



Case in Brief: **Canada (Attorney General) v. Power**

Judgment of July 19, 2024 | On appeal from the Court of Appeal of New Brunswick
Neutral citation: 2024 SCC 26

The Supreme Court confirms that the state can be required to pay damages for making unconstitutional legislation in limited circumstances.

This appeal is about whether the state is immune from liability for damages when it makes legislation that courts later find to be unconstitutional. Immunity from liability for damages means a situation in which courts cannot require the payment of such damages.

Joseph Power says he applied for a record suspension in 2013 but his application was denied. A record suspension allows people who were convicted of a criminal offence, but have completed their sentence and demonstrated that they are law-abiding citizens, to have their criminal record kept separate and apart from other criminal records in some circumstances. Mr. Power says his criminal record prevented him from working in the field in which he had trained.

At the time of Mr. Power's conviction in 1996, persons convicted of indictable offences could apply for a record suspension five years after their release. An indictable offence is a category of more serious criminal offences. Legislation enacted in 2010 and 2012 rendered Mr. Power permanently ineligible for a record suspension. This legislation was declared unconstitutional by courts in other proceedings and the Attorney General of Canada agrees that it violates the *Canadian Charter of Rights and Freedoms*. Mr. Power says he is owed damages under s. 24(1) of the *Charter* for the breach of his rights caused by the enactment of the legislation.

The Attorney General of Canada asked the court hearing Mr. Power's claim to answer two questions. First, can the state be required to pay damages for governments preparing and drafting a Bill that later became law, and was subsequently declared unconstitutional? Second, can the state be required to pay damages for Parliament enacting a Bill into law, which was later declared unconstitutional?

The Court of Queen's Bench of New Brunswick answered "yes" to both questions, finding that the state was entitled to only a limited immunity from *Charter* damages for unconstitutional legislation. The Court of Appeal of New Brunswick agreed and dismissed the Attorney General of Canada's appeal. The Attorney General appealed to the Supreme Court.

The Supreme Court has dismissed the Attorney General's appeal.

The state may be required to pay damages for making unconstitutional legislation if it is clearly unconstitutional, or was in bad faith or an abuse of power.

Writing for the majority, Chief Justice Wagner and Justice Karakatsanis held that the answer to both questions is "yes". The state is not entitled to an absolute immunity from liability for damages when it enacts unconstitutional legislation that infringes *Charter* rights. Rather, it may be liable for *Charter* damages if the legislation is clearly unconstitutional or was in bad faith or an abuse of power. An absolute immunity fails to properly reconcile the constitutional principles that protect legislative autonomy, such as parliamentary sovereignty and parliamentary privilege, and the principles that require the government be held accountable for infringing *Charter* rights, such as constitutionality and the rule of law. Each of these principles constitutes an essential part of Canada's constitutional law and they must all be respected to achieve an appropriate separation of powers. By shielding the government from liability in even the most egregious circumstances, absolute immunity would subvert the principles that demand government accountability.

Breakdown of the decision: *Majority:* Chief Justice [Wagner](#) and Justice [Karakatsanis](#) dismissed the appeal (Justices [Martin](#), [O'Bonsawin](#) and [Moreau](#) agreed) | *Dissenting in part:* Justice [Jamal](#) would have allowed the appeal in part (Justice [Kasirer](#) agreed) | *Dissenting:* Justice [Rowe](#) would have allowed the appeal (Justice [Côté](#) agreed)

More information: [Decision](#) | [Case information](#) | [Webcast of hearing](#).

Lower court rulings: [Decision](#) (Court of Queen's Bench of New Brunswick) | [Appeal](#) (Court of Appeal of New Brunswick)

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