JFK LAW LLP

MEMORANDUM

To: Tamra Thomson

From: Tim Dickson

Date: May 5, 2023

Re: Potential Intervention in *AGC v Power*

This is a proposal that the CBA intervene in the upcoming SCC appeal in *Attorney General of Canada v Power*.

Copies of the lower court decisions and of Canada's memorandum of leave argument are attached.

The SCC granted leave to appeal on March 2, 2023. Canada's factum is due by May 29, 2023. If the CBA wishes to apply to intervene, its application would be due by June 26, 2023 at the latest. In order to have time to prepare the application, counsel would need to know whether the CBA wishes to intervene two weeks after Canada files its factum.

The Case

In the underlying action, the plaintiff is suing the Attorney General of Canada as the representative of both the Crown and Parliament, alleging that legislation passed in 2010 and 2012 was unconstitutional and caused personal damage to him. Power had been convicted of an offence and he served a sentence of imprisonment as a result. Subsequently, Parliament enacted legislation[1] that extended the period in which persons convicted of such crimes are ineligible to receive a record suspension (ie a pardon). The plaintiff says the relevant provisions in the legislation are unconstitutional because they breach ss. 11(h) and 11(i) of the *Charter* by retroactively increasing the

[1] *Limiting Pardons for Serious Crimes Act*, S.C. 2010, c. 5 and *Safe Streets and Communities Act*, S.C. 2012, c. 1.

punishment for his crime. Lower courts have twice found the legislation to be unconstitutional.[2]

The plaintiff's damages claim is based not just on the unconstitutionality of the legislation. Rather, the plaintiff says the legislation was enacted in the knowledge that it was unconstitutional, or passed in bad faith or with wilful blindness, and that he is therefore entitled to damages under s. 24(1) of the *Charter*. That is, he says his claim lies beyond the limited immunity enjoyed by Parliament and the Executive, as set out in *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, as discussed below.

In defence, Canada brought a motion for the determination of these two questions of law:

> 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 pursuant to s. 52(1) of the *Constitution Act, 1982*? and
>
> 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 pursuant to s. 52(1) of the *Constitution Act, 1982*?

The Chambers Judge distilled these questions in this inquiry: "does the state enjoy an absolute immunity in respect of the passage of legislation? In effect, is there absolute state immunity with respect to the legislative function?"[3]

Two decades ago the Court answered those questions in the negative in *Mackin*, in which Justine Gonthier stated for the majority at paragraph 78:

> According to a general rule of public law, absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional (*Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957; *Central Canada Potash Co. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42). In other words "[i]nvalidity of governmental action, without more, clearly should not be a basis for liability for harm caused by the action" (K. C. Davis, *Administrative Law Treatise* (1958), vol. 3, at p. 487). In the legal sense, therefore, both public officials and legislative bodies enjoy limited immunity [emphasis in original] against actions in civil liability based on the fact that a legislative instrument is invalid.

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[2] *Chu v. Canada (Attorney General)*, 2017 BCSC 630; *P.H. v. Canada (Attorney General)*, 2020 FC 393.
[3] *Joseph Power v. Attorney General of Canada*, 2021 NBQB 107 ("**Chambers Judgment**").

He went on to summarize at paragraph 91:

> In short, although it cannot be asserted that damages may never be obtained following a declaration of unconstitutionality, it is true that, as a rule, an action for damages brought under s. 24(1) of the *Charter* cannot be combined with an action for a declaration of invalidity based on s. 52 of the *Constitution Act, 1982*.

In its motion in *Power*, Canada says these passages from *Mackin* have been both misinterpreted and superseded by subsequent decisions from the Court. With respect to the interpretation of *Mackin*, Canada articulated its position this way before the Chambers Judge:

> *Mackin* only relates to state conduct post-enactment. … The limited immunity described in *Mackin* pertains to state action taken under a law, valid at the time, later declared unconstitutional: *Mackin* does not stand for the proposition that the law-making process itself can give rise to Charter section 24 liability.[4]

As for subsequent case law, Canada relies on *Vancouver (City) v. Ward*, 2010 SCC 27 and *Henry v. British Columbia (Attorney General)*, 2015 SCC 24, each of which concerned damages remedies under s. 24 arising out of the unconstitutional exercise of executive action.

Canada also relies on *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, which was a challenge to legislation on the basis that the legislation had the potential to limit Treaty rights and the government had not discharged its alleged duty to consult prior to enactment. In four sets of reasons, the Court rejected the challenge in that case, holding that a duty to consult in such circumstances is incompatible with parliamentary supremacy.

Canada urges that the result reached in *Mikisew* should also apply to a post-enactment claim for legislation that is found to be breach *Charter* rights. It says that permitting the possibility of liability – even in narrow circumstances – for the enactment of legislation is incompatible with the separation of powers, parliamentary sovereignty, and parliamentary privilege. It argues that liability for unconstitutionality should be limited to post-enactment conduct by officials; it should not include damage arising from the legislation itself.

Both the Chambers Judge and the Court of Appeal (which was unanimous) firmly rejected Canada's argument. Both found that *Mackin* clearly holds that government's immunity for unconstitutional legislation is only limited, in that government can be held

[4] Chambers Judgment, para 23.

liable for damages arising from that legislation where the legislature's conduct was clearly wrong, or was taken in bad faith or wilful blindness. They also found that a limited immunity does not wrongly encroach on the fundamental principles of the separation of powers and parliamentary sovereignty. In that regard, they distinguished between a) a scenario where a court is called upon to set aside legislation because of the process in which it was enacted (such as where a First Nation was not consulted, as in *Mikisew*); and b) a claim that the legislation, once enacted, breaches *Charter* rights and that its enactment was clearly wrong or the product of bad faith or wilful blindness. The courts found that the former scenario would place the court in a supervisory role in respect of the legislative process; the latter would not. As for parliamentary privilege, the courts found they were bound by *Mackin*.

The Importance of this Case

In essence, Canada is seeking to establish absolute immunity for itself in respect of unconstitutional legislation, in even the most egregious circumstances. In seeking that result, it is asking the Court to overturn *Mackin*, the foundational decision on this issue, which has been in place for over two decades. If Canada's position were taken up, it would mark a dramatic shift in the law.

That change in the law would preclude any claim for damages for losses occasioned by unconstitutional damage, no matter how flagrant the unconstitutionality. It would mean that a resident of Canada who is particularly harmed by unconstitutional legislation would have no remedy for their losses, even if they are particularly vulnerable to legislative abuse. Indeed, in addition to *Power v. Canada* there are at least two other cases where plaintiffs are currently seeking damages for unconstitutional legislation. In both cases the plaintiffs are members of groups particularly vulnerable to state power:

- *Whaling v. Canada*, 2020 FC 1074 and 2022 FCA 37, which is a putative class action brought by a class of federal inmates who were deprived of access to automatic early parole by legislation later declared unconstitutional; and

- *Sarrazin c. Canada (Procureur general)*, 2018 QCCA 1077, where the class is comprised of Indigenous persons who were deprived of entitlement to registration as status Indians under provisions of the *Indian Act* that were declared unconstitutional.

The change in the law Canada seeks can also be anticipated to have broader impacts on law-making. The governments and legislatures of Canada and the provinces would know that they could never be required, under any circumstances, to compensate persons who had suffered damage as a result of legislation that breached *Charter* rights. While Canada's position is that the potential for such liability would have a

chilling effect on the passage of legislation, in the case of unconstitutional legislation such a chill is not necessarily a bad thing. The potential for liability in the most egregious cases can serve to encourage legislatures to only pass legislation that can reasonably be considered constitutional; the absence of any such potential may increase the possibility of legislatures enacting flagrantly unconstitutional legislation without concern for the losses that result.

Further, underlying the immediate question of whether unconstitutional legislative action should be entirely immune to damages remedies is a broader question about the courts' role in reviewing that legislative action. In its leave memorandum, Canada argues: "Putting the law-making process on trial to examine whether lawmakers acted in a way that was "wrong" according to any standard is irreconcilable with the sovereignty of Parliament."[5] Canada essentially says that any liability imposed for unconstitutional legislation would amount to impermissible interference in the law-making process.

Canada's position in this regard is incorrect, as all judges in the courts below unanimously found, in that it equates a claim aimed at a remedy that would halt the law-making process (such as the kind of consultation-based argument at issue in *Mikisew*) with a claim that awards compensation after-the-fact for legislation that has already been enacted.

If Canada's approach were adopted by the Court, however, then it would significantly curtail the courts' role as the guardians of the Constitution, in that it is premised on the assertion that it is impermissible for the courts to consider the motives, objectives or good faith of legislators. However, in vindicating constitutional supremacy and fulfilling their role in that regard, the courts are required in a variety of circumstances to consider the objectives, reasonableness and legitimacy of legislative action, including when reviewing:

- Whether a statute is an colourable attempt by one level of government to legislate beyond its jurisdiction, as was in the case in *R. v. Morgentaler*, [1993] 3 SCR 463;

- Whether a legislature had an invalid purpose in passing legislation, as was the case in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, where the Court found that purpose of the *Lord's Day Act* was the compulsion of religious observance, contrary to s. 2(a) of the *Charter*;

[5] Canada's Memorandum of Argument, para 30.

- Whether, in order to justify an infringement of *Charter* rights or s. 35 rights, the legislature had a sufficiently pressing and substantial purpose;[6] and

- Whether, in order to justify an infringement of s. 35 rights, the government meaningfully engaged with affected First Nations and sought to accommodate their rights, so as to fulfil the Crown's duty to consult.[7]

Canada's position appears to question the legitimacy of these well-established judicial functions. The bluntness of Canada's argument – that the application of any fault-based standard to the development of legislation is inconsistent with parliamentary supremacy – could have broad implications for both constitutional supremacy and the courts' role in protecting it.

The Importance of the CBA Intervening in this Case

The issues raised by this case are closely connected to a core principle to which the CBA is committed, namely "an impartial and independent judiciary, without which there is no rule of law."[8] In this appeal, Canada advances an enlarged version of parliamentary supremacy that would erode the role of judicial review in safeguarding constitutional supremacy. Canada's assertion that courts cannot legitimately review the law-making process in order to remedy constitutional defects could, if adopted, have very negative implications for the independence of the judiciary and the rule of law. Intervening in this case would be consistent with the CBA's commitment to defending a strong, independent judiciary and the rule of law.

The CBA's intervention in this case would assist the Court in at least two ways.

First, the mere fact of the CBA intervening in order to oppose Canada's approach would likely carry significance for the Court, in that it would support the Court in protecting a robust role for constitutional judicial review. Further, the plaintiff (respondent in the appeal) was unrepresented in the New Brunswick Court of Appeal. He now has counsel in the SCC, but no doubt those counsel would be grateful for the CBA's intervention on their side of the case.

Second, the issues in this case are broad. Especially because he was unrepresented in the NBCA, we will not know precisely how the respondent will argue the appeal until he

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[6] See *R. v. Oakes*, [1986] 1 SCR 103 and innumerable cases since.

[7] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, paras 77-180.

[8] CBA Intervention Regulation.

files his factum, but the breadth of the issues leaves a great deal of room for the CBA to contribute distinct, useful arguments. There is currently no sign of other interveners.

If it wishes to intervene in the case, then the CBA should take the position in the appeal that the *Mackin* test applies to unconstitutional legislation, just as with unconstitutional executive action, and that it should continue to do so. In supporting that position, the CBA could focus on the following points, subject to what Canada and the respondent argue in their factums:

- Canada's enlarged vision of parliamentary sovereignty would encroach on constitutional supremacy and the courts' legitimate role in enforcing constitutional limits. In fulfilling that role, the courts regularly review the motivations of legislatures and the rationales for legislation, as noted above. Canada's approach would erode that judicial function, to the detriment of constitutionalism and the rule of law.

- In addition to undermining the courts' function in reviewing the constitutionality of legislative action, absolute immunity for law-making would decrease the incentive on legislatures to ensure that the legislation they pass is arguably constitutional. Constitutionalism requires not only that courts are able to perform judicial review effectively and cure constitutional defects, but that all government actors seek to respect constitutional limits. Respect for those limits is likely to decrease if legislatures are entirely immune from liability for the losses caused by their unconstitutional legislation.

- Further, denying an effective remedy to individuals damaged by flagrantly unconstitutional legislation is not in the interests of justice. It would plainly detract from confidence in the fairness of the justice system for someone who is targeted by egregiously unconstitutional legislation, for instance, not to be able to recover their losses.

- The theory of absolute immunity for legislation that unjustifiably breaches the *Charter* would also conflict with other areas of constitutional law. For instance, legislative infringements of Aboriginal title are generally understood as requiring compensation as part of justifying those infringements,[9] strongly suggesting that compensation should be ordered by way of remedy in appropriate circumstances.

[9] See *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para 169; *Mikisew*, para 154.

Proposed Counsel

My practice focuses on public law, including Aboriginal law and the *Charter of Rights*. I have appeared in more than a dozen SCC appeals. I am currently representing the CBA (National) in its intervention in the "Single Mothers" legal aid case in the BC Supreme Court.[10]

[10] Single Mothers' Alliance of BC Society v British Columbia, 2022 BCSC 2193.

COURT OF APPEAL OF
NEW BRUNSWICK

COUR D'APPEL DU
NOUVEAU-BRUNSWICK

56-21-CA

ATTORNEY GENERAL OF CANADA

APPELLANT

- and -

JOSEPH POWER

RESPONDENT

PROCUREUR GÉNÉRAL DU CANADA

APPELANT

- et -

JOSEPH POWER

INTIMÉ

Attorney General of Canada v. Power, 2022 NBCA 14

CORAM:
The Honourable Chief Justice Richard
The Honourable Justice LaVigne
The Honourable Justice LeBlond

Appeal from a decision of the Court of Queen's Bench:
May 14, 2021

History of case:

Decision under appeal:
2021 NBQB 107

Preliminary or incidental proceedings:
Leave to appeal allowed June 10, 2021

Appeal heard:
September 21, 2021

Judgment rendered:
April 21, 2022

Counsel at hearing:

For the appellant:
Jan Jensen and Ami Assignon

Procureur général du Canada c. Power, 2022 NBCA 14

CORAM :
l'honorable juge en chef Richard
l'honorable juge LaVigne
l'honorable juge LeBlond

Appel d'une décision de la Cour du Banc de la Reine :
le 14 mai 2021

Historique de la cause :

Décision frappée d'appel :
2021 NBBR 107

Procédures préliminaires ou accessoires :
Demande d'autorisation d'appel accueillie
le 10 juin 2021

Appel entendu :
le 21 septembre 2021

Jugement rendu :
le 21 avril 2022

Avocats à l'audience :

Pour l'appelant :
Jan Jensen et Ami Assignon

For the respondent:
Joseph Power on his own behalf

Pour l’intimé :
Joseph Power en son propre nom

THE COURT

The appeal is dismissed with costs of $1,000.

LA COUR

L’appel est rejeté avec dépens de 1 000 $.

The following is the judgment delivered by

THE COURT

I. Introduction

[1] The issue in this appeal is very narrow. It arises out of questions of law determined before trial under the regime of Rule 23 of the *Rules of Court*. While two questions were posed to the Court of Queen's Bench, the matter turns on a single question: Whether the Crown enjoys absolute immunity from a civil suit seeking *Charter* damages for the enactment of legislation later declared unconstitutional. The Attorney General of Canada says it does; Joseph Power, who claims to have suffered damages flowing from unconstitutional legislation, says otherwise. A judge of the Court of Queen's Bench applied the Supreme Court's decision in *Mackin v. New Brunswick (Minister of Finance)*; *Rice v. New Brunswick,* 2002 SCC 13, [2002] 1 S.C.R. 405, and concluded that Crown immunity is not absolute because it does not extend to conduct that is clearly wrong, in bad faith or an abuse of power. With leave, the Attorney General appeals.

[2] For the following reasons, the appeal is dismissed.

II. Factual background

[3] The question whether the Crown enjoys absolute immunity from suit for having enacted unconstitutional legislation can be answered absent the facts; however, for the sake of a narrative, we briefly outline the factual background leading to the present appeal.

[4] In a Notice of Action filed in 2018, Joseph Power seeks a declaration that transitional provisions contained in the *Limiting Pardons for Serious Crimes Act*, S.C. 2010, c. 5, s. 10, and in the *Safe Streets and Communities Act*, S.C. 2012, c. 1, s. 161, are

of no force or effect, and claims against the Attorney General of Canada damages alleged to have been caused by the enactment of these provisions.

[5] The facts alleged in the pleadings reveal that, over two and a half decades ago, Mr. Power was convicted of two offences of sexual assault and was sentenced to two eight-month terms of imprisonment to be served concurrently. After his release, in June 1996, Mr. Power lived in various communities in Canada, enrolled in college to become an X-ray technician, graduated with a diploma in medical radiation technology, and became a member of the Ordre des technologues en imagerie médicale en radio-oncologie et en électrophysiologie médicale du Quebec. He began work in that field in Longueuil, Quebec, and, in 2001, relocated to New Brunswick, where he became employed at the Miramichi Regional Hospital as a medical radiation technologist.

[6] In 2011, Mr. Power's employer discussed with him an anonymous phone call to the hospital alleging Mr. Power had a criminal record. Until then, neither the hospital nor the organizations that govern the conduct of X-ray technicians had asked whether he had a criminal past. In August 2011, the Miramichi Regional Hospital informed Mr. Power he posed a risk because of his criminal record. He was suspended pending a final decision, first with pay and later without.

[7] In 2010, Mr. Power had begun making inquiries regarding the process to obtain a pardon, now called a "record suspension," but he did not apply until 2013, once he learned he would require one if he were to continue working as a medical radiation technologist either in New Brunswick or in Quebec.

[8] By the time Mr. Power applied for a pardon, the regime had changed. Among other things, the combined effects and transitional provisions of the *Limiting Pardons for Serious Crimes Act* and the *Safe Streets and Communities Act* made Mr. Power permanently ineligible for a record suspension because of the nature of the offences for which he had been convicted. In these circumstances, his employment at the Miramichi Regional Hospital was terminated. Moreover, Mr. Power became ineligible

for membership with the respective medical radiation technologist governing bodies of both New Brunswick and Quebec.

[9] The transitional provisions of both Acts, which gave them retrospective application to cases where offences were committed prior to these statutes coming into force, have been declared unconstitutional (see *Chu v. Canada (Attorney General)*, 2017 BCSC 630, [2017] B.C.J. No. 742 (QL); *P.H. v. Canada (Attorney General)*, 2020 FC 393, [2020] F.C.J. No. 396 (QL), at para. 97). In the present case, the unconstitutionality of these provisions is admitted in the Attorney General's Statement of Defence.

[10] Mr. Power's action alleges that the adoption and application of the transitional provisions constitute conduct that was clearly wrong, undertaken in bad faith, and abusive of government power. He seeks damages pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, being Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.) (*Charter*). In a Statement of Particulars, Mr. Power explains his claims of bad faith and abuse of power as follows:

> 6. […] the Plaintiff submits that the Transitional Provisions were clearly wrong, taken in bad faith, and an abuse of power due to the fact that the Transitional Provisions and retrospective application of the law were clear violations of Section 11(h) and (i) of the *Canadian Charter of Rights and Freedoms*. Furthermore, the Transitional Provisions were imposed in bad faith, with the intention to add to the punishment of offenders who had been sentenced prior to the passing of the legislation.
>
> 7. The Defendant knew that the effect of the Transitional Provisions in the SSCA and the LPSCA would be to increase punishment of certain convicted persons after the fact and that this was a violation of the *Canadian Charter of Rights and Freedoms*. Nevertheless, these provisions came into force and were imposed on the Plaintiff and other persons convicted of crimes prior to the passing of the legislation.

> 8. The Plaintiff submits that it was an abuse of power to impose these provisions despite being aware of their unconstitutional effect on the Plaintiff and other persons convicted of crimes prior to the passing of the legislation.

[11] Rule 23.01(1)(a) of the *Rules of Court* allows a party to an action to apply "for the determination prior to trial, of any question of law raised by a pleading in the action where the determination of that question may dispose of the action, shorten the trial, or result in a substantial saving of costs." Invoking that Rule, the Attorney General applied for a determination of the following two questions:

> 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 pursuant to s. 52(1) of the *Constitution Act, 1982*? and
>
> 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 pursuant to s. 52(1) of the *Constitution Act, 1982*?

[12] At the hearing of the motion, the Attorney General argued that Parliament and the executive branch of government are protected from all liability when performing an essentially legislative function. According to the Attorney General, the mere enactment of legislation by Parliament, with the assistance of the Executive Branch, cannot give rise to any entitlement to damages under s. 24(1) of the *Charter* because of immunity founded upon the principles of parliamentary privilege and the constitutional division of powers among the legislative, executive and judicial branches of government. He maintains the only remedy available to anyone affected by legislation later found to be unconstitutional is a declaration under s. 52(1) of the *Constitution Act, 1982* that the impugned legislation violates the *Charter* and is therefore of no force or effect.

[13] In a decision reported at 2021 NBQB 107, [2021] N.B.J. No. 172 (QL), the motion judge recognized the two questions posed under Rule 23 "blend together into a single question – does the state enjoy an absolute immunity in respect of the passage of legislation" or, put differently, "is there absolute state immunity with respect to the legislative function?" (para. 22). In the end, the motion judge applied the Supreme Court's decision in *Mackin*, which generally recognized Crown immunity but subject to a high threshold beyond which damages may be awarded for the enactment or application of a law that is subsequently declared unconstitutional. The threshold is met when the state conduct is shown to have been "clearly wrong, in bad faith or an abuse of power" (*Mackin*, at para. 78). As a result, the motion judge answered in the affirmative both questions posed under Rule 23, thus holding there is no absolute immunity. He recognized that, while the legal threshold is very high, there may be cases where it is not insurmountable.

[14] With the consent of both parties, a judge of this Court granted leave to appeal.

III. Issues on appeal

[15] In his written submission, the Attorney General condenses his grounds of appeal into the following allegations of error: (1) the motion judge gave inadequate and erroneous consideration to the principles of the separation of powers, parliamentary sovereignty, and parliamentary privilege; and (2) the motion judge misinterpreted and misapplied Supreme Court jurisprudence concerning liability under the *Charter*.

IV. Analysis

[16] It is common ground that the standard of review governing questions of law is that of correctness. We agree with the motion judge's statement that the two questions posed under Rule 23 can be blended into a single question. We formulate that question as follows: Do the Crown and its officials enjoy absolute immunity when

exercising a legislative function? Like the motion judge, we find the solution in *Mackin* and determine that the answer is "no."

[17] *Mackin* arose out of a 1995 amendment to New Brunswick's *Provincial Court Act*, R.S.N.B. 1973, c. P-21, abolishing the system of supernumerary judges and replacing it with a panel of retired judges paid on a *per diem* basis. Supernumerary judges in office when the amendment came into force were to choose between retirement or returning to sit full time. Two judges affected by this amendment challenged the constitutionality of the amendment, claiming it infringed upon the security of tenure and financial security aspects of their judicial independence. They also claimed damages. Ultimately, the Supreme Court (5-2) held the amendment was unconstitutional but rejected the claim for damages. On the question of damages, Gonthier J., for the majority, explained as follows:

> According to a general rule of public law, absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional (*Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957; *Central Canada Potash Co. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42). In other words "[i]nvalidity of governmental action, without more, clearly should not be a basis for liability for harm caused by the action" (K. C. Davis, *Administrative Law Treatise* (1958), vol. 3, at p. 487). In the legal sense, therefore, both public officials and legislative bodies enjoy limited immunity [emphasis in original] against actions in civil liability based on the fact that a legislative instrument is invalid. With respect to the possibility that a legislative assembly will be held liable for enacting a statute that is subsequently declared unconstitutional, R. Dussault and L. Borgeat confirmed in their *Administrative Law: A Treatise* (2nd ed. 1990), vol. 5, at p. 177, that:
>
> > In our parliamentary system of government, Parliament or a legislature of a province cannot be held liable for anything it does in exercising its legislative powers. The law is the source of duty, as much for citizens as for the Administration, and while

> a wrong and damaging failure to respect the law may for anyone raise a liability, it is hard to imagine that either Parliament or a legislature can as the lawmaker be held accountable for harm caused to an individual following the enactment of legislation. [Footnotes omitted in original.]

However, as I stated in *Guimond v. Quebec (Attorney General)*, [[1996] 3 S.C.R. 347, [1996] S.C.J. No. 91]] since the adoption of the *Charter*, a plaintiff is no longer restricted to an action in damages based on the general law of civil liability. In theory, a plaintiff could seek compensatory and punitive damages by way of "appropriate and just" remedy under s. 24(1) of the *Charter*. The limited immunity given to government is specifically a means of creating a balance between the protection of constitutional rights and the need for effective government. In other words, this doctrine makes it possible to determine whether a remedy is appropriate and just in the circumstances. Consequently, the reasons that inform the general principle of public law are also relevant in a *Charter* context. Thus, the government and its representatives are required to exercise their powers in good faith and to respect the "established and indisputable" laws that define the constitutional rights of individuals. However, if they act in good faith and without abusing their power under prevailing law and only subsequently are their acts found to be unconstitutional, they will not be liable. Otherwise, the effectiveness and efficiency of government action would be excessively constrained. Laws must be given their full force and effect as long as they are not declared invalid. Thus it is only in the event of conduct that is clearly wrong, in bad faith or an abuse of power that damages may be awarded (*Crown Trust Co. v. The Queen in Right of Ontario* (1986), 26 D.L.R. (4th) 41 (Ont. Div. Ct.)).

Thus, it is against this backdrop that we must read the following comments made by Lamer C.J. in *Schachter* [*v. Canada*, [1992] 2 S.C.R. 679, [1992] S.C.J. No. 68] , at p. 720:

> An individual remedy under s. 24(1) of the *Charter* will rarely be available in conjunction with an 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. [Emphasis in original.]
>
> In short, although it cannot be asserted that damages may never be obtained following a declaration of unconstitutionality, it is true that, as a rule, an action for damages brought under s. 24(1) of the *Charter* cannot be combined with an action for a declaration of invalidity based on s. 52 of the *Constitution Act, 1982*. [Emphasis added; paras. 78-81.]

[18] In *Mackin*, the claim for damages was dismissed because the Supreme Court did "not find any evidence that might suggest that the government of New Brunswick acted negligently, in bad faith or by abusing its powers," and because "[i]ts knowledge of the unconstitutionality of eliminating the office of supernumerary judge has never been established" (para. 82).

[19] *Mackin* is authoritative, and the motion judge was right to apply it in the present case. While the burden on Mr. Power may be a heavy one to prove that the enactment of the impugned transitional provisions was clearly wrong, in bad faith or an abuse of power, the fact remains that there is no absolute Crown immunity from suit seeking damages under s. 24(1) of the *Charter*.

[20] The Attorney General forcefully argues that there can be no Crown liability for the enactment of legislation that may be found to be unconstitutional because of immunity arising from the separation of powers, parliamentary sovereignty, and parliamentary privilege. With respect, although those arguments were not expressly addressed in *Mackin*, it remains that the case says what it says and, until the Supreme Court overrules it or limits its application, we are duty-bound to apply it.

[21] No one disputes that the separation of powers is a fundamental organizing principle of our Constitution. The government is composed of three branches that have distinct roles, and it would be inappropriate for one branch to impinge on the role of

another. The distinct roles of each branch were summarized by Karakatsanis J. in *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, and repeated by Brown J. in *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765:

> The legislative branch makes policy choices, adopts laws and holds the purse strings of government, as only it can authorize the spending of public funds. The executive implements and administers those policy choices and laws with the assistance of a professional public service. The judiciary maintains the rule of law, by interpreting and applying these laws through the independent and impartial adjudication of references and disputes, and protects the fundamental liberties and freedoms guaranteed under the *Charter*. [para. 118]

[22] The Attorney General alleges that attaching any liability to the legislative process would constitute improper judicial branch impingement into the duties and responsibilities of the legislative branch. With respect, if this were so, *Mackin* would have recognized absolute immunity against damages for the enactment of legislation. However, it did not.

[23] Nowhere in the scheme recognized in *Mackin* is a court interfering with the legislative functions of government. The legislative branch is free to make policy choices and adopt laws. Occasionally, a law is passed and later declared unconstitutional. Declaring a law to be of no force or effect under s. 52 of the *Constitution Act, 1982* is indisputably within the exclusive power of the judicial branch. No one argues that such a declaration impinges on the role of the legislative branch. Similarly, the adjudication of a claim for damages under s. 24(1) of the *Charter* falls within the exclusive power of the judicial branch. We fail to see how an after-the-fact determination of liability for damages, upon proof of unconstitutional legislation having been enacted in circumstances that were clearly wrong, in bad faith or an abuse of power in any way impinges on the role of the legislative branch. Throughout, the legislative branch and those within it are free to make policy choices and adopt laws, although they may have to pay a price if they

do so in circumstances that are clearly wrong, or where bad faith or abuse of power is proven.

[24] The Attorney General argues that "[t]he spectre of open-ended liability for enacting a law that could later, or much later, be found unconstitutional is a fetter on Parliament and is impermissibly chilling." According to him, anything short of absolute immunity would result in legislatures having to formulate bills within the constraints of uncertain and potentially unlimited future liability. Yet, absolute immunity was rejected in *Mackin* in favour of a threshold that will guard against such a chilling effect. That threshold places a very heavy burden on a person claiming damages for the enactment of legislation later found to be unconstitutional. Claims attacking the *bona fides* of parliamentary action will be extremely rare, and those that are made will likely be subjected to motions to strike or for summary judgment to determine whether the allegations meeting the *Makin* threshold can be proven. In this regard, we note the statement of the Supreme Court in *Henry v. British Columbia (Attorney General)*, 2015 SCC 24, [2015] 2 S.C.R. 214, that, where a heightened liability threshold has been imposed, such as here, to survive a motion to strike, a claimant must have pled sufficient facts to disclose a reasonable cause of action by particularizing "facts that, if proven, would be sufficient to establish that the state conduct met the required threshold of gravity" (para. 43).

[25] The Attorney General argues that, by endorsing a theory of liability based on Parliament's alleged bad faith or wilful blindness, the motion judge invited scrutiny of Parliament's action and thereby disregarded well-established categories of parliamentary privilege. Whether or not this is so is of no moment because the motion judge, like this Court, was duty-bound to apply the law as formulated in *Mackin*. It must be recalled that this was not a motion to strike a pleading or a motion for summary judgment; this was a motion for the determination of a question of law, that is whether the Crown enjoys absolute immunity from suit for the enactment of legislation. *Mackin* provides the answer: "[A]bsent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or

application of a law that is subsequently declared to be unconstitutional" (para. 78). Thus, "it cannot be asserted that damages may never be obtained following a declaration of unconstitutionality" (para. 81).

[26] Finally, the Attorney General argues that the motion judge misinterpreted *Mackin* and misapplied Supreme Court jurisprudence concerning *Charter* liability. He submits the statement of the majority in *Mackin* regarding liability under s. 24(1) of the *Charter* constitutes only *obiter* remarks and does not apply to the legislative branch. We do not accept that argument nor do we agree with his statement that the Supreme Court went no further than raise the notional idea of liability. The passage reproduced above clearly demonstrates that the question of damages was a live issue throughout the proceedings, including in the Supreme Court. The threshold was identified in *Mackin* and was applied. The Court held it was not met.

[27] As for subsequent jurisprudence where separation of powers was raised as prime or determinative consideration, such as *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, or *Mikisew*, we do not agree with the Attorney General that these cases should have been preferred over *Mackin*. *Mackin* was on point, while those cases were not since they did not involve unconstitutional legislation leading to a claim for damages for conduct in the legislative process said to have been clearly wrong, in bad faith or abusive of power. Moreover, the *Mackin* principles find support in *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28, in which the Supreme Court elaborated upon the concept of damages as a remedy under s. 24(1) of the *Charter*. While *Ward* was not concerned with a claim for damages resulting from the enactment of legislation later found to be unconstitutional, the Supreme Court references *Mackin* and notes that "[t]he *Mackin* principle recognizes that the state must be afforded some immunity from liability in damages resulting from the conduct of certain functions that only the state can perform," recognizing though that the immunity is "limited" (para. 40). While *Ward* in many respects explains *Mackin*, it does not overrule it. Thus, *Mackin* continues to hold that the "mere enactment" of a law that is

subsequently declared unconstitutional is not protected by immunity if it can be shown the enactment was clearly wrong, in bad faith or an abuse of power.

[28] In sum, despite the able arguments of the Attorney General, which, but for *Mackin*, might have gained traction, we are duty-bound to hold that the motion judge did not err in his determination of the questions before him based on the law as established by the Supreme Court in *Mackin*.

V. Disposition

[29] For these reasons, the appeal is dismissed. Although Mr. Power was not represented for the hearing of the appeal, he did have counsel file a written submission on his behalf. In these circumstances, we award him costs of $1,000.

Version française de la décision rendue par

LA COUR

I. Introduction

[1] La question en litige dans le présent appel est très précise. Elle fait suite à des questions de droit tranchées avant le procès sous le régime de la règle 23 des *Règles de procédure*. Quoique deux questions aient été soumises à la Cour du Banc de la Reine, l'affaire ne soulève qu'une question : La Couronne jouit-elle d'une immunité absolue contre une poursuite civile réclamant des dommages-intérêts en vertu de la *Charte* pour l'adoption d'une loi déclarée plus tard inconstitutionnelle? Le procureur général du Canada l'affirme; Joseph Power, qui prétend avoir subi un préjudice par suite d'une loi inconstitutionnelle, soutient le contraire. Un juge de la Cour du Banc de la Reine a appliqué l'arrêt de la Cour suprême dans *Mackin c. Nouveau-Brunswick (Ministre des Finances); Rice c. Nouveau-Brunswick*, 2002 CSC 13, [2002] 1 R.C.S. 405, et a conclu que l'immunité de la Couronne n'est pas absolue, car elle ne couvre pas un comportement clairement fautif, adopté de mauvaise foi ou constituant un abus de pouvoir. Avec l'autorisation de la Cour, le procureur général interjette appel.

[2] Pour les motifs qui suivent, l'appel est rejeté.

II. Contexte factuel

[3] La question de savoir si la Couronne jouit d'une immunité absolue contre toute poursuite après avoir adopté une loi inconstitutionnelle peut être résolue sans égard aux faits; cependant, pour replacer la question dans son contexte, nous rappellerons brièvement la genèse factuelle du présent appel.

[4] Dans un avis de poursuite déposé en 2018, Joseph Power sollicite une déclaration selon laquelle les dispositions transitoires de l'art. 10 de la *Loi limitant*

l'admissibilité à la réhabilitation pour des crimes graves, L.C. 2010, ch. 5, et de l'art. 161 de la *Loi sur la sécurité des rues et des communautés*, L.C. 2012, ch. 1, sont inopérantes, et présente une réclamation contre le procureur général du Canada à l'égard du préjudice qu'aurait entraîné l'adoption de ces dispositions.

[5] Les faits allégués dans les plaidoiries révèlent que, il y a plus de deux décennies et demie de cela, M. Power a été déclaré coupable de deux infractions d'agression sexuelle et a été condamné à deux peines de huit mois d'emprisonnement à purger concurremment. Après sa libération en juin 1996, M. Power a vécu dans divers coins du Canada, s'est inscrit à des études collégiales pour devenir technologue en radiation, a obtenu un diplôme en technologie de la radiation médicale et est devenu membre de l'Ordre des technologues en imagerie médicale, en radio-oncologie et en électrophysiologie médicale du Québec. Il a entrepris sa carrière dans ce domaine à Longueuil, au Québec, et, en 2001, a déménagé au Nouveau-Brunswick, où il a travaillé au service de l'Hôpital régional de Miramichi à titre de technologue en radiation médicale.

[6] En 2011, l'employeur de M. Power a abordé avec lui le sujet d'un appel téléphonique anonyme à l'Hôpital selon lequel il avait des antécédents judiciaires. Jusqu'à ce moment-là, ni l'Hôpital ni les ordres professionnels des technologues en radiation ne lui avaient demandé s'il avait des antécédents judiciaires. En août 2011, l'Hôpital régional de Miramichi a avisé M. Power qu'il présentait un risque à cause de ses antécédents judiciaires. Il a été suspendu en attendant une décision définitive, d'abord avec rémunération, puis sans solde.

[7] En 2010, M. Power avait commencé à se renseigner sur le processus d'obtention d'un pardon, que l'on appelle aujourd'hui la « suspension du casier judiciaire », mais n'en a pas fait la demande avant 2013, ayant alors appris qu'il en aurait besoin pour pouvoir continuer de travailler comme technologue en radiation médicale, tant au Nouveau-Brunswick qu'au Québec.

[8] Lorsque M. Power a enfin fait sa demande de pardon, le régime avait changé. Entre autres choses, les effets combinés de la *Loi limitant l'admissibilité à la réhabilitation pour des crimes graves* et de la *Loi sur la sécurité des rues et des communautés* et les dispositions transitoires qu'elles renfermaient l'avaient rendu inadmissible de façon définitive à la suspension du casier en raison de la nature des infractions dont il avait été déclaré coupable. Dans ces circonstances, il a été congédié de l'Hôpital régional de Miramichi. De plus, il est devenu inadmissible à la qualité de membre des organismes encadrant les technologues en radiation médicale tant au Nouveau-Brunswick qu'au Québec.

[9] Les dispositions transitoires des deux lois prévoyant une application rétrospective aux situations où les infractions ont été commises avant l'entrée en vigueur de ces lois ont été déclarées inconstitutionnelles (voir *Chu c. Canada (Attorney General)*, 2017 BCSC 630, [2017] B.C.J. No. 742 (QL); *P.H. c. Canada (Procureur général)*, 2020 CF 393, [2020] A.C.F. nº 396 (QL), au par. 97). En l'espèce, l'inconstitutionnalité de ces dispositions est admise dans l'exposé de la défense du procureur général.

[10] Selon la poursuite de M. Power, l'adoption et l'application des dispositions transitoires constituent un comportement qui était clairement fautif, adopté de mauvaise foi et constituant un abus de pouvoir gouvernemental. Il réclame des dommages-intérêts en vertu du par. 24(1) de la *Charte canadienne des droits et libertés*, partie I de la *Loi constitutionnelle de 1982*, constituant l'annexe B de la *Loi de 1982 sur le Canada*, 1982, ch. 11 (R.-U.) (la *Charte*). Dans son exposé des précisions, M. Power explique de la façon suivante ses allégations de mauvaise foi et d'abus de pouvoir :

> [TRADUCTION]
> 6. […] le demandeur affirme que les dispositions transitoires étaient clairement fautives, avaient été adoptées de mauvaise foi et constituaient un abus de pouvoir parce que les dispositions transitoires et l'application rétrospective de la loi violaient de toute évidence les alinéas 11*h*) et *i*) de la *Charte canadienne des droits et libertés*. En outre, les dispositions transitoires ont été imposées de mauvaise foi, avec

> l'intention d'accroître la peine de contrevenants qui avaient été condamnés avant leur adoption.
>
> 7. Le défendeur savait que l'effet des dispositions transitoires de la [*Loi sur la sécurité des rues et des communautés*] et de la [*Loi limitant l'admissibilité à la réhabilitation pour des crimes graves*] serait d'infliger, après le fait, des peines plus sévères à certaines personnes déclarées coupables, et cela constituait une violation de la *Charte canadienne des droits et libertés*. Néanmoins, ces dispositions sont entrées en vigueur et ont été appliquées au demandeur et à d'autres personnes qui avaient été déclarées coupables de crimes avant leur adoption.
>
> 8. Le demandeur soutient que le fait d'appliquer ces dispositions tout en étant conscients de leur effet inconstitutionnel à l'égard du demandeur et d'autres personnes déclarées coupables de crimes avant leur adoption constituait un abus de pouvoir.

[11] La règle 23.01(1)a) des *Règles de procédure* autorise une partie à une action de demander « que toute question de droit soulevée par une plaidoirie dans l'action en cours soit tranchée avant le procès, si la solution de cette question peut régler le litige, abréger le procès ou réduire considérablement les frais ». Le procureur général s'est fondé sur cette règle pour demander que les deux questions suivantes soient tranchées :

> [TRADUCTION]
> 1 – La Couronne peut-elle, dans l'exercice de sa fonction exécutive, être tenue de verser des dommages-intérêts pour le compte des représentants et des ministres du gouvernement qui ont préparé et rédigé un projet de loi que le législateur a adopté et qui a subséquemment été déclaré inopérant par un tribunal en application du paragraphe 52(1) de la *Loi constitutionnelle de 1982*?
>
> 2 – La Couronne peut-elle, dans l'exercice de sa fonction exécutive, être tenue de verser des dommages-intérêts du fait que le législateur a adopté un texte législatif qui a par la suite été déclaré inopérant par un tribunal en application du paragraphe 52(1) de la *Loi constitutionnelle de 1982*?

[12] À l'audition de la motion, le procureur général a soutenu que le législateur et le pouvoir exécutif du gouvernement sont à l'abri de toute responsabilité dans l'exercice d'une fonction essentiellement législative. Selon lui, la seule adoption de lois par le législateur, avec l'aide du pouvoir exécutif, ne peut donner naissance à un droit à des dommages-intérêts sur le fondement du paragraphe 24(1) de la *Charte*, vu l'immunité qui repose sur les principes de privilège parlementaire et de la division des pouvoirs entre les organes législatif, exécutif et judiciaire du gouvernement que prévoit la Constitution. Il soutient que la seule réparation que peut obtenir la personne visée par une loi déclarée plus tard inconstitutionnelle est une déclaration fondée sur le paragraphe 52(1) de la *Loi constitutionnelle de 1982* selon laquelle la loi contestée contrevient à la *Charte* et est donc inopérante.

[13] Dans une décision publiée à 2021 NBBR 107, [2021] A.N.-B. n° 172 (QL), le juge saisi de la motion a reconnu que les deux questions posées sous le régime de la règle 23 [TRADUCTION] « se marient en une seule question : l'État jouit-il de l'immunité absolue lorsqu'il adopte des lois? », autrement dit, [TRADUCTION] « l'immunité de l'État est-elle absolue en ce qui concerne sa fonction législative? » (par. 22). Au bout du compte, le juge saisi de la motion a appliqué la décision de la Cour suprême dans l'affaire *Mackin*, qui a reconnu, en général, l'immunité de la Couronne, sous réserve cependant d'un seuil élevé au-delà duquel des dommages-intérêts peuvent être accordés pour l'adoption ou l'application d'une loi subséquemment déclarée inconstitutionnelle. Le seuil est atteint lorsqu'il est démontré que le comportement de l'État était « clairement fautif, de mauvaise foi ou [un] abus de pouvoir » (*Mackin*, par. 78). En conséquence, le juge saisi de la motion a répondu affirmativement aux deux questions posées sous le régime de la règle 23, statuant ainsi qu'il n'y a pas d'immunité absolue. Il a reconnu que, bien que le critère juridique soit très exigeant, il puisse y avoir des cas où il n'est pas insurmontable.

[14] Avec le consentement des deux parties, une juge de notre Cour a accordé l'autorisation d'en appeler.

III. Questions à trancher en appel

[15] Dans son mémoire, le procureur général condense ses moyens d'appel en formulant ainsi ses allégations d'erreur : 1) le juge saisi de la motion a pris en considération de façon inadéquate et erronée les principes de la division des pouvoirs, de la souveraineté parlementaire et du privilège parlementaire; 2) le juge saisi de la motion a mal interprété et mal appliqué la jurisprudence de la Cour suprême concernant la responsabilité découlant de la *Charte*.

IV. Analyse

[16] Il est admis par tous que la norme de contrôle régissant les questions de droit est celle de la décision correcte. Nous sommes d'accord avec le juge saisi de la motion lorsqu'il dit que les deux questions posées sous le régime de la règle 23 peuvent se marier en une seule question. Nous formulons ainsi cette question : La Couronne et ses représentants jouissent-ils de l'immunité absolue lorsqu'ils exercent une fonction législative? À l'instar du juge saisi de la motion, nous trouvons la solution dans l'arrêt *Mackin* et décidons que la réponse doit être « non ».

[17] L'affaire *Mackin* est issue d'une modification apportée en 1995 à la *Loi sur la Cour provinciale*, L.R.N.-B. 1973, ch. P-21, abolissant le système de juges surnuméraires et le remplaçant par un tableau de juges à la retraite rémunérés sur une base journalière. Les juges surnuméraires en poste lors de l'entrée en vigueur de la modification devaient choisir soit de prendre leur retraite soit de recommencer à siéger à temps complet. Deux juges touchés par cette modification ont contesté la constitutionnalité de la modification, prétendant qu'elle portait atteinte aux aspects inamovibilité et sécurité financière de leur indépendance judiciaire. Ils réclamaient aussi des dommages-intérêts. En fin de compte, la Cour suprême (5-2) a jugé que la modification était inconstitutionnelle, mais a rejeté la demande de dommages-intérêts. Sur la question des dommages-intérêts, le juge Gonthier, parlant au nom de la majorité, a donné les explications suivantes :

Selon un principe général de droit public, en l'absence de comportement clairement fautif, de mauvaise foi ou d'abus de pouvoir, les tribunaux n'accorderont pas de dommages-intérêts pour le préjudice subi à cause de la simple adoption ou application d'une loi subséquemment déclarée inconstitutionnelle (*Welbridge Holdings Ltd. c. Greater Winnipeg*, [1971] R.C.S. 957; *Central Canada Potash Co. c. Gouvernement de la Saskatchewan*, [1979] 1 R.C.S. 42). Autrement dit, [TRADUCTION] « l'invalidité n'est pas le critère de la faute et ne devrait pas être le critère de la responsabilité » (K. C. Davis, *Administrative Law Treatise* (1958), vol. 3, p. 487). Ainsi, au sens juridique, tant les fonctionnaires que les institutions législatives bénéficient d'une immunité restreinte [souligné dans l'original] vis-à-vis des actions en responsabilité civile dont le fondement serait l'invalidité d'un texte législatif. Quant à la possibilité qu'une assemblée législative soit tenue responsable pour l'adoption d'une loi subséquemment déclarée inconstitutionnelle, R. Dussault et L. Borgeat confirment dans leur *Traité de droit administratif* (2e éd. 1989), t. III, p. 959, que :

> Dans notre régime parlementaire, il est impensable que le Parlement puisse être déclaré responsable civilement en raison de l'exercice de son pouvoir législatif. La loi est la source des devoirs, tant des citoyens que de l'Administration, et son inobservation, si elle est fautive et préjudiciable, peut pour quiconque faire naître une responsabilité. Il est difficilement imaginable cependant que le législateur en tant que tel soit tenu responsable du préjudice causé à quelqu'un par suite de l'adoption d'une loi. [Notes infrapaginales omises dans l'original.]

Toutefois, comme je le mentionne dans *Guimond c. Québec (Procureur général)*, [[1996] 3 R.C.S. 347, [1996] A.C.S. no 91], depuis l'adoption de la *Charte* un demandeur n'est plus limité uniquement à une action en dommages-intérêts fondée sur le droit général de la responsabilité civile. Il pourrait, en théorie, solliciter des dommages-intérêts compensatoires et punitifs à titre de réparation « convenable et juste » en vertu du par. 24(1) de la *Charte*. Or, l'immunité restreinte accordée à l'État constitue justement un moyen d'établir un équilibre entre la protection des droits constitutionnels et la nécessité d'avoir

un gouvernement efficace. Autrement dit, cette doctrine permet de déterminer si une réparation est convenable et juste dans les circonstances. Par conséquent les raisons qui sous-tendent le principe général de droit public sont également pertinentes dans le contexte de la *Charte*. Ainsi, l'État et ses représentants sont tenus d'exercer leurs pouvoirs de bonne foi et de respecter les règles de droit « établies et incontestables » qui définissent les droits constitutionnels des individus. Cependant, s'ils agissent de bonne foi et sans abuser de leur pouvoir eu égard à l'état du droit, et qu'après coup seulement leurs actes sont jugés inconstitutionnels, leur responsabilité n'est pas engagée. Autrement, l'effectivité et l'efficacité de l'action gouvernementale seraient exagérément contraintes. Les lois doivent être appliquées dans toute leur force et tout leur effet tant qu'elles ne sont pas invalidées. Ce n'est donc qu'en cas de comportement clairement fautif, de mauvaise foi ou d'abus de pouvoir que des dommages-intérêts peuvent être octroyés (*Crown Trust Co. c. The Queen in Right of Ontario* (1986), 26 D.L.R. (4th) 41 (C. div. Ont.)).

C'est sur cette toile de fond qu'il faut lire les commentaires du juge en chef Lamer dans *Schachter* [*c. Canada*, [1992] 2 R.C.S. 679, [1992] A.C.S. nº 68], p. 720, selon lesquels :

> Il y aura rarement lieu à une réparation en vertu du par. 24(1) de la *Charte* en même temps qu'une mesure prise en vertu de l'art. 52 de la *Loi constitutionnelle de 1982*. Habituellement, si une disposition est déclarée inconstitutionnelle et immédiatement annulée en vertu de l'art. 52, l'affaire est close. Il n'y aura pas lieu à une réparation rétroactive en vertu de l'art. 24. [Souligné dans l'original.]

En somme, même s'il est impossible d'affirmer que des dommages-intérêts ne peuvent jamais être obtenus à la suite d'une déclaration d'inconstitutionnalité, il est exact que, en règle générale, une action en dommages-intérêts présentée en vertu du par. 24(1) de la *Charte* ne peut être jumelée à une action en déclaration d'invalidité fondée sur l'art. 52 de la *Loi constitutionnelle de 1982*. [Nous soulignons; par. 78 à 81.]

[18] Dans l'affaire *Mackin*, la demande de dommages-intérêts a été rejetée parce que la Cour suprême n'avait trouvé « aucun élément de preuve qui puisse indiquer que le gouvernement du Nouveau-Brunswick a agi négligemment, de mauvaise foi, ou en abusant de ses pouvoirs » et parce qu'il « n'a jamais été démontré qu'il savait que l'élimination du poste de juge surnuméraire était inconstitutionnelle » (par. 82).

[19] L'arrêt *Mackin* fait autorité, et le juge saisi de la motion a eu raison de l'appliquer à l'espèce. Malgré la lourdeur du fardeau qui incombe à M. Power de prouver que l'adoption des dispositions transitoires contestées était clairement fautive, de mauvaise foi ou un abus de pouvoir, il reste qu'il n'existe aucune immunité absolue mettant la Couronne à l'abri d'une poursuite en dommages-intérêts engagée en vertu du par. 24(1) de la *Charte*.

[20] Le procureur général soutient vigoureusement qu'il ne peut y avoir de responsabilité de la Couronne à l'égard de l'adoption d'une loi qui puisse s'avérer inconstitutionnelle, vu l'immunité découlant de la division des pouvoirs, de la souveraineté parlementaire et du privilège parlementaire. Avec égards, même s'il est vrai que ces arguments n'ont pas été présentés expressément dans l'affaire *Mackin*, il reste que l'arrêt dit ce qu'il dit et, tant que la Cour suprême ne l'aura pas infirmé ou n'aura pas restreint son application, il est de notre devoir de l'appliquer.

[21] Tout le monde s'entend pour dire que la division des pouvoirs est un principe organisateur fondamental de notre Constitution. Le gouvernement est composé de trois organes qui ont des rôles distincts, et il serait inadmissible pour un des organes d'empiéter sur le rôle d'un autre. Les rôles distincts de chaque organe ont été exposés sommairement par la juge Karakatsanis dans *Ontario c. Criminal Lawyers' Association of Ontario*, 2013 CSC 43, [2013] 3 R.C.S. 3, et ses propos ont été repris par le juge Brown dans *Mikisew Cree First Nation c. Canada (Gouverneur général en conseil)*, 2018 CSC 40, [2018] 2 R.C.S. 765 :

> Le pouvoir législatif fait des choix politiques, adopte des lois et tient les cordons de la bourse de l'État, car lui seul

> peut autoriser l'affectation de fonds publics. L'exécutif met en œuvre et administre ces choix politiques et ces lois par le recours à une fonction publique compétente. Le judiciaire assure la primauté du droit en interprétant et en appliquant ces lois dans le cadre de renvois et de litiges sur lesquels il statue de manière indépendante et impartiale, et il défend les libertés fondamentales garanties par la *Charte*. [par. 118]

[22] Le procureur général soutient que le fait d'assortir le processus législatif d'une responsabilité quelconque constituerait un empiétement irrégulier du pouvoir judiciaire sur les obligations et les responsabilités du législateur. Avec égards, si tel était le cas, l'arrêt *Mackin* aurait reconnu l'immunité absolue de dommages-intérêts pour l'adoption de lois. Mais il ne l'a pas fait.

[23] Le régime reconnu dans l'arrêt *Mackin* ne fait aucune place à l'ingérence des tribunaux dans les fonctions législatives du gouvernement. Le législateur est libre de faire des choix politiques et d'adopter des lois. Il arrive parfois qu'une loi soit adoptée, puis, plus tard, déclarée inconstitutionnelle. Déclarer une loi inopérante en application de l'art. 52 de la *Loi constitutionnelle de 1982* relève incontestablement et exclusivement du pouvoir judiciaire. Personne ne prétend que pareille déclaration empiète sur le rôle du législateur. De même, il appartient exclusivement au pouvoir judiciaire de trancher sur des demandes de dommages-intérêts présentées en vertu du par. 24(1) de la *Charte*. Nous ne voyons pas comment le fait d'imposer des dommages-intérêts après le fait, s'il y a de la preuve qu'une loi inconstitutionnelle a été adoptée dans des circonstances qui sont clairement fautives, de mauvaise foi ou indicatives d'un abus de pouvoir, puisse en aucune manière empiéter sur le rôle du législateur. Tout au long du processus, l'organe législatif et ceux qui le composent sont libres de faire des choix politiques et d'adopter des lois, quoiqu'ils s'exposent à en payer le prix s'il est démontré qu'ils l'ont fait dans des circonstances qui sont clairement fautives, de mauvaise foi ou indicatives d'un abus de pouvoir.

[24] Le procureur général soutient que [TRADUCTION] « le spectre d'une responsabilité illimitée par suite de l'adoption d'une loi qui pourrait plus tard, voire

beaucoup plus tard, être déclarée inconstitutionnelle constitue une entrave sur l'activité du législateur et est insupportablement paralysant ». Selon lui, sans une immunité absolue, le législateur sera réduit à devoir pondre des projets de loi sous la contrainte d'une responsabilité future incertaine et potentiellement illimitée. Pourtant, l'immunité absolue a été écartée dans l'arrêt *Mackin* en faveur d'un seuil qui assure une protection contre un tel effet paralysant. Ce seuil impose un très lourd fardeau à la personne qui réclame des dommages-intérêts pour l'adoption de lois déclarées plus tard inconstitutionnelles. Les réclamations attaquant la bonne foi du législateur seront extrêmement rares, et celles qui seront faites feront sans doute l'objet de motions en radiation ou de motions en jugement sommaire afin qu'il soit déterminé si les allégations satisfaisant au seuil établi dans l'arrêt *Mackin* peuvent être prouvées. À cet égard, nous prenons acte des propos de la Cour suprême dans *Henry c. Colombie-Britannique (Procureur général)*, 2015 CSC 24, [2015] 2 R.C.S. 214, selon lesquels, lorsqu'est imposé un seuil de responsabilité plus élevé, comme en l'espèce, le demandeur, pour résister à une motion en radiation, doit avoir allégué des faits suffisants pour révéler une cause d'action raisonnable en précisant « des faits qui, s'ils étaient prouvés, seraient suffisants pour établir que la conduite de l'État atteint le seuil de gravité requis » (par. 43).

[25] Le procureur général soutient que, en appuyant une théorie de la responsabilité fondée sur la prétendue mauvaise foi ou le prétendu aveuglement volontaire du Parlement, le juge saisi de la motion a ouvert la porte à l'examen de l'action parlementaire, fermant ainsi les yeux sur les catégories bien établies du privilège parlementaire. Que cela soit vrai ou non n'a aucune pertinence, puisqu'il était du devoir du juge saisi de la motion, tout comme de notre Cour, d'appliquer le droit tel que formulé dans l'arrêt *Mackin*. Il faut bien se rappeler qu'il ne s'agissait pas d'une motion en radiation d'une plaidoirie ou d'une motion en jugement sommaire, mais plutôt d'une motion visant la résolution d'une question de droit, savoir si la Couronne jouit d'une immunité absolue contre toute poursuite en rapport avec l'adoption d'une loi. L'arrêt *Mackin* nous fournit la réponse : « [E]n l'absence de comportement clairement fautif, de mauvaise foi ou d'abus de pouvoir, les tribunaux n'accorderont pas de dommages-intérêts

pour le préjudice subi à cause de la simple adoption ou application d'une loi subséquemment déclarée inconstitutionnelle » (par. 78). Par conséquent, « il est impossible d'affirmer que des dommages-intérêts ne peuvent jamais être obtenus à la suite d'une déclaration d'inconstitutionnalité » (par. 81).

[26] Finalement, le procureur général soutient que le juge saisi de la motion a mal interprété l'arrêt *Mackin* et a mal appliqué la jurisprudence de la Cour suprême concernant la responsabilité découlant de la *Charte*. Selon lui, les propos de la majorité dans l'arrêt *Mackin* concernant la responsabilité découlant du par. 24(1) de la *Charte* ne sont qu'une remarque incidente et ne s'appliquent pas au législateur. Nous n'acceptons pas cet argument ni son affirmation voulant que la Cour suprême se soit contentée de soulever hypothétiquement l'idée de la responsabilité. Le passage cité ci-dessus montre clairement que la question des dommages-intérêts était une question litigieuse vitale tout au long de l'instance, y compris devant la Cour suprême. Le seuil a été précisé dans l'arrêt *Mackin* et a été appliqué. La Cour a conclu qu'il n'avait pas été atteint.

[27] En ce qui concerne la jurisprudence subséquente dans laquelle la division des pouvoirs a été soulevée comme facteur primordial ou déterminant, tels les arrêts *Doucet-Boudreau c. Nouvelle-Écosse (Ministre de l'Éducation)*, 2003 CSC 62, [2003] 3 R.C.S. 3, ou *Mikisew*, nous ne sommes pas d'accord avec le procureur général lorsqu'il dit que ces arrêts auraient dû prendre préséance sur l'arrêt *Mackin*. L'arrêt *Mackin* était congruent, tandis que ces autres arrêts ne l'étaient pas, puisqu'ils ne portaient pas sur une loi inconstitutionnelle donnant lieu à une demande de dommages-intérêts pour une conduite, dans le processus législatif, qui aurait été clairement fautive, de mauvaise foi ou un abus de pouvoir. De plus, les principes découlant de l'arrêt *Mackin* trouvent appui dans *Vancouver (Ville) c. Ward*, 2010 CSC 27, [2010] 2 R.C.S. 28, où la Cour suprême a donné des détails sur le concept des dommages-intérêts accordés en réparation en vertu du par. 24(1) de la *Charte*. Même si l'arrêt *Ward* ne concernait pas une demande de dommages-intérêts liée à l'adoption d'une loi déclarée plus tard inconstitutionnelle, la Cour suprême y mentionne l'arrêt *Mackin* et fait remarquer que « [s]uivant l'arrêt *Mackin*, l'État doit pouvoir jouir d'une certaine immunité qui écarte sa responsabilité

pour les dommages résultant de certaines fonctions qu'il est seul à pouvoir exercer », reconnaissant néanmoins que l'immunité est « restreinte » (par. 40). Si l'arrêt *Ward* explique, à bien des égards, l'arrêt *Mackin*, il ne l'infirme pas, si bien que l'arrêt *Mackin* demeure un précédent valable pour l'affirmation voulant que la « simple adoption » d'une loi subséquemment déclarée inconstitutionnelle n'est pas protégée par une immunité, s'il peut être démontré que l'adoption de la loi était clairement fautive, de mauvaise foi ou un abus de pouvoir.

[28] En somme, malgré les arguments adroits du procureur général, lesquels, n'eût été l'arrêt *Mackin*, auraient pu s'avérer prometteurs, il est de notre devoir de conclure que le juge saisi de la motion n'a pas commis d'erreur dans sa résolution des questions qui lui ont été soumises, compte tenu du droit établi par la Cour suprême dans l'arrêt *Mackin*.

V. Dispositif

[29] Pour ces motifs, l'appel est rejeté. Même s'il n'était pas représenté par avocat à l'audition de l'appel, M. Power avait fait déposer par un avocat un mémoire pour son compte. Dans ces circonstances, nous lui accordons des dépens de 1 000 $.

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF MONCTON

Joseph Power v. Attorney General of Canada
2021 NBQB 107 ***MC/358/2018***

BETWEEN: **JOSEPH POWER,**

– and –

ATTORNEY GENERAL OF CANADA

DECISION

BEFORE:	Justice Robert M. Dysart
AT:	Moncton, New Brunswick
DATES OF HEARING:	October 9th & 15th, 2020 and March 31st, 2021
DATE OF DECISION:	May 14th, 2021
APPEARANCES:	Brian Murphy, Q.C. & Christian Michaud, Q.C., for the Plaintiff/Respondent
	Jan Jensen & Ami Assignon for the Defendant/Moving party

DYSART, J.

INTRODUCTION

[1] The Plaintiff, Joseph Power, is suing the Attorney General for Canada as the legal representative of the Crown and the Parliament. He alleges that the Government of Canada enacted legislation in 2010 and 2012 which was unconstitutional, and which caused damages to him personally. He alleges that the legislation was passed in the knowledge that it was unconstitutional or in bad faith or with wilful blindness, and that he is therefore entitled to bring an action under the provisions of section 24(1) of the ***Charter***.

[2] The Attorney General for Canada ("Canada") defends the action, in part, on the basis of what it describes as an absolute immunity applicable to Parliament and the Executive branch of government when performing legislative functions. Canada argues that the Plaintiff may not at law sue for damages for the mere enactment of legislation which is later held to be unconstitutional. As stated in its Brief on Law, Canada says: "Government cannot be held liable for the exercise of Legislative powers. Law-making is not reviewable for damages."

[3] On this motion, Canada asks this Court to answer two questions of law:

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 pursuant to s. 52(1) of the ***Constitution Act, 1982***? and

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 pursuant to s. 52(1) of the ***Constitution Act, 1982***?

BACKGROUND

[4] Mr. Power was convicted of two criminal offences in the 1990s. He was sentenced to eight months imprisonment, which he served without incident. He was released from his incarceration in June 1996.

[5] Thereafter, according to the Statement of Claim, Mr. Power went on to obtain a college diploma, graduating as a Medical Radiation Technologist. He eventually settled in Miramichi, New Brunswick, working for the Horizon Health Network at the Miramichi Hospital. He was a member of the Canadian Association of Medical Radiation Technologists and the New Brunswick Association of Medical Radiation Technologists, as well as

the equivalent governing body in Quebec, where he had trained and initially worked.

[6] In 2010, Mr. Power made inquiries regarding the process by which he might receive a pardon – now referred to as a record suspension. That process is governed by the ***Criminal Records Act***, R.S.C., 1985, c. C-47. He met with a probation officer but did not complete the application process at that time.

[7] In or about 2011, Horizon Health Network received an anonymous communication advising that the Plaintiff had a criminal record. This resulted in the Plaintiff being initially suspended from his employment, as his criminal record apparently rendered him a "risk" to the Health Authority.

[8] In or about 2013, the Plaintiff submitted his application for a record suspension. This was refused. In 2010 and 2012, the Parliament of Canada enacted the ***Limiting Pardons for Serious Crimes Act***, S.C. 2010, c. 5 and the ***Safe Streets and Communities Act***, S.C. 2012, c. 1. The combined effect of those two pieces of legislation was to amend the ***Criminal Records Act*** so as to increase the period of time an offender had to wait before being eligible to apply for a record suspension and to render some offenders permanently ineligible to apply for a record

suspension. Mr. Power, due to the nature of his offences, was one of those who became permanently ineligible to apply for a record suspension.

[9] He alleges that his ineligibility to receive a record suspension resulted in his losing his employment with Horizon Health and, as well, his becoming ineligible for membership with the governing bodies for medical radiation technologists.

[10] Those legislative provisions have since been declared unconstitutional. In ***Chu v. Canada (Attorney General)***, 2017 BCSC 630 (CanLII), Justice MacNaughton of the Supreme Court of British Columbia held that they violated an offender's rights under s. 11 of the ***Charter of Rights and Freedoms***, writing:

> [294] Offenders do not have a right to be pardoned for their criminal offences. However, through enactment of the CRA, Parliament chose to provide a statutory scheme under which offenders could apply for a pardon. Parliament's rationale for doing so was to recognize that offenders can rehabilitate themselves and should have the opportunity to reintegrate into society without the stigma of a criminal record.
>
> [295] When Mr. Chu was sentenced, he knew that if he successfully rehabilitated himself, and lived crime-free in the community, he would be eligible to apply for a pardon five years after the expiry of his sentence. Part of the punishment associated with his guilty pleas was the knowledge that he would have a criminal record for a minimum of five years after his sentence expired.
>
> [296] However, after his release and while he was awaiting the end of his pardon ineligibility period, the rules changed. Mr. Chu was unable to apply for a record suspension for double the amount of time that he expected. He continues to be ineligible to apply and when he does, will have to meet the additional criteria which are more onerous than he originally expected. Similar impacts were experienced by offenders who offended prior to the Amendments and were sentenced afterwards. Other offenders are now permanently ineligible for a pardon.

> [297] Section 11 of the ***Charter*** prohibits retrospectively increasing punishment unless doing so is demonstrably justified in a free and democratic society under s. 1 of the ***Charter***.
>
> [298] In this case, the Crown has failed to demonstrate that the violation of s. 11 rights is justified under s. 1.

[11] A similar finding was made by the Federal Court in ***P.H. v. Canada (Attorney General)***, 2020 FC 393 (CanLII), where Justice Roussel wrote:

> [97] I conclude that the Transitional Provisions have the effect of increasing punishment, thus violating both sections 11(h) and 11(i) of the ***Charter***. In the absence of any evidence to justify the violation, I also conclude that these provisions cannot be saved under section 1 of the ***Charter***. Consequently, section 10 of the LPSCA and section 161 of the SSCA are declared to be constitutionally invalid and of no force or effect pursuant to subsection 52(1) of the Constitution Act, 1982.
>
> [98] Finally, to remedy P.H.'s individual situation, I will issue injunctive relief to require the Parole Board of Canada to consider his application for a record suspension in accordance with the provisions of the CRA as they read at the time he committed the offence in June 2009.

[12] There is no dispute that the legislative amendments in question breach the ***Charter***. Counsel for Canada acknowledged same in its pleadings and during arguments.

[13] The Plaintiff, Mr. Power, filed his action with this Court in May 2018. In his Statement of Claim, he alleges:

> "The Plaintiff states that the imposition of the Transitional Provisions [i.e. the above-referenced amendments] by the government were clearly wrong, taken in bad faith, and an abuse of process. As such, the Plaintiff makes a claim for compensation and remedy pursuant to section 24 of the Charter."

[14] The Plaintiff provided additional particulars of that allegation in a Statement of Particulars dated August 16, 2018, which reads in part:

> "… The Plaintiff submits that the Transitional Provisions were clearly wrong, taken in bad faith, and an abuse of power due to the fact that the Transitional Provisions and retrospective application of the law were clearly violations of Section 11(h) and (i) of the ***Canadian Charter of Rights and Freedoms***. Furthermore, the Transitional Provisions were imposed in bad faith, with the intention to add to the punishment of offenders who had been sentenced prior to the passing of the legislation.
>
> 7. The Defendant knew that the effect of the Transitional Provisions in the SSCA and the LPSCA would be to increase punishment of certain convicted persons after the fact and that this was a violation of the ***Canadian Charter of Rights and Freedoms***. Nevertheless, these provisions came into force and were imposed on the Plaintiff and other persons convicted of crimes prior to the passing of the legislation.
>
> 8. The Plaintiff submits that it was an abuse of power to impose these provisions despite being aware of their unconstitutional effect on the Plaintiff and other persons convicted of crimes prior to the passing of the legislation."

[15] In its Amended Statement of Defence, Canada maintains that the Plaintiff is not entitled to damages under s. 24(1) of the ***Charter*** based solely on the passage of legislation which is later deemed to be in breach of the ***Charter***. Canada pleads Parliamentary immunity, and further pleads:

> 20. The Defendant denies that damages are an appropriate remedy for the mere enactment of legislation that is later determined by the courts to be unconstitutional. Such liability would undermine the fundamental nature of the Canadian Constitution by ignoring Parliament's role, as a distinct, independent democratic and sovereign constitutional actor, to enact statutes that are only thereafter subject to judicial review for constitutionality.
>
> 21. The theory that liability in damages can be assessed on the basis that the enactment of legislation (as distinct from its implementation or enforcement) occurred as a result of "conduct that is clearly wrong, in bad faith, or an abuse of power" on the part of individuals, whether Crown servants, agents or employees, Ministers of the Crown or members of the Executive is also incompatible with Canada's constitutional structure.
>
> […]
>
> 23. The Crown in its executive capacity, however defined, is not responsible in law or under the Canadian Constitution for the enactment of legislation. The executive's recommendation and introduction of a Bill has no effect per se. A Bill becomes law only after the parliamentary process unfolds and it is adopted by the Senate and the House of Commons and given a royal assent by the Governor General.

> 24. Parliament is incapable of acting in a manner that can, in law, be labelled as wrong or in bad faith, or as an abuse of power. A court that condemns Parliament in such terms improperly intrudes into the functions and privileges of Parliament.
>
> 25. An award of damages predicated on such an assessment necessarily undermines good governance because it fails to respect the separation of powers. The process of legislating cannot give rise to liability and damages, because it would require courts to unacceptably scrutinize the proceedings of the Senate and House of Commons, which are protected by parliamentary privilege.
>
> 26. Immunity from liability for proceedings in Parliament is a well-recognized category of parliamentary privilege, which has constitutional status. For this reason, damages for the enactment of legislation later ruled the unconstitutional are not an appropriate remedy within the meaning of section 24(1) of the ***Charter***."

[16] Those paragraphs from the Amended Statement of Defence capture the essence of Canada's position on this motion. That being the case, though, I am compelled to comment further. The fact that these paragraphs present Canada's argument is, in my view, indicative that they do not comply with Rule 27.06(1) of our Rules of Court, which requires litigants to plead material facts. They are not to plead argument. See ***McIntosh v. Jones Heward***, 2007 NBQB 13 (CanLII), per Justice Glennie; and ***Durelle v. Elite Insurance Company***, 2019 NBQB 130 (CanLII), per Justice Walsh. That said, the Amended Statement of Defence was filed with the consent of counsel for the Plaintiff, and that issue is not directly before the Court on this motion.

POSITIONS OF THE PARTIES

The Moving Party

[17] As indicated in its pleading, Canada maintains that a party who is alleged to have been adversely affected by legislation which is subsequently found to be unconstitutional may, indeed, seek a remedy under the ***Charter*** – under s. 52(1), which reads:

> 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.

[18] Mr. Power has sought a declaration under s. 52(1) of the ***Constitution Act, 1982*** that the statutory amendments to the ***Criminal Records Act*** is a violation of the ***Charter*** and is therefore of no force or effect.

[19] Canada argues that such a declaration is the sole remedy available to Mr. Power – and given that those statutory amendments have already been held by the Courts to be unconstitutional, and given that Canada admits their unconstitutionality, that remedy is now moot.

[20] As for Mr. Power's claim for damages under s. 24(1) of the ***Charter***, Canada maintains that the Parliament of Canada and the Executive branch of government (i.e. Ministers and staff) – when performing an essentially legislative function, such as proposing and drafting legislation – are protected from liability. Canada argues that the state, in exercising its legislative functions, is subject to what it describes as "absolute immunity"

(or something approaching it) in respect of the enactment of legislation. To further clarify, Canada maintains that the mere enactment of legislation by Parliament (and with the assistance of the Executive branch) which is later deemed to be unconstitutional cannot give rise to any entitlement to damages under 2. 24(1) of the ***Charter*** because of this immunity, founded upon the principles of Parliamentary privilege and the constitutional division of powers as between the Legislative, Executive and Judicial branches of government.

[21] The gist of Canada's argument is twofold: firstly, Canada argues that the decision of the Supreme Court of Canada in ***Mackin v. New Brunswick (Minister of Finance)***, 2002 SCC 13 (CanLII), has effectively been misunderstood since its release; and secondly, as most recently pronounced by the Supreme Court in ***Mikisew Cree First Nation v. Canada (Governor General in Council)***, 2018 SCC 40 (CanLII), the judiciary has no role with respect the law-making process, even a post-enactment analysis based on a claim for damages, such as the present action.

[22] While expressed as two distinct arguments, they in fact blend together into a single question – does the state enjoy an absolute immunity in respect of the passage of legislation? In effect, is there absolute state immunity with respect to the legislative function?

ANALYSIS

[23] In its written submissions, Canada writes:

> "Properly understood, Mackin only relates to state conduct post-enactment. … The limited immunity described in Mackin pertains to state action taken under a law, valid at the time, later declared unconstitutional: Mackin does not stand for the proposition that the law-making process itself can give rise to Charter section 24 liability."

[24] ***Mackin*** involved an action brought by judges of the Provincial Court in New Brunswick who alleged that what was then Bill 7, which did away with the system of supernumerary judges, was unconstitutional as it violated judicial independence as guaranteed in s. 11(d) of the ***Charter*** and the Preamble to the ***Constitution Act, 1867***. The Supreme Court confirmed that the legislation was in breach of the ***Charter*** but concluded that, where the plaintiffs in that case were seeking both a declaratory order of unconstitutionality (under s. 52 of the ***Constitution Act, 1982***) and an award of damages (under s. 24(1) of the ***Charter***), an award of damages was not appropriate. That being said, the key words from the decision – the words which Canada says have been misunderstood or taken out of context – are as follows:

> 78 According to a general rule of public law, absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional (***Welbridge Holdings Ltd. v. Greater Winnipeg***, 1970 CanLII 1 (SCC), [1971] S.C.R. 957; ***Central Canada Potash Co. v. Government of Saskatchewan***, 1978 CanLII 21 (SCC), [1979] 1 S.C.R. 42). In other words "[i]nvalidity of governmental action, without more, clearly should not be a basis for liability for harm caused by the action" (K. C. Davis, Administrative Law Treatise (1958), vol. 3, at p. 487). In the legal sense, therefore, both public officials and legislative bodies enjoy limited immunity against actions in civil liability based on the fact that a legislative instrument is invalid. With respect to the possibility that a

> legislative assembly will be held liable for enacting a statute that is subsequently declared unconstitutional, R. Dussault and L. Borgeat confirmed in their Administrative Law: A Treatise (2nd ed. 1990), vol. 5, at p. 177, that:
>
> > In our parliamentary system of government, Parliament or a legislature of a province cannot be held liable for anything it does in exercising its legislative powers. The law is the source of duty, as much for citizens as for the Administration, and while a wrong and damaging failure to respect the law may for anyone raise a liability, it is hard to imagine that either Parliament or a legislature can as the lawmaker be held accountable for harm caused to an individual following the enactment of legislation. [Footnotes omitted.]
>
> 79 However, as I stated in ***Guimond v. Quebec (Attorney General)***, supra, since the adoption of the ***Charter***, a plaintiff is no longer restricted to an action in damages based on the general law of civil liability. In theory, a plaintiff could seek compensatory and punitive damages by way of "appropriate and just" remedy under s. 24(1) of the ***Charter***. The limited immunity given to government is specifically a means of creating a balance between the protection of constitutional rights and the need for effective government. In other words, this doctrine makes it possible to determine whether a remedy is appropriate and just in the circumstances. Consequently, the reasons that inform the general principle of public law are also relevant in a ***Charter*** context. Thus, the government and its representatives are required to exercise their powers in good faith and to respect the "established and indisputable" laws that define the constitutional rights of individuals. However, if they act in good faith and without abusing their power under prevailing law and only subsequently are their acts found to be unconstitutional, they will not be liable. Otherwise, the effectiveness and efficiency of government action would be excessively constrained. Laws must be given their full force and effect as long as they are not declared invalid. Thus it is only in the event of conduct that is clearly wrong, in bad faith or an abuse of power that damages may be awarded (***Crown Trust Co. v. The Queen in Right of Ontario (1986)***, 1986 CanLII 2725 (ON SC), 26 D.L.R. (4th) 41 (Ont. Div. Ct.)).
>
> [emphasis added]

[25] Canada argues that the Supreme Court of Canada again created uncertainty on this topic in ***Canada (Attorney General) v. Hislop***, 2007 SCC 10 (CanLII), where Justices LeBel and Rothstein wrote:

> 102 The strict declaratory approach also hardly appears reconcilable with the well-established doctrine of qualified immunity in respect of the adoption of unconstitutional statutes which our Court applied, for

> example, in cases such as ***Mackin*** and ***Guimond v. Quebec (Attorney General)***, 1996 CanLII 175 (SCC), [1996] 3 S.C.R. 347.

[26] Canada cites the Supreme Court's decision in ***Doucet-Boudreau v. Nova Scotia (Minister of Education)***, 2003 SCC 62 (CanLII) as authority for the proposition that the Court never intended to create liability upon the state for the mere enactment of legislation which, at some later date, is found to violate the ***Charter***. Rather, Canada argues that the scenario described in ***Mackin*** – where the state could attract liability – is where there something done by a government actor under or pursuant to legislation which is later held to be unconstitutional – as opposed to the actual passage of that legislation by Parliament.

[27] In ***Doucet-Boudreau***, the plaintiff parents were asking that the provincial government and the school district be ordered to provide "homogeneous French-language facilities and programs at the secondary school level." In allowing the parents' appeal, the Supreme Court held that s. 24(1) of the Charter required a purposive interpretation. The Court considered the scope of the judiciary's power to grant a remedy under s. 24(1) and considered its broad wording – the power to award "such remedy as the court considers appropriate and just in the circumstances." At paragraph 51, Justices Iacobucci and Arbour, writing for the majority, held:

> The power of the superior courts under s. 24(1) to make appropriate and just orders to remedy infringements or denials of ***Charter*** rights is part of the supreme law of Canada. It follows that this remedial power cannot be strictly limited by statutes or rules of the common law. We note, however, that statutes and common law rules may be helpful to a court choosing a remedy under s. 24(1) insofar as the statutory provisions or

> common law rules express principles that are relevant to determining what is "appropriate and just in the circumstances".

[28] Canada cites an earlier paragraph in ***Doucet-Boudreau*** to suggest that the Supreme Court retreated somewhat from its decision in ***Mackin***.

> [43] A remedy under s. 24(1) is available where there is some government action, beyond the enactment of an unconstitutional statute or provision, that infringes a person's ***Charter*** rights (see ***Schachter v. Canada***, 1992 CanLII 74 (SCC), [1992] 2 S.C.R. 679, at pp. 719-20). In the present appeal, the difficulty does not lie with the legislation: no provision or omission in the ***Education Act*** prevented the government from providing minority language education as required by the ***Constitution Act, 1982***. On the contrary, the ***Education Act***, as amended in 1996, establishes a French-language school board to provide homogeneous French-language education to children of s. 23 entitled parents. Neither is the problem rooted in any particular government action; rather, the problem was inaction on the part of the provincial government, particularly its failure to mobilize resources to provide school facilities in a timely fashion, as required by s. 23 of the ***Charter***. Section 24(1) is available to remedy this failure.

[29] Canada argues that this retreat from ***Mackin*** was continued in ***Vancouver (City) v. Ward***, 2010 SCC 27 (CanLII), where Chief Justice McLachlin wrote:

> [39] In some situations, however, the state may establish that an award of ***Charter*** damages would interfere with good governance such that damages should not be awarded unless the state conduct meets a minimum threshold of gravity. This was the situation in ***Mackin v. New Brunswick (Minister of Finance)***, 2002 SCC 13, [2002] 1 S.C.R. 405, where the claimant sought damages for state conduct pursuant to a valid statute. The Court held that the action must be struck on the ground that duly enacted laws should be enforced until declared invalid, unless the state conduct under the law was "clearly wrong, in bad faith or an abuse of power": para. 78. The rule of law would be undermined if governments were deterred from enforcing the law by the possibility of future damage awards in the event the law was, at some future date, to be declared invalid. Thus, absent threshold misconduct, an action for damages under s. 24(1) of the ***Charter*** cannot be combined with an action for invalidity based on s. 52 of the Constitution Act, 1982: ***Mackin***, at para. 81.
>
> [emphasis added]

[30] This, says Canada, serves to refine and narrow the application of ***Mackin*** to situations where a government actor – other than Parliament itself – does something pursuant to, or under legislation which at the time is valid but which is later deemed to be unconstitutional. Canada suggests that the Supreme Court clearly broadened the notion of "limited immunity" regarding the mere enactment of legislation to one of "absolute immunity" – regardless of the circumstances surrounding the passage of the legislation.

[31] According to Canada, this trend towards absolute immunity is most clearly articulated in the more recent decision of ***Mikisew Cree First Nation v. Canada (Governor General in Council)***, 2018 SCC 40 (CanLII). Taken from the headnote, the facts of that case were as follows:

> In April 2012, two pieces of omnibus legislation with significant effects on Canada's environmental protection regime were introduced into Parliament. The Mikisew Cree First Nation was not consulted on either of these omnibus bills at any stage in their development or prior to the granting of royal assent. The Mikisew brought an application for judicial review in Federal Court, arguing that the Crown had a duty to consult them on the development of the legislation, since it had the potential to adversely affect their treaty rights to hunt, trap, and fish under Treaty No. 8.

[32] The Supreme Court gave no less than four separate sets of reasons.

[33] In the first, Justice Karakatsanis (Chief Justice Wagner and Justice Gascon concurring) writes that the Federal Court lacked jurisdiction to consider the matter on an application for judicial review, but she goes on to address the question of whether there was a duty to consult. In

concluding that the law-making process of Parliament does not give rise to a duty to consult, she writes:

> [31] The respondents submit that the development of legislation by ministers is legislative action that does not trigger the duty to consult, as this would be inconsistent with parliamentary sovereignty and the separation of powers. These principles dictate that courts cannot supervise the law-making process. The respondents ground their argument on the premise that ministers act in a parliamentary capacity, not an executive capacity, when developing legislation. Furthermore, they suggest that, while the duty to consult is not triggered by legislative action, this does not leave claimants without an effective remedy. Once legislation has passed, it can be challenged under the ***Sparrow*** framework if it infringes s. 35 rights. Additionally, decisions made under the new or amended legislation may trigger the duty to consult.
>
> [32] For the reasons that follow, I conclude that the law-making process — that is, the development, passage, and enactment of legislation — does not trigger the duty to consult. The separation of powers and parliamentary sovereignty dictate that courts should forebear from intervening in the law-making process. Therefore, the duty to consult doctrine is ill-suited for legislative action.
>
> […]
>
> [34] The development of legislation by ministers is part of the law-making process, and this process is generally protected from judicial oversight. Further, this Court's jurisprudence makes clear that, if Cabinet is restrained from introducing legislation, then this effectively restrains Parliament (Canada Assistance Plan, at p. 560). This Court has emphasized the importance of safeguarding the law-making process from judicial supervision on numerous occasions. In ***Reference re Resolution to amend the Constitution, 1981*** CanLII 25 (SCC), [1981] 1 S.C.R. 753, a majority of the Court stated that "[c]ourts come into the picture when legislation is enacted and not before" (p. 785). In ***Canada Assistance Plan***, the Court underscored that "[t]he formulation and introduction of a bill are part of the legislative process with which the courts will not meddle" (p. 559).
>
> […]
>
> [36] Parliamentary sovereignty mandates that the legislature can make or unmake any law it wishes, within the confines of its constitutional authority. While the adoption of the ***Canadian Charter of Rights and Freedoms*** transformed the Canadian system of government "to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy" (***Reference re Secession of Quebec***, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217, at para. 72), democracy remains one of the unwritten principles of the Constitution (***Secession Reference***, at paras. 61-69). Recognizing that the elected legislature has specific consultation obligations may constrain it in pursuing its mandate and therefore undermine its ability to act as the voice of the electorate.

> [37] Parliamentary privilege, a related constitutional principle, also demonstrates that the law-making process is largely beyond the reach of judicial interference. It is defined as "the sum of the privileges, immunities and powers enjoyed by the Senate, the House of Commons and provincial legislative assemblies, and by each member individually, without which they could not discharge their functions" (***Vaid***, at para. 29(2)). Once a category of parliamentary privilege is established, "it is for Parliament, not the courts, to determine whether in a particular case the exercise of the privilege is necessary or appropriate" (***Vaid***, at para. 29(9) and paras. 47-48 (emphasis in original)). Canadian jurisprudence makes clear that parliamentary privilege protects control over "debates or proceedings in Parliament" (***Vaid***, at para. 29(10); J. P. J. Maingot, Parliamentary Immunity in Canada (2016), at pp. 166-71; see also ***New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)***, 1993 CanLII 153 (SCC), [1993] 1 S.C.R. 319, at p. 385; P. W. Hogg, ***Constitutional Law of Canada*** (5th ed. Supp.), at s. 1.7; Article 9 of the U.K. ***Bill of Rights of 1689***). The existence of this privilege generally prevents courts from enforcing procedural constraints on the parliamentary process.
>
> [38] Applying the duty to consult doctrine during the law-making process would lead to significant judicial incursion into the workings of the legislature, even if such a duty were only enforced post-enactment. The duty to consult jurisprudence has developed a spectrum of consultation requirements that fit in the context of administrative decision-making processes. Directly transposing such executive requirements into the legislative context would be an inappropriate constraint on legislatures' ability to control their own processes.
>
> [emphasis added]

[34] That said, Justice Karakatsanis went on to clarify that, while the state does not have a duty to consult prior to the development and enactment of legislation, the state is not beyond the reach of the Courts with respect to remedies which might be available to aggrieved parties should the state fail to conduct itself in a manner which is required of it. In her conclusion, she writes:

> [52] I add this. Even though the duty to consult does not apply to the law-making process, it does not necessarily follow that once enacted, legislation that may adversely affect s. 35 rights is consistent with the honour of the Crown. The constitutional principles — such as the separation of powers and parliamentary sovereignty — that preclude the application of the duty to consult during the legislative process do not absolve the Crown of its duty to act honourably or limit the application of s. 35. While an Aboriginal group will not be able to challenge legislation

> on the basis that the duty to consult was not fulfilled, other protections may well be recognized in future cases. Simply because the duty to consult doctrine, as it has evolved to regulate executive conduct, is inapplicable in the legislative sphere, does not mean the Crown qua sovereign is absolved of its obligation to conduct itself honourably.

[35] In a second set of reasons, Justice Abella (Justice Martin concurring) writes that, while she agrees with the result in respect of the Federal Court's jurisdiction, she disagrees with Justice Karakatsanis regarding the duty to consult. As summarized in the headnote of the decision, it is her view that:

> The honour of the Crown governs the relationship between the government of Canada and Indigenous peoples. This obligation of honour gives rise to a duty to consult that applies to all contemplated government conduct with the potential to adversely impact asserted or established Aboriginal and treaty rights, including legislative action.

[36] In a third set of reasons, Justice Brown concurs in the result – that the Federal Court lacked jurisdiction to consider the matter on judicial review. On the issue of the duty to consult, he agrees with Justice Karakatsanis that such duty does not extend to the legislative function, but he feels that she did not go far enough, writing:

> [117] I agree with the majority of the Court of Appeal that the entire law-making process — from initial policy development to and including royal assent — is an exercise of legislative power which is immune from judicial interference. As this Court explained in ***Ontario v. Criminal Lawyers' Association of Ontario***, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 28, the making of "policy choices" is a legislative function, while the implementation and administration of those choices is an executive function. This precludes judicial imposition of a duty to consult in the course of the law-making process.
>
> [118] The separation of powers protects the process of legislative policy-making by Cabinet and the preparation and introduction of bills for consideration by Parliament (and provincial legislatures) from judicial review. Again in ***Criminal Lawyers' Association***, at para. 28, this Court recognized each branch of the Canadian state as having a distinct role:
>
> > The legislative branch makes policy choices, adopts laws and holds the purse strings of government, as only it can

> authorize the spending of public funds. The executive implements and administers those policy choices and laws with the assistance of a professional public service. The judiciary maintains the rule of law, by interpreting and applying these laws through the independent and impartial adjudication of references and disputes, and protects the fundamental liberties and freedoms guaranteed under the ***Charter***.

In order for each branch to fulfill its role, it must not be "unduly interfered with by the others" (***Criminal Lawyers' Association***, at para. 29).

[emphasis added]

[37] Justice Brown went on as follows:

> [122] Imposing a duty to consult with respect to legislative policy development would also be contrary to parliamentary privilege, understood as freedom from interference with "the parliamentary work of a Member of Parliament — i.e., any of the Member's activities that have a connection with a proceeding in Parliament" (J. P. J. Maingot, Parliamentary Immunity in Canada (2016), at p. 16 (emphasis added)). This is no anachronism or technical nicety. Parliamentary privilege is "the necessary immunity that the law provides for Members of Parliament . . . in order for these legislators to do their legislative work, 'including the assembly's work in holding the government to account'" (Maingot, at p. 15, citing ***Canada (House of Commons) v. Vaid***, 2005 SCC 30, [2005] 1 S.C.R. 667, at para. 46). Since "holding the government to account" is the raison d'être of Parliament (***Maingot***, at p. 317, citing W. Gladstone, U.K. House of Commons Debates (Hansard), January 29, 1855, at p. 1202; see also ***Vaid***, at para. 46), parliamentary privilege is therefore essential to allowing Parliament to perform its constitutional functions. As this Court said in ***Re Canada Assistance Plan***, at p. 560, "[a] restraint . . . in the introduction of legislation is a fetter on the sovereignty of Parliament itself." Parliament therefore has the right to "exercise unfettered freedom in the formulation, tabling, amendment, and passage of legislation" (***Galati v. Canada (Governor General)***, 2015 FC 91, [2015] 4 F.C.R. 3, at para. 34).

[38] Justice Brown concludes his reasons as follows:

> [144] An apex court should not strive to sow uncertainty, but rather to resolve it by, wherever possible (as here), stating clear legal rules. To be clear, then: judicial review of the legislative process, including post-facto review of the process of legislative enactment, for adherence to s. 35 and for consistency with the honour of the Crown, is unconstitutional.
>
> [145] That this is so should not, however, be seen to diminish the value and wisdom of consulting Indigenous peoples prior to enacting legislation that has the potential to adversely impact the exercise of Aboriginal or treaty rights. Consultation during the legislative process, including the formulation of policy, is an important consideration in the justification analysis under s. 35 (***Sparrow***, at p. 1119; ***Tsilhqot'in***, at paras. 77-78).

> But the absence or inadequacy of consultation may be considered only once the legislation at issue has been enacted, and then, only in respect of a challenge under s. 35 to the substance or the effects of such enacted legislation (as opposed to a challenge to the legislative process leading to and including its enactment).
>
> [146] I would therefore dismiss the appeal.
>
> [emphasis added]

[39] Finally, Justice Rowe (Justices Moldaver and Côté concurring) provides the Supreme Court's fourth set of reasons. Justice Rowe effectively concurs with the reasons of Justice Brown, but seeks to add a few additional points:

> [148] I concur with the reasons of Justice Brown. In particular, I would adopt his analysis with respect to the lack of jurisdiction of the Federal Court to conduct the review under the ***Federal Courts Act***, R.S.C. 1985, c. F-7; the distinction between the Crown and the legislature; the preparation of legislation as a legislative function; the separation of powers, notably between the legislature and the judiciary; and the critical importance of maintaining parliamentary privilege.
>
> [149] To this I would add three main points. First, contrary to submissions made by the appellant Mikisew Cree First Nation, the fact that the duty to consult has not been recognized as a procedural requirement in the legislative process does not leave Aboriginal claimants without effective means to have their rights, which are protected under s. 35 of the Constitution Act, 1982, vindicated by the courts. Second, recognizing a constitutionally mandated duty to consult with Indigenous peoples during the process of preparing legislation (and other matters to go before the legislature for consideration, notably budgets) would be highly disruptive to the carrying out of that work. Finally, an additional and serious consequence to the appellant's suggested course of action would be the interventionist role that the courts would be called upon to play in order to supervise interactions between Indigenous parties and those preparing legislation (and other measures) for consideration by Parliament and by provincial legislatures.
>
> […]
>
> III. The Role of the Court
>
> [169] As surely as night follows day, if such a duty were to be imposed, disagreements would arise as to the foregoing questions and many others. How would such disagreements be resolved? Where a constitutionally mandated duty exists, affected parties would inevitably turn to the courts. Thus, courts would be drawn into a supervisory role as

> to the operation of a duty to consult in the preparation of legislation (as well as, in all likelihood, other matters, notably budgets, requiring approval by the legislature). I agree with Justice Brown's discussion on the impact of imposing a duty to consult on the separation of powers.
>
> [170] I would add the following point. If the courts were to impose a duty to consult on the preparation of legislation, would not the next logical step be for the courts to impose a duty to consult on legislatures in their consideration of legislation? In such an eventuality, one would have to situate "consultations" somewhere in the sequence of first reading, second reading, committee stage, report stage, third reading, royal assent. If a legislature chooses to participate in consultation with Indigenous peoples pursuant to Sparrow, at what stage that consultation takes place is a matter of discretion. Yet the trial judge in this case suggested just such a remedy — that affected groups would be able to make submissions in Parliament. The trial judge's order stated that the duty arose "at the time that each of the [bills] was introduced into Parliament" (2014 FC 1244, 470 F.T.R. 243, at para. 112). Such a result offends the separation of powers and would necessarily engage the courts in regulating the exercise by Parliament and legislatures of their powers and privileges. That would be a profound change in our system of government.
>
> IV. Conclusion
>
> [171] This brings me full circle, back to whether there is a "gap" in the jurisprudence that needs to be filled. As I have set out above, no such gap exists. Vindicating s. 35 rights does not require imposition of a duty to consult in the preparation of legislation. Indeed, the imposition of such a duty would be contrary to the distinction between the Crown and the legislature. It would offend the separation of powers. It would encroach on parliamentary privilege. It would involve the courts in supervising matters that they have always held back from doing. In short, imposing such a duty would not provide needed protection for s. 35 rights. Rather, it would offend foundational constitutional principles and create rather than resolve problems.
>
> [emphasis added]

[40] Canada argues that the words of Justices Karakatsanis, Brown and Rowe show a clear statement on the part of the Supreme Court of Canada that the Courts in this country have absolutely no role in respect of the operations and functions of the Legislative branch. Canada argues that, if the Courts are entitled to review the Legislative branch (either Parliament or the Executive branch when performing its legislative functions) and to

inquire as to its true intentions, i.e. whether there was bad faith in the passage of this legislation or, as suggested by the Plaintiff, a wilful blindness as to ***Charter*** compliance, this would not only violate the constitutional separation between the branches of government, it would have a "chilling" effect on Parliament and on Members of Parliament who must be free to exercise their role in an unfettered manner, beyond the gaze and reach of the judiciary.

[41] Effectively, Canada is equating the Court's interfering in the legislative process itself – that is, telling Parliament how it should go about the development, introduction, debate and passage of legislation – with reviewing the manner in which Parliament conducted its affairs post-enactment with a view to determining whether it has, indeed, acted in good faith.

[42] I am not convinced by Canada's argument.

[43] Firstly, I do not agree that ***Mackin*** has been effectively misunderstood by Courts and scholars for the past 20 years. Secondly, I do not agree that the Supreme Court in ***Mikisew Cree First Nation*** intended to create absolute immunity in favour of the state in respect of all matters deemed "legislative". And finally, the Supreme Court of Canada and the Federal Court have rendered decisions which strongly suggest that Courts indeed

can, as part of their role in determining whether (and in what form) damages are appropriate under s. 24(1) of the ***Charter***, review the work of Parliament in retrospect, i.e. post-enactment.

[44] In my view, ***Mackin*** must be given its ordinary and plain meaning. The words of that decision are clear:

> "… absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional …"

[45] The Supreme Court speaks of "limited immunity" rather than the absolute or near-absolute immunity espoused by Canada.

[46] Canada argues that, if the Courts are allowed to review the motives or "true intentions" of Parliament as an institution, or of the ruling party or individual Members of Parliament, this will inevitably have a chilling effect on the Legislative branch, fettering its role within the constitutional framework of Canada. This, argues Canada, would violate Parliamentary privilege.

[47] In my view, answering "yes" to either or both questions before the Court will not violate or displace Parliamentary privilege and the protections it affords Members of Parliament. An award of damages in this case, if an award is deemed appropriate, would not expose individual MPs to liability for anything they have said or done in the House of Commons. As stated

by the Supreme Court in ***Ward***, public law damages (including constitutional damages) lie "against the state and not against individual actors" (paragraph 22). An award of damages in this case would not personally affect any Members of Parliament or government actor.

[48] As for the alleged "chilling effect" on the Legislative branch, the Supreme Court in ***Ward*** established the analysis to be undertaken by the Court when assessing the appropriateness and form of damages which might be awarded under s. 24(1) of the ***Charter***. The Court set out that analysis in the following paragraphs:

> [55] First, an appropriate and just remedy in the circumstances of a ***Charter*** claim is one that meaningfully vindicates the rights and freedoms of the claimants. Naturally, this will take account of the nature of the right that has been violated and the situation of the claimant. A meaningful remedy must be relevant to the experience of the claimant and must address the circumstances in which the right was infringed or denied. An ineffective remedy, or one which was "smothered in procedural delays and difficulties", is not a meaningful vindication of the right and therefore not appropriate and just (see Dunedin, supra, at para. 20, McLachlin C.J. citing Mills, supra, at p. 882, per Lamer J. (as he then was)).
>
> [56] Second, an appropriate and just remedy must employ means that are legitimate within the framework of our constitutional democracy. As discussed above, a court ordering a ***Charter*** remedy must strive to respect the relationships with and separation of functions among the legislature, the executive and the judiciary. This is not to say that there is a bright line separating these functions in all cases. A remedy may be appropriate and just notwithstanding that it might touch on functions that are principally assigned to the executive. The essential point is that the courts must not, in making orders under s. 24(1), depart unduly or unnecessarily from their role of adjudicating disputes and granting remedies that address the matter of those disputes.
>
> [57] Third, an appropriate and just remedy is a judicial one which vindicates the right while invoking the function and powers of a court. It will not be appropriate for a court to leap into the kinds of decisions and functions for which its design and expertise are manifestly unsuited. The capacities and competence of courts can be inferred, in part, from the tasks with which they are normally charged and for which they have developed procedures and precedent.

> [58] Fourth, an appropriate and just remedy is one that, after ensuring that the right of the claimant is fully vindicated, is also fair to the party against whom the order is made. The remedy should not impose substantial hardships that are unrelated to securing the right.
>
> [59] Finally, it must be remembered that s. 24 is part of a constitutional scheme for the vindication of fundamental rights and freedoms enshrined in the ***Charter***. As such, s. 24, because of its broad language and the myriad of roles it may play in cases, should be allowed to evolve to meet the challenges and circumstances of those cases. That evolution may require novel and creative features when compared to traditional and historical remedial practice because tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand. In short, the judicial approach to remedies must remain flexible and responsive to the needs of a given case.

[49] With respect to the third step in the analysis, the Supreme Court held that, once the claimant has established a "basic functionality having regard to the objects of constitutional damages," the burden shifts to the state to show that another remedy – or perhaps no remedy at all – is better suited to the facts. Writing for the Court, Chief Justice McLachlin stated:

> [38] Another consideration that may negate the appropriateness of s. 24(1) damages is concern for effective governance. Good governance concerns may take different forms. At one extreme, it may be argued that any award of s. 24(1) damages will always have a chilling effect on government conduct, and hence will impact negatively on good governance. The logical conclusion of this argument is that s. 24(1) damages would never be appropriate. Clearly, this is not what the Constitution intends. Moreover, insofar as s. 24(1) damages deter Charter breaches, they promote good governance. Compliance with Charter standards is a foundational principle of good governance.
>
> [39] In some situations, however, the state may establish that an award of ***Charter*** damages would interfere with good governance such that damages should not be awarded unless the state conduct meets a minimum threshold of gravity. This was the situation in ***Mackin v. New Brunswick (Minister of Finance)***, 2002 SCC 13, [2002] 1 S.C.R. 405, where the claimant sought damages for state conduct pursuant to a valid statute. The Court held that the action must be struck on the ground that duly enacted laws should be enforced until declared invalid, unless the state conduct under the law was "clearly wrong, in bad faith or an abuse of power": para. 78. The rule of law would be undermined if governments were deterred from enforcing the law by the possibility of future damage awards in the event the law was, at some future date, to be declared invalid. Thus, absent threshold misconduct, an action for damages under s. 24(1) of the ***Charter*** cannot be combined with an action for invalidity based on s. 52 of the Constitution Act, 1982: ***Mackin***, at para. 81.

> [40] The ***Mackin*** principle recognizes that the state must be afforded some immunity from liability in damages resulting from the conduct of certain functions that only the state can perform. Legislative and policy-making functions are one such area of state activity. The immunity is justified because the law does not wish to chill the exercise of policy-making discretion.
>
> [emphasis added]

[50] In ***Ward***, the Supreme Court reiterates that the immunity afforded the state is limited ("some") and not absolute. Further, concerns over the "chilling effect" described by Canada can be addressed during the third stage in the analysis outlined above. In that context, and given the broad powers granted to Courts to fashion an appropriate remedy in the circumstances, I am not in agreement with Canada that the effect of a single line in a single paragraph of ***Doucet-Boudreau*** demonstrates an intention on the part of the Supreme Court to create "absolute immunity."

[51] In ***Doucet-Boudreau***, the Court held that the mere enactment of legislation which is later found to be unconstitutional will generally not give rise to a claim in damages under s. 24(1) of the ***Charter***. I agree. And so too, I believe, does the Plaintiff, Mr. Power. As I understand his claim, the action is based not on the fact that the legislation in question was passed and later found to be unconstitutional; rather, the claim is founded on the allegation that its passing was "clearly wrong, in bad faith or an abuse of power." That is the distinction between the "limited immunity" referenced by the Supreme Court in ***Mackin*** and the absolute immunity suggested by

Canada. ***Doucet-Boudreau*** does not alter the limited immunity described in ***Mackin***, as it requires something more – some government action beyond the mere enactment. According to the Plaintiff's lawsuit, that government action is the passage of the legislation which the government knew was not ***Charter***-compliant, i.e. it was passed in bad faith or with wilful blindness. That added threshold which the Plaintiff must meet in order to recover will inevitably restrict the awarding of damages to a limited number of cases.

[52] If the Supreme Court in ***Doucet-Boudreau*** or ***Ward*** had intended to retreat from its decision in ***Mackin***, it could have done so (and arguably should have done so) expressly. It has not, in my view. The Supreme Court's wording in ***Mackin*** is clear: the state enjoys a limited immunity from liability in respect of the enactment of legislation, such that the mere introduction and passage of unconstitutional legislation will not give rise to a claim. However, there may be liability where the aggrieved party can show that the state knew that such legislation was plainly wrong or that it was enacted as a result of bad faith or an abuse of power. Hence a limited immunity.

[53] Further, I am not convinced that the ***Mikisew Cree First Nation*** decision represents a shift in the Supreme Court's position with respect to the

ability of superior courts in Canada to award damages against the state where appropriate.

[54] Recall that in ***Mikisew Cree First Nation***, the applicant sought an order requiring the Crown to enter into pre-legislative consultations, which the Supreme Court held was beyond the reach of the courts. In the present case, though, and in the vast majority of cases involving claims under s. 24(1), the Court is being asked to determine whether and in what form damages are appropriate for a violation of someone's ***Charter*** rights. In the present action, the Court is not being asked to require the federal government, either the Parliament or the Executive branch, to do something or to refrain from doing something within the four walls of the Legislative function. This case is not about interfering in the machinery of law-making. Rather, it is about deciding whether, in carrying out its functions, Parliament conducted itself in a manner which might expose the state to the very limited forms of liability available in respect of the mere enactment of legislation.

[55] I am aware that the distinction between what the Plaintiff seeks in this case and what the Supreme Court counselled against in ***Mikisew Cree First Nation*** might appear narrow. But there is a distinction which is, in my view, clear. This Court is being asked to determine whether Parliament (and perhaps the Executive in its legislative function) acted

badly and whether damages should follow. If the conclusion is that Parliament acted in bad faith or in a reckless manner (a significant hurdle which the Plaintiff will have to overcome), the Court is making that determination post-enactment. There is a difference between, on the one hand, dictating to Parliament how it must conduct its business, and, on the other hand, deciding whether the state, because of how Parliament conducted its business, should be liable for damages as a result of ***Charter*** breaches.

[56] Further, I am not satisfied that the Supreme Court of Canada was signaling a significant shift towards absolute immunity in ***Mikisew Cree First Nation*** given its more recent decision in ***Conseil scolaire francophone de la Colombie-Britannique v. British Columbia***, 2020 SCC 13 (CanLII). In that case, the applicant filed a notice of civil claim against the province, arguing that the funding of the education system penalized the official language minority and infringed its rights under s. 23 of the ***Charter***. Writing for the majority, Chief Justice Wagner considered the breadth of the government's limited immunity.

> [164] Governments have a limited immunity from damages awards in relation to infringements of the ***Charter***. This immunity does not apply in the case of conduct that is "clearly wrong, in bad faith or an abuse of power" (***Ward***, at para. 39, quoting ***Mackin***, at para 78). In the instant case, no one claims that the Province acted in bad faith. The issue is instead whether the immunity applies to decisions made in accordance with government policies.
>
> [165] The limited immunity governments have can be raised when there are countervailing considerations against the payment of damages. Such considerations include, in particular, the existence of alternative remedies and concerns for good governance (***Ward***, at para. 33). The case at bar requires the Court to determine whether this limited immunity

> applies where an infringement results from a decision made in accordance with a government policy.
>
> […]
>
> [168] This Court made it clear that there will be situations in which good governance concerns justify requiring that a minimum threshold of gravity be crossed before damages are awarded (***Ward***, at para. 39). One such situation had arisen in ***Mackin***, in which a claimant sought damages for a government's acts pursuant to a law that had been duly enacted but was subsequently found to violate the ***Charter***. In that context, the Court concluded that the possibility of a damages award could have a chilling effect on the work of those who make laws and those who enforce them, owing to a fear of being held liable. Such an outcome would be unacceptable, because the legislature and those who enforce laws must be able to perform their functions without fear of reprisals. This means that there must be a minimum threshold of gravity and that, absent conduct that is "clearly wrong, in bad faith or an abuse of power", damages may not be awarded under s. 24(1) for acts carried out pursuant to a law that is subsequently declared to be invalid and of no force or effect under s. 52(1) of the ***Constitution Act, 1982*** (***Ward***, at para. 39, quoting ***Mackin***, at para. 78).
>
> [emphasis added]

[57] If anything, the decision in ***Conseil scolaire francophone de la Colombie-Britannique*** suggests that the principle of limited immunity described in ***Mackin*** is alive and well.

[58] As referenced above, there is also reason to doubt the correctness of Canada's position due to more recent caselaw from the Federal Court of Appeal. At the hearing of this case, the Court referenced ***Canada (Attorney General) v. Whaling***, 2018 FCA 38 (CanLII), which related to an appeal of a decision by the Federal Court reported at 2017 FC 121 (CanLII). Neither Canada nor Mr. Power raised that case with the Court, which is somewhat surprising given that it is clearly on-point and involves the same defendant.

[59] The decision under appeal from the Federal Court was written by Justice Barnes. His opening paragraphs give a good synopsis of the issues in that case.

> [1] The Defendant, the Attorney General of Canada, brings two motions to strike the Statements of Claim filed in the two proceedings styled above. These reasons are intended to apply to both motions and will accordingly be filed in T-456-16 and T-455-16.
>
> [2] The Plaintiffs in these two proceedings, Christopher John Whaling and William Wei Lin Liang, brought their respective claims in the form of proposed class actions. Each Statement of Claim asserts a cause of action alleging a breach of section 11 of the ***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 [***Charter***] and seeking damages pursuant to section 24(1) of the ***Charter***. The proposed classes of claimants are those federal inmates whose rights to accelerated parole review were removed by the retrospective application of the Abolition of Early Parole Act, SC 2011, c 11. It is common ground that the attempt by Parliament to apply this legislative change retrospectively was ultimately held to be unconstitutional because, in Mr. Whaling's case, it violated the section 11(h) ***Charter*** rights of three already sentenced inmates not to be punished again for the same offence. In other words, the retrospective application of the law represented a prohibited form of double jeopardy: see ***Canada (Attorney General) v Whaling***, 2014 SCC 20, [2014] 1 SCR 392 [Whaling]. In the case of Mr. Liang, the ***Charter*** violation was found to arise under section 11(i) which extends to a guilty person the benefit of lesser punishment in the face of a legislative change occurring between the dates of the commission of the offence and sentencing: see ***Liang v Canada (Attorney General)***, 2014 BCCA 190, 355 BCAC 238 [Liang].
>
> [3] Notwithstanding the prior determination of these ***Charter*** breaches, the Defendant moves to strike these actions under Rule 221(1)(a) of the Federal Courts Rules, SOR/98-106, on the basis that the Statements of Claim disclose no reasonable cause of action. In particular, the Defendant says that the asserted claims cannot succeed in the face of Parliamentary (or legislative) immunity for the consequences flowing from the passage of unconstitutional legislation. The present pleadings, it is argued, are insufficient to overcome this significant legal obstacle. The Defendant also asserts that these actions are statute barred and should be struck based on estoppel and abuse of process principles.

[60] Justice Barnes considered ***Mackin***, ***Ward*** and the Supreme Court's decision in ***Ernst v Alberta***, 2017 SCC 1. With respect to ***Mackin***, he wrote:

> [15] I accept the Plaintiffs' point that no bright-line test for grounding liability in cases like this emerges from the decision in ***Mackin***, above. What does emerge from the majority judgment are some general impressions coupled with considerable uncertainty about where the boundaries of the limited immunity for legislative action begin and end. At various places in the judgment the Court indicates that legislative immunity for ***Charter*** damages may not be available for the exercise of governmental action that is "clearly wrong," "in bad faith," "an abuse of power," "negligent," brought with an "unreasonable attitude" or for "ulterior motives," or "with knowledge of … unconstitutionality," or that fails to "respect the 'established and indisputable' laws that define the constitutional rights of individuals." Whether the test is subjective, objective or something in between is left unanswered.

[61] Ultimately, while Justice Barnes poses a number of rhetorical questions regarding the availability of damages for the mere enactment of legislation and the evidentiary difficulties inherent with attempting to prove the "institutional motivations or knowledge of Parliament when it passes legislation," his decision turned on a more technical question with respect to proper pleadings, i.e. the need to plead material facts. In that case, there was no pleading of material facts by the plaintiffs which could underpin a bare allegation of "bad faith," or "recklessness" or "abuse of power" by the state. As a result, Justice Barnes dismissed the action but allowed the plaintiffs an opportunity to re-file, writing:

> [26] As discussed above, the Statements of Claim as presently constituted fail to meet the legal requirements set out in ***Henry***, above, and, on that basis, they are struck out in their entirety.
>
> [27] What remains for determination is whether the Court should permit the Plaintiffs to amend their pleadings and to propose a fresh theory of liability that might be viable. The test for granting leave to amend is whether the defect in the pleading is potentially curable: see ***Simon v Canada***, 2011 FCA 6 at para 8, [2011] FCJ No 32 (QL).
>
> [28] Notwithstanding the fatal flaws in the present Statements of Claim, I am mindful of the admonition in ***Henry***, above, that the boundaries for accessing ***Charter*** damages, particularly in cases like this one, are in the early stages of judicial development and should not be unduly stifled:

> [35] ***Charter*** damages are a powerful tool that can provide a meaningful response to rights violations. They also represent an evolving area of the law that must be allowed to "develop incrementally": ***Ward***, at para. 21. When defining the circumstances in which a ***Charter*** damages award would be appropriate and just, courts must therefore be careful not to stifle the emergence and development of this important remedy.

Also see ***Ward***, above, at paragraph 18, cautioning against unduly constraining the broad discretion afforded by section 24(1), and ***Canada v Hislop***, 2007 SCC 10, [2007] 1 SCR 429, at paragraph 103, referring to the need to allow for the evolution of the relevant jurisprudence.

> [29] Given the uncertain boundaries that surround legislative immunity as discussed in ***Mackin***, above, and ***Henry***, above, I am not, at this point, able to say with confidence that no arguably viable claim to ***Charter*** damages could ever be pleaded in the circumstances of this case. For that reason, the Statements of Claim are struck but with leave to refile.

[62] Canada appealed that decision to the Federal Court of Appeal, arguing that no amendment to the pleading would disclose a reasonable cause of action. Writing for the Court of Appeal, Justice Pelletier disagreed with Canada:

> [6] The Federal Court agreed that the facts pleaded did not disclose recklessness, bad faith or abuse of power such as to ground a claim for relief under subsection 24(1) of the ***Charter***: Reasons at para. 12. <u>To be clear, the Federal Court did not rule that the cause of action advanced by the plaintiffs was not known to law; it ruled that the pleading of the facts was defective, and so the proceedings should be struck</u>. However, the Court declined to exercise its discretion with respect to the Attorney General's arguments as to cause of action estoppel or abuse of process because it was of the view that doing so would result in unfairness to potential class members, should the claims be certified as class proceedings. The Court did not accept the Attorney General's contention that the applicable limitation period had expired. It found that the applicable limitation period is six years as set out in subsection 39(2) of the ***Federal Courts Act***, R.S.C. 1985, c. F-7 because the cause of action arose otherwise than in a province. In the end, the Federal Court struck out the claims in their entirety but gave the plaintiffs leave to amend.
>
> [7] In this Court, the Attorney General argues that the Federal Court erred in granting leave to amend. […]
>
> [emphasis added]

[63] Ultimately, Justice Pelletier dismissed Canada's appeal. He held that it was not "plain and obvious" that the claim would be unsuccessful.

> [10] The first two arguments made by the Attorney General, justiciability and legislative immunity, refer to two distinct legal doctrines which on the facts of this case are intertwined. Justiciability refers to the judiciary's reluctance to engage with questions which are not appropriate for adjudication. In ***Reference re Canada Assistance Plan***, 1991 CanLII 74 (SCC), [1991] 2 S.C.R. 525 at page 546, 83 D.L.R. (4th) 297, the Supreme Court of Canada held that "a question which possesses a sufficient legal component to warrant a decision by a court" is, to that extent, justiciable.
>
> [11] As for legislative immunity, in ***Mackin v. New Brunswick (Minister of Finance)***, 2002 SCC 13 at paragraphs 78 to 82, 209 D.L.R. (4th) 564 (***Mackin***), the Supreme Court held that "absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional […] [emphasis added]". The general rule that the enactment of unconstitutional legislation is not actionable does not apply where the plaintiff can show "conduct that is clearly wrong, in bad faith or an abuse of power."
>
> [12] In deciding whether the plaintiff's statement of claim should be struck, the test is whether it is "plain and obvious" that the plaintiff's claim will fail: ***Hunt v Carey Canada Inc***, 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959 at page 980, 74 D.L.R. (4th) 321. Taking ***Mackin*** at face value, it is not plain and obvious that the doctrine of legislative immunity is an absolute bar to the plaintiff's action. Further, a question as to whether Charter damages will be awarded because of "conduct that is clearly wrong, in bad faith or an abuse of power" in the enactment of a law subsequently found to be unconstitutional "possesses a sufficient legal component" to be justiciable. These arguments fail.
>
> [emphasis added]

[64] The ***Whaling*** case returned to the Federal Court last year. In a decision reported at 2020 FC 1074 (CanLII), Justice Barnes considered a series of questions of law which the parties asked to be determined prior to trial.

> [6] The Plaintiffs propose four common questions of fact and law – the answers to which, they say, are necessary to resolve the liability issues between the parties. They are the following:

> (1) Did the AEPA breach the s. 11(h) ***Charter*** rights of the class members?
>
> (2) If so, was the s. 11(h) breach justified under s. 1 of the ***Charter***?
>
> (3) If the s. 11(h) breach was not justified under s. 1 of the ***Charter***, are damages pursuant to s. 24(1) a just and appropriate remedy for:
>
> i. Category One subclass members?
>
> ii. Category Two subclass members?
>
> (4) Is the claim statute-barred under section 39(1) of the ***Federal Courts Act*** and does section 39(2) apply?
>
> [7] The Defendant does not take issue with these questions and, indeed, they generally conform to the four-part framework described in ***Vancouver v Ward***, 2010 SCC 27, [2010] SCR 28 [***Ward***] for establishing a claim to damages under s 24(1) of the ***Charter***. The Defendant does, however, assert that a fifth "critical" question is required, the answer to which could be dispositive. That question is the following:
>
> a. On the facts of this case, can the Crown, in its executive capacity, be held liable for government officials and Ministers implementing s. 10(1) of the AEPA, a legislative provision which was subsequently declared invalid by a court pursuant to s. 52(1) of the Constitution Act, 1982?

[65] That last question is similar to, but not identical to the questions before the Court on this motion. But the rationale for asking that the question be determined is nearly identical to the position advanced by Canada in the present matter – the suggestion that the state enjoys immunity in respect of the passage of legislation. Justice Barnes went on:

> [11] It seems to me that if there is one issue of law in this area that amounts to settled doctrine it is that the state, in whatever capacity or capacities it acts, does not enjoy an absolute immunity from the payment of ***Charter*** damages when it causes injury to a person's ***Charter***-protected rights by implementing unconstitutional legislation. While the legal threshold may be high, it is decidedly not insurmountable. This point is made quite clearly in ***Ward*** at paras 39-40 where the Court recognized the possibility of an award of ***Charter*** damages arising from state conduct that is "clearly wrong, in bad faith or an abuse of power" (ie. threshold misconduct): […]

> [12] Of course, if the Plaintiffs are able to establish a functional justification for an award of damages, it will be open to the Defendant to raise its own case to show why damages are not an appropriate or just remedy for reasons of public policy, good governance and separation of powers. It is not open, however, to the Defendant to recast the Plaintiffs' legal theory of their cases into something much narrower. As noted above, answering the Defendant's question will not be dispositive of the larger case the Plaintiffs already assert in the form of the broader common questions the parties have put forward by agreement. What the Defendant appears to be advancing indirectly is a motion to strike these actions on the basis that they do not disclose a legally tenable cause of action. The Court has already dismissed two previous defence motions to strike based on a finding that the state of the law in these factual contexts is uncertain and evolving. The current situation is no better than it was when those motions were dismissed. These remain issues for trial that can and should be answered on a full evidentiary record in response to the agreed common questions. The need for an evidentiary record in the determination of ***Charter*** damages in cases like these was clearly recognized in ***Doucet-Boudreau v Nova Scotia (Minister of Education)***, 2003 SCC 62 at paras 55-59, [2003] 3 SCR 3 […]
>
> [emphasis added]

[66] Before Justice Barnes, Canada then proposed to amend the question and to ask two questions in its place:

> [18] The Defendant proposes the following alternatives:
>
> > a) 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 pursuant to s 52(1) of the ***Constitution Act, 1982***?
> >
> > b) 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 pursuant to s 52(1) of the ***Constitution Act, 1982***?

[67] Those two questions will look familiar – they are identical to the two questions to be determined in this case. It is hardly a coincidence that the same defendant asks the same questions.

[68] Justice Barnes concluded that he was not capable of answering the two questions in a factual vacuum. He concluded that answering the questions without a proper evidentiary context would not determine the state's potential liability because the question of whether damages are an appropriate remedy will necessarily depend on the particular circumstances of the case, i.e. the facts.

[69] While I share Justice Barnes' conclusion that the determination of cases involving an alleged breach of the ***Charter*** should always have an evidentiary framework, I disagree that the Court cannot answer these two questions as pure questions of law, unchained to the particular facts of this case.

[70] Canada asks this Court to effectively dismiss the Plaintiff's action by closing the door to state liability. That is, if the answer to the two questions is "No," the Plaintiff's action (as currently framed) will inevitably fail. On the other hand, if the answer is "Yes," the action may continue – not because the Plaintiff has proven that he is entitled to damages under s. 24(1) of the ***Charter***, but because such damages are not precluded at law. Whether Mr. Power will ultimately succeed in his lawsuit is far from clear. He will have to marshal the necessary evidence to meet the very high burden upon him. That will not be easy. But as stated by Justice

Barnes, “While the legal threshold may be high, it is decidedly not insurmountable.”

[71] The fact that it is not insurmountable, in my view, means that the answer to both questions must be “Yes.” The state can, at law (though only in limited circumstances), be held liable for damages under s. 24(1) of the ***Charter*** for the enactment of legislation which is later held to be unconstitutional. The key word is “can.” Not “is” or “shall be.”

DISPOSITION

[72] The Defendant asks the following legal questions:

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 pursuant to s. 52(1) of the ***Constitution Act, 1982***? and

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 pursuant to s. 52(1) of the ***Constitution Act, 1982***?

[73] For the reasons set out herein, the answer to both questions is “Yes.”

[74] The Plaintiff, Mr. Power, shall be entitled to costs on this motion in the sum of $2,500, inclusive of all allowable disbursements and taxes.

DATED at Moncton, New Brunswick this 14th day of May, 2021.

_____

Robert M. Dysart,
Judge of the Court of Queen's Bench
of New Brunswick

FILE NUMBER: _____

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

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant
(Appellant in Appeal)

and

JOSEPH POWER

Respondent
(Respondent in Appeal)

MEMORANDUM OF ARGUMENT
ON BEHALF OF THE APPLICANT, THE ATTORNEY GENERAL OF CANADA
(pursuant to paragraph 58(1)(a) of *Supreme Court Act* and
Rule 25(1) of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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APPLICANT'S MEMORANDUM OF ARGUMENT

PART I – STATEMENT OF FACTS

A. Overview

1. This case raises issues of public importance about the availability of s. 24(1) *Charter* damages for allegedly faulty behaviour in the drafting and enactment of legislation subsequently declared unconstitutional. The New Brunswick Court of Appeal erroneously concluded that *Charter* damages may be awarded if it can be demonstrated that in deciding to legislate in a particular way, Parliament or those engaged in the process of enacting legislation performed their role in a manner that was clearly wrong, in bad faith or an abuse of power. Adopting this approach subjects the law-making process to impermissible judicial scrutiny. Assigning fault to the legislature fails to respect constitutional principles, including the separation of powers, parliamentary sovereignty and parliamentary privilege.

2. These foundational constitutional principles were key to deciding against a similar potential intrusion into the legislative sphere in 2018 in *Mikisew Cree First Nation v. Canada (Governor General in Council).*[1] In that decision, and as recently as the 2022 decision of *R. v. Sullivan*,[2] this Court has re-affirmed that constitutional remedies must be determined in light of other relevant constitutional principles. But the Court of Appeal erroneously excluded the analysis and ruled that it was bound by *Mackin v. New Brunswick (Minister of Finance)*,[3] a decision now twenty years old. Given that decision's brief comments on *Charter* damages and how its ratio has since been characterized by this Court, *Mackin* cannot be read as permitting the Respondent's theory of *Charter* s. 24 liability.

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[1] *Mikisew Cree First Nation v. Canada (Governor General in Council),* 2018 SCC 40 (hereafter "*Mikisew Cree*").
[2] *R. v. Sullivan*, 2022 SCC 19 (hereafter "*Sullivan*").
[3] *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13 (hereafter "*Mackin*").

3. The Court of Appeal's decision also erodes parliamentary privileges including the freedom of expression of Parliamentarians and Parliament's control over its debates and proceedings, by its invitation to litigate alleged wrongful motives or bad faith. This is a sharp and novel departure from principles of the common law and it would create significant, unpredictable liability on a hindsight analysis of legislative "bad conduct."

4. Maintaining the proper constitutional relationship between the legislative, executive and judicial branches of government is of fundamental importance. These issues are live not only in this action for damages, but across the country in the Federal Court class action *Whaling v. Canada*,[4] where damages are sought for legislation later declared unconstitutional, and in *Sarrazin c. Canada (Procureur general)*, a class action which includes a theory of alleged bad faith in legislating.[5] The problems posed by the Court of Appeal's decision will recur until resolved.

B. Statement of Facts

5. The Respondent was denied a criminal record suspension, previously known as a pardon, in 2013.[6] His ineligibility resulted upon the enactment of section 10 of the *Limiting Pardons for Serious Crimes Act*,[7] and section 161 of the *Safe Streets and Communities Act*,[8] referred to herein as the "Transitional Provisions." By virtue of his offences, the Respondent's prior eligibility was eliminated retrospectively, by operation of law.

[4] *Whaling v Canada*, 2020 FC 1074; see particularly *Canada v. Whaling*, 2022 FCA 37 at para 34.
[5] *Procureure générale du Canada c. Sarrazin*, 2018 QCCA 1077, at paras 12, 15.
[6] Statement of Claim, at paras 24, 25. [Tab 6, Exhibit A, page 103]
[7] *Limiting Pardons for Serious Crimes Act*, S.C. 2010 C-5, s. 10.
[8] *Safe Streets and Communities Act*, S.C. 2012, C-1, s. 161. Statement of Claim, at paras 22, 24. [Tab 6, Exhibit A, page 102, 103]

6. In May 2018, five years after the record suspension denial, the Respondent filed an action against the Applicant (hereafter the Attorney General of Canada "AGC") in the New Brunswick Court of Queen's Bench ("NBQB"). The action sought both a declaration of invalidity[9] of the Transitional Provisions pursuant to section 52(1) of the *Constitution Act, 1982*[10] and damages[11] pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms*[12] for unconstitutional legislation.

7. In its Amended Statement of Defence, the AGC conceded that the Transitional Provisions are unconstitutional for infringing the *Charter*.[13] The Transitional Provisions had already been declared unconstitutional and of no force and effect for infringing section 11 of the *Charter* pursuant to section 52(1) of the *Constitution Act, 1982* in 2017 in *Chu v. Canada (Attorney General).*[14] In 2020, they were also so declared by the Federal Court in *P.H. v. the Attorney General of Canada*.[15]

8. The Respondent alleged that the AGC's liability for *Charter* damages arises due to "the imposition of the Transitional Provisions by the government."[16] The claim alleged that the enactment of the legislation was "clearly wrong, taken in bad faith, and an abuse of power," further alleging that the AGC knew at the time of a lack of *Charter*-compliance and the legislation's "unconstitutional effect."[17]

[9] Statement of Claim, at para 35. [Tab 6, Exhibit A, page 104]
[10] *Constitution Act, 1982,* s. 52(1), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[11] Statement of Claim, at paras 34, 35. [Tab 6, Exhibit A, page 104]
[12] *Canadian Charter of Rights and Freedoms,* s. 24(1) being Part 1 of the *Constitution Act, 1982* (the "*Charter*").
[13] Amended Statement of Defence, at paras 16, 34. [Tab 6, Exhibit E, page 123, 126]
[14] *Chu v. Canada (Attorney General),* 2017 BCSC 630.
[15] *P.H. v. the Attorney General of Canada,* 2020 FC 393, at para 97.
[16] Statement of Claim, at para 34. [Tab 6, Exhibit A, page 104]
[17] Statement of Particulars, at paras 6-8. [Tab 6, Exhibit C, page 110]

9. In the Amended Statement of Defence, the AGC pled that there is no Crown liability for the enactment of legislation that is later found to be unconstitutional.[18] Accordingly, the AGC brought a motion for answers to two questions of law (the "Questions"):

> *Question 1:* Can the Crown, in its executive capacity, be held liable in damages for governmental officials and Ministers preparing and drafting a proposed Bill that was later enacted by Parliament, and subsequently declared invalid by a court pursuant to s. 52(1) of the *Constitution Act, 1982*?
>
> *Question 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 pursuant to s. 52(1) of the *Constitution Act,* 1982?

10. The AGC argued that the Questions must be answered "No." On May 14, 2021, the Motion Judge in the New Brunswick Court of Queens' Bench ("NBQB") answered "Yes" to both questions.[19] The NBQB relied heavily on remarks in *Mackin* that it would be notionally possible for a court to come to the conclusion that legislators, in drafting or enacting an unconstitutional law, acted in a manner that was "clearly wrong, in bad faith, or an abuse of power."[20]

11. In answering the Questions in the affirmative, the NBQB endorsed the Respondent's theory that the courts can award *Charter* damages under s. 24(1) if legislative actors passed legislation with the knowledge that it was unconstitutional, or did so in bad faith or with willful blindness to the unconstitutionality of the impugned legislation.[21]

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[18] Amended Statement of Defence, at para 20. [Tab 6, Exhibit E, page 123]
[19] *Joseph Power v. Attorney General of Canada,* 2021 NBQB 107 (hereafter "*Power (NBQB)*").
[20] *Ibid*, at paras 24, 44.
[21] *Ibid*, at para 1.

12. The AGC appealed to the New Brunswick Court of Appeal on the grounds that the Motion Judge failed to give adequate consideration to the principles of the separation of powers, parliamentary sovereignty, and parliamentary privilege; and that the Motion Judge misinterpreted and misapplied this Court's jurisprudence concerning liability under the *Charter*.[22] On April 21, 2022, the Court of Appeal dismissed the appeal and affirmed the NBQB's decision (the "Decision").[23]

13. The Court of Appeal compressed the Questions of law into one: "do the Crown and its officials enjoy absolute immunity when exercising a legislative function?"[24] The Court of Appeal noted that the separation of powers was central in *Mikisew Cree*, but found that since that decision was not directly on point regarding *Charter* damages it should not be preferred over *Mackin*.[25] The Court of Appeal reasoned that although this Court in *Mackin* had not dealt with the constitutional principles at play, that decision was nevertheless on point and determinative of the Questions put to the Court of Appeal[26] "until the Supreme Court overrules [*Mackin*] or limits its application."[27]

14. The Court of Appeal concluded that the scheme recognized in *Mackin* does not interfere with the legislative function of government. It reasoned that the legislative branch remained free to make policy choices and adopt laws. But it would have to pay the price if unconstitutional legislation was determined, afterward, to have been enacted in circumstances that were clearly wrong, in bad faith or an abuse of power.[28]

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[22] *Attorney General of Canada v. Joseph Power*, 2022 NBCA 14 (hereafter the "Decision"), at para 15.
[23] *Ibid*.
[24] *Ibid*, at para 16.
[25] *Ibid*, at paras 21, 27.
[26] *Ibid*, at paras 20, 28.
[27] *Ibid*, at para 20.
[28] *Ibid*, at para 23.

15. The Court of Appeal held that this Court rejected absolute immunity for the enactment of legislation in favour of a threshold that guards against any chilling effect on the legislative branch in its core role of legislating. The Court of Appeal described that threshold as placing a very heavy burden of proof on rare claims for damages for the enactment of legislation later found to be unconstitutional.[29]

16. The Court of Appeal found that *Mackin* was a complete answer to the Questions and concluded that the Crown immunity for the enactment of a law that is subsequently declared to be unconstitutional is not absolute because the immunity does not extend to "conduct that is clearly wrong, in bad faith or an abuse of power."[30]

PART II – POINTS IN ISSUE

17. The issue to be determined in this application is whether the Decision of the New Brunswick Court of Appeal raises an issue of public importance. By finding, erroneously, that the Crown does not enjoy absolute immunity from a civil suit seeking *Charter* damages for the drafting or enactment of legislation later declared unconstitutional, the Decision has raised multiple issues requiring this Court's guidance:

    a. whether law-making by Parliament or the Legislatures should be subject to unprecedented judicial supervision and constraint, despite the separation of powers and this Court's recent guidance on defining constitutional remedies in *Mikisew Cree* and *Sullivan*;

    b. whether trial courts may now, in search of indicators of alleged bad faith in legislating, disregard the parliamentary privilege of members of Parliament, including their freedom of speech; and

    c. whether the Decision creates a novel *Charter* damages remedy that sharply departs from existing law barring private law damages for legislative acts, and, additionally, seeds unpredictable and immense potential Crown liability.

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[29] Decision, at para 24.
[30] *Ibid*, at para 25, citing *Mackin* at para 78.

PART III – ARGUMENT

18. Resolution of the issues arising from the Decision is particularly pressing because they are currently live in litigation across the country. For example, in the Federal Court action *Whaling v. Canada*,[31] damages are sought by a class of federal inmates who were deprived of access to automatic early parole by legislation later declared unconstitutional. In *Sarrazin c. Canada (Procureur general)*, a class of persons who were deprived of entitlement to registration as status Indians under provisions of the *Indian Act* that were declared unconstitutional decades after they were enacted seek damages for the benefits they were deprived of as a result of alleged bad faith in legislating.[32] In both cases, the courts have concluded that the claims must be allowed to proceed based on this Court's brief remarks in *Mackin*.

19. The Decision will encourage new litigation from plaintiffs seeking damages for the enactment of laws later declared unconstitutional.

A. Whether the law-making process should be subject to judicial scrutiny and constraint is a matter of public importance

20. The proposed appeal is crucial to ensuring the proper relationship between the courts and Parliament and the provincial Legislatures, in particular, protecting their core constitutional role of legislating. This Court in *Mikisew Cree* stressed the need for respecting this role of the legislative branch, but the Decision disregards it. Clarity is required because maintaining the proper balance between the judicial and legislative branches is integral to our constitutional order and representative democracy.

[31] *Whaling v Canada*, 2020 FC 1074; see particularly *Canada v. Whaling*, 2022 FCA 37 at para 34.
[32] *Procureure générale du Canada c. Sarrazin*, 2018 QCCA 1077, at paras 12, 15.

21. On the theory of liability endorsed by the Court of Appeal, the judicial branch is asked to examine what was known by the legislative branch of government in law-making, and then to admonish and redress the alleged failings with damages awards, to deter similar conduct in the future. That amounts to judicial oversight of the law-making process itself, rather than the substance of the laws passed, and judicial determination as to how it ought to be done.

22. The Court of Appeal's approach cannot be correct in light of the principles stressed in *Mikisew Cree.* Although that decision was about the duty to consult, not *Charter* s. 24(1) damages, protecting the integrity of the law-making process from judicial interference was a central concern for all seven of the judges who decided against recognizing the duty therein.[33] Justice Karakatsanis held that the development of legislation by ministers and those who assist them is part of the law-making process, which is generally protected from judicial oversight.[34] Justice Brown, concurred with by Justices Rowe, Moldaver and Côté,[35] expressed it as an outright prohibition: the development, drafting and introduction of bills are immune from judicial interference.[36]

[33] *Mikisew Cree,* at paras 32, 34, 35 (per Karakatsanis J. et al), at paras 102, 117, 118 (per Brown J.), at paras 148, 169, 170 (per Rowe J.).
[34] *Mikisew Cree,* at para 34 (per Karakatsanis J.).
[35] *Mikisew Cree,* at para 148 (per Rowe, J.).
[36] *Mikisew Cree,* at para 102 (per Brown J.).

23. This is consistent with longstanding authority. The formulation and introduction of a bill are part of the legislative process and beyond the reach of the courts.[37] Parliament's sovereignty when engaged in the performance of its legislative duties is undoubted.[38] This Court has consistently emphasized that the enactment of laws is the fundamental role of legislatures and that "[c]ourts come into the picture when legislation is enacted and not before."[39] Whether it is Ministers developing and introducing bills, or Parliament enacting them, this Court has repeatedly stated the importance of safeguarding the role of the legislative branch.

24. The Decision does not respect the separation of powers. The fact that an intrusion by the judicial branch into the law-making process occurs post-enactment does not make it acceptable.[40] The Court of Appeal erroneously held that, because the assessment for potential liability for s. 24(1) damages would be after-the-fact, there was no interference.[41] However, this Court rejected this very distinction in *Mikisew Cree*: "[a]pplying the duty to consult doctrine during the law-making process would lead to significant judicial incursion into the workings of the legislature, even if such a duty were only enforced post-enactment"[42] (underlining added).

25. Furthermore, monetary damages, as sought by the Respondent for his s. 24(1) remedy, were specifically cited in *Mikisew Cree* as a remedy that would invite inappropriate judicial intervention into the legislature's domain.[43]

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[37] *Reference re Canada Assistance Plan (B.C.),* [1991] 2 S.C.R. 525, p. 559.
[38] *Canada (House of Commons) v. Vaid,* 2005 SCC 30 (hereafter "*Vaid*"), at para 45.
[39] *Re: Resolution to amend the Constitution,* 1981 CanLII 25 (SCC), cited to 1981 CarswellMan 110, at pg. 785.
[40] *Mikisew Cree,* at para 38.
[41] Decision, at para 23.
[42] *Mikisew Cree*, at para 38.
[43] *Mikisew Cree,* at para 39.

26. The availability of a qualified immunity does not sufficiently diminish the intrusion. According to the Decision, a plaintiff need only make an allegation of "bad faith, an abuse of power, or [conduct that is] clearly wrong" to put the legislative process on trial. The NBQB found that simply alleging wilful blindness by legislators as to the constitutionality of legislation sufficed.[44]

27. Justice Cromwell noted in *Ernst v. Alberta Energy Regulator* that a qualified immunity is easily frustrated where the mere pleading of an allegation of bad faith in a statement of claim can call into question a decision-maker's conduct. Even qualified immunity undermines a statutory decision-maker's ability to act in accordance with their role, as the mere threat of litigation, achieved by artful pleadings, will require the decision-maker to engage with claims brought against him or her.[45] This is no less problematic for Ministers or members of Parliament responsible for the drafting or enactment of legislation. The legislative actor would be obliged to engage with the claim, and have their core constitutional function of law-making assessed as to what were and ought to have been their intentions, motivations, actions or decisions.

28. The principles which weighed against recognizing a duty to consult in *Mikisew Cree* are themselves part of the Constitution. The Court of Appeal should not have disregarded them in determining what another part of the Constitution, i.e. a *Charter* s. 24(1) remedy, properly entails.

[44] *Power (NBQB)*, at para 51.
[45] *Ernst v. Alberta Energy Regulator*, 2017 SCC 1 (hereafter "*Ernst*") at para 57.

The separation of powers

29. Each of the three branches of government can only fulfill their distinct role if they are not unduly interfered with by the others.[46] Each is vouchsafed a measure of autonomy from the others.[47] The courts, for their part, are careful not to interfere with the workings of Parliament.[48] Although the separation of powers is not rigid and absolute,[49] it is part of the constitutional framework.[50] It was central to the result in *Mikisew Cree.*[51]

Parliamentary sovereignty

30. Parliamentary sovereignty is a longstanding constitutional principle that underlies the reluctance by courts to supervise the law-making process.[52] It too was cited in *Mikisew Cree* as a reason why courts should forebear from intervening in the law-making process.[53] In *Vaid,* the Court said that Parliament's sovereignty when engaged in the performance of its legislative duties is undoubted.[54] Putting the law-making process on trial to examine whether lawmakers acted in a way that was "wrong" according to any standard is irreconcilable with the sovereignty of Parliament.

[46] *Mikisew Cree,* at para 118 (per Brown J.); *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43 (hereafter "*Ontario*"), at para 29.
[47] *Vaid*, at para 21.
[48] *Vaid*, at para 20.
[49] *Mikisew Cree*, at para 119 (per Brown J.).
[50] *Ontario*, at para 29; *Schmidt v. Canada (Attorney General),* [2018] F.C.J. No. 315, (FCA), at para 80.
[51] *Mikisew Cree*, at paras 32, 34, 35 (per Karakatsanis J. et al), at paras 102, 117, 118 (per Brown J.), at paras 148, 169, 170 (per Rowe J.).
[52] *Mikisew Cree,* at para 35 (per Karakatsanis J.).
[53] *Mikisew Cree,* at para 32 (per Karakatsanis J.).
[54] *Vaid,* at para 45.

Parliamentary privilege

31. If an activity falls within a recognized category of parliamentary privilege, a court has no power to review that action, even on *Charter* grounds.[55] It was cited in Justice Karakastanis's reasons in *Mikisew Cree* as a constitutional principle demonstrating why the law-making process is largely beyond the reach of judicial interference.[56] Two well-established categories of privilege would inevitably be intruded upon by the theory of liability advanced in this case: Parliament's control over its debates and proceedings, and Parliament's freedom of expression, as further discussed below.

***The failure to consider these constitutional principles by preferring* Mackin**

32. Despite these principles of our Constitution, the Court of Appeal decided the scope of the s. 24(1) remedy without considering them. The Decision acknowledged that *Mackin* had not addressed these principles, but nevertheless reasoned that the Court of Appeal was duty bound to apply *Mackin*.[57] Respectfully, this was an error which needs to be addressed by this Court.

33. The task of the Court of Appeal was to interpret one part of the constitution in light of others. In the 2022 decision of *R. v. Sullivan* and the 2021 decision of *R. v. Albashir*, this Court re-emphasized that constitutional remedies must be interpreted in light of other constitutional principles.[58] In *Mikisew Cree*, the scope of the duty to consult had to be interpreted in light of the separation of powers, parliamentary sovereignty and parliamentary privilege. Here, the scope of the *Charter*'s remedial provision, section 24, must also be interpreted and applied in a manner that is consistent with these same principles.

[55] *Vaid,* at para 30; *Chagnon v. Syndicat de la fonction publique*, 2018 SCC 39, at para 2.
[56] *Mikisew Cree,* at para 37 (per Karakatsanis J.).
[57] Decision, at para 20.
[58] *R. v. Sullivan*, 2022 SCC 19, at para 61; *R. v. Albashir*, 2021 SCC 48 at paras 40, 42.

34. The Court of Appeal said that the AGC's arguments might have found traction but for *Mackin*.[59] Twenty years have passed since *Mackin*, and this Court's guidance is required given the intervening jurisprudence.

35. *Mackin* cannot be read as creating potential liability for the drafting or enactment of laws. As to what kind of state conduct might generate liability for *Charter* damages, recent statements by this Court suggest that such liability was meant to be limited to post-enactment conduct by officials. In *Henry v. British Columbia (Attorney General),* this Court summarized, regarding *Mackin*, that "state actors were afforded a limited immunity for actions taken in good faith under a law they believed to be valid."[60] Similarly, in *Vancouver (City) v. Ward,*[61] this Court said "This was the situation in *Mackin v. New Brunswick (Minister of Finance),* where the claimant sought damages for state conduct pursuant to a valid statute"[62] (underlining added). In *R. v. Albashir,* the qualified immunity doctrine in *Mackin* was described as precluding financial liability for government actions taken under laws that are later found to be unconstitutional.[63] The words "under a law" and "state conduct pursuant to a valid statute" are key: the kind of state conduct that might potentially justify a damages award under s. 24(1) is post-enactment conduct by state actors under an enacted law. No such state conduct is at issue in this case – the effects of the law, which retroactively made the plaintiff ineligible for a *Criminal Records Act* record suspension, were imposed directly by Parliament.

[59] Decision, at para 28.
[60] *Henry v. British Columbia (Attorney General),* [2015] S.C.J. No. 24 (hereafter "*Henry*") at para 42.
[61] *Vancouver (City) v. Ward,* 2010 SCC 27 (hereafter "*Ward"*).
[62] *Ibid,* at para 39.
[63] *Albashir,* at para 40.

36. In *Mackin,* the discussion of a potential *Charter* s. 24(1) remedy was too limited for the theory endorsed by the Decision. The issue of damages was incidental.[64] The analysis is brief, without consideration or explanation of how those other constitutional principles discussed above could be reconciled with assessing whether Ministers, Parliament or legislatures acted in bad faith in legislating. Ultimately in *Mackin,* the evidence was simply fatally deficient.[65]

B. The Decision disregards and would erode parliamentary privilege

37. The theory of liability endorsed by the Court of Appeal would pierce parliamentary privilege to facilitate a search for alleged bad faith by members of Parliament in legislating. By suggesting that the Respondent could somehow prove that parliamentarians legislated in a manner that was an abuse of process, the Decision will create an expectation in litigants that courts should disregard well-established categories of parliamentary privilege. They will be eroded as the courts consider the particular ways plaintiffs attempt to prove legislative wrongful conduct.

[64] *Mackin,* at para 1.
[65] *Mackin,* at para 82.

38. Freedom of speech in Parliament is an established category that is meant to be completely beyond the purview of the courts,[66] leaving them "no power to inquire into what statements were made in Parliament, why they were made, who made them, what was the motive for making them or anything about them."[67] It is an absolute privilege, and prevents parties to litigation from bringing "into question anything said or done in the House by suggesting (whether by direct evidence, cross-examination, inference or submission) that the actions or words were inspired by improper motives or were untrue or misleading."[68] The problem extends to Parliament's privilege over control of its debates and proceedings, since the Decision similarly suggests that they can come under judicial scrutiny for alleged *mala fides* or wrongful conduct.

39. This action or other cases will bring this issue back for more appeals, if not considered now by the Court. Whose bad faith, in particular, would be at issue? What is the scope of permissible discovery in light of parliamentary privilege? If preparations for trial must begin without this Court's guidance on how to reconcile the Respondent's cause of action with fundamental constitutional principles, then the issues will inevitably arise again prior to trial.

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[66] *Vaid*, at para 4. Note that *Hansard* may of course be used to assist in the interpretation of a statute showing the historical context in which legislation was enacted.

[67] *Ontario v. Rothmans Inc.*, [2014] O.J. No. 2816 (Ont. SCJ), at para 31, citing *Roman Corp. v. Hudson's Bay Oil & Gas Co.*, [1971] 2 O.R. 418, at para 13.

[68] *Prebble v. Television New Zealand Ltd*., (hereafter "*Prebble*"), [1994] UKPC 4; cited to [1994] 3 All E.R. 407 at p. 417(j) - 418(a).

C. The Decision represents a sharp departure in *Charter* remedies and unpredictable liability

40. It is a matter of public importance whether *Charter* s. 24(1) liability ought to expand so dramatically, with such a broad base for potential litigation and a commensurate increase in potential government liability for public law damages. There is no cause of action for the tortious enactment of legislation[69] and so this s. 24(1) remedy founded on legislative conduct where legislation is later declared unconstitutional is a dramatic shift, in comparison. The practical wisdom of the common law is an important guide;[70] while the availability of *Charter* damages does not need to develop in lock-step with the private law,[71] the immunities and fault thresholds of the common law were noted in *Ward* as being examples of relevant considerations. That practical wisdom of the common law led the majority of this Court to conclude that *Charter* damages would never be an appropriate or just remedy where the state actor was performing an adjudicative function.[72] *Charter* damages jurisprudence has departed from the common law,[73] but never so sharply as by subjecting the parliamentary process to judicial scrutiny for condemnation via damages awards.

[69] *Turner v. Canada,* (1992) 93 D.L.R. (4th) 628 (F.C.A.); 1992 CanLII 8504 (FCA), at paras 6, 7 (hereafter "*Turner*").
[70] *Ward,* at para 43.
[71] *Ward,* at para 43.
[72] *Ernst,* at paras 24-31, 50-55 (per Cromwell J.), at para 171 (per McLachlin J.).
[73] *Henry*, at paras 56, 64, 65.

41. Furthermore, the theory of liability endorsed by the Court of Appeal creates a *Charter* damages remedy the subject of which expands unpredictably with time. Years may pass before the ultimate determination that a law is unconstitutional. Once a declaration of unconstitutionality is made, there is nothing to prevent a litigant from alleging there was "clearly wrong" legislative behavior all those years – or decades – earlier, when the law was drafted or passed. A law that was meanwhile presumed constitutional will have been applied to a great number of persons. Given the scope of federal legislation, it could have had vast application in innumerable situations. The class of potential litigants will have grown exponentially and their potential entitlement to damages, now, will turn on a hindsight analysis of motivations and alleged *mala fides*. Whether such a large and unpredictable expansion in the availability of *Charter* damages is viable in view of the constitutional principles at issue is of great public importance.

42. These questions were not considered in *Mackin,* nor since this Court established the *Ward* framework for determining whether *Charter* damages are just and appropriate.[74] The law of *Charter* damages should develop incrementally,[75] and must employ only means that are legitimate within the framework of constitutional democracy.[76] Because of the significant and unpredictable leap made by the Decision, the proposed appeal is of significant public importance.

[74] *Ward*, at paras 16-57.
[75] *Ward*, at para 21.
[76] *Ward*, at para 20.

PART IV – COSTS

43. The AGC does not ask for its costs.

PART V – ORDER SOUGHT

44. The AGC asks for an order granting leave to appeal from the Decision.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Halifax, in the Province of Nova Scotia, this 17th day of June, 2022.

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PART VI – TABLE OF AUTHORITIES

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