

TABLE OF CONTENTS

| | PAGE |
|--|------|
| <i>Preface</i> | v |
| <i>Preface to Second Edition</i> | x |
| <i>Table of Cases</i> | TC-1 |

PART I. THE SIGNIFICANCE OF CONSTITUTIONAL REMEDIES

| | |
|--|------|
| CHAPTER 1. INTRODUCTION..... | 1-1 |
| CHAPTER 2. HISTORICAL OVERVIEW..... | 2-1 |
| I. Constitutional Remedies at Confederation..... | 2-1 |
| II. Interplay of Judicial and Legislative Remedies: The Manitoba Language and Schools Crises..... | 2-6 |
| A. Minority Language Rights..... | 2-7 |
| B. Denominational School Rights..... | 2-10 |
| C. Summary..... | 2-13 |
| III. Civil Disobedience..... | 2-14 |
| IV. The Development of Judicial Remedies..... | 2-15 |
| A. Damages..... | 2-15 |
| B. Injunctions..... | 2-17 |
| C. Declarations..... | 2-18 |
| D. Standing..... | 2-20 |
| E. Prerogative Writs..... | 2-21 |
| V. Remedies in the Criminal Process..... | 2-22 |
| A. Exclusion of Improperly Obtained Evidence..... | 2-22 |
| B. Stays of Proceedings..... | 2-23 |
| C. Habeas Corpus..... | 2-25 |
| VI. The Canadian Bill of Rights..... | 2-26 |
| VII. The Development of Administrative Remedies..... | 2-29 |
| A. Human Rights Commissions..... | 2-29 |
| B. Social and Economic Rights..... | 2-31 |
| VIII. International Law..... | 2-32 |
| IX. The Development of the Canadian Charter of Rights and Freedoms..... | 2-34 |
| X. Conclusion..... | 2-37 |

CONSTITUTIONAL REMEDIES IN CANADA

| | |
|---|------|
| CHAPTER 3. REMEDIAL PURPOSES, PRINCIPLES AND CONSTRAINTS | 3-1 |
| I. Textual Approaches..... | 3-4 |
| A. Section 24(1) of the Charter | 3-5 |
| B. Section 24(2) of the Charter | 3-6 |
| C. Section 52(1) of the Constitution Act, 1982 | 3-8 |
| II. Positive and Negative Remedies..... | 3-10 |
| III. The Nature of Remedial Discretion | 3-13 |
| IV. Purposive Approaches | 3-15 |
| V. Meaningful Remedies that Compensate and Vindicate | 3-19 |
| VI. Effective Remedies that Ensure Compliance in the Future.. | 3-24 |
| VII. Respecting Institutional Roles | 3-31 |
| VIII. Fairness to all the Parties..... | 3-37 |
| IX. Countervailing Factors and Interests that Mitigate Remedies | 3-39 |
| X. Retroactive and Prospective Relief | 3-43 |
| XI. The Roles of Proportionality as a Remedial Principle | 3-46 |
| A. Proportionality and the Choice of Less Drastic or Intrusive Remedies | 3-47 |
| B. Proportionality and the Justification of Public Interest Constraints on Remedies | 3-50 |
| XII. Conclusion | 3-55 |

PART II. ACCESS TO CONSTITUTIONAL REMEDIES

| | |
|---|------|
| CHAPTER 4. INTRODUCTION..... | 4-1 |
| CHAPTER 5. STANDING AND TIMING..... | 5-1 |
| I. Standing Under Section 52(1) of the Constitution Act, 1982 | 5-2 |
| A. Discretionary Standing for Those Not Directly Affected by Impugned Laws or Activities..... | 5-3 |
| (1) Serious issue of constitutionality..... | 5-5 |
| (2) Genuine interest in the validity of the legislation | 5-7 |
| (3) A reasonable and effective way to bring the issue to court | 5-8 |
| (4) Summary | 5-13 |
| B. Standing as of Right for Those Directly Affected..... | 5-13 |
| C. Standing of the Accused to Challenge Unconstitutional Laws..... | 5-17 |
| II. Standing Under Section 24(1) of the Charter..... | 5-19 |

TABLE OF CONTENTS

| | | |
|---|--|--------|
| III. | Establishing the Basis for Claiming a Charter Remedy | 5-26 |
| | A. The Need for Facts to Support Violations and Remedies | 5-26 |
| | B. Burdens of Proof | 5-27 |
| | C. Standard of Appellate Review | 5-28.1 |
| IV. | Ripeness and Claims in Anticipation of a Violation | 5-28.2 |
| V. | Mootness and Claims After a Dispute is Resolved..... | 5-32 |
| | A. Adversarial Presentation..... | 5-36 |
| | B. Judicial Economy | 5-37 |
| | C. Relations with Other Institutions | 5-38 |
| | D. Immunizing Actions from Review..... | 5-39 |
| | E. A Reasonable and Effective Way to Bring the Issue to Court..... | 5-42 |
| VI. | Conclusion | 5-43 |
| CHAPTER 6. COURT OF COMPETENT JURISDICTION..... | | 6-1 |
| I. | General Definitions of a Court of Competent Jurisdiction... | 6-3 |
| | A. Jurisdiction under Section 24(1) of the Charter | 6-3 |
| | B. Jurisdiction under Section 52(1) of the Constitution Act, 1982..... | 6-10.1 |
| II. | Jurisdiction in the Criminal Process..... | 6-18 |
| | A. Preliminary Inquiries..... | 6-18 |
| | B. Superior Courts | 6-20 |
| | C. Trial Courts..... | 6-23 |
| | (1) Provincial and other statutory courts | 6-23 |
| | (2) Superior courts..... | 6-26 |
| | D. Appellate Courts..... | 6-27 |
| | E. Federal Court | 6-28 |
| III. | Jurisdiction in the Civil Process | 6-30 |
| | A. Role of Provincial Superior Courts..... | 6-30 |
| | (1) In Relation to the Federal Court | 6-30 |
| | (2) In Relation to Administrative Agencies and Schemes | 6-32 |
| IV. | Jurisdiction in the Administrative Process | 6-34 |
| | A. Jurisdiction under Section 52(1) of the Constitution Act, 1982..... | 6-35 |
| | B. Jurisdiction under Section 24(1) of the Charter | 6-38 |
| | C. The Role of Provincial Superior Courts and the Federal Court | 6-41 |
| V. | Conclusion | 6-42 |

CONSTITUTIONAL REMEDIES IN CANADA

| | |
|--|--------|
| CHAPTER 7. INTERLOCUTORY REMEDIES | 7-1 |
| I. Interlocutory Injunctions | 7-3 |
| A. Standard of Review | 7-6 |
| A.1 Strength of the Plaintiff's Case | 7-6 |
| (1) Serious Question that is not Frivolous or Vexatious | 7-6 |
| (2) Simple Questions of Law | 7-13 |
| (3) Final determination of an Action | 7-13 |
| (4) No Presumption of Constitutionality | 7-14.2 |
| B. Irreparable Harm | 7-14.3 |
| (1) Irreparable Harm to the Plaintiff..... | 7-14.3 |
| (2) Irreparable Harm to the Defendant..... | 7-22.1 |
| (3) Plaintiff's Undertaking to Pay Damages | 7-23 |
| C. Balance of Convenience..... | 7-24 |
| (1) Maintenance of the Status Quo..... | 7-24 |
| (2) Consideration of the Public Interest | 7-24.1 |
| (3) Suspensions and Exemptions..... | 7-27 |
| (4) The Balance of Convenience and Proportionality .. | 7-33 |
| (5) Balance of Convenience and Injunctions that both Threaten and Protect Constitutional Rights.... | 7-34.1 |
| II. Interim Stays of Proceedings Based on Legislation Alleged to be Unconstitutional | 7-37 |
| III. Interim Declarations | 7-42 |
| IV. Interim Costs | 7-42 |
| V. Review of the Trial Judge's Decision | 7-43 |
| VI. Conclusion | 7-44 |

PART III. CONSTITUTIONAL REMEDIES

| | |
|--|------|
| CHAPTER 8. INTRODUCTION | 8-1 |
| CHAPTER 9. REMEDIES IN THE CRIMINAL PROCESS | 9-1 |
| I. The Evolution and Purposes of Remedies in the Criminal Process..... | 9-2 |
| II. Stays of Proceedings | 9-4 |
| A. The Test for Granting a Stay of Proceedings..... | 9-5 |
| (1) The Alternative grounds of Protecting Rights and Judicial Integrity | 9-6 |
| a) The Differences and Relation Between the Alternative Grounds | 9-6 |
| b) Stays based on Judicial Integrity | 9-10 |
| c) Stays based on Fair Trial Grounds..... | 9-13 |

TABLE OF CONTENTS

| | |
|--|--------|
| d) The Cumulative Effects of Harms to Rights and Judicial Integrity | 9-14 |
| (2) The Need for the Abuse to be Perpetuated by the Subsequent Trial | 9-16 |
| (3) No Other Less Drastic but Adequate Alternative Remedies | 9-19 |
| (4) Balancing the Affected Interests | 9-21 |
| (5) Procedural Matters | 9-23 |
| (a) Burdens and Standards of Proof | 9-23 |
| (b) Procedure and Timing of Stay Applications ... | 9-24 |
| (c) Appellate Deference to Trial Judges’ Decisions | 9-24 |
| (d) Summary | 9-26 |
| B. Stays and Alternative Remedies for Violation of Disclosure Rights | 9-26 |
| (1) Cases where Stays of Proceedings have been Granted and Upheld | 9-27 |
| (2) Cases where Stays of Proceedings have been Reversed | 9-30 |
| (3) Alternative Remedies for Disclosure Violations | 9-31 |
| (a) Disclosure Orders | 9-33 |
| (b) Mistrials | 9-33 |
| (c) Exclusion of Evidence not Disclosed | 9-34 |
| (d) Costs | 9-38 |
| (e) New Trials | 9-39 |
| (f) Summary | 9-40 |
| C. Violation of Rights to Legal Assistance | 9-40 |
| (1) Stays of Proceedings | 9-40 |
| (2) Alternative Remedies to Stays of Proceedings | 9-42 |
| D. Violation of Rights Relating to Conditions of Confinement | 9-42.1 |
| E. Violation of Right to an Interpreter | 9-42.2 |
| F. Violations of Section 11(d) of the Charter | 9-42.3 |
| G. Violations of Section 11(b) of the Charter | 9-43 |
| (a) Delayed Child Apprehension Proceedings | 9-49 |
| H. Violations of Sections 8 and 9 of the Charter | 9-50 |
| I. Summary | 9-57 |
| III. Prerogative Remedies and Related Pre-Trial Relief | 9-57 |
| A. Non-Prerogative Pre-Trial Relief | 9-58 |
| B. Prerogative Relief | 9-60.1 |
| (1) Prohibition | 9-61 |
| (2) Mandamus | 9-63 |
| (3) Certiorari | 9-63 |
| IV. Return of Evidence | 9-65 |

CONSTITUTIONAL REMEDIES IN CANADA

| | |
|---|-------|
| A. Court of Competent Jurisdiction..... | 9-66 |
| B. Tests for Return of the Evidence..... | 9-66 |
| V. Charter Violations as a Criminal Defence | 9-70 |
| VI. Sentence Reductions..... | 9-70 |
| A. General Considerations | 9-70 |
| B. The Connection Between the Charter Violation and the Circumstances of the Offence | 9-75 |
| C. Sentence Reductions and Statutory Minimums | 9-79 |
| D. Summary | 9-81 |
| VII. Relief Related to Conditions of Imprisonment | 9-81 |
| VIII. Habeas Corpus and Related Relief..... | 9-83 |
| A. Section 10(c) of the Charter | 9-83 |
| B. Expanded Grounds of Review..... | 9-84 |
| C. Ancillary Remedies..... | 9-90 |
| IX. Conclusion | 9-92 |
| CHAPTER 10. EXCLUSION OF UNCONSTITUTIONALLY OBTAINED EVIDENCE..... | |
| I. The Evolution and Purposes of Exclusion of Evidence..... | 10-1 |
| A. Exclusion of Evidence to Correct a Violation | 10-2 |
| B. Exclusion of Evidence to Regulate Police Conduct..... | 10-3 |
| C. Balancing Tests for the Exclusion of Evidence..... | 10-5 |
| II. An Outline of Section 24(2) Jurisprudence..... | 10-7 |
| A. R. v. Collins and R. v. Stillman..... | 10-7 |
| (1) Exclusion to Prevent Unfair Trials..... | 10-9 |
| (2) Exclusion to Prevent Judicial Condonation of Unacceptable Conduct | 10-10 |
| (3) The Effects of Excluding Evidence..... | 10-11 |
| (4) Implications of the Collins tests..... | 10-12 |
| (5) Criticisms of the Collins tests..... | 10-14 |
| B. Abolition of the Fair Trial Test and the New Test in Grant | 10-16 |
| III. Threshold Issues in the Exclusion of Evidence | 10-20 |
| A. Standing | 10-20 |
| Summary | 10-26 |
| B. Procedure for Exclusionary Claims | 10-26 |
| (1) At Trial | 10-26 |
| (2) On Appeal..... | 10-28 |
| (3) Standard of Appellate Review | 10-28 |
| (4) No Substantial Wrong or Miscarriage of Justice.... | 10-31 |
| (5) The Use that is Sought to be Made of the Impugned Evidence | 10-31 |
| C. Burden of Proof..... | 10-33 |
| (1) Persuasive Burden | 10-33 |

TABLE OF CONTENTS

| | |
|--|---------|
| (2) Evidential Burdens | 10-34 |
| D. Evidence Obtained in a Manner that Violates Charter Rights..... | 10-34 |
| (1) The Need for a Temporal or Causal Connection between the Violation and the Evidence..... | 10-34 |
| (a) Determining if the Connection between the Charter Violation and the Evidence Sought to be Excluded is too Remote | 10-38 |
| E. Conclusion to Threshold Issues..... | 10-42.1 |
| IV. The Three-Part Grant Test for Exclusion of Evidence | 10-43 |
| A. The Seriousness of the Charter Violation..... | 10-44 |
| (1) The Purpose of the Serious Violation Test..... | 10-45 |
| (2) Compliance with the Charter during the Investigation | 10-46 |
| (3) Good Faith Violations..... | 10-48 |
| (a) Reliance on Statutes | 10-48 |
| (b) Reliance on Judicial Decisions | 10-50 |
| (c) Reliance on Warrants | 10-51 |
| (d) Reliance on Practices and Policies..... | 10-56 |
| (e) The Effect of Uncertainty in the Law | 10-57 |
| Summary..... | 10-58.1 |
| (4) Inadvertent and Minor Charter Violations..... | 10-59 |
| (5) Deliberate, Blatant and Flagrant Violations..... | 10-61 |
| (6) Availability of other Investigative Means and the Discoverability of the Evidence | 10-63 |
| (7) Urgency and Necessity | 10-66 |
| B. The Impact of the Breach on the Accused’s Charter-Based Interests | 10-69 |
| (1) Statements from the Accused | 10-69 |
| (2) Bodily Substances | 10-71 |
| (3) Physical Evidence | 10-72 |
| (4) Derivative Evidence | 10-72.1 |
| C. Society’s Interest in an Adjudication on the Merits | 10-72 |
| (1) Determining Disrepute..... | 10-73 |
| (2) The Seriousness of the Offence Charged | 10-74 |
| (3) The Importance and Reliability of the Evidence Sought to be Excluded..... | 10-77 |
| V. Conclusion | 10-81 |
| CHAPTER 11. DAMAGES AND COSTS | 11-1 |
| I. The Evolution and Purposes of Money Awards | 11-4 |
| II. Procedural Barriers to Charter Damage Claims..... | 11-6 |
| A. Court of Competent Jurisdiction..... | 11-6 |
| (1) Provincial Criminal Courts..... | 11-7 |

CONSTITUTIONAL REMEDIES IN CANADA

| | |
|--|----------|
| (2) Superior Courts of Criminal Jurisdiction | 11-9 |
| A.1. Class Proceedings | 11-12 |
| B. Estoppel and Abuse of Process | 11-13 |
| C. Statutes of Limitation..... | 11-14 |
| D. Immunities from Civil Actions | 11-16 |
| (1) Absolute Immunities..... | 11-16 |
| (2) Qualified Immunities | 11-21 |
| III. Elements of a Charter Damage Claim..... | 11-24 |
| A. The Appropriate Defendant | 11-26 |
| B. The Functional Need for Damages | 11-28 |
| (1) Compensation for a Wide Range of Harm and Loss..... | 11-29 |
| (2) Vindication of the Charter Right..... | 11-30 |
| (3) Deterrence of Future Charter Violations | 11-31 |
| C. Countervailing Factors to the Award of Damages..... | 11-32 |
| (1) Alternative Remedies..... | 11-32 |
| (2) Effective Governance Concerns | 11-33 |
| D. Appropriate and Just Quantum of Damage Awards | 11-34.6 |
| (1) Rejection of Per Se Awards | 11-34.6 |
| (2) Compensatory Awards | 11-34.7 |
| (3) Vindication | 11-34.13 |
| (4) Deterrence | 11-34.13 |
| (5) Exemplary and Punitive Damages..... | 11-34.15 |
| IV. Costs..... | 11-36 |
| A. Advance Costs | 11-36 |
| B. The Application of Costs Rule in Constitutional Litigation | 11-40 |
| (1) Costs in Criminal Cases and Appeals..... | 11-40 |
| (2) Costs against an Unsuccessful Charter Applicant .. | 11-42 |
| (3) Costs for an Unsuccessful Charter Applicant | 11-47 |
| (4) Costs for a Successful Charter Applicant..... | 11-48 |
| C. The Use of Costs as a Section 24(1) Remedy | 11-52 |
| V. Conclusion | 11-56 |
| | |
| CHAPTER 12. DECLARATIONS..... | 12-1 |
| I. The Evolution and Purposes of Declaratory Relief..... | 12-3 |
| II. Declarations Concerning Future Violations..... | 12-6 |
| III. Declarations Concerning Past Violations..... | 12-14 |
| IV. Declarations Concerning Constitutional Rights | 12-23 |
| A. Minority Language Cases | 12-24 |
| B. Equality Cases..... | 12-29 |
| C. Suspended Declarations..... | 12-32 |
| D. Summary | 12-32.1 |

TABLE OF CONTENTS

| | | |
|---|---|---------|
| V. | “Declarations Plus” | 12-33 |
| | A. Declarations, Retention of Jurisdiction and Other Means to Resolve Disputes about the Declaration | 12-34 |
| | B. Declarations that are Directions | 12-36.2 |
| | C. Consultation and Negotiations about the Implementation of Declarations | 12-38 |
| | D. Declarations on Consent..... | 12-41 |
| VI. | When Declarations may not be Appropriate and Just | 12-44 |
| | A. Custodial Institutions | 12-46 |
| | B. Governmental Resistance and Neglect..... | 12-49 |
| VII. | Conclusion | 12-51 |
| | | |
| CHAPTER 13. INJUNCTIONS AND OTHER MANDATORY REMEDIES | | 13-1 |
| I. | The Evolution and Purposes of Mandatory Relief..... | 13-2 |
| | A. The Role of Equity | 13-3 |
| | B. Crown Immunity and the Preference for Declaratory Relief | 13-5 |
| II. | Comparative Experience With Injunctions as a Constitutional Remedy | 13-6 |
| | A. The United States | 13-6 |
| | (1) Judicial Experience..... | 13-7 |
| | (2) Fiss’s typology..... | 13-9 |
| | (3) Other perspectives | 13-11 |
| | B. India..... | 13-13 |
| | C. South Africa..... | 13-16 |
| III. | The Use of Injunctions in Canada | 13-20 |
| | A. Preventive Injunctions..... | 13-20 |
| | B. Reparative Injunctions..... | 13-22 |
| | (1) Reference re: Language Rights under the Manitoba Act, 1870..... | 13-22 |
| | C. Structural Injunctions..... | 13-27 |
| | (1) Cases where Structural Injunctions have been Granted and Sustained on Appeal | 13-29 |
| | (a) La Société des Acadiens v. Minority Language School Board..... | 13-29 |
| | (b) Marchand v. Simcoe (County) Board of Education | 13-31 |
| | (c) Lavoie v. Nova Scotia..... | 13-34 |
| | (d) Doucet-Boudreau v. Nova Scotia..... | 13-38 |
| | (e) Other Minority Language Rights Cases..... | 13-44 |
| | (f) National Security Cases..... | 13-47 |

CONSTITUTIONAL REMEDIES IN CANADA

| | |
|--|----------|
| (2) Cases where Structural Injunctions were Not Ordered or Overturned on Appeal | 13-48.1 |
| (a) Little Sisters Book and Art Emporium v. Canada (Minister of Justice) | 13-48 |
| (b) Khadr and Diplomatic Representations | 13-52 |
| (c) Thibodeau v. Air Canada..... | 13-61 |
| (d) Other Cases | 13-66 |
| IV. Other Mandatory Remedies..... | 13-66.1 |
| A. Mandamus | 13-66.1 |
| (1) Voting Rights Cases | 13-66.1 |
| (2) The Insite Decision | 13-70 |
| B. Prohibition | 13-72 |
| V. Mandatory Remedies to Enforce Equality Rights..... | 13-73 |
| A. American Experience | 13-74 |
| B. Canadian Experience Under Human Rights Codes..... | 13-75 |
| (1) Remedies Available under Human Rights Codes... | 13-75 |
| (2) The Approach to Remedies under Human Rights Codes | 13-77 |
| (3) Action Travail des Femmes v. C.N.R. Co..... | 13-80 |
| VI. Conclusion | 13-84 |
| CHAPTER 14. REMEDIES INVOLVING LEGISLATION | 14-1 |
| I. The Evolution and Purposes of Remedies for Unconstitutional Legislation..... | 14-3 |
| A. American Experience | 14-3 |
| B. Canadian Experience..... | 14-8 |
| (1) Enforcing the Division of Powers | 14-8 |
| (2) The Evolution of Section 52(1) Charter Remedies..... | 14-10 |
| II. Upholding Permissive Legislation..... | 14-13 |
| III. Reading Down Potentially Unconstitutional Legislation..... | 14-15 |
| A. Freedom of Expression Cases | 14-16 |
| (1) Osborne and Rocket | 14-16 |
| (2) Butler, Zundel and Sharpe..... | 14-18 |
| (3) Criminal cases | 14-25 |
| (a) Cases Where Reading In was Not Appropriate | 14-29 |
| (b) Radical Reading In to Save s. 43 of the Criminal Code | 14-30 |
| (4) Administrative Cases | 14-30.3 |
| (5) Summary | 14-34.1 |
| IV. Constitutional Exemptions | 14-34.2 |
| A. Early cases..... | 14-36 |
| B. Ferguson..... | 14-38 |

TABLE OF CONTENTS

| | | |
|------|--|---------|
| C. | Constitutional Exemptions After Ferguson | 14-40 |
| (1) | Section 24(1) Remedies | 14-40 |
| (2) | Section 24(1) Exemptions During a Suspended Declaration of Invalidity | 14-42 |
| (3) | Reading Down as a Functional Alternative | 14-46.2 |
| V. | Severance | 14-47 |
| A. | Cases where Severance is Not Appropriate | 14-48 |
| B. | Cases where Severance is Appropriate..... | 14-51 |
| C. | Summary | 14-52.3 |
| VI. | Extension by Reading In or Nullification of Underinclusive Legislation..... | 14-52.3 |
| A. | Extension of Legislation through Invalidation or Reading In | 14-53 |
| B. | Schachter v. Canada | 14-54 |
| (1) | Respect for the Role of the Legislature | 14-57 |
| (a) | Remedial Precision | 14-57 |
| (b) | Consistency with Legislative Objectives | 14-58 |
| (c) | The Size of the Group to be Included..... | 14-58 |
| (2) | Respect for the Purposes of the Charter | 14-58 |
| (a) | The Protection of Vulnerable Minorities | 14-58 |
| (b) | The Role of Constitutional Rights and Hints .. | 14-60 |
| (3) | Temporary Suspensions of Nullification or Extension..... | 14-61 |
| (4) | Summary | 14-63 |
| C. | Cases where Extension by Reading In is Appropriate .. | 14-63 |
| D. | Cases where Extension by Reading In was Not Appropriate..... | 14-68 |
| E. | Summary | 14-73 |
| VII. | Suspended Declaration of Invalidity | 14-73 |
| A. | Reference re: Language Rights and Other Bilingualism Cases | 14-74 |
| B. | R. v. Swain and Other Early Cases | 14-77 |
| C. | Schachter v. Canada | 14-79 |
| D. | Cases where Suspended Declarations of Invalidity are Appropriate | 14-82 |
| (1) | Cases that Fall Within the Schachter Guidelines ... | 14-82 |
| (2) | Cases Outside the Schachter Guidelines | 14-83 |
| (3) | Exempting Successful Charter Applicants from the Period of Suspension..... | 14-87 |
| (4) | Cases where Applicants were Exempted..... | 14-88 |
| (5) | Cases where Applicants were not Exempted | 14-91 |
| E. | Cases where Suspended Declarations of Invalidity are Not Appropriate | 14-94 |
| F. | Summary | 14-98.1 |

CONSTITUTIONAL REMEDIES IN CANADA

| | |
|---|---------|
| VIII. Prospective and Retroactive Relief | 14-99 |
| IX. Conclusion | 14-107 |
| | |
| CHAPTER 15. REMEDIES AND ABORIGINAL RIGHTS | 15-1 |
| I. The Evolution and Purposes of Remedies for Violations of Aboriginal Rights..... | 15-5 |
| II. Interlocutory Remedies to Prevent Violations of Aboriginal Rights | 15-12 |
| A. Strength of the Plaintiff’s Case | 15-17 |
| B. Irreparable Harm to the Plaintiff and Defendant | 15-19 |
| (1) Irreparable Harm to the Plaintiff..... | 15-19 |
| (2) Irreparable Harm to the Defendant and Undertakings to Pay Damages | 15-23 |
| C. No Presumption of Constitutionality or Preservation of the Status Quo..... | 15-25 |
| D. The Balance of Convenience and the Public Interest ... | 15-25 |
| (1) No Monopoly on the Public Interest | 15-25 |
| (2) Determining the Balance of Convenience | 15-26 |
| (3) The Duty to Consult..... | 15-31 |
| E. Injunctions Against Aboriginal Protests | 15-33 |
| F. Summary | 15-36 |
| III. Remedies for Breach of Constitutional Duties of Consultation | 15-37 |
| A. Remedies for Breach of the Duty to Consult..... | 15-42 |
| B. Quashing of Government Decisions to Allow Development | 15-43 |
| C. Interlocutory Injunctions and Similar Remedies to Halt Proposed Developments that may Infringe Aboriginal Rights | 15-46 |
| D. Declarations | 15-46.2 |
| E. “Declarations Plus” | 15-47 |
| F. Damages and Costs..... | 15-48.1 |
| G. Jurisdictional Issues and the Duty to Consult | 15-48.2 |
| IV. Remedies for Pre-1982 Extinguishment or Diminution of Aboriginal Title | 15-49 |
| A. Compensation for Expropriation..... | 15-49 |
| B. No Legal Right to Compensation | 15-49 |
| C. Remedies for Breach of Fiduciary Duty..... | 15-51 |
| D. Criticisms of the Fiduciary Approach | 15-58 |
| E. Declarations Concerning Government’s Discharge of Obligations | 15-60 |
| F. Summary | 15-61 |

TABLE OF CONTENTS

| | | |
|-----|--|-------|
| V. | Remedies for Violations of Section 35(1) of the Constitution Act, 1982..... | 15-61 |
| | A. Remedies in Litigation to Secure Aboriginal Rights | 15-62 |
| | (1) Declarations..... | 15-63 |
| | (2) “Declarations Plus” and Negotiation | 15-64 |
| | (3) Suspended Declarations of Invalidity and Transition Periods | 15-72 |
| | (4) Other Section 52(1) Remedies: Reading Down and Constitutional Exemptions..... | 15-74 |
| | (5) Injunctions and Other Equitable Remedies | 15-75 |
| | (6) Compensation | 15-76 |
| | (7) Summary | 15-77 |
| | B. Remedies in Prosecutions Against Aboriginal Rights... | 15-78 |
| VI. | Conclusion | 15-82 |
| | <i>Index</i> | IN-1 |