SCC File No. 40241

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK)

BETWEEN:

ATTORNEY GENERAL OF CANADA

APPELLANT
(Appellant)

– and –

JOSEPH POWER

RESPONDENT
(Respondent)

– and –

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TABLE OF CONTENTS

PARTS I & II – OVERVIEW AND STATEMENT OF POSITION

1. The law on the availability of *Charter* damages against the Crown is settled and clear—the Crown enjoys limited but not absolute immunity. The Appellant argues that this limited immunity set out in *Mackin v. New Brunswick*[1] must be expanded so that *Charter* damages are restricted to state acts carried out *under* a law, rather than state conduct relating to the enactment of a law. Contrary to this position, a historical and purposive approach to *Charter* remedies supports the conclusion that remedies must be flexible to ensure that they are both proportional and meaningful in addressing state harm to claimants. This is so regardless of whether the harm flows from the process of creating legislation or state acts carried out under a law. There is no principled reason to find absolute immunity from damages claims arising from constitutional wrongs committed during the law-making process. The policy considerations raised before this Court are better dealt with in a rigorous balancing analysis, rather than by a bright-line rule.

2. As a remedial clause, section 24(1) demands a "broad and purposive" and "large and liberal" interpretation.[2] Such a reading, together with a careful review of the historical approach to both pre-*Charter* state harm through legislation, and the *Charter* itself, militates against the expansion of the Crown's limited immunity. An absolute immunity approach would mean that a claimant who can prove that the legislature acted in a manner that was clearly wrong or an abuse of process in enacting legislation is left without a meaningful remedy. Such an outcome would be inconsistent with the basic principle of *ubi jus, ibi remedium* – where there is a right, there must be a remedy; more specifically, remedies must be responsive and effective.[3] In this light, the *Mackin* categories represent a minimum standard for availability of *Charter* damages. There is no reason to restrict further the category of cases in which damages may be sought.

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[1] *Mackin v. New Brunswick (Minister of Finance)* [*Mackin*]*; Rice v. New Brunswick*, 2002 SCC 13.

[2] *R. v. 974649 Ontario Inc*., 2001 SCC 81, at para 18.

[3] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, at para. 25 [*Doucet-Boudreau*].

PART III – ARGUMENT

A. There is no basis to disturb this Court's holding in Mackin

3. In *Mackin,* this Court was clear on the scope of Crown immunity from *Charter* damages: the immunity is limited, not absolute. This Court has held that the enactment or application of an unconstitutional law, "without more," does not ground a basis for *Charter* damages.[4] However, this Court affirmed that there was no absolute bar to recovering damages for unconstitutional laws, provided there was proof of "more" in the facts of a given case. The categories laid out in *Mackin*—conduct that is "clearly wrong, in bad faith, or an abuse of process"—set a minimum standard and describe circumstances in which damages arising from the enactment of legislation may be appropriate and just, and thus available to a claimant.[5]

4. This finding was made in express contemplation of policy considerations implicated by the award of *Charter* damages. This Court did not limit its holding to state actions under an unconstitutional law in *Mackin*, and there is no reason to constrain *Mackin*'s flexible and purposive approach in this regard.

1. The *Charter* applies to the legislative process

5. The *Charter*, including s. 24(1), applies to the legislatures and governments of Canada and the provinces. While the Appellant attempts to draw a bright-line distinction between legislative and executive powers, no such delineation exists with respect to *Charter* application.

6. The *Charter* applies to state action throughout the legislative process, including prior to enactment of the legislation. In assessing the constitutional validity of a law, the courts regularly inquire into the legislative process as a whole. For example, this Court found in *Vriend v. Alberta* that the *Charter* applied to a legislative omission, relying in part on the legislative record to find

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[4] *Mackin*, at para 78.

[5] *Mackin,* at para 78.

that the "omission of sexual orientation from the *IRPA* was deliberate and not the result of an oversight."[6] This is no different in principle from an inquiry into the *Mackin* categories.

7. The *Charter* "fosters both dynamic interaction and accountability among the various branches" of government.[7] The *Charter*'s application to all branches of government, and the courts' work of evaluating the acts and omissions of all branches of government, enriches the legislative and democratic process. To position the application of *Charter* remedies as a threat to the separation of powers ignores the "dialogue" between branches that supports good governance. The *Charter* merely provides the framework for such dialogue.

8. The Appellant relies on the separation of powers to argue that the process of making law is not Crown conduct, citing this Court's decision in *Mikisew Cree First Nation v. Canada*.[8] However, the Court in *Mikisew* found that the law-making process was not Crown conduct that *triggered the duty to consult*. Crucially, *Mikisew* does not hold that no part of the legislative process is Crown conduct at all. In fact, the majority in *Mikisew* found that the honour of the Crown was engaged by the law-making process.[9] The legislative and executive roles are separate, but both are subject to the *Charter*, and *Charter* breaches should give rise to appropriate and just remedies regardless of which arm of the state caused the breach.

9. Further, there is a difference between inserting a duty to consult into the law-making process, under which the legislature must potentially negotiate terms of a law before the law is enacted, and holding that bad faith or clearly improper conduct in the law-making process may give rise to s. 24(1) damages. *Mikisew*'s admonition that courts must not "meddle" in the

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[6] *Vriend v. Alberta*, [1998] 1 SCR 493 at para 4 [*Vriend*]. The Court specifically reviewed extrinsic evidence about the process of drafting the impugned legislation, including recommendations from the Alberta Human Rights Commission and internal correspondence, in support of its finding. While this was not determinative on the issue of *Charter* application, it was considered relevant by the Court.

[7] *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42at para 65.

[8] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 [*Mikisew*].

[9] *Mikisew*, at para 23.

legislative process does not preclude an after-the-fact award of damages in appropriate cases.[10] *Mackin* does not "interpose further procedural requirements in the legislative process," as the duty to consult was conceived in *Mikisew*.[11] There is a pre-existing, ever-present requirement that the legislature make laws with an "eye to what the Constitution requires,"[12] without wrongdoing, bad faith, or abuse of process. Thus, *Mackin* does not introduce a procedural requirement—it simply holds the state accountable for meeting the substantive requirements of the *Charter*.

2. The approach in *Mackin* provides sufficient protection for the legislative process

10. The general rule that, "without more", the creation and enactment of unconstitutional legislation and actions under such legislation does not give rise to monetary damages is ample protection for the legislative process. *Mackin* does not establish a low bar for the finding of *Charter* damages for any government act.

11. The Court in *Mackin* expressly accounted for the "balance between the protection of constitutional rights and the need for effective government," as part of the process of determining whether damages are just and appropriate.[13] Governments have a responsibility to "exercise their powers," including those to do with the enactment of legislation, "in good faith."[14] Parliamentary sovereignty allows for the legislature to "make or unmake any law it wishes, *within the confines of its constitutional authority*."[15] The analysis proposed in *Mackin* and furthered in *Vancouver (City) v. Ward* is not in opposition to this principle, as has been suggested in this appeal. Rather, *Mackin* and *Ward* assist in determining the appropriate limits to the legislature's constitutional authority.

12. The policy concerns raised in this appeal are best dealt with through a flexible approach to remedies and a strong balancing analysis, in which all interests are accounted for and duly weighed.

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[10] *Mikisew,* at para 119, quoting *Reference re Canada Assistance Plan (B.C.)*, [1991] SCR 525 at 559.

[11] *Mikisew,* at para 119.

[12] *Canada (Attorney General) v. Hislop,* 2007 SCC 10, at para 103 [*Hislop*].

[13] *Mackin,* at para 79.

[14] *Mackin,* at para 79.

[15] *Mikisew,* at para 36, emphasis added.

Absolute immunity is an inflexible and unresponsive approach to s. 24(1) and is not supported by s. 24 caselaw. It is axiomatic that remedies under s. 24(1) are to be broad and flexible and must have the ability to evolve.

13. Further, the necessarily fact-specific approach to s. 24(1) ameliorates many of the considerations raised by the Appellant. The onus is on the individual launching the challenge to prove that damages are just and appropriate in the circumstances. Awarding personal remedies under s. 24(1) is a "highly factual exercise, involving the application of law to a specific context."[16] The particularized nature of any monetary remedy, partnered with a balancing analysis that accounts for the various policy considerations that arise, results in the flexible and responsive approach contemplated by s. 24(1).

14. Thus, *Mackin*'s application to the legislative process results in a fact-specific, contextual inquiry into the circumstances of a law's enactment. This is a routine exercise for the courts, who regularly study the intentions of lawmakers. For example, courts regularly study extrinsic evidence in the process of determining the "true" purpose of legislation for the purposes of a pith and substance analysis.[17] Determining whether a law is minimally impairing under s. 1 can require a study of evidence as to why less intrusive and equally effective measures were not chosen,[18] which may involve review of Cabinet documents.[19] That is, contrary to some assertions before this Court,[20] the judiciary's constitutional role *does* include an assessment of Parliament's actions in deciding to legislate in a particular way.

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[16] *R v. Sullivan*, 2022 SCC 19, at para 56.

[17] *R v. Morgantaler*, [1993] 3 SCR 463 at p 481-485.

[18] *RJR-MacDonald Inc. v. Canada (Attorney General),* [1995] 3 SCR 199*,* at para 160.

[19] See e.g. *British Columbia Teachers' Federation v. British Columbia*, 2013 BCSC 1216. This Court ordered that there be a limited review of Cabinet documents to determine whether Nova Scotia had respected its constitutional obligations with respect to judicial compensation in *Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia*, 2020 SCC 21.

[20] Appellant's Factum, at para 32.

3. Absolute immunity from *Charter* damages for legislative acts harms the rule of law and raises distinct policy issues

15. Applying *Mackin* to the law-making process is particularly important to maintaining the rule of law. When an unconstitutional law is passed, state actors are bound to follow it, as are all persons in Canada, regardless of its unconstitutionality, until it is declared to be invalid. The reasoning in *Mackin* that, absent more, state actors simply acting under an unconstitutional law does not give rise to s. 24(1) damages, recognizes this fact. However, this makes it all the more important that in cases of bad faith or other significant wrongdoing in enacting an unconstitutional law, those affected by it should have an effective remedy that vindicates their rights and makes them whole.

16. Additionally, there are policy concerns that militate against overly broad immunity from damages for legislative acts. A majority government may seek to avoid liability by ensuring that its bad faith conduct in breach of *Charter* rights takes legislative form.[21] Similarly, a government may enact unconstitutional legislation to reduce government spending, knowing that while it will likely be declared invalid, the government will have saved money during the years before the matter is finally determined in the courts. The public policy concerns engaged on both sides further necessitate a contextual, balanced approach to *Charter* damages in the legislative process.

B. A mere declaration of invalidity can be an insufficient remedy

17. The court's ability to award *Charter* damages is constrained by the "facts and circumstances of the particular case" before it.[22] Occasionally, the facts and circumstances surrounding the enactment of unconstitutional legislation will indicate that a mere declaration of invalidity is insufficient as a just and appropriate remedy. Nothing in the text of the *Charter* indicates that unconstitutional actions of the legislature should not give rise to s. 24(1) damages in

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[21] Under the division of powers doctrine of colourability, the Court recognized that a government may seek to use legislation ostensibly within its powers to do indirectly what it could not do directly: see e.g. *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 SCR 297. This is conceptually similar to finding that legislation was enacted in bad faith for *Charter* remedial purposes.

[22] *Vancouver (City) v. Ward*, 2010 SCC 27, at para 19.

"appropriate and just" circumstances. In such situations, a court has not only unfettered discretion to award s. 24(1) damages, but a responsibility to do so.

18. Egregious breaches of rights can flow from legislation, including the enactment of a law itself. Absolute immunity in the law-making process leaves no remedy and thus no accountability in the process of creating and enacting a law, despite the possibility of great harm. The Appellant's argument ignores these possible harms. Limiting the recovery of damages to exclude compensation for harms caused by *Charter*-infringing legislation is ahistorical and counterintuitive.

19. Pre-*Charter* cases, which were well known to the framers of the *Charter*, illustrate that egregious breaches of civil liberties can arise from legislation just as much as from the conduct of government officials – for example, the exclusion of Chinese immigrants unless they paid a discriminatory "head tax",[23] the "Padlock Law" of Duplessis-era Quebec (which chilled political activity by opponents of Duplessis),[24] and the *War Measures Act*, which expressly allowed for detention without charge including the wartime internment of Japanese Canadians.[25] It is extremely unlikely that the framers intended a bright-line prohibition on recovery of damages for unconstitutional legislation.

20. Additionally, a purposive view of the caselaw points to remedies that are functionally equivalent to damages and require their own considered balancing analysis. A declaration of invalidity may lead to the functional equivalent of damages where it makes benefits available retroactively. In these cases, balancing mechanisms rather than an outright ban on recovery apply,

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[23] The *Chinese Immigration Act* of 1885 stipulated that every person of Chinese origin entering Canada had to pay a fee, or "head tax": see *Mack v. Canada (Attorney General),* 2002 CanLII 45062 (ON CA).

[24] *An Act to Protect the Province Against Communistic Propaganda*, which was found to be *ultra vires* the province in *Switzman v. Elbling and A.G. of Quebec*, [1957] SCR 285.

[25] *Reference to the Validity of Orders in Council in relation to Persons of Japanese Race*, [1946] SCR 248. One can readily imagine variants of this situation, such as the reintroduction of elements of the *War Measures Act* following a terrorist attack, in circumstances where there is reason to believe the legislature is targeting a particular group.

in recognition of the importance of the rule of law. [26] Damages claims for unconstitutional legislation are conceptually similar and this law should be reconcilable. This Court expressly drew a parallel between damages and retroactive benefit claims in *Hislop*.[27]

C. The approach to remedies under s. 24(1) must be flexible

21. An appropriately historical and purposive interpretation of s. 24(1) demands a flexible approach to *Charter* damages. Neither s. 24(1) itself, nor the settled and expansive jurisprudence interpreting it, support a restrictive approach to *Charter* damages. Section 24(1) "must be construed generously, in a manner that best ensures the attainment of its objects." Section 24 requires a remedy that is both responsive and effective—that is, appropriate and just.

22. An appropriate and just remedy in a *Charter* claim is one that "meaningfully vindicates the rights and freedoms of the claimants," and as such, considers the nature of the right being violated, and the "circumstances in which the right was infringed."[28] Section 24 must be able to evolve, because of its "broad language and the myriad of roles it may play in cases."[29] Too restrictive an approach to *Charter* damages is inconsistent with this Court's purposive approach to s. 24(1) .

23. The expansive language of s. 24 requires that the *Mackin* categories not be viewed as exhaustive—rather, they represent a minimum standard of conduct that may justify a finding of *Charter* damages. The ultimate question before any court determining a remedy is whether there is a remedy that is just, based on the harm suffered by the claimant and the facts of the case. Sometimes, monetary damages are just because of a proven abuse of process, or bad faith conduct. However, there may be factual matrixes in the future that justify monetary damages in the legislative process that are impossible to predict. There is no need to outline such situations exhaustively, nor is it possible to do so. This Court should continue to affirm a fact-specific and balanced approach to *Charter* damages that allows for sufficient flexibility and does not handcuff future courts in situations that have not yet arisen.

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[26] *Hislop*, at para 107.
[27] *Hislop,* at para 102.
[28] *Doucet-Boudreau,* at para 55.
[29] *Doucet-Boudreau,* at para 59.

24. It is well established that *Charter* cases vindicate the rights of persons in Canada as a whole. Just as striking down unconstitutional legislation provides a benefit to all persons in Canada, even those who were not directly affected by the law, the availability of *Charter* damages provides a benefit to everyone, despite their individual nature. Deterrence is part of the rationale for *Charter* damages,[30] and deferring conduct in the legislative process that deserves sanction benefits all persons in Canada. The availability of *Charter* damages imposes no new requirement on the legislature, nor does it remove the ability to consider the legislature's unique role. The availability of *Charter* damages merely preserves the possibility of a meaningful remedy, where the facts and circumstances of a case demand them.

PART IV – SUBMISSIONS AS TO COSTS

25. The CCLA does not seek costs and asks that it not be liable for costs.

PART V – ORDER SOUGHT

26. The CCLA takes no position on the outcome of this appeal.

All of which is respectfully submitted this 22nd day of September, 2023.

Andrew Lokan and Mariam Moktar
Counsel for the intervener,
Canadian Civil Liberties Association

[30] *Ward*, at para 25.

PART VI – TABLE OF AUTHORITIES AND LEGISLATION

Jurisprudence	**Paragraphs Cited**
Bell ExpressVu Limited Partnership v. Rex, 2002 SCC 42	7
British Columbia Teachers' Federation v. British Columbia, 2013 BCSC 1216	14
Canada (Attorney General) v. Hislop, 2007 SCC 10	9, 20
Doucet-Boudreau v. Nova Scotia (Minister of Education), 2003 SCC 62	2, 22
Mack v. Canada (Attorney General), 2002 CanLII 45062 (ON CA)	19
Mackin v. New Brunswick (Minister of Finance)	1, 2, 3, 4, 6, 9, 10, 11, 14, 15, 23
Mikisew Cree First Nation v. Canada (Governor General in Council), 2018 SCC 40	8, 9, 11
Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia, 2020 SCC 21	14
R. v. 974649 Ontario Inc., 2001 SCC 81	2
R v. Morgantaler, [1993] 3 SCR 463	14
R v. Sullivan, 2022 SCC 19	13
Reference re Canada Assistance Plan (B.C.), [1991] SCR 525	9
Reference re Upper Churchill Water Rights Reversion Act, [1984] 1 SCR 297	16
Reference to the Validity of Orders in Council in relation to Persons of Japanese Race, [1946] SCR 248	19
Rice v. New Brunswick, 2002 SCC 13	1
RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 SCR 199	14
Switzman v. Elbling and A.G. of Quebec, [1957] SCR 285	19
Vancouver (City) v. Ward, 2010 SCC 27	11, 17, 24
Vriend v. Alberta, [1998] 1 SCR 493	6

Other Sources	**Paragraphs Cited**
Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, ss 1, 24(1)	*Multiple citations throughout*