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# Striking the Balance of *Power*: Supreme Court Confirms Government Has No Absolute Immunity from *Charter* Damages When Adopting Unconstitutional Legislation

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In its recent decision, *Canada (Attorney General) v Power (Power)*, a divided Supreme Court of Canada (SCC) confirmed that a government can incur liability for damages under section 24(1) of the *Canadian Charter of Rights and Freedoms (Charter)* when Parliament or a legislature adopts legislation that breaches *Charter* rights.

## Key Takeaways

- The SCC had to determine whether a government enjoys absolute immunity from *Charter* damages for the enactment of unconstitutional legislation.
- The 7–2 majority of the SCC held that the government can be ordered to pay *Charter* damages for laws that are clearly unconstitutional at the time of their enactment. This threshold is met when a law clearly breaches the *Charter*, even when the contents of the law are unprecedented and have not previously been declared to be unconstitutional.
- A 5–4 majority of the SCC also found that the government can be ordered to pay *Charter* damages when Parliament or a legislature acted in bad faith or abused its power in enacting an unconstitutional law.
- The *Power* decision clarifies the limited immunity threshold that has been the state of the law for the last 20 years.
- *Charter* damages remain available as a remedy for constitutional litigants who seek to have legislation declared inconsistent with the *Charter* and therefore of no force or effect when the thresholds described above are met, when this remedy furthers the general objectives of the *Charter*, and when no other countervailing factors render damages inappropriate or unjust.

## Decision

The case stems from legislation enacted by Parliament, in 2013, that made individuals convicted of various criminal offences permanently ineligible for pardons, now called criminal record suspensions. These measures applied retrospectively to offences committed before the measures came into force. As a result of this legislation, Mr. Power was rendered permanently ineligible to a record suspension. After its enactment, the legislation was declared inconsistent with the *Charter* and therefore of no force and effect. Mr. Power subsequently sued the Canadian government for *Charter* damages as an additional and consequential constitutional remedy.

The Attorney General of Canada moved to strike Mr. Power's claim, arguing that the government, in its executive capacity, enjoys absolute immunity and can never be held liable in damages for Parliament enacting an unconstitutional law or for government officials and ministers having been involved in the preparation and drafting of legislation subsequently declared unconstitutional.

This was an outright challenge of *Mackin v New Brunswick (Minister of Finance) (Mackin)*, a 2002 case in which the SCC held that damages for the enactment or application of unconstitutional laws could be awarded “*in the event of conduct that is clearly wrong, in bad faith or an abuse of power.*” The limited immunity threshold recognized in *Mackin* was argued to be inconsistent with the constitutional principles of parliamentary sovereignty, the separation of powers, and parliamentary privilege.

The decision in *Power* therefore turned on the proper delineation and balancing of the foregoing constitutional principles and of other constitutional principles that require government accountability for *Charter* breaches, namely constitutionalism and the rule of law.

Seven (7) justices agreed that granting the government absolute immunity would not properly reconcile government's legislative autonomy, on the one hand, and the important principles of government accountability enshrined in our Constitution and the rule of law, on the other. Importantly, for these justices, there was no categorical restriction on the availability of the "*unique public law remedy*" of *Charter* damages in combination with a declaration of invalidity under section 52(1) of the *Constitution Act, 1982*. However, that majority fractured when dealing with other aspects of the test for government liability.

Wagner C.J. and Karakatsanis J., writing for five (5) justices, held that the proper reconciliation of the constitutional principles at play required reaffirming the limited immunity threshold. They stated that "[h]olding the legislature liable for *Charter* damages when it seriously misuses its legislative power does not constitute undue judicial interference in the legislative process," and that damages may instead promote good governance by supporting compliance with the Constitution.

They went on to clarify the Mackin threshold holding that *Charter* damages could first be awarded in respect of laws that are "*clearly unconstitutional*" —namely, that "*clearly violate Charter rights*" at the time of their enactment. Notably, it will be possible to meet this threshold when "*the state either knew that the law was clearly unconstitutional, or was reckless or wilfully blind as to its unconstitutionality,*" even in the absence of a clear precedent for the *Charter* breach. Although expecting the "*clearly unconstitutional*" standard to resolve most issues, this majority also confirmed that the limited immunity threshold can be met by evidence of bad faith or of an abuse of power in enacting the unconstitutional law.

Kasirer and Jamal JJ. dissented in part. While they also held that the government could be ordered to pay *Charter* damages for the adoption of "*clearly unconstitutional*" laws, they found that parliamentary privilege precluded any liability for government officials or ministers having been involved in the preparation or drafting of bills, and any assessment of whether Parliament or a legislature had acted in bad faith or abused its power in enacting legislation. By contrast, for the majority of five (5) justices, it was unnecessary to consider the conduct of government officials or ministers distinctly from Parliament's enactment of the unconstitutional legislation.

The majority of five (5) justices expressly disagreed with the dissenters' analysis of parliamentary privilege, noting that "*extending the privilege to the executive*" would have "*far-reaching and unforeseeable consequences.*"

Rowe and Côté JJ. completely dissented. In their opinion, the government enjoys absolute immunity from *Charter* damages in relation to the adoption of unconstitutional laws.

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