Supreme Court of Canada confirms that there is no absolute immunity for Parliament (or legislatures) for legislative acts

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In *Canada (Attorney General) v. Power*, 2024 SCC 26, the Supreme Court of Canada had to reconcile the courts' duty to protect the rights guaranteed by the *Canadian Charter of Rights and Freedoms* (the *Charter*), with the state's legislative autonomy to govern effectively. At the heart of the appeal was how to apply these principles in the context of section 24(1) of the *Charter*, which authorizes courts to award damages to individuals for the infringement of their *Charter* rights where it is appropriate and just in the circumstances. The 5 – 4 decision confirms that there is no absolute immunity for the enactment of legislation later found to be unconstitutional.

Key takeaways

The Majority's decision confirms that the test set out in *Vancouver (City) v. Ward*, 2010 SCC 27 (*Ward*) remains the standard for determining whether damages ought to be awarded for *Charter* breaches. There is no absolute immunity for the enactment of legislation later found to be unconstitutional and the state may be liable for enacting invalid legislation if it is clearly unconstitutional or was in bad faith or an abuse of power. State immunity for the exercise of legislative power is not a preliminary question when considering *Charter* damages, but rather is considered in the context of the *Ward* test at step three.

Background

In 1996, Joseph Power was convicted of two indictable offences. He was sentenced to 8 months imprisonment and served his time. After his release, he enrolled in college and graduated with an x-ray technician diploma. He became a medical radiation technologist in a hospital in New Brunswick. In 2011, his employer received a tip that he had a criminal record and suspended him from his employment. He searched for a new job but found that his criminal record prevented him from working in his field.

In 2013, he applied for a record suspension. At the time of his conviction, persons convicted of indictable offences could apply for a record suspension five years after

their release. However, Parliament subsequently enacted legislation that retroactively changed the availability of criminal record suspensions for certain offenders, which rendered him permanently ineligible for a record suspension. His application was denied, and he has not since been able to find work in his profession.

The legislative provisions at issue were subsequently declared unconstitutional by provincial and federal courts across Canada. These courts found that the provisions unjustifiably violated the *Charter* because they retroactively increased an offender's punishment.

The plaintiff then filed a notice of action seeking damages under section 24(1) of the *Charter* against the Government of Canada ("Canada", the "Crown" or the "state") for breaching his *Charter* rights.

In response, Canada brought a motion on a question of law. It conceded that the retroactive application of the legislation violated the *Charter* but argued that it enjoys absolute immunity from s. 24(1) damages for the enactment of unconstitutional legislation. It argued that the state cannot be held liable for anything done in the exercise of legislative power. The questions of law were as follows:

1. Can the Crown, in its executive capacity, be held liable in damages for government officials and Ministers preparing and drafting a proposed Bill that was later enacted by Parliament, and subsequently declared invalid by a court?
2. Can the Crown, in its executive capacity, be held liable in damages for Parliament enacting a Bill into law, which legislation was later declared invalid by a court?

Lower court decisions

The motion judge answered "yes" to both questions, finding that Canada was entitled only to a limited immunity from *Charter* damages for the enactment of unconstitutional legislation. The Court of Appeal dismissed Canada's appeal, agreeing with the motion judge that Canada does not enjoy absolute immunity in exercising its legislative powers.

Supreme Court decision

A Majority of the Supreme Court held that both questions should be answered in the affirmative.

Referencing the Court's previous decision in *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, the Majority re-affirmed that the state enjoys a limited immunity in the exercise of its law-making power. The Majority declined to overrule the precedent set in *Mackin* but clarified the threshold to be applied for this immunity.

In *Ward*, the Supreme Court previously set out a four-step test for determining whether damages are an appropriate and just remedy: (1) whether a *Charter* right has been breached; (2) whether damages would fulfill one or more of the related functions of compensation, vindicating the right, or deterring future breaches; (3) whether the state has demonstrated that countervailing factors defeat the functional considerations that

support a damage award and render damages inappropriate or unjust; and (4) the appropriate quantum of damages.

The Majority reiterated that the above four-part test continues to govern all claims for *Charter* damages. “Immunity” is not a preliminary question in a claim for *Charter* damages based on invalid legislation. Rather, any immunity defence fits best as a consideration at the third step of the *Ward* test.

In that respect, Canada argued that a declaration that legislation is invalid will always render damages inappropriate and unjust. The Majority disagreed. While the existence of an alternative remedy is a consideration when determining whether damages are appropriate, and there is a general presumption against combining remedies, there is no categorical restriction. The concern with alternative remedies is to avoid duplication and double recovery.

Canada further argued that *Charter* damages in these circumstances would interfere with Parliament’s law-making functions, impeding Canada’s ability to govern effectively. The Majority again disagreed. While the Court has previously held that good governance concerns may defeat an award of damages, the mere suggestion that damages will have a “chilling effect” on government is not sufficient to defeat the entitlement to *Charter* damages. On the contrary, damages may promote good governance by encouraging constitutional compliance and deterring *Charter* breaches.

Finally, Canada argued that anything less than absolute immunity in these circumstances is inconsistent with three longstanding and foundational constitutional principles: parliamentary sovereignty, the separation of powers, and parliamentary privilege.

With respect to parliamentary sovereignty, the Court reiterated that in Canada, it is the Constitution that is the supreme law: the legislature can “make or unmake any law it wishes, **within the confines of its constitutional authority**”. In other words, “the principle of parliamentary sovereignty must not be confused with parliamentary supremacy.” Canada remains subject to the constraints and accountability mechanisms of the Constitution, including the *Charter*.

With respect to the separation of powers, the Majority recognized that the three branches of government have different functions, institutional capacities, and expertise. However, this does not mean that each branch is completely “separate” or works in isolation. Absolute immunity would give insufficient respect to the judicial role to provide meaningful remedies for the legislature’s breach of constitutional rights. Indeed, damages are an “after-the-fact” remedy for a *Charter* violation and therefore such a judicial remedy for unconstitutional legislation does not interfere with the law-making process.

Finally, with respect to parliamentary privilege, the Majority explained that the privilege provides the legislature with the tools to execute its core functions and operates by “shielding some areas of legislative activity from external review” (for example, it shields against legal proceedings for what was said during debate). In the Majority’s view, however, *Charter* damages for the enactment of unconstitutional legislation are not claimed against any individual members involved in the legislative process. Instead, such an action is against the state and the nature of the remedy requires the state to

compensate an individual for breaches of the individual's constitutional rights. The state's liability for unconstitutional legislation does not engage members' personal immunity for parliamentary speech. Nor does it interfere with Parliament's power to control its own debates and proceedings, or dictate how the legislative function is exercised. The state's conduct within the legislative process informs whether damages are an "appropriate and just remedy" for the breach caused by the enactment of the *Charter*-infringing law. Accordingly, in the Court's view, limited immunity reconciles the importance of parliamentary privilege with the *Charter* by ensuring that the privilege is no broader than is justified for a functioning constitutional democracy.

Ultimately, the Majority ruled that Canada is not entitled to absolute immunity from liability for damages when it enacts unconstitutional legislation that infringes *Charter* rights. Rather, Canada may be liable for *Charter* damages if the legislation is "clearly unconstitutional" (that Canada either knew that the law was clearly unconstitutional or was reckless or wilfully blind as to its unconstitutionality) or was in bad faith or an abuse of power. This is a high threshold for a litigant to meet.

The dissent: Part 1

Justices Kasirer and Jamal dissented in part, while Justices Côté and Rowe dissented from the Majority opinion.

Justice Jamal's dissent includes a thorough discussion on parliamentary privilege, concluding that "parliamentary privilege is an integral part of the Constitution of Canada. Once the existence of a category of parliamentary privilege is established, conduct or activities that are themselves an exercise of that privilege are not subject to review by the courts, even when such conduct or activities are alleged to violate the *Charter*." In Justice Jamal's view, parliamentary privilege is a threshold jurisdictional issue, and should not be considered as part of the third step of the *Ward* framework regarding *Charter* damages.

In Justice Jamal's view, both questions before the Court raised distinct parliamentary privilege considerations: for question 1, relating to the legislative process of preparing and drafting legislation; and in question 2, relating to the grounds on which legislation, once enacted, may be reviewed. Concerning the first question, Justice Jamal held that the Crown cannot be liable for preparing and drafting legislation. Exposing the Crown to liability in damages for the conduct of government officials and Ministers in preparing and drafting legislation would inevitably intrude upon this category of privilege.

Justice Jamal held that the Court's previous decision in *Mackin* ought to be clarified and modified to eliminate "bad faith" and "abuse of power" in enacting primary legislation as grounds for damages under s. 24(1) of the *Charter*. Once legislation has been found to be unconstitutional, there is no "legal yardstick" to measure whether the legislation was in bad faith or involved an abuse of power. In Justice Jamal's view, scrutinizing legislation for evidence of bad faith or abuse of power, would inevitably pull courts into judging the legislative process, which is beyond their jurisdiction.

Accordingly, Justice Jamal held that with respect to the second question, the limited immunity rule in *Mackin* should be modified to clarify that the Crown can be liable in damages for the breach of *Charter* rights caused by legislation only when the legislation is shown to have been "clearly unconstitutional" at the time it was enacted.

The dissent: Part 2

A second dissent authored by Justice Rowe concluded that both questions ought to be answered in the negative, holding that absolute immunity is necessary. “Parliamentary privilege is like an eggshell; one cannot break it just a little.” Justice Rowe noted that Mr. Power could have applied for a judicial review on *Charter* grounds of the decision to deny his application for a criminal record suspension. Such a remedy was available and would in no way detract from parliamentary privilege.

By

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