SCC No. 41805

SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO)

BETWEEN:

ONTARIO PLACE PROTECTORS

APPELLANT
(Appellant)

and

HIS MAJESTY THE KING IN RIGHT OF ONTARIO
ATTORNEY GENERAL OF ONTARIO

RESPONDENTS
(Respondents)

(Style of cause continued on next page)

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(Rules 47, 55 and 56 of the *Rules of the Supreme Court of Canada*)

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PARTS & II – OVERVIEW AND ISSUES FOCUSED ON BY INTERVENER

1. This appeal evaluates the constitutionality of statutory immunity provisions that seek to extinguish or otherwise prevent the assertion of private law causes of action against government actors. This is, fundamentally, a question of Crown liability. But statutory immunity clauses are also about access to justice and the rule of law. By precluding private law lawsuits against the state, statutory immunity clauses serve as impediments to access to justice and to ensuring state accountability – both of which are essential to the rule of law.[1] Statutory immunity provisions are essentially the public law equivalent of privative clauses seeking to preclude judicial review of administrative action. The interest in legal consistency requires their coherent treatment.

2. In *Democracy Watch v. Canada (Attorney General)*, 2026 SCC 28, this Court affirmed the existence of a constitutional right to legality review of all aspects of a decision or other state action amenable to judicial review under administrative law principles.[2] The Public Interest Litigation Institute ("PILI") submits that the next logical step is for this Court to affirm the constitutional right to legality review in private law applicable to all state action that is not amenable to judicial review or for which judicial review would not be an adequate alternative remedy. In such circumstances, statutory immunity provisions will – like their public law privative clause counterparts – generally be unconstitutional and of no force or effect.

3. PILI's argument will be developed under the following themes:

   a. The constitutional right to legality review in private law: a logical development
   b. The scope and content of the constitutional right to private law legality review
   c. Private law legality review and the contemporary Crown liability landscape

4. PILI asserts that the constitutional right to private law legality review is the necessary counterpart of the constitutional right to legality review in public law and that it is also anchored in the superior courts' role as guardians of the rule of law. In addition, the right to private law legality review is easily applied and reconciled with the current landscape of civil litigation.

5. As Canada's legal system is bijuridical – and as the principles of state liability in Quebec civil law incorporate public and common law principles of Crown liability[3] – the constitutional right to private law legality review should be affirmed to apply in Quebec and the rest of Canada.

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[1] *Trial Lawyers Association of British Columbia v British Columbia*, 2014 SCC 59, at para. 38-40
[2] See paragraphs
[3] Art. 1376 C.C.Q.; *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, 2004 SCC 61.

PART III – PILI'S ARGUMENTS

A – The Constitutional Right to Legality Review in Private Law: A Logical Development

6. This Court should affirm the existence of a constitutional right to legality review in private law. Affirming the constitutional right to private law legality review is a logical development from – and the private law counterpart to – the constitutional right to legality review in public and administrative law affirmed in *Democracy Watch v. Canada (Attorney General)*, 2026 SCC 28. Private and public law legality review share a singular purpose: ensuring that Canadians have access to justice in order to vindicate their rights and interests and ensure state accountability. This, in turn, reinforces the rule of law as the lynchpin of our constitutional order. It also promotes good governance and public administration, and public confidence in democratic institutions and the administration of justice.

7. The unanimous reasons in *Democracy Watch* state:

> The judicature provisions in ss. 96 to 101 of the *Constitution Act, 1867*, interpreted in light of the preamble and the principle of the rule of law, enshrine the superior courts as guardians of the rule of law and constitutionally guarantee the core aspects of their jurisdiction that are essential to their function.[4]

8. Further, "[b]y virtue of these features of our constitutional system, every exercise of public authority is subject to the courts' supervisory jurisdiction to ensure that it does not exceed its legal limits." (emphasis added) As a result, "legality review of *all* aspects of an administrative decision… is constitutionally guaranteed."[5]

9. However, judicial review of administrative action is only "one of these essential aspects of the courts' constitutional function."[6] (emphasis added) The constitutional right to legality review extends beyond judicial review and necessarily encompasses the private law legality review of governmental action. This is because the rule of law requires more than just compliance with administrative law principles and because governmental action can violate the rule of law in ways other than being inconsistent with those principles. The limits on public power include "the common law or civil law"[7] and state action inconsistent with private law principles in either of Canada's state legal traditions is equally antithetical to the rule of law.

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[4] *Democracy Watch*, at para. 3. See also paras. 39-40.
[5] *Democracy Watch*, at para. 8. See also paras. 17, 66-67.
[6] *Democracy Watch*, at para. 41.
[7] *Democracy Watch*, at para. 1.

10. Thus, in the same way that ss. 96-101 of the *Constitution Act, 1867* guarantee a constitutional right to legality review in administrative and constitutional law, the judicature provisions also guarantee a constitutional right to private law legality review. And in the same way that the right to legality review in public law results in privative clauses being unconstitutional, the right to private law legality review results in statutory absolute immunity provisions[8] also being unconstitutional. These are two sides of the same constitutional coin.

11. The common denominator between privative clauses and statutory absolute immunity provisions is that each and both represents a limit on access to justice and, consequently, to the rule of law. As much as privative clauses preclude individuals from vindicating their interests from unlawful state action in the context of an application for judicial review, legislation extinguishing all – or most – private law causes of action against one or all state entities prevents individuals from vindicating their interests in the context of private law litigation. In turn, both are antithetical to the rule of law and prohibited under ss. 96-101 of the *Constitution Act, 1867*. As stated in *Hryniak v. Mauldin*, 2014 SCC 7 – a private law case – "without an accessible public forum for the adjudication of disputes, the rule of law is threatened and the development of the common law undermined." (para. 26) This Court has indeed been clear:

> [40] In the context of legislation which effectively denies people the right to take their cases to court, concerns about the maintenance of the rule of law are not abstract or theoretical. If people cannot challenge government actions in court, individuals cannot hold the state to account — the government will be, or be seen to be, above the law.[9]

12. Laws that purport to confer absolute immunity on state actors – including by extinguishing all private law causes of action – generate these precise deleterious effects. Yet, this Court's jurisprudence "has long recognized that the power of the courts to review exercises of public power so as to guard against unlawful government action in any form, is constitutionally guaranteed."[10] (emphasis added) In addition, s. 96 provides "constitutional protection for access to justice"[11] and "[a]ny action that interferes with such access… will rally the court's powers to ensure the citizen his or her day in court."[12]

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[8] Laws that extinguish all private law causes of action confer absolute immunity in private law.
[9] *Trial Lawyers Association of British Columbia v. British Columbia*, 2014 SCC 59.
[10] *Democracy Watch*, at para. 44.
[11] *Trial Lawyers*, at para. 39. See also paras. 41, 43.
[12] *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, at 230.

13. The constitutional right to private law legality review is a quintessential tool for actualizing this promise. It is also anchored in the Constitution's basic structure. Provincial enactment of laws extinguishing private law causes of action or otherwise conferring absolute immunity in private law are an exercise of the legislative power over Property and Civil Rights conferred by s. 92(13) of the *Constitution Act, 1867*.[13] However, "particular constitutional grants of power must be read together with other grants of power so that the Constitution operates as an internally consistent harmonious whole."[14] Here, the ambit of s. 92(13) "must be determined, not only by reference to its bare wording," but also with respect to ss. 96-101 of the *Constitution Act, 1867* and with the nature and structure of the government established by the constitution.[15] Section 92(13) is therefore limited by the constitutional right to private law legality review. This flows directly from the "process of liberalization" that the s. 96 jurisprudence has undergone in order "to adapt to modern realities"[16] Immunity principles antedating this evolution are obsolete.

14. The constitutional right to private law legality review is also a logical development of *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62 and its two companion cases. Emphasizing access to justice, *TeleZone* affirmed that individuals can challenge a given state action in the context of private law litigation *and* an application for judicial review in administrative law – and this, without needing to pursue both or any one before the other.[17] Based on their shared objective of ensuring accountability to law – and on the core jurisdiction of Canada's superior courts – both of these twin remedies are constitutionally protected. The need is particularly acute for state action that is not subject to judicial review, or where judicial review is available but would not be an adequate alternative remedy to a civil lawsuit. In either case, eliminating the right to institute a civil lawsuit would result in absolute immunity.[18]

15. Indeed, absent the constitutional right to private law legality review, what prevents a legislature from passing a law immunizing the relevant government from all private law lawsuits? The answer is simple: nothing except the absence of political will. State accountability to law is, however, a matter of constitutional obligation – not a matter of choice or convenience.

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[13] Parliament may also enact such clauses under any relevant head of power listed in s. 91.
[14] *Trial Lawyers*, at para. 25; *Alford v. Canada (Attorney General)*, 2026 SCC 14, at para. 48.
[15] *Trial Lawyers*, at paras. 25-28; *Alford*, at paras. 48-49.
[16] *Reference re Code of Civil Procedure (Que.), art. 35*, 2021 SCC 27, at para. 54.
[17] See paras. 18-19. Note that this is also the rule in Quebec: see *Canadian Food Inspection Agency v. Professional Institute of the Public Service of Canada*, 2010 SCC 66.
[18] Yet, not even legislatures enjoy absolute immunity for the enactment of legislation.

C – The Scope and Content of the Constitutional Right to Private Law Legality Review

16. Anchored in the courts' core jurisdictional function of safeguarding the rule of law, the constitutional right to private law legality review guarantees the right to file a civil lawsuit in respect of specific government action when this is required to prevent absolute immunity.

17. These circumstances are readily identifiable, namely: (i) when state action is not judicially reviewable under administrative law principles; (ii) when judicial review is available but would not be an adequate alternative remedy to a civil lawsuit; and (iii) when constitutional remedies are not available because the interests alleged to be injured are not constitutionally protected. In these situations, a civil lawsuit is the only way to ensure state accountability to law and statutory immunity clauses purporting to preclude civil lawsuits are unconstitutional.

(i) State Action Not Subject to Judicial Review

18. A statutory immunity provision cannot constitutionally operate to preclude a civil lawsuit against the state in respect of specific state action that is not amenable to judicial review under administrative law principles. State action of this nature includes **(a)** state action that is not of a sufficiently public character; and **(b)** state action of a sufficiently public character that is nevertheless not subject to judicial review.

19. As concerns **(a)**, it is trite law that "[j]udicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character." As such, state action and "decisions that are private in nature… are not subject to judicial review."[19] Public law remedies such as *certiorari* cannot be granted in the context of civil lawsuits.[20] State action of a private nature – including actions taken in the Crown's private capacity pursuant to its natural person powers – is, therefore, generally only challengeable in the context of a civil lawsuit. This is the case, for, *inter alia*, state action engaging its duties attaching to the ownership, occupation, possession, or control of property; the state's obligations as signatory to a contract; the state's obligations in the context of tender-calling; and the state's obligation as an employer.[21] Other examples include the state's obligations as a custodian of the property of others (such as personal data),[22] and as private law fiduciary of non-constitutional interests.

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[19] *Highwood Congregation of Jehovah's Witnesses v. Wall*, 2018 SCC 26, at para. 14.
[20] *Highwood Congregation*, at para. 15.
[21] *Martel Building Ltd. v. Canada*, 2000 SCC 60; *Dunsmuir v. New Brunswick*, 2008 SCC 9
[22] *Condon v. Canada*, 2015 FCA 159; *Canada v. John Doe*, 2016 FCA 191.

20. Admittedly, the divide between state action of a private nature and state action of a sufficiently public character is not always clear-cut. For example, private law contracts entered into by the state that are "also structured, controlled and supplemented by […] legislation" engage private and public law principles and are amenable to judicial review for procedural fairness.[23] In other circumstances, contracts anchored in a statutory framework will be entirely governed by private law and exclude judicial review.[24] Defining the private and public divide is "a tricky question" of an "elusive nature" for which "there can be no comprehensive answer."[25] A multifactorial assessment is therefore applied to determine whether state action is amenable to judicial review when jurisdiction is contested on the basis its purportedly private character.[26]

21. The fundamental point is this, however: once it is determined that state action is private in nature and not amenable to judicial review, the constitutional right to private law legality review requires that individuals have access to justice and to a remedy able to vindicate their legal interests. To the extent that such access and remedies are precluded by absolute statutory immunity clauses – or clauses that extinguish the precise cause of action sought to be asserted – such clauses trench upon the protected core of the courts' inherent jurisdiction to uphold the rule of law. Absolute immunity is anathema to the rule of law.[27] And to the same extent that privative clauses are constitutionally inoperative, the same must be true for their private law statutory immunity counterparts. Once again, these are two sides of the same constitutional coin.

22. It is no answer to rely on parliamentary sovereignty or the state's unique status. While the Crown is no ordinary litigant and enjoys public and private law immunities created by the courts, parliamentary sovereignty is to be reconciled with the separation of powers and cannot operate to displace the courts' core jurisdiction over the rule of law absent constitutional amendment.[28] As well, once the state has chosen to act pursuant to its natural persons powers, it must like any other actor, accept the benefits and burdens of that choice. Ordinary legislation cannot, therefore, directly or indirect result in conferring absolute immunity on the state. Yet, this is precisely the effect of statutes extinguishing all – or most – private law causes of action.

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[23] *Canada (Attorney General) v. Mavi*, 2011 SCC 30, at para. 2.
[24] *Ferme Vi-Ber inc. v. Financière agricole du Québec*, 2016 SCC 34, at para. 46.
[25] *Air Canada v. Toronto Port Authority*, 2011 FCA 347, at paras. 56-57.
[26] *Air Canada*, at para. 60, cited in 53 cases on CanLII.
[27] *Democracy Watch v. Canada (Attorney General)*, 2026 SCC 28, at paras. 1, 7.
[28] *Canada (Attorney General) v. Power*, 2024 SCC 26, at paras. 48-50, 78; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, at para. 18.

23. As concerns **(b)**, the constitutional right to private law legality review guarantees access to private law remedies in respect of state action that is of a sufficiently public character but is nevertheless not amenable to judicial review under administrative law or constitutional law principles. In the absence of administrative law or constitutional law review, civil causes of action remain the only viable judicially-enforceable recourse for the vindication of individuals' legally-cognizable interests and for ensuring state accountability to law.

24. Take the example of the tort of malicious prosecution, which is available when a prosecutor acts maliciously in fraud of their prosecutorial duties and injures a criminal accused. This Court has been clear that this tort "is not an after-the-fact judicial review of a Crown's exercise of prosecutorial discretion."[29] As well, an exercise of prosecutorial discretion that could anchor the tort of malicious prosecution is not amenable to judicial review on administrative law grounds even if prosecutors act in a "quasi-judicial role as 'ministers of justice'"[30] Significantly, "[u]ntil *Nelles v. Ontario*, [1989] 2 S.C.R. 170" – which recognized the tort of malicious prosecution – "it was generally accepted that Crown prosecutors in Canada had absolute immunity from civil liability."[31] Transitioning from absolute to qualified immunity for prosecutorial misconduct was not impeded by the fact that actions in malicious prosecution were not part of the superior courts' core jurisdiction in 1867. This transition was, instead, anchored in the rule of law, since malicious prosecution involves a prosecutor having "wilfully perverted or abused the office of the Attorney General or the process of criminal justice."[32] In such cases, absolute immunity cannot be constitutionally justified. The same is true in Quebec civil law.[33]

25. Another example of discretionary power that is not amenable to judicial review on administrative law grounds arises in the context of policing. This state of unreviewability obtains despite the concept of "unfettered discretion" being antithetical to the rule of law.[34] After highlighting that "discretion [is] inherent in police work" and that "police investigation involves significant discretion,"[35] this Court affirmed in *Hill v. Hamilton-Wentworth Regional Board*, 2007 SCC 41 that "police are not immune from liability under the Canadian law of negligence"

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[29] *Miazga v. Kvello Estate*, 2009 SCC 51, at para. 7, cited in *TeleZone*, at para. 30.
[30] *Miazga*, at para. 47; *Henry v. British Columbia (Attorney General)*, 2015 SCC 24, at para. 73.
[31] *Ontario (Attorney General) v. Clark*, 2021 SCC 18, at para. 25.
[32] *Miazga*, at para. 80; *Henry*, at para. 51;
[33] *Proulx v. Quebec (Attorney General)*, 2001 SCC 66, at paras. 7, 9, 35; *Henry*, at para. 47.
[34] *Democracy Watch*, at para. 86, citing *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at 140.
[35] *Hill*, at paras. 51-54; *Kosoian v. Société de transport de Montréal*, 2019 SCC 59, at para. 46.

and that "[t]he tort of negligent investigation exists in Canada." Not only did the Court reject absolute immunity for police investigative discretion, it emphasized that its review of discretion under this tort reflects the basic principle that police officers are "not permitted… to exercise their discretion unreasonably."[36] The tort of negligent investigation shows that a private lawsuit is essential to ensuring that the state's exercise of discretion respects the principles of legality when judicial review under administrative law principles is not available. This is also true in Quebec civil law (see *Kosoian v. Société de transport de Montréal*, 2019 SCC 59, at para. 46).

26. A third example may be stated briefly. Judicial review under administrative law principles is not available for a discretionary exercise of police power that results in the death of an individual. Nor are *Charter* damages possible, since an action in *Charter* damages cannot be instituted by the estate of a deceased.[37] By contrast, in Quebec civil law, the parent of the deceased may file a civil lawsuit seeking compensatory damages for *solatium doloris*.[38]

27. The common denominator uniting these three examples is clear: laws extinguishing these causes of action would result in absolute immunity and would be unconstitutional for trenching upon the courts' core jurisdiction and the associated constitutional right to private law legality review. Public confidence in the administration of justice would also be impaired.

(ii) When Judicial Review is Not A Sufficient or Adequate Alternative Remedy

28. The constitutional right to private law legality review also guarantees access to private law remedies in respect of state action that is amenable to judicial review when judicial review would not be a sufficient or adequate alternative remedy to a civil lawsuit. As emphasized by this Court: "An adequate remedy is one capable of capturing the nature and scope of the wrong and the harm as a whole."[39] A private lawsuit must, therefore, be available when judicial review does not have that capacity – and this, regardless of whether the plaintiff intends to pursue private law remedies and an application for judicial review in parallel.[40]

29. Without being exhaustive, judicial review will not be an adequate alternative remedy to a private lawsuit when it is insufficient, on its own, to vindicate the interests alleged to have been injured by the impugned state action. This may arise when the nature or severity of the

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[36] *Hill*, at paras. 3, 54.
[37] *Canada (Attorney General) v. Hislop*, 2007 SCC 10, at para. 73.
[38] *Augustus v. Gosset*, [1996] 3 S.C.R. 268.
[39] *Ahluwahlia v. Ahluwahlia*, 2026 SCC 16, at paras. 77, 91, 144.
[40] As authorized under *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, at para. 19.

state conduct, or of the injuries flowing from it – or both – are of such an extreme as to exceed the remedial effect of simply quashing that conduct on administrative law grounds. Indeed, "while Crown liability in tort and the validity of an administrative decision may generate some overlapping considerations, they present distinct and separate justiciable issues."[41] These "distinct and separate" issues are, however, part of an integral whole, namely: state accountability to law. As the limits on state power – in all forms – "are set out in the delegating statute, in the common or civil law, or derived from the Constitution itself,"[42] compliance with administrative law principles does not automatically result in compliance with the rule of law. An administrative decision that is reasonable but occasions a private wrong is still unlawful – just not from not the vantage point of administrative law. Remedies must remain available.

30. As laws conferring absolute statutory immunity or otherwise extinguishing all private causes of action prevent the courts from ensuring that the state abides by all limits on state power, and as that role forms part of the courts' core jurisdiction, such laws violate the constitutional right to private law legality review and are, therefore, unconstitutional. This is subject to one judge-made exception: the existence of a comprehensive statutory scheme intended to provide redress for the injury that would otherwise be pursued in a civil lawsuit.[43] To ensure compliance with the rule of law, this scheme must itself be subject to judicial scrutiny.

D – Private Law Legality Review and The Civil Litigation Landscape

31. The constitutional right to private law legality review fits comfortably within the modern landscape of civil litigation, including existing statutory and common law rules, principles, and practices. Affirming this right will not transform civil litigation or Crown liability. Indeed, it is clear that private law "must account for the unique role of public authorities in governing society in the public interest" and that "public bodies must be shielded to some extent from the chilling effect of the threat of private lawsuits."[44] (emphasis added). While rejecting absolute immunity, private law legality review accepts the legitimacy of judge-made rules, doctrines, and principles giving effect to these concerns. Private law legality review is, for example, compatible with the policy/operational distinction in the law of tort and extracontractual liability, as well as with requirements for a heightened threshold of severity for state action to attract liability.

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[41] *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, at para. 30.
[42] *Democracy Watch v. Canada (Attorney General)*, 2026 SCC 28, at para. 1.
[43] *Seneca College v. Bhadauria*, [1981] 2 S.C.R. 181.
[44] *Nelson (City) v. Marchi*, 2021 SCC 41, at para. 1.

32. This includes causes of action requiring proof of malice or bad faith, for example.

33. Indeed, these judge-made rules "are fully consistent with the requirements of the rule of law: they constitute an exercise of, not a limit on, the supervisory jurisdiction of the courts."[45] For this same reason, statutes that codify these rules[46] will also not violate the constitutional right to private law legality review. The same is true for principles including *res judicata*, issue estoppel, cause of action estoppel, *stare decisis*, and abuse of process, and for the rules governing standing, vexatious litigants, and motions to strike (among others). And the same is also true for the defence of statutory authority which is "a matter of defence, not jurisdiction," and thus does not prevent the court from adjudicating the cause of action in respect of which it is asserted.[47]

34. The constitutional right to private law legality review also operates in tandem with the presumption of constitutionality attaching to statutes and rules of court governing the conduct of civil litigation generally, or against the Crown, specifically. Affirming this right does not *ipso facto* lead to the constitutional invalidity of Crown liability legislation. Nor does it undermine notice requirements or statutory limitations, including the special limitations periods applying to state conduct that engages a state actor's public duties rather than its private rights.[48] A limitation period could, however, be unconstitutional if it is so short as to make it virtually impossible for a lawsuit to be instituted. In any event, the constitutional invalidation of statutes or rules that limit the courts' jurisdiction to adjudicate private law claims is far from unprecedented,[49] especially in light of the principle of constitutional supremacy enshrined in s. 52(1) of the *Constitution Act, 1982*. Overall, in the same way that "legislatures are competent to prescribe procedures for judicial review, provided that the supervisory role of the courts is not ousted,"[50] they may also prescribe rules governing civil litigation against the Crown. And in the same way that privative clauses are unconstitutional, the same is true for absolute statutory immunity clauses and clauses that extinguish all private causes of action. These are two sides of the same constitutional coin.

THE WHOLE RESPECTFULLY SUBMITTED THIS 10th DAY OF AUGUST 2026



Lawrence David, JD/BCL, LLM

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[45] *Democracy Watch v. Canada (Attorney General)*, 2026 SCC 28, at para. 1.
[46] Such as the statute at issue in *Anglin v. Resler*, 2026 SCC 23, at paras. 56-71.
[47] *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, at paras. 69-72.
[48] e.g., *Berendsen v. Ontario*, 2001 SCC 55, at paras. 12-30.
[49] e.g., *Trial Lawyers Association of British Columbia v. British Columbia*, 2014 SCC 59.
[50] *Democracy Watch v. Canada (Attorney General)*, 2026 SCC 28, at paras. 75.

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