu de la procédure réglementant l'exercice de la compétence des tribunaux en vertu de la Charte: L'opportunité de procéder par action ou requête*, in CHARTER CASES 1986-1987, at 207 (reviewing rules in Québec and in the Federal Court of Canada).

233. *Rahey*, [1987] 1 S.C.R. at 631.

applications into the existing procedural framework, eliminating any need to perform the difficult task of prioritizing remedies.²³⁴ In keeping with the set parameters of this study, nothing will be said about judicial appeals save that they should be understood as the consummate alternative.

As for internal administrative remedies, the administrative law rule of exhaustion of remedies within the institutional framework where the decision originated should not bar an application for relief under Section 24(1).²³⁵ The reason is indirectly given by Dussault and Borgeat in their overview of that rule:

Both the authors and the cases conclude that *the necessity of exhausting all available internal recourse is linked to the discretionary character of the power to superintend and reform.* One must therefore examine the scope of the discretionary power as its purpose is to reconcile observance of internal remedies with observance of the rule of law.²³⁶

We have already seen that the power granted to a court of competent jurisdiction pursuant to Section 24(1) is not of a discretionary nature, but rather fulfills a substantive constitutional right. The discretion which that provision bestows upon the judge relates solely to the determination of a just and appropriate remedy. Therefore, an application under Section 24(1) cannot be summarily denied on the basis that internal institutional remedies have not been exhausted. An examination of the merits is necessary. One can hardly imagine that an order to remand to an institutional body due to the non-exhaustion of administrative remedies would ever be an "appropriate and just" remedy for a constitutional violation, since it would not in any sense provide *effective* redress. In order to provide an effective remedy, the court must address at least some substantive aspect of the application, even if it decides to remand the case to the administrative body for further consideration.

This interpretation conforms to the legislative history of Sec-

234. This consequence of both amparo and the Charter application's exclusivity was also one of the major advantages noticed by an American scholar in his comparative study of amparo and remedies in the United States. Schwarz, *supra* note 22, at 269 ("[Amparo] possesses not only uniqueness and broad scope, but a simplicity and uniformity of procedure, in contrast to the United States' procedures.").

235. For discussion of the administrative law rule, see Harelkin v. University of Regina, [1979] 2 S.C.R. 561 (Can.); DUSSAULT & BORGEAT, *supra* note 161, at 459-68; JONES & DE VILLARS, *supra* note 171, at 348-53.

236. DUSSAULT & BORGEAT, *supra* note 161, at 460 (emphasis added).

tion 24(1) of the Charter. The original proposal of Section 24(1) stated that a constitutional remedy would lie “[w]here no other effective recourse or remedy is available or provided for by law”²³⁷ This limitation on the courts’ power under Section 24(1) was later removed to give judges more discretion, “unfettered by traditional or alternative remedies.”²³⁸ It can therefore be concluded that the subsidiary character of applications pursuant to Section 24(1) of the Charter is weakened when compared to the Argentine law of amparo and that the rule of exhaustion of institutional administrative remedies does not apply to a Section 24(1) application.

b. Court of Competent Jurisdiction

Section 24(1) of the Charter requires that a person seeking redress for a violation of rights contained in the Charter apply to “a court of competent jurisdiction.” The Supreme Court unanimously set as the first tenet of this provision that there must *always* be a court of competent jurisdiction.²³⁹ Since the superior courts of each province have nearly unlimited inherent powers, this requirement does not pose much difficulty in situations where there is no extant cause at the time of the Charter application. Charter applications should be directed at those superior courts. A more difficult question is how to choose a court of competent jurisdiction when a court other than the provincial superior court has apparently been given jurisdiction by statute.

Jurisdiction can be broken down into three elements: jurisdiction over the person (*ratione personae*), over the subject matter (*ratione materiae*), and over the remedy sought. We have already seen that the Supreme Court of Canada in *Mills* held that a court must have jurisdiction over all three elements in order to entertain applications based on Section 24(1) of the Charter.²⁴⁰ As one author has remarked, however, the remedy is not always known at the time of the application, since the Constitution grants the court discretion to fashion a just and appropriate remedy after having heard the facts of the case.²⁴¹ A court must possess jurisdiction

237. McLellan & Elman, *supra* note 8, at 207.

238. Nora Gillespie, *Charter Remedies: The Structural Injunction*, 11 *Advoc. Q.* 190, 199 (1990).

239. *Mills*, [1986] 1 S.C.R. 863.

240. *See supra* notes 129-30 and accompanying text.

241. Levy, *supra* note 129, at 537-38.

over the person and over the subject matter before it can competently grant a remedy under Section 24(1).²⁴² As for the particular remedy granted, the Supreme Court has invited judges to be imaginative in creating new remedies.²⁴³ Such remedies could be defined as being similar in nature to remedies generally accorded by the seized court, following a principle similar to *noscitur a sociis* or *eiusdem generis*. Such limitations, of course, do not apply to the provincial superior courts, whose remedial powers know practically no limit.²⁴⁴

This principle requiring jurisdiction over the person, subject matter, and remedy cannot, however, be absolute. The first tenet of Section 24 demands that there always be a court of competent jurisdiction available. Thus, the principle should state that a competent court should enjoy all three types of jurisdiction "whenever possible." There may well be situations where the statutory scheme regulating courts' jurisdiction will obstruct the attainment of effective redress under Section 24(1). For example, the federal court sitting solely in Ottawa may be out of reach for a remote community in the northern regions of Québec. In such a case, Section 24(1) of the Charter should directly empower a local court to be seized of the matter. Otherwise, the applicant will be deprived of his or her constitutional right to an appropriate and just remedy, merely because of the statutory division of jurisdiction. While allowing limitations of constitutional rights, Section 1 of the Charter does not countenance their outright denial. In sum, if a choice is possible, a court possessing all three jurisdictional requirements will be preferred. However, if no such court is available, and the delay incurred in seizing the appropriate court would cause irreparable harm, then any court should have jurisdiction to grant relief under Section 24(1) of the Charter. As Roach says, the courts would be exercising their discretion not judicially but constitutionally.²⁴⁵

In general, the procedural aspects of Charter litigation under Section 24(1) should not be allowed to unnecessarily derail an application. On the contrary, as with the Argentine rule of *suplencia*

242. See Hogg, *supra* note 166, at 696-97; Levy, *supra* note 129, at 537-38.

243. Mills, [1986] 1 S.C.R. at 955; see also Dickson, *supra* note 201, at 187; Fred Kaufman, *The Canadian Charter: A Time for Bold Spirits, Not Timorous Souls*, 31 MCGILL L.J. 456, 464 (1986).

244. See Glenn, *supra* note 129, at 78-79.

245. Roach, *supra* note 114, at 271.

de la queja, the procedure should be afforded more flexibility than is currently found in ordinary proceedings. For example, the rule of mandatory notice to the federal and provincial Attorney-Generals when the constitutionality of a statute is in question, and the related delays of up to sixty days, is subject to the reasonableness test under Section 1 of the Charter. Some have suggested that a limitation of this kind depriving any court of jurisdiction cannot be reasonable.²⁴⁶ A less categorical view is that reasonableness depends on the circumstances and, particularly, on the urgent nature of the application, as well as on the degree of flexibility given to courts by statute to waive the delay or the notice altogether.

It is important to note that the singularity of applications pursuant to Section 24(1) of the Charter generally has a simplifying effect on the procedure used to enforce constitutional rights. This is even more true of the Canadian Charter than of the *amparo* suit in Argentina.

3. Judgment on a Charter Application

A judgment according redress for a violation of a Charter right must, according to Section 24(1) of the Charter, consist of a remedy "appropriate and just in the circumstances." What this concept entails will be examined after considering the question of declarations of unconstitutionality.

a. Declarations of Unconstitutionality

We have seen that one of the major stumbling blocks in the development of the Argentine law of *amparo* was the prohibition against declaring general norms invalid through that procedure. The rationale for such a statutory rule, to which many exceptions were eventually created, lay in the opinion that a summary proceeding such as *amparo* could not serve as a rebuttal to the presumption that all laws are constitutional.²⁴⁷

In Canada, the situation is quite different. Declaratory actions and motions are available to have a statute declared unconstitu-

246. See GIBSON *supra* note 205, at 275-78; Glenn, *supra* note 129, at 81; Levy, *supra* note 129, at 524-27; McLellan & Elman, *supra* note 8, at 214; Danielle Pinard, *L'exigence d'avis préalable au Procureur général prévue à l'article 95 du Code de procédure civile*, 50 R. DU B. 629, 684-88 (1990); Robert, *supra* note 232, at 215-16.

247. See *supra* notes 98-99 and accompanying text.

tional.²⁴⁸ No formal presumption that a law complies with the Charter exists, though such a presumption with regard to the constitutional separation of legislative powers can be found in Sections 91 and 92 of the Constitution Act of 1867.²⁴⁹ Applications or actions under either Section 24(1) of the Charter or Section 52(1) of the Constitution Act of 1982 may lead to a declaration of unconstitutionality, but the two provisions have very different purposes. This difference, in the Argentine context, is aptly illustrated by the distinction between the amparo and the direct action in unconstitutionality drawn by professor Bidart Campos: Amparo enforces individual rights whereas the direct action in unconstitutionality protects the integrity of the Constitution.²⁵⁰ Likewise, Section 24(1) grants a remedy where there is a violation of a Charter right, while Section 52(1) invalidates a statute when it is incompatible with the Constitution of Canada. Section 52(1) is broader in the sense that it allows for a declaration of unconstitutionality where the statute is invalid on its face, even if no relevant violation has taken place.²⁵¹ Under this provision, no reference to Section 24(1) of the Charter is necessary if another procedural vehicle, such as an action, is used. On the other hand, an application pursuant to Section 24(1) may also lead to a declaration of invalidity, since Section 52(1) of the Constitution Act of 1982 may be invoked through a Section 24(1) application.²⁵²

In a very recent decision, *Schachter v. Canada*,²⁵³ the Supreme Court of Canada appears to have taken the position that Section 24(1) of the Charter and Section 52 of the Constitution Act of 1982, provide alternative rather than cumulative remedies.²⁵⁴ The consequence of this approach is to limit Section 24(1) reme-

248. See Glenn, *supra* note 129, at 82-83.

249. *A.G. Manitoba v. Metropolitan Stores*, [1987] 1 S.C.R. 110, 121-26 (Can.). See also Danielle Pinard, *Le principe d'interprétation issu de la présomption de constitutionnalité et la Charte canadienne des droits et libertés*, 35 MCGILL L.J. 305 (1990).

250. BIDART CAMPOS, *supra* note 58, at 124-27.

251. See *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (Can.) (corporation allowed to invoke freedom of religion, even though it did not itself enjoy such a right).

252. See Béliveau, *supra* note 114, at 623; see also Glenn, *supra* note 129, at 82-83.

253. *Schachter v. Canada*, File No. 21889 (July 9, 1992) (Can.).

254. Lamer, C.J., writes:

An individual remedy under s. 24(1) of the Charter will rarely be available in conjunction with action under s. 52 of the Constitution Act, 1982. 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.

Schachter, File No. 21889 at 44.

dies to violations stemming from strictly individual acts of Crown agents, not directed or encouraged by any statute, regulation, or other legislative norm found to be inconsistent with Section 52. Little justification is given for this position which severely curtails the breadth of Section 24(1). The interpretation does not reflect the different purposes of Sections 24(1) and 52, as discussed above. Nor does it conform to the text of Section 24(1) which grants a constitutional right to a remedy to anyone whose Charter rights have been infringed or denied. Indeed, the wording of that provision suggests that a right to a remedy exists for any kind of violation and should not be limited to acts of a purely executive nature.

b. Appropriate and Just Remedy

Section 24(1) of the Charter grants the judge wide discretion to evaluate which remedy is "appropriate and just" under the circumstances set forth in the application. As Justice McIntyre remarked in *Mills*:

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 preempt or cut down this wide discretion. No court may say, for example, that a stay of proceedings will always be appropriate in a given type of case. Although there will be cases where a trial judge may well conclude that a stay is the appropriate remedy, the circumstances will be infinitely variable from case to case and the remedy will vary with the circumstances.²⁵⁵

Some members of the judiciary have been even more emphatic in assessing the role entrusted to them by this particular provision of the Charter.²⁵⁶

A judge's discretion to evaluate what remedy is appropriate and just is, however, not unlimited. Indeed, it finds its limitation in the substantive rights which the remedy is destined to enforce. Professor Morel explains that some rights contain in their nature

255: *Mills*, [1986] 1 S.C.R. at 965-66 (emphasis added).

256. See Kaufman, *supra* note 243, at 464:

The very wording of this section—"such remedy as the court considers appropriate and just"—is, of course, a call for judicial ingenuity or, if you will, an open door to activism. Indeed, some might say, and not without reason, that Parliament, in giving this power to the judges, virtually opened the door to the promulgation of laws by the judiciary.

the remedy which will be appropriate and just.²⁵⁷ For example, the right to receive education in English or French, as guaranteed by Section 23 of the Charter, would seem to mandate an order to provide such education if it is found that the applicant is entitled to it. This principle is echoed by Justice Wilson's opinion in *Rahey*, in which she concluded that a violation of the right to a speedy trial can only be remedied by a stay of permanent proceedings.²⁵⁸ However, the members of the Supreme Court have not reached a consensus on this point. In that same decision, Justice La Forest disagreed with Justice Wilson, holding that the flexible criteria expressed in Section 24(1) of the Charter imply that there is never necessarily one remedy alone available.²⁵⁹ Nevertheless, it would appear that the concept of "just and appropriate" as adopted by the Supreme Court in *Gamble*²⁶⁰ more closely resembles Justice Wilson's opinion that violations of certain specific rights by their nature mandate a specific remedy.

The court's decision as to which remedy is appropriate and just under the circumstances may rely on any element, as long as it is relevant and has been properly brought to the court's attention. One factor that the judge should consider is the general societal interest. Some commentators have suggested that the public interest can justify denying redress completely if, on balance, it outweighs the applicant's interest in enjoying his or her Charter rights. This suggestion does not seem appropriate. Considerations of public interest should come into play only at the stage where the remedy is fashioned, since it is at that stage that the judge has discretion.²⁶¹ It may be that, in some situations, the most effective remedy from the litigant's perspective is not appropriate because of its injurious effects on society's interest. The court must then devise a remedy reconciling the societal interest with the applicant's constitutional right to redress under the Charter.

The notion of a "just and reasonable" remedy raises a difficult question concerning the award of damages. It is possible that a vio-

257. Morel, *supra* note 115, at 256-58. The same idea has been expressed in relation to the right to an effective remedy under Article 13 of the European Convention on Human Rights. Wolfgang Strasser, *The Relationship Between Substantive Rights and Procedural Rights Guaranteed by the European Convention on Human Rights*, in *PROTECTING RIGHTS, THE EUROPEAN DIMENSION* 595, 598 (1988).

258. *Rahey*, [1987] 1 S.C.R. at 620.

259. *Id.* at 639.

260. *Gamble*, [1988] 2 S.C.R. at 640-41.

261. See Roach, *supra* note 114, at 269-70.

lation of a Charter right may be compensated by damages. This possibility stems from the distinction between rights where the violation calls for restitution, and rights where the violation is irreversible, therefore calling for compensation.²⁶² Violations of a Charter right by a Crown servant can be readily qualified as a fault under the protean civil responsibility provision of Québec's Civil Code of Lower Canada, Article 1053.²⁶³ Similarly, the common law provinces of Canada have incorporated certain Charter violations into private law for the purpose of compensatory damages.²⁶⁴ The problem is one of a procedural nature. This application under Section 24(1) of the Charter has its roots in such summary proceedings as prerogative writs and injunctions. Such procedural vehicles are not well suited to sustain claims for damages, since they do not allow the respondent sufficient opportunity to present an adequate defense. Also, when damages are sought as compensation, the urgency that generally surrounds the redress of a Charter violation is simply not present. Furthermore, as in all cases where damages are sought, the quantum must be established. This procedure, which often involves complex factual issues, goes against the summary nature of the application. Finally, the compensation of prejudice incurred by the fault of another is a *right*, therefore damages would appear incompatible with the wide discretion granted the judge under Section 24(1) to fashion a remedy appropriate under the circumstances. For all these reasons, damages to compensate for the violation of a right in the Charter should be sought through an ordinary action in damages, not by an application pursuant to Section 24(1) of the Charter. This approach was adopted by the Federal Court of Appeal in *Lussier v. Collins*: "The rules of procedure do not allow such an order [of damages] to be made on a mere motion; to maintain the contrary would seriously prejudice the right of the defendant to raise all his defenses."²⁶⁵

262. See Morel, *supra* note 115, at 256-60.

263. "Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill." 8 BIBLIOTHEQUE DU CODE CIVIL DE LA PROVINCE DE QUÉBEC, art. 1053 (C. C. de Lorimier, ed., 1883); see Glenn, *supra* note 129, at 85-86.

264. See Glenn, *supra* note 129, at 85-86; see also Ken Cooper-Stephenson, *Tort Theory for the Charter Damage Remedy*, 52 SASK L. REV. 1 (1988); Gibson & Gibson, *supra* note 114, at 821-22; Morgan *supra* note 200, at 51-56; Pilkington, *supra* note 129, at 307; Marilyn Pilkington, *Damages as Remedy for Infringement of the Canadian Charter of Rights and Freedoms*, 62 CAN. BAR REV. 517 (1984).

265. [1985] 1 F.C. 124, 126 (Fed. C.A.) (Can.); see also DUSSAULT & BERGEAT, *supra* note 161, at 409 n.256 (quoting *Lambert v. A.G. Québec*, 3 C.R.R. 41, 44-45 (Qué. S.C. 1983)); *R.L. Crane Inc. v. Couture*, [1983] 6 D.L.R. (4th) 478; *Johnson v. R.*, [1985] 16 D.L.R.

On the other hand, punitive damages would not be subject to this limitation and could be awarded by the judge as an "appropriate and just" remedy under the circumstances, since there is no difficulty with quantum, entitlement, or compensation. Punitive damages could prove adequate where a mandatory order against the Crown would run afoul of societal interest.²⁶⁶ Perhaps paradoxically, the purpose of punitive damages must not be to punish but simply to provide the victim with a remedy for the violation of Charter rights. As such, punitive damages under Section 24(1) represent more of a symbolic award, appropriate when harm to the victim cannot be undone and did not generate any real pecuniary or moral loss. The term "punitive" damages seems inappropriate with respect to such an award and should perhaps be renamed "presumed general damages" following a terminology suggested by some academics in the United States.²⁶⁷ Remedies under Section 24(1) in general, are of a corrective rather than punitive nature. As pointed out by the Québec Court of Appeal in a recent decision, *R. v. Latulippe*,²⁶⁸ this connotation appears more clearly in the French word "*réparation*" than in the English "remedy." In *Latulippe* the Court of Appeal refused to issue a contempt of court order as a Section 24(1) remedy because it would not have provided a remedy to the victim, but only punished the violators. This corrective rather than punitive nature of Section 24(1) remedies echoes the non-punitive nature of amparo in Argentina, although different conclusions are reached as to the availability of punitive damages awards on Charter applications.²⁶⁹ In the end, apart from the possibility of ordering punitive damages, the rules proposed here contain restrictions similar to those imposed in Argentina.

(4th) 441; *Banks v. R.*, 21 ALL CAN. WKLY. SUMM. [A.C.W.S.] 2d 1 (Fed. C. Trial Div. 1983); *Dufresne v. R.*, 1989 RECUEIL DE JUR. DU QUÉBEC [R.J.Q.] 312.

266. For instance, in *R. v. F (R.G.)*, 5 C.R.R. (2d) 62 (Nfld. S.C., trial div. 1991), a man accused of five counts of indecent and sexual assaults sought to have his indictment stayed because the proceedings had been adjourned for four days, one more than the statutory maximum. The court agreed that the accused's constitutional rights had been infringed due to the illegal detention, but found that quashing the charges would be inappropriate, and instead awarded \$1,000 in punitive damages against the Crown. See also *Freeman v. West Vancouver District*, 24 A.C.W.S. 3d 936 (B.C.S.C. 1991) (\$5,000 punitive damages awarded); *Crossman v. R.*, [1984] 9 D.L.R. (4th) 588 (Fed. C. Trial Div.) (\$500 punitive damages awarded). But see *Vespoli v. Minister of National Revenue*, 55 N.R. 269, 272 (Fed. C.A. 1984), and *Pilote v. Québec*, 1986 RECUEIL EN RESPONSABILITÉ ET ASSURANCE 65 (refusing to award damages absent proof of loss).

267. See Jean C. Love, *Presumed General Damages in Constitutional Tort Litigation*, in REMEDIES: ISSUES AND PERSPECTIVES 243 (Jeffrey Berryman ed., 1991).

268. 69 CANADIAN CRIMINAL CASES [C.C.C.] (3d) 365, 377 (1991).

269. See *supra* notes 106-07 and accompanying text.

The unavailability of a damage award pursuant to a summary application under Section 24(1) would have the same *res judicata* effect for a final decision on a Charter application as the one governing the Argentine *amparo*.²⁷⁰ The decision reached on an application will therefore be *res judicata* only for Section 24(1) applications based on the same facts and between the same parties. Since the nature and purpose of an *action* in damages are different from that of a Charter *application*, the court in such an action would not be bound by a decision on the Section 24(1) application.

In closing, interim relief should be available in any Charter application if irreparable harm will occur before the court has had time to reach a final decision on the application itself. The Supreme Court of Canada in *Attorney General v. Metropolitan Stores*²⁷¹ stated that interim relief should be granted if (i) there is *prima facie* proof of the Charter violation; (ii) the party seeking the injunction will suffer irreparable harm, not compensable through damages, if the interim order is not granted; and (iii) the burden on the applying party will exceed any harm to the public interest if the interim order is not granted. These criteria are identical to those developed in relation to interlocutory orders in *amparo* applications.²⁷²

IV. CONCLUSION

The unsettled state of Canadian law governing applications under Section 24(1) is directly due to the failure of the legislatures, at both the federal and provincial levels, to enact procedural rules for the enforcement of the Charter. While the law of *amparo* in Argentina developed in a similar context, its evolution was the result of the thoughtful and prudent guidance of the Supreme Court of that country. The potential for guidance is also present in Canada, though Canadian courts have acted with excessive conservatism, finding the appearance of creating new constitutional remedies repugnant. Although Canada need not directly adopt a foreign body of law, there are valuable lessons to be learned from the development of *amparo* in Argentina. Ultimately, *amparo* should in-

270. *Supra* note 108 and accompanying text.

271. [1987] 1 S.C.R. 110, 127-29, 149-50 (Can.); see also *Hardie v. Corp. of Summerland*, 22 C.R.R. 204, 209-10 (B.C.S.C. 1985); Gibson & Gibson, *supra* note 114, at 815-17; Morgan, *supra* note 200, at 56-59; Sgayias, *supra* note 174, at 49-58.

272. See Fix-Zamudio, *supra* note 27, at 339-40.

spire the Canadian courts to develop Charter applications.

The ambivalent attitude of Canadian courts, attempting to create new remedies, but not daring to abandon older ones completely, has led to a jurisprudence riddled with contradictions. As we have seen, this half-hearted effort is leading the Canadian law of ordinary and extraordinary remedies down a dangerous path. Traditional remedies risk an unnecessary transformation through their application as Charter remedies. There is a need for the creation of a unique, all-encompassing Charter application pursuant to Section 24(1) of the Charter, possessing flexibility, as well as the more striking qualities of administrative, civil, and criminal remedies. Such simplification of the enforcement of Charter rights is necessary to fight the "chilling effect" produced by the high costs and complications of ordinary litigation. Unless this is achieved, the vindication of constitutional rights will remain beyond the means of many victims, especially those who find themselves in a very vulnerable position when confronting the government.²⁷³

Legislative action can at any moment intervene to regulate applications pursuant to Section 24(1) of the Charter. The rights conferred thereby, like all other rights embodied in the Charter, are not absolute but rather subject to such "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."²⁷⁴ Professor Hogg has suggested that without such legislation there exist no limits to the courts' powers under Section 24(1).²⁷⁵ Canadian courts should not shirk from the task entrusted to them by this provision of the new Constitution. They should strive to develop a procedural vehicle that will allow Canadians to enforce their constitutional rights in a manner that is fast, simple, and effective, so as to fully implement the Charter.²⁷⁶

273. See Langlois, *supra* note 143, at 247.

274. Charter, *supra* note 3, § 1.

275. HOGG, *supra* note 114, at 697. This statement is somewhat limited by the content of the rights themselves. See *supra* text accompanying notes 257-58.

276. Section 24(1) of the Charter should be used in such a way as to bring about the same beneficial results sought by amparo in Argentina.

[E]s de congratularse, en efecto, que los ciudadanos de un país, aun equivocándose, se habitúen a pensar con sentido práctico sobre sus derechos constitucionales y sobre los límites que ellos imponen a las arbitrariedades de la autoridad o de otros individuos. Sólo por esta práctica reflexiva y constante, puede lograrse que una Constitución "viva" realmente y no sea mera literatura en el país que ella preside y gobierna.

Orgaz, *supra* note 67, at 1073-74.