SCC 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
(Appellant)

- and -

JOSEPH POWER

RESPONDENT
(Respondent)

- and -

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PART I - OVERVIEW

1. Absolute immunities are anathema to the rule of law and good governance. The exercise of public authority requires, as a bare minimum, that the state and its representatives not exercise such power in bad faith. Indeed, it is a foundational principle of English law received in Canada that no immunity applies to bad faith exercises of public authority.

2. For close to 30 years, this Court has consistently affirmed that the same principle applies to the enactment of *Charter*-infringing legislation: when a legislature has infringed *Charter* rights and acted in bad faith, abused its power, or legislated in a plainly wrong manner, the state's limited immunity will not apply and *Charter* damages may be ordered.

3. Canada asks this Court to overturn this settled authority and, in its place, recognize an "absolute Crown immunity" from *Charter* damages arising from the drafting and enactment of rights-infringing legislation, including legislation that is clearly wrong, in bad faith, or an abuse of power.[1] Instead, this Court should hold that good governance concerns can never justify absolute immunities, because good governance demands that the state account for bad faith and abusive exercises of public power that infringe *Charter* protected rights. [2]

4. In seeking to overturn *Mackin*, Canada also asks this Court to hold that it is never appropriate for courts to inquire into the legislative process. Such a change in the law would impair the judiciary's constitutionally-mandated role of ensuring that legislation complies with the constitution. This Court should instead reaffirm that the courts may, where appropriate, make *post hoc* inquiries into the legislative process so as to effectively discharge this constitutional duty.

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1 Factum of the Appellant, the Attorney General of Canada [**A.F.**] at para. 77.

2 The BCCLA understands Mr. Power does not argue that a different standard should apply, and thus the question on appeal is limited to whether the state is absolutely immune for the enactment of Charter rights violating legislation, even when it was clearly wrong or enacted in bad faith or an abuse of power. The BCCLA accordingly does not make submissions on whether a different standard than *Mackin* may apply.

PART II - ISSUE IN APPEAL

5. The appellant raises a single issue on appeal: "whether *Charter* damages can ever be an appropriate and just remedy in respect of the process leading to the enactment of primary legislation that is later declared unconstitutional."[3]

6. The BCCLA submits that this question must be answered in the affirmative. The BCCLA takes no position on the merits of the appeal.

PART III - STATEMENT OF ARGUMENT

A. *Charter* damages reflect the principle of equality before the law

7. The principle of equality before the law (i.e., the equal subjection of state and citizen to the law) is part of the fundamental law of Canada and the leading feature of all British-derived law on government liability.[4] The principle of equality has historically allowed citizens to seek redress against any state official, from the "Prime Minster down to a constable or a collector of taxes", for acts done "without legal justification".[5] Indeed, the maxim "the King can do no wrong" originally meant that even the King was not privileged to commit illegal acts.[6]

8. Section 24(1) of the *Charter* entrenches the foundational principle of equality by entitling anyone whose rights or freedoms have been infringed to apply to a court of competent jurisdiction to obtain a just and appropriate remedy.[7] Section 24(1) does not limit such remedies to when state officials infringe individual rights. Rather, by virtue of s. 32(1), s. 24(1) applies to Parliament and the legislature of each province.[8]

9. The purpose of *Charter* damages further embodies the principle of equality. *Charter* damages require "the state (or society writ large)" to compensate an individual for infringements

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3 A.F. at para. 24.

4 *Roncarelli v. Duplessis*, [1959] S.C.R. 121 [*Roncarelli*]; P. Hogg, P.J. Monahan, & W.K. Wright, *Liability of the Crown*, 4th ed. (Toronto: Carswell, 2011) at 2 [*Liability of the Crown*], Book of Authorities [BoA] Tab 2; N. Jobidon, *Liability of the Crown: Are Immunities Unnecessary in Quebec*, (PhD Thesis, University of Ottawa Faculty of Postdoctorate and Graduate Studies, 2020) at 38 [unpublished].

5 *Roncarelli* at 184.

6 *Liability of the Crown* at footnote 17, BoA Tab 2.

7 *Canadian Charter of Rights and Freedoms*, 1982, c. 11, s. 24(1) [*Charter*]

8 *Charter*, s. 32(1).

of their constitutional rights by the state or its representatives.[9] The animating goal of *Charter* damages is thus to hold "the state" to account for rights infringements and provide citizens an appropriate and just remedy for such violations. As such, this distinct remedy of "constitutional damages" lies directly against "the state" and not individual actors.[10]

B. The *Mackin* standard is rooted in the principle of equality before the law

10. When determining whether an award of damages is an "appropriate and just" remedy pursuant to s. 24(1) of the *Charter*, courts must consider whether there are any "countervailing factors" that would militate against ordering damages.[11]

11. The paramount countervailing factor is a concern for good governance. Good governance concerns may take different forms; however, they should limit the availability of *Charter* damages only so far as necessary.[12] Only in "some situations" can the state 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.[13]

12. *Mackin* establishes that threshold for *Charter*-infringing legislation: specifically, that "*[a]ccording 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".[14]

13. This qualified immunity is based in the principle of equality. As the Court stated, "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…[h]owever, 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."[15]

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[9] *Vancouver (City) v Ward*, 2010 SCC 27 at para. 22 [*Ward*].
[10] *Ward* at para. 22.
[11] *Ward* at paras. 32-33.
[12] *Ernst v. Alberta Energy Regulator*, 2017 SCC 1 at para. 174 (per McLachlin C.J., Moldaver and Brown JJ.) [*Ernst*].
[13] *Ward* at para. 39.
[14] *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13 at para. 78 [*Mackin*] [emphasis added].
[15] *Mackin* at para. 79.

14. The general rule of public law referred to in *Mackin* was cited to *Welbridge* and *Canada Potash*, leading cases on common law state liability.[16] Canada argues that these cases do not establish that the "Crown may be held liable in damages for Parliament's enactment of unconstitutional primary legislation."[17] In fact, they reflect the principle of equality before the law and the resulting rule that there is no absolute immunity for state conduct that is clearly wrong, in bad faith, or an abuse of power.

15. *Welbridge* concerned a claim in negligence against a municipality for enacting, in good faith, an *ultra vires* by-law.[18] The Court held that an action in negligence cannot succeed against a legislative body for enacting legislation or by-laws, when it does so "in the good faith exercise of its powers".[19] However, this immunity would not extend to acts taken "on a complete want of jurisdiction or on intentional wrongdoing", such as had been the case in *Roncarelli*.[20]

16. In *Canada Potash*, this Court concluded that actions of a government official pursued in good faith, including enforcement of legislation subsequently held to be unconstitutional, could not support a private law tort claim. In reaching this conclusion, the court relied upon its earlier decision in *Roman Corp. v. Hudson's Bay Oil & Gas Co.* which established that pursuing legislative policy priorities in "good faith" could not support a variety of intentional tort claims.[21] The immunity in *Canada Potash* and *Roman Corp* was expressly limited to "good faith" conduct. Such an immunity necessarily does not apply to bad faith state conduct, consistent with the general principle there is no immunity for bad faith exercises of public power.

17. The *Mackin* principle reflects a general norm applied to a range of office holders. For example, Crown prosecutors enjoy a limited immunity from civil liability to allow them to fulfill their "*quasi*-judicial role as Minister of Justice".[22] However, when a prosecutor acts maliciously,

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16 *Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957 [*Welbridge*]; *Central Canada Potash Co. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42 [*Canada Potash*].
17 A.F. at para. 70.
18 *Welbridge* at 965.
19 *Welbridge* at 967.
20 *Welbridge* at 967; citing *McGillivray v. Kimber* (1915), 52 S.C.R. 146.
21 *Canada Potash* at 90; *Roman Corp. v. Hudson's Bay Oil & Gas Co.*, [1973] S.C.R. 820.
22 *Miazga v. Kvello Estate*, 2009 SCC 51 at para. 47 [*Miazga*].

they are no longer acting within their proper role, "such that the general rule of judicial non-intervention with Crown discretion is no longer justified."[23]

18. Similarly, the Minister of Justice's exercise of the royal prerogative of mercy (as codified in the *Criminal Code*) only benefits from a qualified immunity. Damages in a civil case could still be awarded where the Minister of Justice acts in "bad faith" or with serious recklessness when reviewing an application for mercy.[24]

19. Even the immunity of judicial actors is not absolute. While judges enjoy broad immunity when acting within their jurisdiction, they may be liable for judicial acts committed in bad faith by knowingly acting without jurisdiction.[25]

20. Indeed, the *Mackin* standard is so well-established that it has been codified in Ontario's *Crown Liability and Proceedings Act*, which provides a limited immunity for *negligent* legislative acts, but not for bad faith or abusive actions:

> No cause of action arises against the Crown or an officer, employee or agent of the Crown in respect of *any negligence or failure to take reasonable care* while exercising or intending to exercise powers or performing or intending to perform duties or functions of a *legislative nature, including the development or introduction of a bill, the enactment of an Act or the making of a regulation*.[26]

21. In enacting s. 11 of the *Crown Liability and Proceedings Act*, the Ontario legislature set out to codify the existing law on Crown liability.[27] Section 11(1) specifically codifies the qualified immunity of the Crown and its officials in performing duties or functions of a legislative nature.

22. The Ontario legislature plainly thought it was neither necessary nor desirable to limit liability for intentional wrongdoing in performing duties of a legislative nature. Rather, the legislature chose to codify the well-worn principle that there is no immunity for an exercise of public power that is clearly wrong, in bad faith, or an abuse of power. The legislature's choice

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23 *Miazga* at para. 51.
24 *Hinse v. Canada (Attorney General)*, 2015 SCC 35 at paras. 28–31, 69.
25 *Taylor v. Canada (Attorney General)*, [2000] 3 FC 298 at para. 41 (FCA); *Ernst* at para. 176; *Liability of the Crown* at 285–286, BoA Tab 2. See also *Crown Proceeding Act*, R.S.B.C. 1996, c. 89, s. 3(2).
26 *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c. 7, Sch. 17, s. 11(1).
27 *Francis v. Ontario*, 2020 ONSC 1644 at para. 507, aff'd 2021 ONCA 197.

demonstrates that imposing liability is neither unworkable nor "an intrusion by the judicial branch into the law-making process".[28]

C. Absolute immunities offend the rule of law and principles of good governance

23. The long line of jurisprudence recognizing that officials may be liable for exercising public authority in bad faith reflects the general principle that public power may be exercised only for the public good, and not for an ulterior or improper purpose.[29] In *Roncarelli*, Rand J. held that to allow public officials to act "beyond their duty" or exercise their authority arbitrarily would signal "the beginning of [the] disintegration of the rule of law as a fundamental postulate of our constitutional structure."[30] Absolute immunities, which shield even arbitrary and bad faith use of public power, permit just such an erosion of the rule of law.

24. Indeed, since *Roncarelli,* this Court has left in the dustbin legal theories that the state is absolutely immune from the consequences of abuses of public office. As Justice Côté recently wrote, the principle of equality before the law, reaffirmed in *Roncarelli*, "is emblematic of a conception of the rule of law that is *incompatible with absolute immunities*".[31]

25. This court has recognized that the principle that public power may only be exercised in good faith is essential to protecting Canadians' "reasonable expectation that a public officer will not intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of public functions."[32] Where state representatives violate this norm, they step "outside [their] proper role…and as a result, immunity from civil liability is no longer justified."[33]

26. Canadians have the same reasonable expectation that the state will not directly exercise its power to intentionally injure a member of the public through legislative acts committed in bad faith, as an abuse of power, or in a clearly wrong manner. To conclude that the Crown and its officers are absolutely immune for legislative acts that are in bad faith, an abuse of power, or

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28 See A.F. at paras. 53, 81, 84-95.

29 *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para. 24 [*Odhavji Estate*].

30 *Roncarelli* at 142.

31 *Ontario (Attorney General) v. Clark*, 2021 SCC 18 at para. 63, per Côté J., dissenting. Note that Abbott J. specifically invoked the principle of equality before the law in holding that there was no absolute immunity for acts done without legal justification: *Roncarelli* at 184.

32 *Odhavji Estate* at para. 30.

33 *Miazga* at para. 49.

clearly wrong ignores this reasonable expectation and would effectively "deny access to a court of competent jurisdiction to seek a remedy under s. 24(1) of the *Charter*".[34]

27. Indeed, Lamer J. cautioned against this precise issue in *Nelles*, when he warned that it would be "antithetical to one of the purposes of the *Charter*" to create an absolute immunity that prevents an individual from seeking an appropriate and just remedy pursuant to s. 24(1).[35]

28. This Court's reasoning in *Ward* similarly reflects the principle that good governance concerns may only ever justify *qualified* immunities. In that case, the Court recognized that "it could be argued" that any award of *Charter* damages would have a chilling effect on government conduct, and hence it would impact negatively on good governance. The logical conclusion would be that *Charter* damages "would never be appropriate". The Court rejected this line of reasoning, because that was clearly "not what the Constitution intends."[36]

29. Rather, compliance with *Charter* standards is itself a "foundational principle of good governance".[37] As such, where there are countervailing good governance concerns, *Ward* requires a minimum standard of fault to balance those concerns. *Ward* did not contemplate absolute immunities, which undermine *Charter* compliance and thus impair good governance.[38]

30. In *Ernst v. Alberta Energy Regulator*, this Court divided on whether good governance concerns could justify an absolute immunity from *Charter* damages for a *quasi*-judicial tribunal. Chief Justice McLachlin and Moldaver and Brown JJ. rejected the notion that the tribunal at issue benefited from an absolute immunity, remarking that the case law to date only supported qualified immunities for state actors.[39] Justice Cromwell, writing for four judges of the court, wrote that *Charter* damages could never be an appropriate and just remedy in the circumstances.[40] However, Cromwell J.'s reasons did not reflect the views of a majority of the court and have been criticized

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34 K. Roach, *Constitutional Remedies in Canada*, 2d ed. (Toronto: Canada Law Book), s. 11:10, BoA Tab 1; see also *Nelles v. Ontario*, [1989] 2 S.C.R. 170 at 196, per Lamer J. [*Nelles*].

35 *Nelles* at 196.

36 *Ward* at para. 38.

37 *Ward* at para. 38.

38 *Ward* at para. 38.

39 *Ernst* at para. 176 (per Côté J. concurring).

40 *Ernst* at paras. 24, 42–57 (Karakatsanis, Wagner, and Gascon JJ. concurring).

by a range of commentators.[41] No majority of this Court has since endorsed the view that state actors may be absolutely immune from *Charter* damages.

31. This Court should take this opportunity to clarify the law and conclusively hold, in line with the reasons of McLachlin C.J. and Moldaver and Brown JJ., that there can be no absolute immunity for bad faith exercises of state power that infringe *Charter* rights.

D. No basis to restrict *post-hoc* review of legislative process

32. Canada argues that this Court in *Mikisew* held that it is never appropriate for the courts to inquire into the legislative process, even on a *post hoc* basis.[42] Such a novel application of *Mikisew* would dramatically curtail the judiciary's ability to ensure legislation complies with the constitution. This Court should instead reaffirm that courts may inquire into the legislative process where appropriate.

33. Canada raises a number of practical concerns regarding the exercise reviewing courts must embark upon to determine whether legislation was clearly wrong or enacted in bad faith or as an abuse of power.[43] However, courts routinely review the purpose or motives of legislatures as part of the *post-hoc* analysis into legislative intent that informs almost all constitutional litigation and questions of statutory interpretation.

34. For example, in *Morgentaler (1993)*, this Court determined that the Nova Scotia *Medical Services Act* was in pith and substance criminal law, in part because the Hansard showed that all parties in the Legislative Assembly understood that the central feature of the law was the prohibition of Dr. Morgentaler's proposed abortion clinic.[44] As noted in *Morgentaler (1993)*, it is not new for courts "seized of a constitutional issue, to go behind the words used by a Legislature

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41 L. Sossin, "Constitutional Cases 2017: An Overview" (2018) 88 S.C.L.R. (2d) 3 at 21–22; J. Koshan, "The Supreme Court's Decision in *Ernst v Alberta Energy Regulator* and the Future of Statutory Immunity Clauses for Charter Damages", 16 January 2017, online (blog): <ABlawg.ca>; L. Sirota, "Why Bother about the Charter", 18 January 2017, online (blog) <doubleaspect.blog>.

42 A.F. at paras. 39–45.

43 A.F. at paras. 84–95.

44 *R. v. Morgentaler*, [1993] 3 S.C.R. 463 [*Morgentaler (1993)*]

and to see what it is that it is doing".[45] The same is true whether that true intent be to prevent a doctor from opening a clinic or, in bad faith, to target and infringe *Charter* rights.

35. There is no principled reason why it is any more of an intrusion into the legislature's domain to conduct a *post-hoc* review of Hansard to determine whether the legislature had an improper purpose, than it is to determine whether the legislature acted with "colourable" intent—something which Prof. Hogg noted can carry with it "a strong connotation of judicial disapproval".[46]

36. More fundamentally, the availability of *Charter* damages is predicated on the existence of a *Charter* breach. Where legislation is the source of the breach, the s. 1 analysis already requires courts to ascertain the legislature's objective in enacting the infringing measure, and to inquire whether that objective is sufficiently important to warrant overriding a *Charter*-protected right.[47]

37. Weighing the worthiness of the legislature's objective in infringing a right is no different in principle from determining whether that objective was clearly wrong, in bad faith, or an abuse of power. The inquiry is merely a difference in degree, not in nature.

38. Further, Canada's interpretation of *Mikisew* is wrong. In fact, the Court unanimously reaffirmed the long-standing availability of *post-hoc* review of the legislative process once a constitutional breach has been established.

39. While a majority of the Court held that contemporaneous review of the legislative process for compliance with a duty to consult offended the separation of powers, each set of reasons affirmed that, as set out in *Sparrow*, judicial scrutiny of the legislative process is appropriate where

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[45] *Morgentaler (1993)* at 497, quoting *Canada Potash* at 76.

[46] Although the Court did not rely on colourability to resolve *Morgentaler (1993)*, some commentators have noted that the Court nevertheless applied the colourability doctrine. See, *e.g.*, P. Hogg & W. Wright, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Reuters, 2007) (loose-leaf), ch. 15:11, BoA Tab 3: "[*Morgentaler (1993)*] is a remarkable application of the colourability doctrine."

[47] *R. v. Oakes*, [1986] 1 S.C.R. 103 at 138.

a party establishes a legislative infringement of a s. 35 right.[48] As Brown J. stated, "consultation during the legislative process, including the formulation of policy, is an important consideration in the justification analysis under s. 35."[49]

40. If a *post-hoc* review of the legislative process following a s. 35 breach does not offend the separation of powers, there is no principled reason why such review following a *Charter* breach would uniquely offend the separation of powers.

41. As set out above, the law recognizes a wide range of situations in which courts may properly inquire into the legislative process. A holding that such inquiries are inappropriate would significantly impair the judiciary's ability to perform its functions—not least of all, to review legislation for constitutional compliance. This Court should instead reaffirm that courts may make *post-hoc* inquiries of the legislative process so as to discharge their supervisory jurisdiction.

PART IV - SUBMISSIONS ON COSTS

42. The BCCLA does not seek costs and asks that costs not be awarded against it.

PART V - ORDER SOUGHT

43. The BCCLA takes no position with respect to the disposition of the appeal.

DATED at Vancouver this 22nd day of September, 2023.

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[48] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 [*Mikisew*] at paras. 48 (per Karakatsanis J.), 64 and 71 (per Abella & Marin JJ.), 145 (per Brown J.), and 152 (per Rowe J.).

[49] *Mikisew* at para. 145; citing *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1119; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at para. 77.

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