Constitutional forum constitutionnel

The Prudent Parliament and Section 24(1)

Peter Wills & Mary Angela Rowe*

Note: This article was submitted for review before the Supreme Court hearing in Canada (Attorney General) v Power. *The decision in that case has since been rendered and certain aspects of the authors' analysis in the article have now been overtaken by the majority reasons.*

I. Introduction

The appeal of *Attorney General of Canada v Power*[1] will be heard by the Supreme Court of Canada ("SCC") on December 7, 2023. The case concerns the availability of damages under section 24(1) of the *Canadian Charter of Rights and Freedoms* ("*Charter*") for legislative action.[2] In advance of that hearing, we argue: 1) the text of section 24(1) does not bar damages for unconstitutional legislation; 2) the history of section 24(1) points towards damages for legislative action; 3) unwritten constitutional principles suggest courts should treat different types of damages differently; 4) precedent suggests Crown liability for unconstitutional legislation should proceed on a negligence standard for some types of damages; and 5) meeting

* DPhil candidate, Faculty of Law, University of Oxford; Osler, Hoskin & Harcourt LLP, Research Department, Toronto. The views expressed herein are those of the authors and do not necessarily represent those of their employers. For the avoidance of doubt, this work was created entirely independently and without consulting the parties or intervenors (or their counsel) on the *Power* case discussed herein. We thank Brandon Chung, Gerard Kennedy, and David Rankin for generous and helpful comments on an earlier draft, as well as the editors of *Constitutional Forum Constitutionelle*.

1 2022 NBCA 14.

2 *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982*, being Schedule B to the Canada Act, 1982 (UK), 1982, c 11.

the standard of care for such negligence should require Parliament to obtain legal advice.[3] In so doing, we reconsider early *Charter* scholarship on the value of private law concepts to the unique public law context of section 24(1) in light of more recent jurisprudence.[4]

II. Background

Power itself concerns a claim made by Joseph Power against Canada for losses he suffered due to legislation ultimately found unconstitutional. The legislation at issue concerned his eligibility for a pardon (now called a record suspension). In 1996, Mr. Power was convicted of two indictable sexual assault offences. After serving his prison sentences, he trained to become a medical radiation technologist, and was subsequently employed for ten years by a hospital in New Brunswick. In 2011, the hospital became aware of Mr. Power's prior convictions and placed him on leave. Mr. Power learned that his criminal record would prevent him from working in his field unless he obtained a pardon, which he then applied for in 2013. His application was denied due to the 2012 enactment of the *Safe Streets and Communities Act* ("*SSCA*"), which made persons convicted of certain indictable offences ineligible for a pardon.[5] Transitional provisions of the *SSCA* made these changes retrospective and thus applicable to Mr. Power. In 2017, these transitional provisions were found unconstitutional, and in 2018, Mr. Power brought an application for monetary damages under section 24(1).

The current appeal before the SCC concerns Mr. Power's section 24(1) damages claim. Mr. Power argues that the unconstitutional transitional provisions deprived him of the opportunity to work in his chosen field and that he is entitled to damages for loss of employment.

III. Types of Monetary Damages

Before we consider section 24(1) in detail, we find it useful to recall the various types, or measures, of money that courts can award at private law.[6] These include:

> **Restitution**: This remedy compels the defendant to restore a benefit the plaintiff previously held that the defendant received.[7] It is measured by the plaintiff's loss and the defendant's corresponding gain.
>
> **Disgorgement**: This remedy compels the defendant to "disgorge" — or surrender/give up — benefits that the defendant gained through violating the plaintiff's rights.[8] It is

3 When we use "Parliament" in this paper, we intend to refer equally to the provincial legislatures.

4 See e.g. Marilyn L Pilkington, "Damages as a Remedy for Infringement of the *Canadian Charter of Rights and Freedoms*" (1984) 62 Can Bar Rev 517; Marilyn L Pilkington, "Monetary Redress for Charter Infringement" in Robert J Sharpe, ed, *Charter Litigation* (Toronto: Butterworths, 1987), 307; Ken Cooper-Stephenson, "Tort Theory for the Charter Damages Remedy" (1988) 52:1 Sask L Rev 1.

5 SC 2012, c 1.

6 We refer to the common law conceptions of types of monetary awards, but the Québec civil law offers an alternative that is beyond the scope of this paper to address.

7 *Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 at para 23.

8 *Ibid* at paras 24–25.

intended to put the defendant back in the situation they would have been but for the wrong.[9]

Compensatory damages: These damages are aimed at restoring the plaintiff to the position they would have been if their rights had not been violated, subject to remoteness principles.[10] Compensatory damages can be further divided into pecuniary (special) damages, intended to compensate for a specific monetary loss; non-pecuniary (general) damages, intended to compensate for non-monetary loss;[11] and aggravated damages, intended to compensate for any additional harm arising from the manner in which the rights violation occurred.[12]

Punitive or exemplary damages: These are "the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner."[13] Their aim is to "punish the defendant."[14]

Nominal damages: These are normally trifling in sum and were originally created as a way for courts to "record a verdict where no compensation is required."[15]

We set out these private law concepts not to encourage an unthinking transplantation from private law to public, but because they may provide greater structure to the debate about "*Charter* damages." Courts often abhor unstructured discretion due to the spectre of indeterminate liability; accordingly, we suggest a coherent structure of rules governing section 24(1) damages to give better effect to the purpose of section 24(1) and provide greater certainty and predictability to both courts and Parliament.[16]

IV. Section 24(1) Damages for Unconstitutional Legislation

Interpreting any *Charter* provision demands consideration of the provision's text, context, and legislative history.[17] These factors do not clearly affirm whether damages should be available for unconstitutional legislation, but they point more toward damages being available than damages being unavailable.

---

9 *Monsanto Canada Inc v Rivett*, 2009 FC 317 at para 22, appeal allowed but not on that point, 2010 FCA 207.

10 *Fidler v Sun Life Assurance Co of Canada*, 2006 SCC 30 at para 44 (regarding breach of contract); *Toronto Industrial Leaseholds Ltd v Posesorski*, (1994) 21 OR (3d) 1 (CA) at para 23 (regarding solicitor's negligence).

11 Samuel Beswick, *Tort Law: Cases and Commentaries*, 2nd ed (University of British Columbia, 2023) 2021 CanLIIDocs 1859, ss 9.2, 9.3.

12 *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para 196.

13 *Ibid* at para 188.

14 *Ibid*.

15 *Davidson v Tahtsa Timber Ltd*, 2010 BCCA 528, quoting A I Ogus, *The Law of Damages* (London: Butterworths, 1973) at 22.

16 See *Deloitte & Touche v Livent Inc (Receiver of)*, 2017 SCC 63 at paras 42-43; *R (WL (Congo)) v Secretary of State for the Home Department*, [2011] UKSC 12 at para 101, Lord Dyson JSC.

17 *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at para 116–17; *R v Poulin*, 2019 SCC 47 at para 55; *Quebec (Attorney General) v 9147-0732 Québec Inc*, 2020 SCC 32 at para 7 [*9147-0732 Québec*] (albeit all concerning rights-bearing provisions of the *Charter*, not a remedy-granting provision like s 24(1)). But note Le Dain J (dissenting but not on this point) declined to consider the legislative history of s 24(1) in *R v Therens*, [1985] 1 SCR 613 at para 64.

A. The Text

The text of the *Charter*, the starting point for any analysis,[18] provides no hint that section 24(1) *cannot* provide damages for legislation. Sections 24 and 32 of the *Charter* read as follows:

> **24** (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> …
>
> **32** (1) This Charter applies
>
> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Two features of these sections are important. First, the *Charter* applies to Parliament and the legislatures, not merely the government. As a simple matter of textual interpretation, then, a section 24(1) remedy would seem to be available for legislation.[19] Second, "[i]t is difficult to imagine language which could give the court a wider and less fettered discretion" than "such remedy as the court considers appropriate and just in the circumstances." [20] Such broad language could readily encompass damages for legislation.

B. Legislative History

Section 24 was clearly intended to encompass monetary damages. Presenting the current text of section 24 to the Special Joint Committee on the Constitution ("Committee"), Justice Minister Jean Chrétien[21] explained that "the courts will be able to determine that there has been discrimination, require that the problem be resolved and grant compensation to individuals if necessary."[22] The Deputy Minister of Justice confirmed that courts could award "compensation in appropriate circumstances" for violations of legal rights.[23]

---

18 *9147-0732 Québec*, *supra* note 17 at para 8.

19 For example, in *Ontario (Attorney General) v G*, 2020 SCC 38 the SCC affirmed the propriety of granting an individual s 24(1) remedy to a claimant impacted by unconstitutional legislation while suspending the general s 52(1) declaration of invalidity: see paras 142–54, 174, 182–83.

20 *Mills v R*, [1986] 1 SCR 863 at para 278, McIntyre J.

21 Well, almost. The version he read out said "just and appropriate" rather than "appropriate and just." See Parliament of Canada, Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, 32nd Parl, 1st Sess, No 36 (12 January 1981) at 19.

22 Parliament of Canada, Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, 32nd Parl, 1st Sess, No 38 (15 January 1981) at 92.

23 *Ibid* at 40.

Legislative history suggests that Parliament did not distinguish between damages for legislative versus executive action. For example, Minister Chrétien said the new section 24(1) language "would ensure that an appropriate remedy as determined by the courts would be afforded to anyone whose rights have been infringed *whether through enactment of a law* or by an action of a government official."[24]

Committee discussions on the legacy of Japanese internment further support that Parliament intended damages to be available for unconstitutional legislation. A purpose of the *Charter*, and especially of section 24(1), was to provide recourse if events akin to the internment of Japanese Canadians during the Second World War occurred in the future. As Dodek recounts, the National Association of Japanese Canadians's testimony before the Committee was persuasive, memorable, and continually brought up by Committee members and responded to by Minister Chrétien.[25] Committee members referred to Japanese internment and confiscation of property in arguing both for a remedies clause and for entrenchment of the *Charter* so that legislatures could not amend it by ordinary legislation. [26] Brian Tobin had this to say in a discussion on entrenchment:

> I say to you that it was Parliament and the legislatures, not the courts, that interned the Japanese during World War II. I think that is a striking, shocking and a shameful example and we should not allow that type of thing to happen again.[27]

Following a question about whether entrenchment of a bill of rights protected internees in the United States, Tobin asserted:

> [T]he Japanese people were released much quicker and their property, lands and wealth were returned to them very quickly, based on the rights enshrined in the United States constitution. Now, in Canada there was no provision, and it took years, and in many cases people's property was never returned to them.[28]

Two points emerge from this discussion. First, although Japanese Canadian internment and property confiscation in fact occurred via administrative action under the *War Measures Act*, the Committee was less concerned about form than substance. The Committee did not distinguish between executive and legislative action in its discussion of entrenchment, or in its comments on the return of Japanese Canadians' confiscated property. Second, because the *Charter* does not directly protect property, absent a remedial clause there would be no way for internees to necessarily get compensation for their losses. Voiding the taking via a section 52(1)-like remedy would today give rise to a right to compensation for unjust enrichment,[29] but at the

---

24 *Ibid*, emphasis added.

25 Adam Dodek, ed, *The Charter Debates: The Special Joint Committee on the Constitution, 1980-81, and the Making of the Canadian Charter of Rights and Freedoms* (Toronto: University of Toronto Press, 2018) at 61–62, 65.

26 See e.g. Parliament of Canada, Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, 32-1, No 22 (9 December 1980) at 115 (Svend Robinson).

27 Parliament of Canada, Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, 32-1, No 32 (1 June 1981) at 133 (Brian Tobin). Tobin was not ultimately a formal member of the Joint Committee, but he appeared in more than a third of the Joint Committee's meetings: Dodek, *supra* note 25 at 37–38.

28 Parliament of Canada, *supra* note 27 at 134.

29 See *Kingstreet Investments Ltd v New Brunswick (Finance)*, 2007 SCC 1 [*Kingstreet*].

time it was questionable whether any recompense could be had for payments made pursuant to unconstitutional statutes.[30] On that background, the Committee's comments seem to imply (without clearly affirming) that compensation for unconstitutional legislation via damages under section 24(1) is necessary to remedy the harms from Japanese internment or similar future wrongs.

C. Unwritten Constitutional Principles

Unwritten constitutional principles complicate this picture in two ways.[31] First, and most straightforwardly, unwritten constitutional principles could reasonably inform what is "appropriate and just" under section 24(1). More significantly, these principles also inform the scope of parliamentary privilege, which may be in tension with awarding damages for unconstitutional legislation.

Parliamentary privilege grants legislators a legal immunity from civil or criminal liability for actions done in the course of their duties, including developing legislation. Parliamentary privilege is constitutionally entrenched by the preamble to the *Constitution Act, 1867*; however, its scope extends only so far as is "necessary to the assembly's constitutional role."[32] The scope of what is "necessary" is not for courts to decide according to the *Charter*, but instead is determined with reference to the organizing principles of the Canadian Constitution.[33] Relevant principles for assessing section 24(1) damages for legislation include parliamentary democracy and the separation of powers.[34]

We suggest parliamentary privilege has clear implications for who can be the subject of a section 24(1) order, and for the kind of section 24(1) orders that can be made in relation to an unconstitutional law. In our view, parliamentary privilege should immunize both Parliament as a body and individual members from liability under section 24(1). If it did not, then some people might be chilled from choosing to stand for election or, if elected, voting earnestly in the legislature. It would trench on Parliament's right to police conduct of members and voters' right to decide the composition of Parliament by election. Moreover, as Parliament is a group decision-making body, isolating individual members and assigning legal responsibility to them would be fraught. Equally, section 24(1) could not be used to impose *mandamus* or an injunction upon Parliament.

These restrictions, while meaningful, do not go so far as to completely bar recovering damages for unconstitutional legislation. In our view, liability for damages under section 24(1) for unconstitutional legislation would need to be directed at the Crown (in right of Canada or a province as appropriate).

---

30 See *Vancouver Growers Ltd v G H Snow Ltd*, [1937] 4 DLR 128 (BCCA) at 131–32.

31 See *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at paras 56, 65 [*City of Toronto*].

32 *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of the Provincial Court Judges of Prince Edward Island*, [1997] 3 SCR 3 at para 101; *Chagnon v Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39 at para 30 [*Chagnon*].

33 *Chagnon*, *supra* note 32 at para 32, quoting *Canada (House of Commons) v Vaid*, 2005 SCC 30 at para 29(9); Malcolm Rowe & Manish Oza, "Structural Analysis and the Canadian Constitution" (2023) 101:1 Can Bar Rev 205 at 226.

34 See Robin Elliott, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001) 80 Can Bar Rev 67 at 109–14 (democracy) and 128–34 (separation of powers).

Rowe and Oza suggest parliamentary privilege might go further when they quote the Supreme Court of the United Kingdom as saying that it "is no part of the function of the courts under our constitution to exercise a supervisory jurisdiction over the internal procedures of Parliament."[35] If "exercis[ing] a supervisory jurisdiction over the internal procedures of Parliament" includes assessing whether Parliament has acted with fault, then the scope of a court's inquiry into what remedy is "appropriate and just" under section 24(1) should exclude such an assessment.

This exclusion would preclude certain approaches to liability. In the early days of the *Charter*, Cooper-Stephenson identified four "realistic alternative models of liability" for *Charter* damages based on the degree of fault: malice (intentionally and purposefully causing the plaintiff's loss without justifiable motive); intention (intentionally causing the plaintiff's loss even if for another purpose); negligence; and strict liability.[36] The first three models require assessing Parliament's fault. If assessing fault is inappropriate, then Parliament's liability under section 24 should be either strict or non-existent.

This argument, however, has flaws. Parliamentary privilege jurisprudence cannot be imported from the United Kingdom without making relevant changes for the existence of a written constitution.[37] Moreover, imposing a monetary remedy on the Crown due to Parliament's acts does not *supervise* Parliament because the consequences do not fall on Parliament or its Members but on the Public Revenue.

This structure — wherein the Revenue ultimately pays for the acts of Parliament — affects the types of damages that can be "appropriate" per section 24(1). Notwithstanding *Ward* (discussed below), we suggest it precludes awards of the deterrence-oriented remedies of punitive damages or disgorgement.[38] Liability levelled against the public for Parliament's misdeeds will not deter or punish Parliament. At most, such liability would indirectly punish the electorate, with the potential that the electorate responds in the next election. Such an influence path is unrealistic. When the mechanism for deterrence is unreliable and punishment is not directed at the persons responsible, the very purpose of punitive damages falls away.

We also suggest the *Charter* context precludes nominal damages. Nominal damages were meant to allow courts to provide declaratory relief. Courts can do so without nominal damages for *Charter* breaches, so such damages serve no purpose in this context.

We see the other types of damages as more plausible. Although any of Cooper-Stephenson's four models of liability might once have been applicable for such damages, we suggest

35 *City of Toronto*, *supra* note 31 at 226, quoting *R (on the application of SC, CB and 8 children) v Secretary of State for Work and Pensions and others*, [2021] UKSC 26 at para 165.

36 Cooper-Stephenson, *supra* note 4 at 61, 65, 67.

37 See *Chagnon*, *supra* note 32 at para 28. See also the Factum of the Intervenor, British Columbia Civil Liberties Association in *Power* (Court File 40241) at paras 32–35 (concerning how courts make judgments affected by the internal workings of legislatures when assessing colourability in the division of power context); and *Kingstreet*, *supra* note 29 at para 62 (declining to award compound interest against New Brunswick for unconstitutional legislation because there was no alleged "wrongful conduct on behalf of the Province that might warrant moral sanction" rather than because the court had no right to consider the point due to parliamentary privilege).

38 *Vancouver (City) v Ward*, 2010 SCC 27 [*Ward*].

that adherence to *stare decisis* should mandate strict liability for restitutionary damages and otherwise a negligence-based standard.

D. Precedent Points Toward Strict Liability for Restitution and a Negligence Standard for Compensatory Damages

Restitutionary damages are already available for unconstitutional legislation on a strict liability basis outside the *Charter* context, as shown by *Kingstreet*.[39] *Kingstreet* involved a tax statute that violated the separation of powers. The SCC purported to discover a novel "public law" cause of action for the return of taxes wrongfully paid pursuant to the unconstitutional law and a concomitant "constitutional remedy."[40] The Court had no textual support from the remedial provisions of the Constitution, and the complainants' constitutional rights had not been violated (since neither *Constitution Act* protects property). Moreover, the Court awarded this remedy despite finding no "wrongful conduct" by the government, which is to say that liability in this case was strict.[41]

If a strict liability public law right of action where no individual's constitutional rights were violated can be constructed out of a textual vacuum, what more can be done with the authority of section 24(1)? We propose that section 24(1) should permit restitutionary damages at least as liberally as does *Kingstreet*.

While not without ambiguity, precedent points toward a negligence-based standard for other forms of *Charter* damages for unconstitutional legislation. The leading Supreme Court case on this issue is *Mackin*.[42] *Mackin* involved a New Brunswick statute that removed a benefit to provincial court judges with retroactive effect. The statute was declared unconstitutional, and the claimants sought monetary damages under section 24(1).

Justice Gonthier's reasons for the majority are not a model of clarity. Although he clearly holds that there is no absolute immunity from damages for legislative action,[43] he addresses the availability of *Charter* damages for administrative (uncontroversial at this point) and legislative (the subject of the *Power* appeal) action in the same breath, without drawing any principled distinctions between them. Moreover, in the space of six paragraphs, Justice Gonthier articulates several distinct standards for liability: first he says *Charter* damages may only be awarded "in the event of conduct that is clearly wrong, in bad faith or an abuse of power," but he then applies this test by asking whether "New Brunswick [had] acted *negligently*, in bad faith or by abusing its powers," whether it had "displayed … wilful blindness," whether it had a "*negligent* or unreasonable attitude," and whether the legislation had been "enacted wrongly, for ulterior motive or with knowledge of its unconstitutionality."[44]

We suggest this array of language can best be reconciled by considering that acting "wrongly" is meant to refer to acting unreasonably or negligently. The minimum fault stan-

39 *Kingstreet*, *supra* note 29.
40 *Ibid* at para 31, heading 4.1.
41 *Ibid* at para 62.
42 *Mackin v New Brunswick (Minister of Finance); Rice v New Brunswick*, 2002 SCC 13 at paras 22, 79.
43 *Ibid* at paras 78–79.
44 *Ibid* at paras 78–79 and 82–83 (emphasis ours).

dard for *Charter* damages articulated by *Mackin* is therefore negligence. As seen in private law, the fault standard of negligence incorporates all higher standards of fault: a person who intentionally does an act can be held liable for negligently doing that act.[45]

The Court revisited *Charter* damages in *Ward*, a case that concerned executive (not legislative) action.[46] In *Ward*, the complainant was awarded monetary damages for an unconstitutional strip search and seizure of property. The Court held that damages may be awarded under section 24(1) when they fulfil one of three functions: compensation, vindication of the violated right, or deterrence of future breaches.[47] The Court also noted that in some circumstances the state may establish that awarding monetary damages would "interfere with good governance such that damages should not be awarded unless the state conduct meets a minimum threshold of gravity."[48]

Deterrence and compensation are well understood, but the vindicatory function expressed in *Ward* merits further consideration. As *Ward* explains the vindicatory function, it does not concern recognition for the loss of the plaintiff's right *qua* right, but rather "focuses on the harm the *Charter* breach causes to the state and to society."[49] A pronouncement that the claimant's rights were breached may itself be sufficient to vindicate the right,[50] and some Canadian courts have suggested that awarding *Charter* damages for compensation and vindication separately could be duplicative in some contexts.[51] However, *Ward* emphasizes that damages for vindication of a right are distinct from compensation and may be available even when a claimant has not suffered compensable loss.[52]

The private law heads of damages can be mapped onto *Ward*'s purposes: restitutionary and compensatory damages primarily compensate, but may also incidentally deter and vindicate; punitive damages primarily deter but may incidentally vindicate; disgorgement deters; and nominal damages may vindicate.

Does this mapping change the analysis? With one exception, which we will come to, we think not. To start, although comments in both *Mackin* and *Ward* imply a role for punitive *Charter* damages, we suggest such comments should pertain only to executive action. As we argued above, punitive damages for legislative action cannot be appropriate under section 24(1).

Nor does this mapping change anything for compensatory damages, although we do suggest such damages are worth subdividing. We suggest *Mackin*'s comments on negligence (as they pertain to legislative action) should be read as relating to the availability of special and general damages. *Mackin*'s comments on bad faith and abuse of power by Parliament should

45 See Cooper-Stephenson, *supra* note 4 at 22.
46 *Ward*, *supra* note 38.
47 *Ibid* at para 25.
48 *Ibid* at para 39.
49 *Ibid* at para 28.
50 *Ibid* at para 37.
51 See e.g. *Henry v British Columbia (Attorney General)*, 2017 BCCA 420 at paras 52 and 55. *Ward*, *supra* note 38 suggests at paras 28 and 47 that vindicatory damages may not necessarily be available as a distinct head of damages where compensation has been awarded.
52 *Ward*, *supra* note 38 at para 30.

be read as relating to aggravated (not punitive!) damages.[53] Unwritten constitutional principles do not point against aggravated damages because they are plaintiff-focused and respect the harm suffered by someone to whom another has acted egregiously. In all cases, compensatory damages would need principled limits like those imposed by remoteness in private law.[54]

Now we come to the exception: vindication. Having rejected punitive and nominal damages there is now a lacuna in our scheme: *Charter* damages that fulfil a vindicatory purpose where compensatory damages are not available. We suggest this should be met by a distinct head of vindicatory damages, which is not normally recognized in private law.[55] Courts already have awarded damages for vindication of a *Charter* right separately from damages for compensation.[56]

The courts' tendency to conflate the vindicatory and deterrence functions of *Charter* damages[57] raises questions about whether vindicatory damages should be available for unconstitutional laws. In our view, they should, because vindicatory damages reflect the inherent value to society of a *Charter* right, which is no less meaningful when violated by legislative action than by executive action. There is no structural reason to prohibit vindicatory damages for legislation, as there is with punitive damages. For this head of damages, we favour a negligence standard to align with general compensatory damages but recognize there may be arguments for the higher "abuse of process" standard.

To summarize, then, we suggest the law for *Charter* damages due to purely legislative action should be understood as follows:

<table>
<tr><th>Type of Monetary Remedy</th><th>Primary Ward Purpose</th><th>Basis for Liability</th></tr>
<tr><td>Restitutionary</td><td>Compensation</td><td>Strict</td></tr>
<tr><td>Punitive, Disgorgement</td><td>Deterrence</td><td>None</td></tr>
<tr><td>Compensatory (Pecuniary/Special, and Non-pecuniary/General)</td><td rowspan="2">Compensation</td><td>Negligence</td></tr>
<tr><td>Compensatory (Aggravated)</td><td>Abuse of power or bad faith[58]</td></tr>
</table>

53 Recall that aggravated damages are compensatory: see above.

54 Cooper-Stephenson, *supra* note 4 suggests this at 42; and *Morin v Reg Admin Unit #3 (PEI)*, 2004 PESCTD 1 at para 85 adopts Cooper-Stephenson's framing.

55 On discussions of vindicatory damages, see for example: David Pearce & Roger Halston, "Damages for Breach of Contract: Compensation, Restitution and Vindication" (2008) 28:1 Oxford J Legal Stud 73; Jason Varuhas, "The Concept of 'Vindication' in the Law of Torts: Rights, Interests, and Damages" (2014) 34:2 Oxford J Legal Stud 253; Eddy Ventose, "Damages for Constitutional Infringements: Compensation and Vindication" (2010) 36:2 Commw Law Bull 235; Vanessa Wilcox, "Vindicatory Damages: The Farewell?" (2012) 3:3 JETL 390.

56 See e.g. *Henry v British Columbia (Attorney General)*, 2016 BCSC 1038 at para 467 [*Henry* BCSC]; *Carr v Ottawa Police Services Board*, 2017 ONSC 4331 at paras 248 and 254.

57 See e.g. *Ward*, *supra* note 38 at para 52; *Henry* BCSC, *supra* note 56 at para 469.

58 We leave for another day the question of how a legislature can act in bad faith. It is enough that *Mackin* contemplates a court could make such a finding.

Type of Monetary Remedy	Primary *Ward* Purpose	Basis for Liability
Nominal	Vindicatory, if any	None
Vindicatory	Vindicatory	Negligence

The row most relevant for *Power* is that concerning pecuniary compensation damages, which fall to be determined by a negligence standard. We therefore suggest an appropriate question for the Court to consider is what constitutes negligence by the legislature. Or, put another way, how can a legislature fulfil its standard of care not to make unconstitutional legislation?

V. Constructing a Standard of Care

Whether legislation is constitutional is a legal question. When the conduct of a reasonably prudent person or body depends on a legal question, they obtain legal advice. A prudent Parliament, therefore, would get legal advice. We suggest this much of the standard of care is clear. The more interesting questions relate to the nature of that advice: in what circumstances is it necessary? From whom? How strong? In answering these questions, we suggest the negligence standard of fault in private law[59] can be of some (albeit limited) aid.

We suggest the answer to "in what circumstances" is "for all legislation."[60] One might object that only legislation with obvious or substantial constitutional implications should be so burdened. After all, as the SCC explained in *Ryan*, the negligence standard of care is related to the "likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury."[61] Legislation with only minor constitutional implications could thus be ignored.

This objection should fail, however, because this aspect of private law does not have application in the section 24(1) context. Negligence under section 24(1) is not concerned with harm but with violations of constitutional rights, which should always be significant from Parliament's perspective. A bright line rule is appropriate in this context.

Moving onto the question of the appropriate source of parliamentary legal advice, suffice to say Parliament has several options: Parliament's own law clerks, the executive branch, outside counsel, or the judicial branch (via the reference power). Choosing among the former three options is a question for Parliament, not the courts, so long as the advice is provided by qualified counsel exercising independent judgment.[62] We suggest a prudent Parliament would

59 We use this term generally to encompass both the tort of negligence, the statutory duty of care applicable to directors of corporations, and actions for which a due diligence defence applies. In all these cases, courts will consider what a "reasonable" person or a "reasonably prudent" person would have done in the circumstances.

60 Courts may apply a presumption of constitutionality once legislation has been passed, but that is a different matter.

61 *Ryan v Victoria (City)*, [1999] 1 SCR 201 at para 28.

62 The question of whether Parliament's legal advisor would owe a duty to *Charter* rights-bearers to exercise reasonable care in giving advice is beyond the scope of this paper, as are questions relating to solicitor-client privilege. Relevant questions include: whether all members of Parliament would need to be given the legal

seek to compel the executive to engage the reference power only when legal advice received from other sources is insufficient or uncertain (discussed below).

The next question is what standard of legal advice is sufficient to satisfy Parliament's standard of care. In private law, courts assessing the standard of care "look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards."[63] At the federal level, section 4.1 of the *Department of Justice Act* ["*DOJA*"] has long mandated that the Minister of Justice examine every government bill to "ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of the [*Charter*]" and to report such inconsistencies to the House.[64] This provision was considered by the Federal Court of Appeal in *Schmidt v Canada (Attorney General)*,[65] in which the appellant argued that these statutes imply a "more likely than not" standard — i.e. the Minister must conclude that a bill is "more likely than not" to be constitutional.[66] Justice Stratas, rejecting this view, interpreted the *DOJA* narrowly. He held Parliament need be notified only if there is no "credible argument" that the bill was consistent with the *Charter*.[67] In other words, Parliament must be advised only when a bill cannot possibly be deemed constitutional.

If *Schmidt* was correctly decided and established the *only* legal advice Parliament must obtain, there would be a gulf between private and public law standards of care.[68] We do not believe directors would satisfy their duty of care if they sought no advice on the legality of a corporation's actions, but instead instructed counsel only to contact them if there was "no credible argument" that the corporation's actions were legal.

Private law suggests that at minimum, to satisfy the standard of care, Parliament should obtain properly qualified legal advice evaluating and coming to a view on the constitutionality of proposed legislation. The challenges inherent in coming to a view on a novel legal question when faced with inconsistent statements from courts (a concern Stratas JA raised in *Schmidt*[69]) do not prevent private practitioners from regularly advising clients, and should no less hinder parliamentary lawyers. A legal opinion should be appropriately qualified to reflect the level of

---

advice for Parliament itself, as a group decision-making body, to have been advised; whether the advice would need to be *in camera* for privilege to attach; whether references in public debates to such advice would waive privilege; whether relying on the legal advice to defeat a section 24(1) claim would waive privilege (see *S & K Processors Ltd v Campbell Ave Herring Producers Ltd*, 1983 CanLII 407 (BCSC) at para 6); and whether the Attorney General (who would be defending any such claim) could waive Parliament's solicitor-client privilege. For uniform laws, such as those proposed by the Uniform Law Conference of Canada, it might be appropriate for legal advice to be shared among the legislatures, which could give rise to further solicitor-client privilege considerations.

63 *Ryan*, *supra* note 61 at para 28.

64 RSC 1985, c J-2, s 4.1.

65 2018 FCA 55 [*Schmidt*], leave ref'd 2019 CanLII 25897.

66 *Ibid* at para 4.

67 *Ibid* at paras 103–04.

68 *Schmidt*'s correctness is a matter of some dispute. Compare the vigorous assault on the decision by the eponymous Edgar Schmidt in "Why the FCA Decision in *Schmidt v Canada (Attorney General)* is Clearly Erroneous" (2020) 43:2 Man LJ 149 with the defences in John Mark Keyes, "Loyalty, Legality and Public Sector Lawyers" (2019) 97 Can Bar Rev 129, and Andrew Flavelle Martin, "The Attorney General's Forgotten Role as Legal Advisor to the Legislature: A Comment on *Schmidt v Canada (Attorney General)*" (2019) 52:1 UBC L Rev 1.

69 *Schmidt*, *supra* note 65 at paras 90-98.

risk or uncertainty associated with its conclusions.[70] The risk level of a given opinion may be significant, but that does not absolve the practitioner of responsibility for coming to a view, nor the client of responsibility for seeking appropriate advice.

In considering the standard of care under section 24(1), the SCC need not follow *Schmidt*. Indeed, Parliament has not. In a 2019 post-*Schmidt* amendment, Parliament added section 4.2 of the *DOJA*, which requires it be informed about the "potential effects" of bills on people's *Charter* rights. Even so, bare compliance with minimum statutory or industry standards may not suffice to meet the standard of care.[71]

What strength of legal opinion will satisfy the standard of care for section 24(1) is a contextual question, but Parliament should be at least as careful to avoid unconstitutionality as directors in the private realm are to avoid illegality. At minimum *a* legal opinion should be rendered, and the legal opinion should not conclude that the legislation is likely to be unconstitutional. A legislature that proceeded in the face of such an opinion would, in our view, likely display the "wilful blindness" or "unreasonable attitude" decried in *Mackin*.[72] Otherwise, courts might accept the "more likely than not" standard for straightforward constitutional analyses or a "there are good arguments" standard for novel questions or contradictory jurisprudence.[73] Bright-line rules are unhelpful here; courts must assess the reasonableness of reliance on a given legal opinion in context, as they do in private law.

The SCC can set more stringent standards for an opinion than one might expect because of the reference power. Parliament must retain the ability to disagree with the pronouncements of a past court and to pass legislation that may lead to a change of precedent. The reference power allows Parliament to do this: if it receives a legal opinion that is too weak, it can require that the executive refer the question to the courts to obtain certainty.[74] In this way, the reasonably prudent Parliament would avoid passing unconstitutional legislation.

Having set out this analysis, we conclude by noting the obvious: Parliament need not follow its legal advice. If it received advice that a bill might not be constitutional, Parliament would have options. It could scrap the bill; it could amend the bill to improve the likelihood of constitutionality; it could invoke the "notwithstanding clause" with the attendant political costs; or it could pass the bill as-is, with the risk that the Revenue may have to pay compensatory damages. Our analysis here relates only to the last option.

As applied to the *Power* appeal, our analysis suggests the Crown's liability for damages should be highly fact-dependent, albeit on facts that have not yet been litigated. Such facts are not the appropriate subject of judicial notice, so the only appropriate remedy for the SCC is to

70 See Wilfred M Estey, *Legal Opinions in Commercial Transactions*, 4th ed (Toronto: LexisNexis, 2022) at s 1.04.

71 *Garratt v Orillia Power Distribution Corporation*, 2008 ONCA 422 at para 40; *R v General Scrap Iron & Metals Ltd*, 2003 ABCA 107 at para 8.

72 *Mackin*, *supra* note 42 at paras 82 and 83.

73 See Schmidt, *supra* note 68 at 153–55 for standards used inside the Department of Justice and how they are actually employed.

74 Mechanically, we contemplate Parliament doing so via a coming-into-force provision that triggers on a court returning a positive opinion on a reference question posed by the executive. This mechanism also avoids Parliament being forced to wait for a court decision before proceeding with its legislative agenda.

remit the matter to the trial court for fact-finding. Relevant facts would include what measures (if any) Parliament used to satisfy itself as to the *SSCA*'s constitutionality. The trial court would need to decide: had Parliament been prudent?