Court File No. 40241

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

BETWEEN:

ATTORNEY GENERAL OF CANADA

APPELLANT

AND

JOSEPH POWER

RESPONDENT

FACTUM OF THE INTERVENER, THE DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW

1. This appeal concerns the availability of damages pursuant to s. 24(1) of the *Charter* as a remedy for individuals whose *Charter* rights have been violated by a law subsequently found to be unconstitutional. The appellant asks this Court to adopt a bright line rule that would prohibit such a remedy by affording absolute immunity to governments.

2. Absolute immunity has no foundation in either s. 24(1) or s. 52(1). A correct interpretation of s. 24(1)—including its application in circumstances where the claimed harms flow from legislation that has been declared invalid—should be premised on the protective purposes of the *Charter*, the broad language of s. 24(1), and consideration of *all* relevant constitutional principles, including constitutionalism, the rule of law, democracy, and the protection of minorities.

3. Section 24(1), properly interpreted, requires a proportionate approach to remedies. *Vancouver (City) v. Ward* *(Ward)* provides the appropriate framework. The misconduct threshold set out in *Mackin v. New Brunswick (Minister of Finance)* (*Mackin*) must be understood in light of *Ward*, *Ontario (Attorney General) v. G* (*Ontario v. G*), and the principles that animate s. 24(1). It follows from a proper interpretation of s. 24(1) that *mala fides* should not be a prerequisite for *Charter* damages coupled with (or subsequent to) a s. 52(1) remedy, which will be effectively impossible for a plaintiff to establish in all cases—even where the government intended the alleged *Charter*-violating losses.

4. The appellant's request for absolute immunity, if accepted, would mean that *all* losses suffered by those subject to an unconstitutional law must be borne by those rights-holders *in all cases*. That extraordinary position is profoundly incongruous with the protective purposes of the *Charter* and the scope of s. 24(1) correctly understood in light of all relevant constitutional principles.

PART II – QUESTION IN ISSUE

5. The Asper Centre intervenes on the appropriate framework for awarding damages under s. 24(1) to remedy *Charter* violations caused by legislation that is declared unconstitutional. Its intervention is rooted in concerns about access to justice and the need for effective and proportionate remedies.

PART III – ARGUMENT

13. The appellant incorrectly contends that it would *never* be "appropriate and just" for a court to award damages under s. 24(1) as a remedy for harms suffered by an individual due to the existence and operation of a *Charter*-violating law.[1] The appellant's position rests on two faulty hypotheses. First, that the separation of powers must *preclude* such a remedy because the risk of Crown liability for damages in this context would unduly influence how legislators approach law-making.[2] Second, that such a remedy would impermissibly interfere with parliamentary privilege because, applying *Mackin* and *Ward*, a court would have to assess legislators' motivations for introducing the offending law in question.[3] These hypotheses are constitutionally unsound and contrary to this Court's authorities.

A. Section 24(1), properly interpreted, does not bar remedial damages for harms suffered by an individual due to the existence of a law that violates the *Charter*

14. The appellant's restrictive interpretation of s. 24(1) is at odds with the broad wording of the provision, as well as longstanding jurisprudence from this court cautioning against unduly limiting the ambit of s. 24(1). It is premised on a skewed over-emphasis and misunderstanding of the separation of powers and parliamentary privilege. Moreover, it omits highly relevant principles—constitutionalism, the rule of law, democracy, and protection of minorities—that support compensation. Ultimately, the appellant urges a novel interpretation of s. 24(1) that would immunize the state from liability for losses caused by the enactment of unconstitutional laws *in all circumstances*, shifting the burden of *Charter* violations onto those who suffer them.

15. Given its protective purposes, s. 24(1), like all *Charter* provisions, must be read "in a broad and purposive manner".[4] It authorizes courts to grant remedies that they consider "appropriate and just in the circumstances" for *Charter* breaches. This Court has repeatedly emphasized the broad language of this remedial provision.[5] As McIntyre J opined almost 40 years ago, "[i]t is difficult to

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[1] Appellant's Factum, at para. 1.
[2] Appellant's Factum, at paras. 39-54.
[3] Appellant's Factum, at paras. 55-62.
[4] *Hunter et al. v. Southam Inc*, [1984] 2 SCR 145, at 155-56; *R v. Big M Drug Mart Ltd*, [1985] 1 SCR 295, at 344 (*Big M*); *Ontario (Attorney General) v. G*, 2020 SCC 38, at para. 109 (*Ontario v. G*).
[5] *Vancouver (City) v. Ward*, 2010 SCC 27, at para. 17 (*Ward*).

imagine language which could give the court a wider and less fettered discretion."[6] Given this, this Court has found that the broad discretion that is conferred by s. 24(1) should not be reduced by "casting it in a strait-jacket of judicially prescribed conditions"; instead, it "should be allowed to evolve" to meet new challenges.[7] Any suggestion that the provision categorically prohibits a certain remedy must be approached with extreme caution.

16. That s. 24(1) must be understood broadly is confirmed when it is read, as it must be, "in harmony with the rest of our *Constitution"*[8], which includes other "fundamental organizing principles". [9] The separation of powers and parliamentary privilege exist alongside other constitutional principles that must be factored into the interpretation. The appellant cannot cherry pick or overstate certain principles to guide the interpretation of a constitutional provision; one principle "cannot dominate" the analysis "to the exclusion of other[s]". [10] Foundational constitutional principles "function in symbiosis", meaning no principle can "trump or exclude the operation of any other."[11] When different constitutional principles are engaged, it is not a contest for supremacy, but an act of reconciliation so as to arrive at the correct interpretation.[12]

17. The scope of remedial protection offered by s. 24(1) cannot be understood without reference to the organizing principles of constitutionalism, the rule of law, democracy, and the protection of minorities.[13] Long before the *Charter* was enacted, this Court recognized the rule of law as a "fundamental postulate of our constitutional structure".[14] Since the passage of the *Charter*, this Court has found that the rule of law shields "individuals from arbitrary state action", and embraces

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[6] *R. v. Mills*, [1986] 1 SCR 863, at 965 (*Mills* (1986)).
[7] *Ward*, at para. 18. See also *Mills (1986)*, at 965; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, at para. 59 (*Doucet-Boudreau*).
[8] *Doucet-Boudreau*, at para. 50.
[9] *Reference re Secession of Quebec*, [1998] 2 SCR 217, at para. 32 (*Secession Reference*); *Reference re Senate Reform*, 2014 SCC 32, at para. 25; *R v. Comeau*, 2018 SCC 15, at para. 52.
[10] *R v. Sullivan*, 2022 SCC 19, at para. 60.
[11] *Secession Reference*, at para. 49.
[12] *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, at para. 28 (*Chagnon*).
[13] *Secession Reference*, at para. 32.
[14] *Roncarelli v. Duplessis*, [1959] SCR 121, at 142. It bears noting that this was said to refute an argument that the consequences of wrongful action by a public officer are to be suffered by the victim without recourse or remedy.

several key principles including that "the law is supreme over acts of both government and private persons", and that "the exercise of all public power must find its ultimate source in a legal rule".[15] This is true even where compliance will come at a financial cost; the possibility of financial consequences does not excuse a government from the rule of law. For example—and as this Court has explained—to permit the Crown to retain monies collected pursuant to an unconstitutional law such as an *ultra vires* tax "would condone a breach of [a] most fundamental constitutional principle": the rule of law.[16] Policy considerations cannot relieve the government from financial consequences it ought to bear to ensure adherence to the *Constitution*.[17]

18. Whereas the rule of law requires that government action comply with the law, constitutionalism requires that government action comply with the *Constitution*. With the passage of the *Charter*, Canada's system of government "was transformed to a significant extent from a system of legislative supremacy to one of constitutional supremacy. The *Constitution* binds all governments […] including the executive branch".[18] Constitutionalism and the rule of law are "essential to democracy" and create the "orderly framework within which people may make political decisions"; they can require that minority interests be considered before laws are enacted that would affect those interests.[19] The democratic principle mandates that "legislators take into account the interests of majorities and minorities alike [and] where the interests of minorities have been denied consideration […] judicial intervention is warranted to correct a democratic process that has acted improperly."[20] These principles cannot be omitted from the interpretation of s. 24(1).

19. The protection of minorities is another fundamental constitutional principle absent from the appellant's arguments, despite being highly relevant to interpreting the scope of s. 24(1). The concern of courts and governments in protecting minorities has deep roots in Canada's constitutional history, as recognized in the specific constitutional provisions that protect language,

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[15] *Secession Reference*, at paras. 70-71; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, at para. 58.
[16] *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, at paras. 15, 20 (*Kingstreet*).
[17] *Kingstreet*, at para. 21.
[18] *Secession Reference*, at para. 72. Section 32(1) of the *Charter* expressly applies the *Charter* to Parliament and the government of Canada, as well as to provincial legislatures and governments.
[19] *Secession Reference*, at paras. 77-78.
[20] *Vriend v. Alberta*, [1998] 1 SCR 493, at para. 176.

religion, and education rights, even before the *Charter* came into being.[21] This concern has been amplified under the *Charter*. The protection of minorities was a key consideration "motivating the enactment of the *Charter*, and the process of constitutional judicial review" and it "continues to exercise influence in the operation and interpretation of our *Constitution*."[22]

20. The constitutional principles of constitutionalism, the rule of law, democracy, and protection of minorities are inextricably linked to one of the *Charter*'s objectives: to guard against the tyranny of the majority.[23] Section 24(1) and its promise of "appropriate and just" remedies is positioned to enable the meaningful vindication of the rights of minorities, including those from the most vulnerable and marginalized groups in Canadian society, whose interests risk being denied by legislators responding to majority interests. A remedy that meaningfully vindicates these rights and freedoms "must be relevant to the experience of the claimant and must address the circumstances in which the right was infringed or denied".[24]

21. By omitting these highly relevant constitutional principles, the appellant offers a vacuous interpretation of s. 24(1), one that could deprive courts of competent jurisdiction of their ability to grant "appropriate and just" remedies for *Charter* breaches. The absolute immunity urged by the appellant would privilege the state to the detriment of those who have suffered actual harms as the result of being subject to *Charter*-violating laws. Absolute immunity does not protect minority interests; it allows governments to ignore them. It does not protect against the tyranny of the majority; it enshrines it. And it does not respect the rule of law; it undermines it by allowing the state to wash its hands of the real-world losses borne by individuals due to the passage and operation of *Charter*-violating laws *in all cases*.

22. A declaration of invalidity under s. 52 is prospective in nature. It identifies the failures of a law and protects against future enforcement of the law. But it offers no practical remediation for past losses suffered by those under an unconstitutional law. As this Court has stated, "no one should be subjected to an unconstitutional law".[25] This is not only aspirational; those *who have already*

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[21] *Secession Reference*, at paras. 79-80, 82.
[22] *Secession Reference*, at para. 81.
[23] *Big M*, at 337.
[24] *Doucet-Boudreau*, at para. 55.
[25] *R v. Nur*, 2015 SCC 15, at para. 51; *Big M*, at 313; *Ontario v. G*, at para. 109.

been subjected to an unconstitutional law may have been harmed as a result. Nothing in the language of s. 24(1) read purposively suggests that such people should be categorically barred from seeking damages as an "appropriate and just" remedy.

23. The appellant's speculative assertions that the spectre of *Charter* damages could unduly influence the legislative process cannot eclipse the significance of other constitutional principles. The appellant's concerns about the "chilling" impact of *Charter* damages in this context fail to recognize that constitutional remedies are meant to influence the law-making process by, for example, highlighting state overreach or deterring future breaches.[26] While it is not a court's role to prescribe any specific legislative process, it *is* the court's role to hold legislatures to account for *Charter* violations and issue remedies that deter future violations.[27] The *Ward* test provides ample room for governments to justify proportional limits on *Charter* damages.

24. The appellant's assertion that the government requires absolute immunity from *Charter* damages in the circumstances of this case because the court's assessment under *Ward* and *Mackin* would invite a review of privileged parliamentary records is not just novel, but misconceived.[28] The possible existence of privileged records cannot serve to permanently narrow the scope of available remedies under s. 24(1) as a matter of constitutional interpretation. Though this Court has suggested that parliamentary privilege may inform how we understand the scope of protected *Charter* interests, this occurs where the alleged infringement flows from actions covered by the privilege.[29] A constitutional conflict does not arise simply because parliamentary privilege over certain records might be raised. Instead, a conflict arises where a plaintiff asks a court to recognize that the *Charter* protects against conduct or decision-making by legislators that is covered by parliamentary privilege. No such conflict arises in the present matter. While it may be that certain records pertaining to the enactment of a law are privileged, the *Charter*-infringing "act" contemplated in this case is the existence and operation of a law (and not the technical process of legislating). This is not "privileged" conduct in the manner contemplated in *Chagnon*. This Court has recently confirmed that s. 24(1) is "too flexible to be" inapplicable in cases where a law is

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[26] *R v. Mills*, [1999] 3 SCR 668, at para. 57; *Ward*, at para. 43; *Ontario v. G*, at para. 109.
[27] *Ward*, at para. 25.
[28] Appellant's Factum, at paras. 55-62.
[29] *Chagnon*, at para. 28.

challenged.[30] If laws were "privileged", then a s. 52(1) declaration would be toothless and the corollary remedial orders issued in *Doucet-Boudreau*, for example, would be impermissible.

25. Moreover, there is nothing unusual about an inquiry into legislative intent in constitutional litigation (or indeed in any case involving statutory interpretation). Courts have long been required to pull back the curtain on the legislative process, whether to determine a law's "pith and substance" or to determine a law's purpose to gauge *Charter* compliance. The availability of certain remedies does not abrogate parliamentary privilege. While a defendant's claim of legislative privilege over its records in a *Charter* damages claim could make the claim difficult, that is an evidentiary issue. It has no bearing on whether, as a question of constitutional interpretation, s. 24(1) permits *Charter* damages in circumstances such as those raised in this case. A court's assessment of legislative intent is often done on the basis of documents that are necessarily public—including legislative debates and committee reports. The appellant's speculation that privileged records may be implicated in some *Charter* damages claims is best dealt with on a case by case basis and not by adopting a bright line rule that would bar all such claims.

26. It follows from the broad language and protective purposes of s. 24(1)—considered through the lens of foundational constitutional principles including constitutionalism, the rule of law, democracy, and the protection of minorities—that s. 24(1) requires a proportionate approach that allows courts to assess what is needed to meaningfully and appropriately remedy *Charter* breaches.

B. *Ward* provides the necessary proportionate approach for assessing s. 24(1) damages for harms caused by the existence and operation of an unconstitutional law

27. The appellant's call for absolute immunity reflects a disproportionate interpretation of s. 24(1) that is inconsistent with this Court's jurisprudence. "Remedial discretion is a fundamental feature of the *Charter*";[31] that discretion must extend to *individual* remedies, given the importance of "safeguarding constitutional rights".[32] The appellant suggests that its draconian interpretation of s. 24(1) is necessary to guard against the alleged adverse impact of damages being available in circumstances like those in this case. But any such impact can be assessed within the *Ward*

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[30] *Ontario v. G*, at para. 142.
[31] *Ontario v. G*, at para. 146.
[32] *Ontario v. G*, at para. 147, citing K. Roach, "Dialogic remedies" (2019), 17 I CON 860, at 862-65.

framework without adopting an anomalous bright line rule of constitutional law that categorically privileges state interests over individual rights and omits vital constitutional principles.

28. Under the four-part *Ward* test, the claimant would bear the onus of establishing that (1) their *Charter* right has been breached by the government by the enactment of a law that was subsequently declared unconstitutional; and that (2) damages are an appropriate remedy that fulfill one or more of the functions of compensation, vindication, and/or deterrence of future breaches. The state could then attempt to demonstrate that (3) "countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust." If those countervailing "good governance" considerations do not defeat the claim for damages, (4) the quantum would be assessed.[33]

29. The appellant's concern that the spectre of *Charter* damages flowing from the invalidation of unconstitutional laws will interfere with legislating—including by having a chilling effect—can already be addressed under *Ward*. The state can raise "good governance" concerns that would weigh against an award of damages and is best situated to do so. This is how the analysis has proceeded in courts.[34] The appellant points to nothing in the case law to indicate that courts are ill equipped to undertake the necessary analysis.

30. Any concerns about a chilling effect (or "deterrence" in the language of *Ward*[35]) cannot categorically prescribe that no damages are "appropriate and just" in all circumstances. Critically, and as McLachlin CJ explained in *Ward*, "insofar as s. 24(1) damages deter *Charter* breaches, they promote good governance. Compliance with *Charter* standards is a foundational principle of good governance."[36] The appellant's bright-line position can only be reconciled with *Ward* if "good governance" requires that legislatures should *always* be able to pass on the costs of unconstitutional legislation to those who have suffered harms or losses as a result of those laws because legislatures should not be influenced in how they go about legislating. However, we know this is not true. As this Court made clear in *Ward* and other decisions, one purpose of constitutional remedies is to

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[33] *Ward*, at para. 4.
[34] See, e.g., *British Columbia Teachers' Federation v. British Columbia*, 2016 SCC 49, adopting the reasons of Donald J in *British Columbia Teachers' Federation v. British Columbia*, 2015 BCCA 184, at paras. 391-393.
[35] *Ward*, at para. 25.
[36] *Ward*, at para. 38.

deter non-compliance with the *Charter*. Another important purpose is to provide compensatory remedies for those harmed by *Charter* violations. In other words, the appellant's wish for absolute immunity is incompatible with *Ward*.

31. The appellant raises a further concern that can be dealt with under "good governance", namely that absent absolute immunity from *Charter* damages flowing from the existence of an unconstitutional law, governments will face a deluge of damages claims. There is no basis for such a proposition. No litany of successful *Charter* damages cases has emerged post-*Mackin*. We have identified only one case where plaintiffs successfully sought a financial remedy under s. 24(1) *exclusively* in relation to the operation of laws declared unconstitutional under s. 52(10.[37] The appellant asks this Court to narrow the scope s. 24(1) on the basis of a problem that does not exist.

32. The respondent's claim can and should be adjudicated under *Ward*. This Court should clarify and, if necessary, modify *Mackin* in light of this Court's subsequent decisions in *Ward* and *Ontario v. G*. Together, those cases underscore the need for a principled approach to remedial discretion, not one based on blunt and overly broad rules such as absolute immunity. A "principled discretion" approach to remedies requires that courts balance remedial principles, including the rule of law, constitutionality, and the safeguarding of *Charter* rights.[38] This, in turn, requires that a flexible and responsive interpretation be given to the "clearly wrong" threshold set out in *Mackin*.[39] *Ontario v. G* also supports a more unified approach to remedies that allows for s. 24(1) remedies to be combined with s. 52(1) remedies in appropriate cases.[40] The absolute immunity sought by the appellant would delete s. 24(1) from the *Constitution* in cases where a remedy is (or has been) issued under s. 52(1).

33. A principled discretion approach eschews rigid rules that discourage courts from "engaging with the purposes behind the rules [leading] to mechanical application of those rules" and the

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[37] In *Canadian Doctors For Refugee Care v. Canada (Attorney General)*, 2014 FC 651, the Court ordered the government to cover the healthcare costs of those who had lost such coverage as a result of the operation of a law the Court declared invalid under s. 52.

[38] *Ontario v. G*, at paras. 94-98, 131.
[39] *Ontario v. G*, at paras. 90-93.
[40] *Ontario v. G*, at para. 142.

production of "unfair results in individual cases".[41] It follows that *Mackin* should not be read to require subjective intent or *mala fides* on the part of a legislature to justify *Charter* damages *in all cases* involving claims for compensation due to the operation of an unconstitutional law. Given likely claims of solicitor-client, parliamentary, and Cabinet privilege, a requirement for *mala fides* sets an impossible burden on plaintiffs seeking *Charter* relief.[42] There may be cases where an unconstitutional law's breach of protected rights is so significant and the resultant harms so dire, that the enactment of the law would be "clearly wrong" even absent a specific level of subjective "fault" by a legislature. It should be open to courts, applying principled discretion, to identify such circumstances under the "clearly wrong" standard.

34. Something can be "clearly wrong" even if pursued in good faith. For example, a legislature could have a valid pressing and substantial objective for a law, but that law could be drawn so broadly or in defiance of well-established precedent that it causes harms to rights-holders who should never have been subject to it. Courts should have the discretion to consider whether such circumstances are "clearly wrong", opening the door to damages under s. 24(1). A narrow reading of *Mackin* is akin to granting governments absolute immunity because: (1) governments can likely always point to some purported good faith justification for a law; and (2) it will be very difficult for most litigants to demonstrate that all policy justifications offered for an impugned law are colourable or otherwise false. By contrast, permitting a claim for *Charter* damages even in the absence of *mala fides* on the part of a government is consistent with the protective purposes of the *Charter* and this Court's remedial jurisprudence. And critically, courts will still be able to consider "good governance" concerns under *Ward*.

PART IV – SUBMISSIONS RESPECTING COSTS

35. The Asper Centre is a non-profit organization represented on this appeal by counsel acting *pro bono*. It does not seek costs and asks that no costs be ordered against it.

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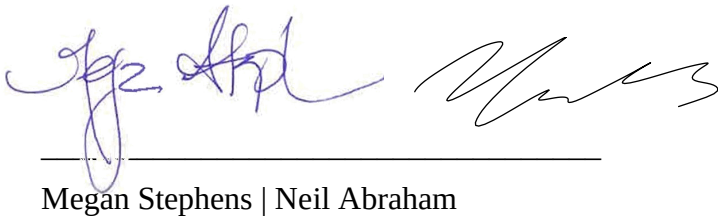
[41] *Ontario v. G*, at para. 91.

[42] An application of the *Ward* test could allow governments to decide whether to waive such privileges in an attempt to establish that damages or a particular quantum of damages caused by an unconstitutional law would harm good governance.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Done at the City of Toronto, this 21st day of September, 2023.



Megan Stephens | Neil Abraham

PART VI – TABLE OF AUTHORITIES

Jurisprudence:

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Statutes, Regulations, Rules, etc.:

Statutes, Regulations, Rules, etc.	Rule, Section
The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c. 11	s. 24(1) s. 32(1) s. 52