



SUPREME COURT OF CANADA

CITATION: Canada (Attorney General) v. Power, 2024 SCC 26

APPEAL HEARD: December 7, 2023

JUDGMENT RENDERED: July 19, 2024

DOCKET: 40241

BETWEEN:

Attorney General of Canada
Appellant

and

Joseph Power
Respondent

- and -

Attorney General of Ontario, Attorney General of Quebec, Attorney General of Nova Scotia, Attorney General of New Brunswick, Attorney General of Manitoba, Attorney General of British Columbia, Attorney General of Prince Edward Island, Attorney General of Saskatchewan, Attorney General of Alberta, Attorney General of Newfoundland and Labrador, Fisher River Cree Nation, Sioux Valley Dakota Nation, Manto Sipi Cree Nation, Lake Manitoba First Nation, Quebec Native Women Inc., Speaker of the Senate, David Asper Centre for Constitutional Rights, Canadian Civil Liberties Association, Canadian Constitution Foundation, Queen's Prison Law Clinic, John Howard Society of Canada, British Columbia Civil Liberties Association, West Coast Prison Justice Society and Speaker of the House of Commons
Interveners

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

JOINT REASONS FOR JUDGMENT: Wagner C.J. and Karakatsanis J. (Martin, O'Bonsawin and Moreau JJ. concurring)
(paras. 1 to 119)

REASONS DISSENTING IN PART: Jamal J. (Kasirer J. concurring)
(paras. 120 to 253)

DISSENTING REASONS: Rowe J. (Côté J. concurring)
(paras. 254 to 383)

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Attorney General of Canada

Appellant

v.

Joseph Power

Respondent

and

**Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of Nova Scotia,
Attorney General of New Brunswick,
Attorney General of Manitoba,
Attorney General of British Columbia,
Attorney General of Prince Edward Island,
Attorney General of Saskatchewan,
Attorney General of Alberta,
Attorney General of Newfoundland and Labrador,
Fisher River Cree Nation, Sioux Valley Dakota Nation,
Manto Sipi Cree Nation, Lake Manitoba First Nation,
Quebec Native Women Inc., Speaker of the Senate,
David Asper Centre for Constitutional Rights,
Canadian Civil Liberties Association,
Canadian Constitution Foundation, Queen's Prison Law Clinic,
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Interveners

Indexed as: Canada (Attorney General) v. Power

2024 SCC 26

File No.: 40241.

2023: December 7; 2024: July 19.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK

Constitutional law — Charter of Rights — Remedy — Damages — Legislation enacted by Parliament later found unconstitutional — Plaintiff commencing action against Crown for damages for breach of Charter rights caused by enactment of legislation — Whether damages against Crown can ever be appropriate remedy under Charter for enactment of legislation later declared unconstitutional — Canadian Charter of Rights and Freedoms, s. 24(1).

In 1996, P was convicted of two indictable offences. He was sentenced and served his time. After his release, P applied for a record suspension but his application was denied. At the time of his conviction, persons convicted of indictable offences could apply for a record suspension five years after their release. However, the transitional provisions of legislation enacted since then by Parliament retroactively rendered him permanently ineligible for a record suspension. The transitional provisions were declared unconstitutional by courts in other matters and Canada concedes that their retrospective application violates s. 11(h) and (i) of the *Charter* in a manner that cannot be justified by s. 1. P filed a notice of action seeking, *inter alia*, damages under s. 24(1) of the *Charter* against Canada for the breach of his rights

caused by the enactment of the transitional provisions. In response to P's action, Canada brought a motion on a question of law, asking two questions:

1. Can the Crown, in its executive capacity, be held liable in damages for government officials and Ministers preparing and drafting a proposed Bill that was later enacted by Parliament, and subsequently declared invalid by a court pursuant to s. 52(1) of the *Constitution Act, 1982*?
2. Can the Crown, in its executive capacity, be held liable in damages for Parliament enacting a Bill into law, which legislation was later declared invalid by a court pursuant to s. 52(1) of the *Constitution Act, 1982*?

The motion judge answered “yes” to both questions, finding that the government was entitled to only a limited immunity from *Charter* damages for the enactment of unconstitutional legislation. The Court of Appeal dismissed Canada's appeal, agreeing with the motion judge that the government does not enjoy absolute immunity in exercising its legislative powers.

Held (Kasirer and Jamal JJ. dissenting in part and Côté and Rowe JJ. dissenting): The appeal should be dismissed.

Per **Wagner** C.J. and **Karakatsanis**, Martin, O'Bonsawin and Moreau JJ.: The questions should both be answered in the affirmative. The state is not entitled to an absolute immunity from liability for damages when it enacts unconstitutional

legislation that infringes *Charter* rights. Rather, as the Court held in *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405, the state 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.

Sections 32(1) and 24 of the *Charter*, along with s. 52(1) of the *Constitution Act, 1982*, entrench the court's role in holding the government to account for *Charter* violations. Pursuant to s. 32(1), the federal and provincial legislatures are subject to *Charter* scrutiny. A declaration of invalidity under s. 52(1), the first and most important remedy when dealing with unconstitutional legislation, allows courts to protect *Charter* rights while respecting the distinct role of the legislature in Canada's constitutional order. As for s. 24(1), it provides a personal remedy in the sense that it is specific to the violation of the applicant's rights; it is a unique public law remedy against the state that should not be assimilated to the principles of private law remedies. An award of damages as a s. 24(1) remedy against the state for exceeding its legal

powers has long been recognized as an important requirement of the rule of law. In *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28, the Court set out a four-step test for determining whether damages are an appropriate and just remedy: (1) whether a *Charter* right has been breached; (2) whether damages would fulfill one or more of the related functions of compensation, vindicating the right, or deterring future breaches; (3) whether the state has demonstrated that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust; and (4) the appropriate quantum of damages.

While there is a general presumption against combining remedies under ss. 24(1) and 52(1), there is no categorical restriction. The existence of an alternative remedy is a countervailing consideration under the *Ward* test; however, provided an award of *Charter* damages is not duplicative, the potential to combine declarations and damages must remain available in situations where a declaration would fail to satisfy the functional need for compensation, vindication or to meaningfully deter future breaches. While good governance concerns may defeat an award of damages, the mere suggestion that damages will have a chilling effect on government is not sufficient to defeat an applicant's functional entitlement to *Charter* damages established at steps one and two of the *Ward* test. Damages may promote good governance by encouraging constitutional compliance and deterring *Charter* breaches. Limited immunity for the state for the enactment of legislation subsequently declared unconstitutional is consistent with and best reconciles the constitutional principles underpinning both legislative autonomy and accountability: parliamentary sovereignty, the separation of

powers, parliamentary privilege, the broad and purposive approach to rights and remedial provisions in the *Charter*, and constitutionalism and the rule of law.

First, the principle of parliamentary sovereignty must not be confused with parliamentary supremacy. Parliamentary sovereignty does not mean that Parliament is above the Constitution; rather, Parliament remains subject to the constraints and accountability mechanisms of the Constitution, including the *Charter*. The supremacy of the Constitution in relation to Parliament is well recognized in each application of s. 52 of the *Constitution Act, 1982*. Limited immunity does not impair Parliament's power to make and repeal laws within the confines of the Constitution.

Second, limited immunity is consistent with the separation of powers. The separation of powers does not mean that each branch works in isolation. The Court has never adopted a watertight system of separation but rather has always emphasized that each branch cannot exercise undue interference, which depends entirely on the circumstances and the constitutional principles engaged. Holding the legislature liable for *Charter* damages when it seriously misuses its legislative power does not constitute undue judicial interference in the legislative process. Rather, damages are an after-the-fact remedy for a *Charter* violation. However, respect for the legislative role requires a high threshold for liability for the enactment of unconstitutional legislation.

Third, courts can respect parliamentary privilege when applying the limited immunity threshold. Parliamentary privilege provides the legislature with the tools to execute its core functions. It operates by shielding some areas of legislative

activity from external review: for example, parliamentary privilege gives members of the legislature the freedom of speech necessary to carry out their law-making power without fear of liability, and protects against the compellability of certain types of evidence, such as the testimony of sitting members of Parliament. The protection of these processes is fundamental to Canada's constitutional structure and the functioning of its democracy. Parliamentary privilege cannot be subordinated or diminished by other parts of the Constitution. But *Charter* damages for the enactment of unconstitutional legislation are not claimed against any individual members involved in the legislative process. The action is directly against the state. The basis for the state's liability for damages under s. 24(1) is the breach of the claimant's *Charter* right. The state's conduct within the legislative process is not an independent basis for liability but rather informs whether damages are an appropriate and just remedy for the breach caused by the enactment of the *Charter*-infringing law. The state's liability for unconstitutional legislation does not engage members' personal immunity for parliamentary speech. Nor does it interfere with Parliament's power to control its own debates and proceedings, or dictate how the legislative function is exercised. Parliamentary privilege must not be extended beyond the scope necessary to protect the legislature's core democratic functions. However, parliamentary privilege may prevent claimants from adducing certain types of evidence relating to the legislative process and hence limit a claimant's practical ability to satisfy the threshold in a given case. But this possibility does not foreclose the availability of such a cause of action in principle.

Fourth, an absolute immunity does not accommodate the principles recognized in the jurisprudence on constitutional remedies. It leaves little room for the principles that underpin legislative accountability — including the broad and purposive approach to rights and remedial provisions in the *Charter*, as well as constitutionalism and the rule of law. An absolute immunity would protect the government from any claim for damages for any unconstitutional legislation, no matter how egregious, and allow a narrow set of constitutional interests to dominate the analysis.

A high bar for immunity, set by the Court in *Mackin*, has been good law for over two decades. It has resulted neither in chilling good governance, nor in a floodgate of claims against the state for damages. Although the Court may depart from precedent where there is a compelling reason to do so, there are no compelling reasons to overrule *Mackin*. The *Mackin* qualified immunity threshold is assessed at step three of the *Ward* framework and can be restated as follows: the good governance defence will prevail unless the law was clearly unconstitutional, in bad faith or an abuse of power. If the threshold is not met, the balance of constitutional principles tilts in favour of state immunity. In such cases, the constitutional imperative that the government be afforded the autonomy to govern effectively will defeat the claim to damages.

Per Kasirer and **Jamal** JJ. (dissenting in part): The appeal should be allowed in part and the first question answered in the negative. The Crown enjoys an absolute immunity from damages under s. 24(1) of the *Charter* when preparing and drafting primary legislation later found to be unconstitutional. Such conduct is

protected from judicial interference by established categories of parliamentary privilege, namely freedom of speech and control over parliamentary proceedings. The courts have no jurisdiction to review or assign liability for the exercise of these established categories of parliamentary privilege. The second question should be answered in the affirmative, but in a qualified manner: damages may only be available under s. 24(1) for harms flowing from “clearly unconstitutional” enactments. *Mackin* should be clarified to eliminate bad faith and abuse of power in enacting primary legislation as grounds for damages under s. 24(1) of the *Charter*, as they inevitably trench on established categories of parliamentary privilege. They would also strain the separation of powers by asking the courts to entertain non-justiciable questions. The Crown may, however, be liable in damages under s. 24(1) for harms flowing from “clearly unconstitutional” enactments. The clearly unconstitutional threshold is a nuanced standard that appropriately protects the autonomy of Parliament and the limited immunity necessary for legislators to carry out their work, while employing a purposive approach to s. 24(1) remedies to vindicate *Charter* rights.

The doctrine of parliamentary privilege refers to the sum of the privileges, powers, and immunities of the federal Houses of Parliament or provincial legislative assemblies, and of their individual members, that are necessary to their capacity to function as legislative bodies. Parliamentary privilege helps Canada’s constitutional democracy maintain the fundamental separation of powers between the legislative, executive, and judicial branches of government, by shielding some areas of legislative activity from external review. Parliamentary privilege is part of the Constitution of

Canada. Since one part of the Constitution cannot be abrogated or diminished by another part of the Constitution, actions or conduct protected by parliamentary privilege are not subject to the *Charter*. Once the existence of a category of parliamentary privilege is established, conduct or activities that are themselves an exercise of that privilege are not subject to review by the courts, even when such conduct or activities are alleged to violate the *Charter*. This means that such conduct or activities cannot be the basis of a *Charter* breach and cannot give rise to a *Charter* remedy such as damages under s. 24(1).

In the instant case, three uncontroversial points regarding the questions at issue guide the analysis. First, there is no debate that the questions, which inquire as to the Crown's liability in its executive capacity, refer to the liability of the Canadian government *qua* executive, to be distinguished from the legislature. Second, there is no debate that the *Charter*, including s. 24(1), applies to Parliament and the government of Canada, pursuant to s. 32(1)(a) of the *Charter*. Third, remedies under s. 52(1) of the *Constitution Act, 1982* and s. 24(1) of the *Charter* can be combined. A remedy will be appropriate and just within the meaning of s. 24(1) when it furthers the general objectives of the *Charter* by compensating the plaintiff for any loss, vindicating rights, or deterring future breaches.

Both questions before the Court raise distinct parliamentary privilege considerations relating, in question 1, to the legislative process of preparing and drafting legislation, and in question 2, to the grounds on which legislation, once

enacted, may be reviewed. Concerning the first question, the Crown cannot be liable for preparing and drafting legislation. Government officials and Ministers involved in preparing and drafting legislation enjoy the parliamentary privilege of freedom of speech for words or conduct connected to their legislative work. Whether the privilege applies is not determined by the nature of the relevant individual, but by the activities in which they are engaged and the necessity of those activities to core legislative functions. Robust legislative debate, which falls within the privilege over freedom of speech, is the lifeblood of Parliament's day-to-day business. Exposing the Crown, in its executive capacity, to liability in damages for the conduct of government officials and Ministers in preparing and drafting legislation would inevitably intrude upon this category of privilege.

As with the free speech privilege, exposing the Crown to liability for the words or conduct of government officials and Ministers in preparing and drafting legislation would unavoidably trench on the established privilege over the proceedings of Parliament. This privilege is broad: it includes everything said or done by a Member in the exercise of their functions as a Member in committees of either House, as well as everything said or done in either House in the transaction of parliamentary business. It also extends to matters taking place outside the houses of Parliament. The words and conduct of Members who are occupied in something closely and necessarily related to a proceeding in Parliament are accorded absolute privilege. It cannot reasonably be suggested that preparing and drafting legislation is not closely and necessarily related to proceedings in Parliament.

Parliamentary privilege is a threshold jurisdictional issue under the *Ward* framework regarding *Charter* damages under s. 24(1). If the existence of a recognized category of parliamentary privilege is proved, there can be no judicial review of the exercise of the privilege, even on *Charter* grounds. This conclusion is a direct consequence of the constitutional nature of parliamentary privilege and its status as a rule of curial jurisdiction. The privilege cannot be the subject of a judicial balancing as to whether countervailing good governance concerns at step three of *Ward* defeat the functional considerations that support a damages award and render damages inappropriate or unjust. Instead, the existence of the privilege means that the courts lack jurisdiction to undertake any further inquiry. In addition, the Crown in its executive capacity cannot be held liable for the work of Ministers and other government officials in preparing and drafting legislation because, in doing so, they act in a legislative rather than an executive capacity. Such conduct is not Crown conduct that can be attributed to the executive for which the Crown can be liable in an action brought under s. 23(1) of the *Crown Liability and Proceedings Act*.

With respect to the second question, if it is interpreted as relating to whether an enactment that violates the *Charter* can ever give rise to *Charter* damages under s. 24(1) after a bill has become law and the legislative process is complete, the answer is a qualified “yes”. The limited immunity rule in *Mackin* should be modified to clarify that the Crown can be liable in damages for the breach of *Charter* rights caused by legislation only when the legislation is shown to have been “clearly unconstitutional” at the time it was enacted. There are compelling reasons to revisit

Mackin. None of the authorities cited in *Mackin* support awarding *Charter* damages against the Crown for harms caused by unconstitutional primary legislation. The test enunciated in *Mackin* also conflicts with the doctrine of parliamentary privilege, as well as the separation of powers and principles of justiciability. None of these points was argued in *Mackin*, and the Court did not consider them in its reasons.

The bad faith and abuse of power thresholds in *Mackin* are inappropriate thresholds in respect of damages under s. 24(1) of the *Charter* for unconstitutional primary legislation because they conflict with the doctrine of parliamentary privilege and principles of justiciability, and strain the separation of powers. The doctrine of parliamentary privilege prevents courts from passing judgment on the process of enacting legislation. Scrutinizing legislation for evidence of bad faith or abuse of power, even once the law has already been enacted, would inevitably pull courts into judging the legislative process, which is beyond their jurisdiction. The courts cannot put Parliament “on trial”.

In addition, inquiring into whether primary legislation was in bad faith and an abuse of power as standards for awarding *Charter* damages would threaten the separation of powers by requiring the courts to consider questions that are not justiciable. Justiciability refers to a set of judge-made rules, norms, and principles delineating the scope of judicial intervention in social, political, and economic life. A court may decline to answer a question on the ground of justiciability when doing so would take it beyond its proper constitutional role, or if the court cannot provide an

answer within its area of expertise. Once legislation has been found to be unconstitutional, there is no legal yardstick to measure whether the legislation was in bad faith or involved an abuse of power. Asking whether the legislation is in bad faith or constitutes an abuse of power requires the court to pass judgment on the content of the legislation on grounds other than its constitutionality, which strays into evaluating the wisdom or policy of the law and is not the proper role of the courts. The appropriate use of *Hansard* as proof of historical context or purpose in statutory interpretation must be distinguished from its inappropriate use to prove that legislation is in bad faith. The former does not impugn the freedom of speech or the integrity of parliamentary proceedings; the latter does.

In the context of legislative enactments, absolute immunity overshoots what is required to protect parliamentary privilege and the separation of powers. These constitutional imperatives can be respected by a test that focuses on whether the enactment itself clearly violated established constitutional norms at the time it was enacted. A qualified or limited immunity preserves the courts' power under s. 24(1) to craft remedies that meaningfully vindicate *Charter* rights, while ensuring that effective government is not jeopardized by overbroad state liability that trenches on parliamentary privilege. To overcome the good governance concerns at step three of the *Ward* framework, a claimant must show that the legislation was clearly unconstitutional in the sense that the unconstitutionality was readily or obviously demonstrable at the time the legislation was enacted and could not be subject to any serious debate. Such a standard focuses on legislative outputs rather than legislative

inputs, and on how the impugned legislation must be significantly wide of the constitutional mark before damages will be an appropriate and just remedy under s. 24(1) of the *Charter*. The clearly unconstitutional standard allows courts to consider whether legislation has an unconstitutional purpose as a factor in a damages assessment, and it is an appropriately high but not insurmountable bar for claimants to meet. If an enactment was clearly unconstitutional at the time of enactment, this should be readily or obviously demonstrable.

Per Côté and **Rowe JJ.** (dissenting): The appeal should be allowed and both questions answered in the negative. The preparation, drafting, and enactment of legislation necessarily implicates parliamentary privilege, which is fundamentally at odds with awarding damages against the Crown in the manner sought. Both parliamentary privilege and the *Charter* constitute components of the Constitution of Canada. Neither one subordinates the other. The *Charter* must, as a matter of constitutional law, be given effect in a manner that is compatible with parliamentary privilege. Parliamentary privilege is rooted in the earliest chapters of Canada's constitutional history, and reflects an inherited legacy of struggle between the Crown and Parliament in the United Kingdom, one that reaches back to Parliament's origins. The Court has a responsibility to preserve the inheritance of Canada's constitutional order. It should not be discarded, and parliamentary privilege should not be subordinated to s. 24(1) of the *Charter*. To do so would be to depart from precedent and to do so unwisely.

Canada's constitutional arrangements (aside from Aboriginal and treaty rights) consist of four written and unwritten components: the *Constitution Acts* of 1867 and 1982, constitutional conventions, Crown prerogative and parliamentary privilege. The unwritten components, including parliamentary privilege, fulfill a necessary role in Canada's constitutional order — they are no less part of the Constitution than are the two *Constitution Acts*. In addition, there are underlying (unwritten) principles that contribute to giving effect to Canada's constitutional arrangements. These principles are not themselves components of the Constitution; rather, they assist in interpreting the Constitution and arriving at answers to questions not otherwise provided for in the Constitution. They do not have a substantive policy content and cannot be the basis to challenge the validity of legislation. Norms expressed in the underlying/unwritten principles of constitutionalism and the rule of law do not constitute a basis to override parliamentary privilege, any more than they can constitute a basis to invalidate legislation. Parliamentary sovereignty and the separation of powers (plus constitutionalism and the rule of law) are underlying/unwritten principles that inform interpretation of the constituent components of the Constitution, but parliamentary privilege is different in that it is itself part of the Constitution. This distinction is fundamental.

The *Constitution Act, 1867* established that parliamentary privilege, which was essential to the operation of the largely unwritten constitution of the United Kingdom, would also be part of Canada's Constitution; the preamble states that Canada will have a Constitution similar in principle to that of the United Kingdom.

Parliamentary privilege was also specifically dealt with in s. 18 of the *Constitution Act, 1867*, which provides that the privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada. Thus, parliamentary privilege was from the outset a component of Canada's Constitution and continues to be so today. Unwritten components of the Constitution — including parliamentary privilege — have continued to be given faithful effect because they continue to play a crucial role in Canada's constitutional order.

Chief among the functions of parliamentary privilege is that it ensures that Parliament and provincial legislatures are able to carry out their work effectively. The purpose of privilege is to recognize Parliament's exclusive jurisdiction to deal with complaints within its privileged sphere of activity. A two-step process applies when courts are confronted with a privilege claim. First, the court must assess whether the existence and scope of the claimed privilege have been authoritatively established. If so, then the court's inquiry stops. The second step, which is not relevant in the instant case given the established nature of the privileges in question, requires the court to assess the necessity of the privilege asserted.

Parliamentary privilege ensures that the legislature is safeguarded from interference by the other two branches of the state, the executive and the judiciary. Intervention by the executive or by the courts in the working of legislatures would

inevitably create delays, disruption, uncertainties and costs which would hold up the nation's business and on that account would be unacceptable.

Parliamentary privilege also structures the dialogue between the courts and the legislature. By delineating the scope of what is open to review, this privilege ensures that legislatures are able to respond to decisions in which courts give meaning to the Constitution, and where necessary, invalidate legislation. The dialogical nature of constitutional development in Canada is reflected in the “second look” cases in which the Court has wrestled with what weight to afford Parliament's attempt to reformulate legislation in response to a decision under s. 52(1). Consistent in these cases is the principle that Parliament should not be discouraged from trying again to reformulate legislation so that it is consistent with the *Charter*.

Respect for the separation of powers — which has been repeatedly affirmed as a constitutional principle — precludes judicial scrutiny of the legislative process. Subordinating parliamentary privilege in order to impose s. 24(1) damages for the preparation, drafting, and enactment of legislation risks drawing the courts into a supervisory role over the legislative process.

In the instant case, the privileges invoked are the House's exclusive control over its proceedings, and the privilege related to freedom of speech. They are both well established, and are rooted in art. 9 of the *Bill of Rights* of 1689, which established that the freedom of speech and debates, or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament. It has long been

accepted that these privileges must be held absolutely and constitutionally if they are to be effective; the legislative branch of government must enjoy a certain autonomy which even the Crown and the courts cannot touch. Judicial consideration of these privileges shows that the broad shelter afforded by the operation of parliamentary privilege is agnostic towards the content of what is protected. It matters not what was said or what the impugned conduct involved — what matters is whether the conduct in question relates to the assembly's ability to fulfill its constitutional functions.

Parliamentary privilege attaches to the entire process through which legislation is developed and adopted. It extends to the range of Parliamentary actors who are involved in the legislative process. When ministers develop legislation, they act in a parliamentary capacity. Despite an inevitable overlap between executive and legislative functions inherent in their work in developing legislation, because they are engaged in the law-making process when they develop legislation, the process is generally protected from judicial oversight.

While the existence and limits of parliamentary privilege are justiciable, their operation is not. Once a court finds that a privilege exists and describes its extent, the court's role ends. It is for the legislature itself to determine whether the exercise of the privilege was proper; such matters are not reviewable by the courts. The wide berth given to parliamentary privilege has been reflected in the manner in which the Court has approached apparent conflicts between parliamentary privilege and other components of the Constitution. The solution, when a conflict emerges between

parliamentary privilege and another component of the Constitution, is not to read down the protections afforded by parliamentary privilege — the solution is to read the relevant constitutional components in a compatible way. It is not open to the courts to intrude upon the *bona fides* of parliamentary debates and proceedings. The courts have long recognized the defining significance of Parliament’s work and the need for parliamentarians to debate and develop legislation freely. Parliamentary privileges are vital to the separation of powers as they enable parliamentarians — both individually and collectively — to freely express themselves and to act on matters of importance to Canadians, including controversial public policy issues, without fear of interference from the Crown or the courts.

The *Charter* did not negate the fundamental constitutional tenets upon which British parliamentary democracy rested or mark a “clean break” with existing constitutional structures that came before the passage of the *Constitution Act, 1982*. Instead, the passage of the *Charter* must be understood within the broader context of Canada’s constitutional development. Many consider the *Charter* to be the paramount constitutional instrument. This is incorrect. All parts of the Constitution must be read together, and no one can be subordinated to the others. That said, the *Charter* was accompanied by a revolutionary transformation of sorts, in the nature and extent of demands by litigants for courts to use their authority to advance goals that those litigants had not achieved through the electoral process. But it is not for the courts to pass upon the policy or wisdom of legislative will or question the wisdom of enactments which are within the competence of the Legislatures. Temperance and

moderation in the face of such invitations remain fundamental to the appreciation by the judiciary of its own position in the constitutional scheme.

The theory of liability endorsed by the courts below in the instant case elides the distinction between “the Crown” in its executive and legislative capacities. Canada’s Constitution incorporates the Westminster system of government, which was varied for a federal structure rather than a unitary state. Subsequent developments in the Constitution have built on this. In the contemporary constitutional order, the Crown acts in multiple distinct capacities, federal and provincial, as well as executive and legislative. The Crown in its executive capacity and the Crown in its legislative capacity are distinct. The Crown in its executive capacity consists of the King (through the Governor General) exercising the executive government and authority of and over Canada, as continued in the *Constitution Act, 1867*, s. 9. Those executive powers are, by constitutional convention, exercised by the Prime Minister, Cabinet, and public authorities in furtherance of statutory delegation of authority. The Crown-in-Parliament consists of the monarch (Governor General) acting in their legislative capacity. The Crown-in-Parliament embraces three determinative acts that are part of Parliament’s core functions as a legislative body: royal recommendation, royal consent and royal assent.

The Crown, thus, is at the heart of both the executive and legislative branches of government, but plays different roles in each. While Canada’s constitutional order envisages some overlap as to the Crown in its various capacities,

the law does not recognize executive control of the legislative branch. This is consistent with the scope of parliamentary privilege and its application across the various steps in the legislative process. The preparation of legislation is a complex process involving multiple actors across government. The courts are ill-equipped to deal with the procedural complexities of the legislative process. The distinctive roles played by the Crown reflects the separation of powers between the different branches of government, and the balance between them. This is part of the explanation as to why absolute immunity is needed for the preparation, drafting, and enactment of legislation, but not for determination of the validity of legislation once it is enacted or the legality of acts taken pursuant to the legislation.

Mackin does not resolve the question as to how parliamentary privilege operates where someone seeks s. 24(1) damages for the preparation, drafting, and enactment of legislation. The Court in *Mackin* did not turn its attention to this question nor has *Mackin* been applied in this way. The Court cannot rely on a passing reference in *Mackin* as the basis to depart from a substantial body of jurisprudence on parliamentary privilege and to abandon the fundamental principle that components of the Constitution do not negate one another. *Mackin* cannot be the basis for deciding that s. 24(1) damages can apply against the Crown in its executive capacity for the preparation, drafting, and enactment of legislation. Parliamentary privilege was never mentioned, much less discussed. To the extent, if any, that *Mackin*'s brief reference to damages for the mere enactment of a law represents a holding of the Court, it should

be treated as weak precedent at most. Accordingly, the matter being considered in the instant case must be seen as novel for the Court's consideration.

To remain faithful to the Court's jurisprudence, the Court's role must be limited to establishing the existence of the privileges in question, rather than inquiring into their operation. Parliamentary privilege stands without exception. Moreover, the Crown in its executive capacity cannot be liable for the preparation, drafting, or enactment of legislation, as it is not part of the legislative process. Rather it is the Crown-in-Parliament which is so; legislation is approved by the Commons and the Senate, followed by royal assent. Seeking damages from the Crown in its executive capacity for the preparation, drafting, and enactment of legislation is conceptually incoherent. The Attorney General of Canada is not the legal representative of Parliament and cannot represent Parliament in legal proceedings.

Absolute immunity is necessary. Parliamentary privilege is like an eggshell; one cannot break it just a little. In order for the Crown in its executive capacity to be held liable for the preparation, drafting, and enactment of legislation, courts will need to inquire into the motivations and knowledge of those engaged in the legislative process. The inquiry into "bad faith or abuse of power" can manifest itself in any variety of ways, many that cannot now be contemplated. Legislatures will have to ask themselves whether a court, sitting in judgment of their actions with the benefit of hindsight, will deem theirs to be "an improper purpose". Furthermore, a "clearly

unconstitutional” standard will necessarily depend on the eye of the beholder, and what is known to the court sitting in judgment of the legislature’s actions *ex post facto*.

Enabling s. 24(1) damages would upset the dialogical balance between legislatures and the courts. Courts will be thrust into a position of overseeing the work of Parliament, and inquiring into the motives and knowledge of parliamentarians and others involved in the legislative process. Extending s. 24(1) damages to the preparation, drafting, and enactment of legislation would deprive Parliament of its ability to meaningfully respond to decisions in which the judiciary has determined the validity of laws or the legality of actions taken pursuant to those laws. Further, given the number of parliamentary actors and the vagaries of the legislative process, it is unclear whose alleged actions would be at issue in any claim seeking *Charter* damages for the drafting and enactment of any one statute. Absolute immunities are required for certain institutions to function. This is exemplified by the fact that the judiciary enjoys an absolute immunity in the exercise of its adjudicative function.

Remedies under s. 24(1) are available following the enactment of legislation, in relation to executive action pursuant to legislation. P is not without recourse to a remedy, nor would others be. P could have applied for judicial review on *Charter* grounds of the decision to deny his application for a criminal record suspension. That remedy accords fully with Canada’s constitutional arrangements and would in no way detract from parliamentary privilege.

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By Wagner C.J. and Karakatsanis J.

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By Jamal J. (dissenting in part)

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Energy, Mines and Resources), [1989] 2 S.C.R. 49; *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28; *Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10; *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295; *Ontario (Attorney General) v. G*, 2020 SCC 38, [2020] 3 S.C.R. 629; *R. v. Albashir*, 2021 SCC 48; *Ontario v. Rothmans Inc.*, 2014 ONSC 3382, 120 O.R. (3d) 467; *Lavigne v. Ontario (Attorney General)* (2008), 91 O.R. (3d) 728; *Gagliano v. Canada (Attorney General)*, 2005 FC 576, [2005] 3 F.C.R. 555, aff'd 2006 FCA 86, 268 D.L.R. (4th) 190; *Canada (Deputy Commissioner, Royal Canadian Mounted Police) v. Canada (Commissioner, Royal Canadian Mounted Police)*, 2007 FC 564, [2008] 1 F.C.R. 752; *Prebble v. Television of New Zealand Ltd.*, [1995] 1 A.C. 321; *Canada (Board of Internal Economy) v. Boulerice*, 2019 FCA 33, [2019] 3 F.C.R. 145; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525; *Reference re Resolution to amend the Constitution*, [1981] 1 S.C.R. 753; *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489; *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429; *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30, [2004] 1 S.C.R. 789; *Henry v. British Columbia (Attorney General)*, 2015 SCC 24, [2015] 2 S.C.R. 214; *Ernst v. Alberta Energy Regulator*, 2017 SCC 1, [2017] 1 S.C.R. 3; *Kosoian v. Société de transport de Montréal*, 2019 SCC 59, [2019] 4 S.C.R. 335; *Rice v. New Brunswick* (1999), 235 N.B.R. (2d) 1; *R. v. McGregor*, 2023 SCC 4; *Plourde v. Wal-Mart Canada Corp.*, 2009 SCC 54, [2009] 3 S.C.R. 465; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R.

609; *R. v. Kirkpatrick*, 2022 SCC 33; *Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957; *Central Canada Potash Co. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42; *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347; *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3; *Janssen-Ortho Inc. v. Amgen Canada Inc.* (2005), 256 D.L.R. (4th) 407; *Club Pro Adult Entertainment v. Ontario* (2006), 150 C.R.R. (2d) 1, rev'd in part 2008 ONCA 158, 42 B.L.R. (4th) 47; *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750; *Bruker v. Marcovitz*, 2007 SCC 54, [2007] 3 S.C.R. 607; *La Rose v. Canada*, 2023 FCA 241, 488 D.L.R. (4th) 340; *Turner v. Canada*, [1992] 3 F.C. 458; *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17; *Hinse v. Canada (Attorney General)*, 2015 SCC 35, [2015] 2 S.C.R. 621; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R. v. Malmö-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571; *R. v. Clay*, 2003 SCC 75, [2003] 3 S.C.R. 735; *R. v. Sharma*, 2022 SCC 39; *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392; *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, [2020] 2 S.C.R. 283; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Pepper (Inspector of Taxes) v. Hart*, [1993] A.C. 593; *Mills v. The Queen*, [1986] 1 S.C.R. 863; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575; *Francis v. Ontario*, 2021 ONCA 197, 154 O.R. (3d) 498.

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APPEAL from a judgment of the New Brunswick Court of Appeal (Richard C.J. and LaVigne and LeBlond JJ.A.), 2022 NBCA 14, 471 D.L.R. (4th) 68, 508 C.R.R. (2d) 115, [2022] N.B.J. No. 80 (Lexis), 2022 CarswellNB 161 (WL), affirming a decision of Dysart J., 2021 NBQB 107, [2021] N.B.J. No. 172 (Lexis), 2021 CarswellNB 336 (WL). Appeal dismissed, Kasirer and Jamal JJ. dissenting in part and Côté and Rowe JJ. dissenting.

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Marc-André Roy, Anne Burgess and Maxime Faille, for the intervener the Speaker of the Senate.

Neil Abraham and Megan Stephens, for the intervener the David Asper Centre for Constitutional Rights.

Andrew Lokan and Mariam Moktar, for the intervener the Canadian Civil Liberties Association.

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Alyssa Tomkins and John J. Wilson, for the intervener the Speaker of the House of Commons.

The judgment of Wagner C.J. and Karakatsanis, Martin, O’Bonsawin and Moreau JJ. was delivered by

THE CHIEF JUSTICE AND KARAKATSANIS J. —

I. Overview

[1] It is a fundamental principle of our constitutional order that courts have a duty to protect the rights guaranteed by the *Canadian Charter of Rights and Freedoms* from infringement by the state. However, other foundational constitutional principles require that the state be afforded the legislative autonomy to govern effectively. At the heart of this appeal is a question about how to reconcile these principles in the context of s. 24(1) of the *Charter*, which authorizes courts to grant such remedies to individuals for the infringement of their *Charter* rights as is considered appropriate and just in the circumstances.

[2] The facts as pleaded indicate that the respondent Joseph Power's *Charter* rights were violated when Parliament enacted legislation that retrospectively changed the availability of criminal record suspensions for certain offenders. These changes made Mr. Power permanently ineligible for a record suspension. As a result, he was unable to maintain his employment. The appellant Attorney General of Canada concedes that the retrospective application of the legislation violates s. 11(h) and (i) of the *Charter* in a manner that cannot be justified by s. 1 (A.R., at pp. 89 and 91). Mr. Power brings a claim against Canada for damages under s. 24(1). He asserts that the invalid law infringed his *Charter* rights, and that damages are an appropriate and just remedy for this infringement. Canada seeks to strike the claim in a preliminary application.

[3] This appeal raises the question of whether damages can ever be an appropriate and just remedy under s. 24(1) of the *Charter* in respect of the enactment of legislation later declared unconstitutional. Canada submits that it enjoys absolute immunity from s. 24(1) damages for the enactment of unconstitutional legislation. It argues that the state cannot be held liable for anything done in the exercise of legislative power.

[4] We disagree. The state is not entitled to an absolute immunity from liability for damages when it enacts unconstitutional legislation that infringes *Charter* rights. Rather, as this Court held in *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405, the state enjoys a limited immunity in the exercise of its

law-making power. Accordingly, damages may be awarded under s. 24(1) for the enactment of legislation that breaches a *Charter* right. However, the defence of immunity will be available to the state unless it is established that the law was clearly unconstitutional, or that its enactment was in bad faith or an abuse of power. This is a high threshold. But it is not insurmountable.

[5] 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 our 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. The necessary reconciliation of these principles demands that we affirm the limited immunity threshold recognized in *Mackin*.

[6] We would dismiss the appeal.

II. Background

[7] Mr. Power filed a notice of action at the Court of Queen's Bench of New Brunswick in 2018. He alleges that the transitional provisions contained in the *Limiting Pardons for Serious Crimes Act*, S.C. 2010, c. 5, s. 10, and the *Safe Streets and*

Communities Act, S.C. 2012, c. 1, s. 161, are unconstitutional. He seeks a declaration of invalidity pursuant to s. 52 of the *Constitution Act, 1982*, and he also seeks damages under s. 24(1) against Canada for the breach of his rights caused by the enactment of the transitional provisions. He claims that the amending legislation was enacted in bad faith, abusively, and with knowledge of its unconstitutionality.

[8] Mr. Power's statement of claim alleges the following facts.

[9] In 1996, he was convicted of two indictable offences. He was sentenced to eight months' imprisonment. He served his time. After his release, he enrolled in college and graduated with an X-ray technician diploma. He became a medical radiation technologist in a hospital in New Brunswick.

[10] In 2011, his employer received a tip that he had a criminal record and suspended him from his employment. He searched for a new job but found that his criminal record prevented him from working in his field.

[11] In 2013, he applied for a record suspension. At the time of his conviction, persons convicted of indictable offences could apply for a record suspension five years after their release. However, the transitional provisions retroactively rendered him permanently ineligible for a record suspension. His application was denied. He has not since been able to find work in his profession in New Brunswick or Quebec.

[12] The transitional provisions have since been declared unconstitutional by provincial and federal courts (*Chu v. Canada (Attorney General)*, 2017 BCSC 630, 347 C.C.C. (3d) 449; *Charron v. The Queen*, Ont. S.C.J., No. 16-67821, June 14, 2017; *Rajab v. The Queen*, Ont. S.C.J., No. 16-67822, June 14, 2017; *P.H. v. Canada (Attorney General)*, 2020 FC 393, [2020] 2 F.C.R. 461). These courts found that the transitional provisions unjustifiably violated s. 11(h) and (i) of the *Charter* because they retroactively increased an offender's punishment.

[13] In response to Mr. Power's action, Canada brought a motion on a question of law to the Court of Queen's Bench. Canada concedes that the transitional provisions are unconstitutional, but maintains that there can be no liability for damages under s. 24(1) based on the enactment of unconstitutional legislation (as distinct from its implementation or enforcement) that is later deemed to violate *Charter* rights.

III. Judicial History

A. *Court of Queen's Bench of New Brunswick, 2021 NBQB 107 (Dysart J.)*

[14] Canada asked the motion judge two questions:

1. Can the Crown, in its executive capacity, be held liable in damages for government officials and Ministers preparing and drafting a proposed Bill that was later enacted by Parliament, and subsequently

declared invalid by a court pursuant to s. 52(1) of the *Constitution Act, 1982*?

2. Can the Crown, in its executive capacity, be held liable in damages for Parliament enacting a Bill into law, which legislation was later declared invalid by a court pursuant to s. 52(1) of the *Constitution Act, 1982*?

[15] The motion judge recognized that these questions turned on the single issue of whether the state enjoys an absolute immunity in respect of the enactment of legislation. He found that the state did not. Accordingly, he answered “yes” to both questions. After reviewing this Court’s jurisprudence, the motion judge found that the government was entitled to only a limited immunity from *Charter* damages for the enactment of unconstitutional legislation. The motion judge found that this Court set a high threshold for such liability in *Mackin*, and that subsequent cases had not displaced this threshold.

B. *Court of Appeal of New Brunswick, 2022 NBCA 14, 471 D.L.R. (4th) 68 (Richard C.J. and LaVigne and LeBlond JJ.A.)*

[16] The Court of Appeal dismissed Canada’s appeal, agreeing with the motion judge that *Mackin* held that the government does not enjoy absolute immunity in exercising its legislative powers. In addition, the court rejected Canada’s argument that various constitutional principles require a finding of absolute immunity. It explained

that the separation of powers, parliamentary sovereignty, and parliamentary privilege are consistent with the high threshold recognized in *Mackin*.

IV. Issue

[17] This appeal raises a single issue: can damages ever be an appropriate and just remedy under s. 24(1) of the *Charter* for the enactment of legislation later declared unconstitutional?

[18] The courts below and both of the parties before this Court framed the two motion questions as turning on this single issue. The parties have not asked us to consider the two questions under separate analyses. Nor have they submitted how we might address the questions differently.

[19] As the motion judge recognized, the answer to the issue — “[i]n effect, is there absolute state immunity with respect to the legislative function?” — will determine the state’s liability under s. 24(1) with respect to the passage of legislation (para. 22 (CanLII)). In our view, the analysis of the single issue as framed above will answer both questions.

[20] That said, the range of state actors and conduct set out in the first question is much broader than the second. The first question refers to “government officials and Ministers preparing and drafting a proposed Bill” that is later enacted and subsequently declared invalid by a court. But, as this Court has recognized, a Minister’s legislative

and executive powers can overlap and are sometimes difficult to disentangle in the law-making process (*Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765, at paras. 33 and 40). Moreover, “government officials” can include public servants — acting in their capacity as part of the executive — engaged in policy development and advice to Ministers and Cabinet on the preparation of legislation. Given the broad and ambiguous scope of conduct implicated by this question, the extent of the state’s immunity in “preparing and drafting a proposed Bill” should not be determined in the absence of any submissions on the point, especially where the question is one of *absolute* immunity.

[21] Mr. Power’s claim focuses squarely on Parliament’s enactment of the unconstitutional legislation. There is no need in this case to define the exact limits as between the executive and parliamentary roles and conduct in the pre-enactment legislative process.

[22] Thus, we approach the issue in this case as did the courts below and the parties in this Court. Both questions ask whether the state may be liable for *Charter* damages for the enactment of invalid legislation. Our answer that there is no absolute immunity applies to both question one and question two.

V. Analysis

[23] We begin our analysis by briefly setting out the constitutional provisions and constitutional principles engaged by this appeal. We then turn to how this Court

has dealt with these principles in the context of s. 24(1), most notably in *Mackin*. Next, we explain why the high threshold established in *Mackin* should not be overturned. We conclude by clarifying this threshold.

A. *Constitutional Provisions and Principles*

[24] Canada and Mr. Power advance opposing views on how to interpret and apply s. 24(1) in the context of a claim for damages for unconstitutional legislation that violates a *Charter* right. Canada submits that important constitutional principles require an absolute immunity for such damages. Mr. Power submits that the government is only entitled to a limited immunity.

(1) *Charter Interpretation*

[25] We start with the proper approach to *Charter* interpretation.

[26] The *Charter* must be given a generous and expansive interpretation; not a narrow, technical or legalistic one (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 156). *Charter* provisions must be “interpreted in a broad and purposive manner and placed in their proper linguistic, philosophic, and historical contexts” (*Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704, at para. 25).

[27] A purposive approach considers constitutional principles. Indeed, “the Constitution must be interpreted with a view to discerning the structure of government

that it seeks to implement. The assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another must inform our interpretation, understanding, and application of the text” (*Reference re Senate Reform*, at para. 26).

(2) Section 32(1): Application of the *Charter*

[28] With this approach in mind, we turn to the applicability of the *Charter* to the legislative branch of government.

[29] Section 32(1) of the *Charter* states that it applies to “the Parliament and government of Canada in respect of all matters within the authority of Parliament” and “to the legislature and government of each province in respect of all matters within the authority of the legislature of each province”.

[30] Clearly, the federal and provincial legislatures are subject to *Charter* scrutiny. As this Court has explained, the words of s. 32(1) express that “the *Charter* is essentially an instrument for checking the powers of government over the individual” (*McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at p. 261). The *Charter* “is intended to constrain governmental action inconsistent with those rights and freedoms” (*Hunter*, at p. 156). As explained further below, ss. 32(1) and 24 of the *Charter*, along with s. 52(1) of the *Constitution Act, 1982*, entrench the court’s role in holding the government to account for *Charter* violations (M. L. Pilkington, “Damages as a

Remedy for Infringement of the Canadian Charter of Rights and Freedoms” (1984), 62 *Can. Bar Rev.* 517, at pp. 535 and 552-67).

(3) Remedies for Breaches of Charter Rights

[31] The *Charter* guarantees the rights and freedoms of all Canadians and provides remedies for their breach. Granting remedies is the courts’ “most meaningful function under the *Charter*” (*Nelles v. Ontario*, [1989] 2 S.C.R. 170, at p. 196).

[32] It is well accepted that the need for a purposive and generous approach to *Charter* interpretation “holds equally true for *Charter* remedies as for *Charter* rights” (*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 24). Courts have a duty to determine the appropriate constitutional remedy for a *Charter* violation and to ensure that the remedy is commensurate with the extent of the violation (*Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 46). This appeal is concerned with declarations of unconstitutionality under s. 52(1) of the *Constitution Act, 1982* and damages under s. 24(1) of the *Charter*.

[33] Section 52(1) provides that the “Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect”.

[34] A declaration of invalidity under s. 52(1) is the “first and most important remedy” when dealing with unconstitutional legislation (*Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28, at para. 1). Section 52(1) establishes the supremacy of the Constitution and empowers courts to declare legislation “of no force or effect” in part or in full. This remedy allows courts to protect *Charter* rights while respecting the distinct role of the legislature in our constitutional order (*Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 715; *Ontario (Attorney General) v. G*, 2020 SCC 38, [2020] 3 S.C.R. 629, at paras. 84-99).

[35] Section 24(1) provides that anyone whose *Charter* rights or freedoms have been infringed or denied may apply for “such remedy as the court considers appropriate and just in the circumstances”.

[36] Section 24(1) provides a “personal” or “individual” remedy in the sense that it is specific to the violation of the applicant’s rights (*R. v. Albashir*, 2021 SCC 48, at para. 33; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at para. 61). It must be remembered, however, that it is a “unique public law remedy” against the state that should not be assimilated to the principles of private law remedies (*Ward*, at paras. 22 and 31; *Ravndahl v. Saskatchewan*, 2009 SCC 7, [2009] 1 S.C.R. 181, at paras. 26-27).

[37] Like other *Charter* provisions, s. 24(1) must be interpreted generously and purposively (*Doucet-Boudreau*, at para. 24). It must be construed “in a manner that best ensures the attainment of its objects” and, more generally, benefits from the principle of statutory interpretation that remedial statutes should receive a “large and liberal”

interpretation (*R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575 (“*Dunedin*”), at para. 18).

[38] The remedial discretion afforded to courts under s. 24(1) is broad. This Court has stated that “the language of this provision appears to confer the widest possible discretion on a court to craft remedies for violations of *Charter* rights” (*Dunedin*, at para. 18), and that it “is difficult to imagine language which could give the court a wider and less fettered discretion” (*Mills v. The Queen*, [1986] 1 S.C.R. 863, at p. 965).

[39] The broad discretion afforded under s. 24(1) and a purposive approach to remedies combine to give meaning to the idea that *Charter* rights are only as meaningful as the remedies provided for their breach. In this way, s. 24(1) is “a cornerstone upon which the rights and freedoms guaranteed by the *Charter* are founded, and a critical means by which they are realized and preserved” (*Dunedin*, at para. 20).

[40] In *Doucet-Boudreau*, the Court noted that s. 24 must be allowed to evolve to meet the different contexts in which *Charter* violations occur, and must remain flexible and responsive to the needs of a given case (para. 59). In general terms, the Court explained that a just and appropriate remedy under s. 24(1) will: (1) meaningfully vindicate the claimant’s rights and freedoms; (2) employ means that are legitimate within the framework of our constitutional democracy; (3) be a judicial remedy which

vindicates the right while invoking the function and powers of a court; and (4) be fair to the party against whom the order is made (paras. 55-58).

(4) Damages as a Section 24(1) Remedy

[41] An award of damages against the state for exceeding its legal powers has long been recognized as an important requirement of the rule of law (K. Roach, *Constitutional Remedies in Canada* (2nd ed. (loose-leaf)), at § 11:1, citing *Roncarelli v. Duplessis*, [1959] S.C.R. 121; see also W. H. Charles, *Understanding Charter Damages: The Judicial Evolution of a Charter Remedy* (2016)).

[42] In *Ward*, this Court set out a four-step test for determining whether damages are an appropriate and just remedy:

1. Has a *Charter* right been breached?
2. Would damages fulfill one or more of the related functions of compensation, vindicating the right, or deterring future breaches?
3. Has the state demonstrated that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust?
4. What is the appropriate quantum of damages?

[43] Canada's argument for absolute immunity to a claim for damages rests on two propositions that implicate the countervailing factors considered at the third step.

[44] First, Canada relies on the availability of an alternative remedy. Canada asserts that the availability of a declaration of invalidity under s. 52(1) will always render damages inappropriate and unjust. Canada asserts that damages will never be appropriate for the enactment of legislation subsequently declared unconstitutional because the declaration of unconstitutionality will always be sufficient. Canada submits that judicial review of a decision under the invalid law may also be appropriate in certain cases.

[45] While there is a general presumption against combining remedies under ss. 24(1) and 52(1) (*Schachter*, at p. 720; *Mackin*, at paras. 78-81), there is no categorical restriction. This Court has instead adopted a functional and flexible approach to combining remedies that is driven by principled and purposive considerations (*Ferguson*, at para. 53; *G*, at para. 147; Roach, *Constitutional Remedies*, at §§ 3:8-3:18). It is true that the existence of an alternative remedy is a countervailing consideration (*Ward*, at para. 33). However, the concern with alternative remedies is to avoid duplication and double recovery (para. 35; *Brazeau v. Canada (Attorney General)*, 2020 ONCA 184, 149 O.R. (3d) 705, at para. 43). Provided an award of *Charter* damages is not duplicative, the potential to combine declarations and damages must remain available in situations where a declaration would fail to satisfy the functional need for compensation, vindication or to meaningfully deter future breaches

(*Albashir*, at paras. 61-67; *Ward*, at para. 56; see also P. W. Hogg and W. K. Wright, *Constitutional Law of Canada* (5th ed. Supp.), at § 40:13). In some cases, a declaration of invalidity alone may be an insufficient and even hollow remedy. The availability of a declaration under s. 52(1) cannot absolutely displace a claim for damages under s. 24(1). The same is true for the availability of judicial review for a decision under the invalid law.

[46] The second countervailing consideration that Canada raises in support of absolute immunity are concerns for good governance. Canada submits that *Charter* damages would interfere with Parliament's law-making functions, impeding the state's ability to govern effectively. While this Court has held that good governance concerns may defeat an award of damages, we have also cautioned that the mere suggestion that damages will have a chilling effect on government is not sufficient to defeat the applicant's functional entitlement to *Charter* damages established at steps one and two of the four-step test (*Ward*, at para. 38). Indeed, damages may promote good governance by encouraging constitutional compliance and deterring *Charter* breaches. Canada nonetheless submits that constitutional principles — that ground those good governance concerns — require that there be an absolute bar to *Charter* damages for the enactment of unconstitutional legislation.

(5) Constitutional Principles

[47] Canada argues that anything less than absolute immunity is inconsistent with three longstanding and foundational constitutional principles: parliamentary

sovereignty, the separation of powers, and parliamentary privilege. Mr. Power responds that these principles do not necessitate absolute immunity and, moreover, that such immunity is inconsistent with other foundational constitutional principles, including constitutionalism and the rule of law. Each of these principles inform the separation of powers. We will briefly consider each in turn, before addressing the parties' substantive submissions later in the analysis.

(a) *Parliamentary Sovereignty, Separation of Powers, and Parliamentary Privilege*

[48] Canada rightly notes that parliamentary sovereignty, the separation of powers and parliamentary privilege are constitutional principles that ensure that democratically elected officials are free to make laws and to hold the executive to account, without undue interference from an unelected judiciary. The preamble to the *Constitution Act, 1867* states that Canada has “a Constitution similar in Principle to that of the United Kingdom”. Parliamentary sovereignty, the separation of powers and parliamentary privilege are core features of the British Constitution (*R. (on the application of Miller) v. Prime Minister*, [2019] UKSC 41, [2019] 4 All E.R. 299). As a result, these are also important constitutional principles in Canada.

[49] As for parliamentary sovereignty, there are important differences between the United Kingdom and Canada. In the United Kingdom, the “laws enacted by the Crown in Parliament are the supreme form of law” (*Miller*, at para. 41; see also *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189,

at paras. 54-55). In Canada, it is the Constitution that is the supreme law: the legislature can “make or unmake any law it wishes, within the confines of its constitutional authority” (*Mikisew*, at para. 36 (emphasis added)). In other words, in Canada the principle of parliamentary sovereignty must not be confused with parliamentary supremacy (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at paras. 308-9).

[50] The separation of powers is part of the foundational architecture of our constitutional order. It is a constitutional principle which recognizes that the three branches of government have different functions, institutional capacities and expertise; and that each must refrain from *undue* interference with the others (*Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, at pp. 469-70; *British Columbia (Attorney General) v. Provincial Court Judges’ Association of British Columbia*, 2020 SCC 20, [2020] 2 S.C.R. 506, at paras. 65-66). The separation of powers allows each branch to fulfill its distinct but complementary institutional role without undue interference and to create a system of checks and balances within our constitutional democracy (*Ontario v. Criminal Lawyers’ Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 29).

[51] Parliamentary privilege plays an essential role in our democratic and constitutional order by allowing legislative officials to carry out their function, including vigorously debating laws and holding the executive to account (*Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2

S.C.R. 687, at paras. 1 and 20-21; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, at p. 354).

[52] This Court has characterized parliamentary privilege as “the sum of the privileges, immunities and powers enjoyed by the Senate, the House of Commons and provincial legislative assemblies, and by each member individually, without which they could not discharge their functions” (*Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667, at para. 29; see also J. P. J. Maingot, *Parliamentary Privilege in Canada* (2nd ed. 1997), at pp. 14-15). Courts cannot review conduct within an area of parliamentary privilege, even for compliance with the *Charter* (*New Brunswick Broadcasting*, at p. 384). The sphere of activity for which privilege is claimed must therefore be closely scrutinized, and it will only receive protection if it is closely and directly connected with the fulfillment by the assembly or by its members of their functions as a legislative and deliberative body (*Chagnon*, at para. 27; *Vaid*, at para. 46).

(b) *Constitutionalism and the Rule of Law*

[53] Mr. Power submits that none of these principles are absolute and that none mandate absolute immunity. Rather, these principles must be reconciled with the role of courts as guardians of the Constitution, as reflected in the principles of the rule of law and constitutionality, both of which require courts to award meaningful and effective remedies for breaches of the *Charter* (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 72; *Doucet-Boudreau*, at para. 25).

[54] The rule of law is “a fundamental postulate of our constitutional structure” (*Roncarelli*, at p. 142) and is “clearly implicit in the very nature of a Constitution” (*Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at p. 750). It protects “individuals from arbitrary state action” by providing “that the law is supreme over the acts of both government and private persons” (*Reference re Secession of Quebec*, at paras. 70-71).

[55] The Constitution is the supreme law of Canada. The principle of constitutionalism finds clear expression in s. 52(1) of the *Constitution Act, 1982*. Thus, “with the adoption of the *Charter*, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy” (*Reference re Secession of Quebec*, at para. 72; see also *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, [2004] 3 S.C.R. 381, at paras. 105-6; C. Mathen and P. Macklem, eds., *Canadian Constitutional Law* (6th ed. 2022), at pp. 16-1 and 1275; L. E. Weinrib, “Of diligence and dice: Reconstituting Canada’s Constitution” (1992), 42 *U.T.L.J.* 207; K. Roach, “The Separation and Interconnection of Powers in Canada: The Role of Courts, the Executive and the Legislature in Crafting Constitutional Remedies” (2018), 5 *J.I.C.L.* 315).

[56] These principles “lie at the root of our system of government” (*Reference re Secession of Quebec*, at para. 70). Together, they explain the duty that courts have “to act as vigilant guardians of constitutional rights and the rule of law” (*Doucet-*

Boudreau, at para. 110). Thus, courts play a fundamental role in holding the executive and legislative branches of government to account in Canada's constitutional order.

[57] We agree with Mr. Power that these constitutional principles must be respected in determining the judicial reach of meaningful remedies for breaches of the *Charter*. Together, they inform the appropriate balance underlying the extent of immunity for the enactment of unconstitutional legislation.

B. *This Court Has Recognized a Limited Immunity for the Enactment of Unconstitutional Legislation*

[58] We now turn to how this Court's jurisprudence has addressed these constitutional principles in the context of state immunity for *Charter* damages. Mr. Power argues that *Mackin* directly dealt with the question in this appeal. He submits that *Mackin* rejected an absolute immunity and that we are bound to do the same here. Canada, however, argues that *Mackin* is not authoritative on this question and, in any case, subsequent cases have displaced the limited immunity established in *Mackin*.

(1) *Mackin* Set a High Threshold for Damages

[59] We agree with Mr. Power and the courts below that in *Mackin*, this Court considered precisely the same issue: the availability of *Charter* damages for the enactment of *Charter*-infringing unconstitutional legislation.

[60] The applicants in *Mackin* were two provincial court judges. They challenged a provincial statute that eliminated the system of supernumerary judges in favour of a panel of retired judges paid on a *per diem* basis. They claimed that the statute violated the right to judicial independence enshrined in s. 11(d) of the *Charter* and sought s. 24(1) damages and s. 52(1) declaratory relief.

[61] The Court agreed with the judges that the legislation was unconstitutional and declared it to be of no force or effect. Turning to the claim for damages, Gonthier J. explained that while legislative bodies enjoy immunity from damages for the “mere enactment or application of a law that is subsequently declared to be unconstitutional” (para. 78 (emphasis added)), such immunity will give way to liability when the law was “clearly wrong, in bad faith or an abuse of power” (para. 79 (emphasis added)). He concluded that damages were not justified in that case because there was no evidence to suggest that this threshold was satisfied (para. 82).

[62] In our view, the following three points can be distilled from *Mackin*.

[63] First, *Mackin* concerned only the enactment of legislation. The state’s actions under the law was not at issue: it was the legislation itself that abolished the supernumerary judicial status, thereby depriving the judges of their status and income — and thus, their independence. Accordingly, we do not accept Canada’s argument that *Mackin* never contemplated a claim for damages against the state for the enactment of unconstitutional legislation. The *Mackin* principle of limited immunity was plainly

set out in the context of the “enactment” of law, and as applying to “legislative bodies” (para. 78).

[64] Second, the Court did not deny the judges’ claim because the state enjoyed an absolute immunity for the enactment of legislation, but because the threshold was not satisfied. Gonthier J. found that there was no evidence to suggest the government of New Brunswick acted in bad faith or abused its power. He explained that the government could not have known of later developments in the law concerning judicial independence at the time the statute was enacted. In reaching this conclusion, Gonthier J. looked to the state’s motives, knowledge and conduct during the legislative process. He found the state had a “perfectly legitimate purpose” when it passed the invalid law: “efficiency, flexibility and cost savings” (para. 70). He also found that there was no evidence the state acted with “wilful blindness with respect to its constitutional obligations” (para. 82), nor that the state enacted the law with “knowledge” of its unconstitutionality, nor for an “ulterior motiv[e]” (para. 83).

[65] Third, the threshold for liability established in *Mackin* was expressly designed to reconcile competing constitutional principles. Gonthier J. explained that the “limited immunity given to government is specifically a means of creating a balance between the protection of constitutional rights and the need for effective government” (para. 79). To award damages merely because legislation was unconstitutional would fail to strike the right balance because it would not give effect to the need for effective government. Yet, at the same time, he recognized that “the government and its

representatives are required to exercise their powers in good faith and to respect the ‘established and indisputable’ laws that define the constitutional rights of individuals” (*ibid.*).

[66] For these reasons, Gonthier J. held that the “clearly wrong, in bad faith or an abuse of power” threshold provides the appropriate qualification on the state’s liability for the enactment of an unconstitutional law.

(2) The *Mackin* Threshold Has Not Been Overruled by Subsequent Cases

[67] Canada further argues that if *Mackin* established a limited immunity, this Court has overruled that immunity in subsequent cases.

[68] We do not agree. Rather, we agree with Mr. Power and the courts below that the post-*Mackin* jurisprudence does not depart from the limited immunity threshold.

[69] The first category of cases said to have overruled *Mackin* are those Canada says demonstrate that the limited immunity threshold in *Mackin* has been restricted in application to situations of executive action, such that it no longer applies in the realm of legislative power. We reject this argument.

[70] True, some of this Court’s cases have referred to the threshold applying to executive conduct under the law. For example, in *Ward*, McLachlin C.J. referred to

Mackin as applying to “state conduct under the law” (para. 39). And in *Henry v. British Columbia (Attorney General)*, 2015 SCC 24, [2015] 2 S.C.R. 214, Moldaver J. referred to it as applying to “state action taken pursuant to a law” (para. 42). But those cases involved such executive conduct. There is no inconsistency here. As explained above, Gonthier J. said in *Mackin* that the threshold applied to the “enactment or application” of legislation later declared unconstitutional (para. 78 (emphasis added)). Indeed, the *Mackin* threshold was described in general terms in *Ward* as recognizing “that the state must be afforded some immunity from liability in damages resulting from the conduct of certain functions that only the state can perform. Legislative and policy-making functions are one such area of state activity” (para. 40 (emphasis added)).

[71] Similarly, in *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678, this Court considered a different type of situation again: whether the *Mackin* threshold applied to government decisions made under government policies. Canada points out that at one point the *Mackin* threshold is described as applying to “acts carried out pursuant to a law that is subsequently declared to be invalid” (para. 168). But, at another point, the threshold is described as applying to “those who make laws” or “the legislature” (*ibid.*). Both are consistent with *Mackin*, and the Court was unanimous on this point. Although dissenting in the result, Brown and Rowe JJ. noted that “a key holding” in *Mackin* was its broad formulation of the immunity threshold and that it “plainly encompasses acts of both the legislatures and other public officials” (paras. 286-87 (emphasis deleted)).

[72] Canada also argues that the principles set down in *Mikisew* overrule *Mackin*. We do not agree. Canada is right that *Mikisew* says that courts should not meddle with the law-making process, including in the enactment of legislation. However, *Mikisew* is readily distinguishable. This appeal concerns remedies for an invalid law that breaches *Charter* rights. *Mikisew* concerned whether to impose a procedural step in the form of a duty to consult under s. 35 of the *Constitution Act, 1982* within the legislative process (paras. 31 and 52). And, while the majority in *Mikisew* accepted that it is “rarely appropriate for courts to scrutinize the law-making process” (para. 2), and that the judiciary “should forebear from intervening” in this process (para. 32), it also noted that after-the-fact review remains available in some circumstances (para. 52).

[73] A *Charter* damages analysis under s. 24(1) is conceptually distinct from the recognition of a duty to consult. As the motion judge and the Court of Appeal in this case explained, there is an important difference between, on the one hand, courts requiring the legislature to implement a substantive step within the legislative process, such as the pre-enactment consultations contemplated in *Mikisew*, and on the other, courts enforcing the *Charter* by requiring the state to pay damages for a *Charter* violation, even when that violation results from an unconstitutional law (motion judge’s reasons, at paras. 54-55; C.A. reasons, at para. 23). Compelling the government to consult as part of the legislative process would be a clear interference with Parliament’s exclusive control over its own procedures. By contrast, post-enactment damages do not “unduly interfer[e]” with Parliament, including its control over its own procedures

(*Mikisew*, at para. 35, citing *Criminal Lawyers' Association*, at para. 29). Such damages do not compel the legislature to regulate its own internal affairs in a certain way. *Mikisew* does not determine the outcome of this appeal.

[74] Finally, Canada raises *Ernst v. Alberta Energy Regulator*, 2017 SCC 1, [2017] 1 S.C.R. 3, as an example of the approach the Court should take in this case. In *Ernst*, this Court held that an administrative board, in exercising its adjudicative function, is immune from liability for damages. *Ernst* is of limited assistance to this appeal. Although *Ernst* engaged some of the same constitutional principles at work in this case, it did so in a different context. *Ernst* was concerned with protecting a different state function and implicated a different balance of underlying constitutional principles. An assessment into immunity must focus on the branches of government implicated by the claim (K. Cooper-Stephenson, *Charter Damages Claims* (1990), at p. 316). It is not surprising that a different form of state action raised different concerns about constitutional design and institutional relationships. Nothing in *Ernst* suggests a retreat from *Mackin*.

[75] Accordingly, we cannot accept Canada's submission that the *Mackin* threshold has been overruled.

C. *Mackin Should Not Be Overruled*

[76] Canada's final argument is that if this Court has not overruled *Mackin* already, it should do so now. Canada submits that the constitutional principles

underpinning legislative autonomy and good governance require absolute immunity for the enactment of legislation subsequently declared unconstitutional. Mr. Power responds that an absolute immunity would be inconsistent with the other fundamental constitutional principles engaged by the state's law-making function.

[77] We agree with Mr. Power. Canada has not provided a compelling reason to overrule a precedent of this Court. Accordingly, we would not overturn *Mackin*. Limited immunity respects the constitutional principles underpinning both legislative autonomy and accountability. As this Court has said before, effective government and respect for constitutional rights are both “important pillars of our democracy” (*Ernst*, at para. 25). In order to fulfill its institutional function, the legislative branch requires an independent space for elected representatives to carry out their parliamentary duties, to freely debate and decide what laws should govern, and to exercise the unfettered ability to hold the executive branch of the state to account. But absolute immunity would subvert the principles that command government compliance with the *Charter* and the courts' role in enforcing its fundamental guarantees.

(1) Limited Immunity Respects All of the Constitutional Principles

[78] As McLachlin J., as she then was, explained in *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876, “[w]here apparent conflicts between different constitutional principles arise, the proper approach is not to resolve the conflict by subordinating one principle to the other, but rather to attempt to reconcile them” (para. 69). And as Mr. Power notes, our Court's jurisprudence demonstrates “that there

is no one constitutional principle that dominates the remedial analysis” (R.F., at para. 76, citing *G*, at paras. 89-99, *R. v. Sullivan*, 2022 SCC 19, at para. 60, and *Albashir*, at para. 34).

[79] Our constitutional jurisprudence has not created hierarchies of constitutional principles. It has aimed to provide flexibility and accommodation in the pursuit of good governance and fundamental rights. This is especially important in an era of increased transparency and accountability. Our constitutional remedies must reflect the interdependency of principles, and balance the need for both government autonomy and accountability.

[80] As we will explain, the *Mackin* threshold is consistent with and best reconciles each of the constitutional principles engaged by this appeal.

[81] First, parliamentary sovereignty is not undermined by the *Mackin* threshold. As noted above, parliamentary sovereignty does not mean that Parliament is above the Constitution. Parliament remains subject to the constraints and accountability mechanisms of the Constitution, including the *Charter*. By the text of s. 32(1), the *Charter* specifically applies to Parliament and the provincial legislatures. The supremacy of the Constitution in relation to Parliament is well recognized in each application of s. 52 of the *Constitution Act, 1982*. Limited immunity does not impair Parliament’s power to make and repeal laws within the confines of the Constitution.

[82] Second, limited immunity is consistent with the separation of powers. The separation of powers does not mean that each branch is completely “separate” or works in isolation. The separation of powers in Canada is not strict (*Reference re Secession of Quebec*, at para. 15; *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, at para. 10). We have “never adopted a watertight system of separation of judicial, legislative and executive functions” (*Doucet-Boudreau*, at para. 107). Rather, our Court has always emphasized that each branch cannot exercise “undue” interference, which depends entirely on the circumstances and the constitutional principles engaged. The availability of an after-the-fact judicial remedy for unconstitutional legislation does not interfere with the law-making process. However, respect for the legislative role requires a high threshold for liability for the enactment of unconstitutional legislation. The high bar for liability established in *Mackin* ensures that the judiciary does not unduly interfere with the government’s ability to carry out its legislative function. Absolute immunity would give insufficient respect to the judicial role to provide meaningful remedies for the breach of constitutional rights.

[83] Like parliamentary privilege, discussed below, the separation of powers supports the need for some immunity, but not absolute immunity. Holding the legislature liable for *Charter* damages when it seriously misuses its legislative power does not constitute undue judicial interference in the legislative process. Rather, damages are an after-the-fact remedy for a *Charter* violation. Insofar as an award of damages provides any guidance to the legislature at all, it merely says that “the government and its representatives are required to exercise their powers in good faith

and to respect the ‘established and indisputable’ laws that define the constitutional rights of individuals” (*Mackin*, at para. 79). While the separation of powers demands a core of legislative autonomy, it also demands legislative accountability through the role of the courts.

[84] Third, courts can respect parliamentary privilege when applying the limited immunity threshold. Parliamentary privilege provides the legislature with the tools to execute its core functions. It operates by “shielding some areas of legislative activity from external review” (*Chagnon*, at para. 1). For example, it shields against legal proceedings for what was said during debate, giving members of the legislature the freedom of speech necessary to carry out their law-making power without fear of liability. Parliamentary privilege also protects against the compellability of certain types of evidence, discussed below, such as the testimony of sitting members of Parliament (*Vaid*, at para. 29). The protection of these processes is fundamental to Canada’s constitutional structure and the functioning of our democracy. Parliamentary privilege cannot be subordinated or diminished by other parts of the Constitution.

[85] But *Charter* damages for the enactment of unconstitutional legislation are not claimed against any individual members involved in the legislative process. The action is against the state. An action for public law damages “is not a private law action in the nature of a tort claim for which the state is vicariously liable but [a distinct] public law action directly against the state for which the state is primarily liable” (*Ward*, at para. 22, citing *Dunlea v. Attorney-General*, [2000] NZCA 84, [2000] 3 N.Z.L.R.

136, at para. 81; *Henry* (2015), at para. 34; see also *Maharaj v. Attorney-General of Trinidad and Tobago* (No. 2), [1979] A.C. 385 (P.C.), at p. 399). The nature of the remedy requires “the state (or society writ large) to compensate an individual for breaches of the individual’s constitutional rights” (*Ward*, at para. 22). For these reasons, the Attorney General for the Crown or a government agency is the appropriate defendant in *Charter* damages claims (Roach, *Constitutional Remedies*, at § 11:13).

[86] It is also worth emphasizing that the basis for the state’s liability for damages under s. 24(1) is the breach of the claimant’s *Charter* right. The state’s conduct within the legislative process is not an independent basis for liability but rather informs whether damages are an appropriate and just remedy for the breach caused by the enactment of the *Charter*-infringing law. Mr. Power’s action does not engage members’ personal immunity for parliamentary speech. Nor does it interfere with Parliament’s power to control its own debates and proceedings, or dictate how the legislative function is exercised. Mr. Power does not suggest that parliamentary speech or anything done in the legislative process breached his *Charter* rights.

[87] We reject Canada’s suggestion that recognized categories of parliamentary privilege extend to bar external review of every stage in the law-making process, and of all speech and all conduct by government officials or Ministers related to the law-making process, including their unspoken motivations. Courts must be careful to avoid enlarging recognized categories of privilege in response to broad or vague assertions of privilege, especially in the context of an alleged *Charter* rights violation (see, e.g.,

M.-A. Roy, “Le Parlement, les tribunaux et la *Charte canadienne des droits et libertés*: vers un modèle de privilège parlementaire adapté au XXI^e siècle” (2014), 55 *C. de D.* 489, at pp. 512, 517 and 521). For example, we do not view parliamentary privilege over freedom of speech in Parliament or control over legislative proceedings as inherently extending to government officials, including public servants acting in an executive capacity, involved in policy development and advisory roles related to the preparation of legislation. The concern is not with the nature of the official, but with the breadth of state conduct implicated by this suggestion. Canada’s broad conceptualization of parliamentary privilege is not known in Canadian law, and is not necessary to protect Parliament’s constitutional role. Nor has Canada demonstrated that the scope of the privilege it invokes is inexorably supported under the strict necessity test. For this reason, we fundamentally disagree with the scope of parliamentary privilege asserted by our colleagues.

[88] This Court has emphasized that parliamentary privilege must not be extended beyond the scope necessary to protect the legislature’s core democratic functions (*Chagnon*, at para. 25; *Vaid*, at para. 41). In both *Vaid* and *Chagnon*, this Court rejected claims of parliamentary privilege, recognizing that the scope of each category of privilege must be carefully scrutinized, in part on the basis that the matters protected by the claimed privilege cannot be externally reviewed, including by courts on *Charter* grounds. In *Vaid*, this Court held that the parliamentary privilege to control parliamentary proceedings did not extend so far as to preclude a human rights claim on the basis of discrimination by the chauffeur to the Speaker of the House of Commons.

In *Chagnon*, this Court held that the parliamentary privilege to either manage employees or to exclude strangers from the National Assembly does not prevent judicial review of the dismissal of security guards employed by the National Assembly. Because of its inherent nature, parliamentary privilege means that its existence and scope must be strictly anchored to its rationale, delimited by the purposes it serves. Such an approach helps to reconcile the privilege with the *Charter*, by ensuring that it is only as broad as is necessary for the proper function of a constitutional democracy.

[89] A limited immunity reconciles the importance of parliamentary privilege with the *Charter* by ensuring that the privilege is no broader than is justified for a functioning constitutional democracy. In this respect, we agree that “parliamentary privilege, like parliamentary institutions themselves, must operate within — and never trump — the constitutional framework from which those bodies have emerged, and upon which they depend for their lawful authority and powers. In a country respectful of the rule of law, the courts must continue to maintain the supremacy of constitutional norms” (W. J. Newman, “Parliamentary Privilege, the Canadian Constitution and the Courts” (2008), 39 *Ottawa L. Rev.* 573, at p. 609).

[90] We also note that this Court has made clear that privilege claims should not be adjudicated “at too high a level of generality” (*Vaid*, at para. 51). As Mr. Power submits, “[i]ssues regarding the admissibility of parliamentary statements cannot be decided in the abstract” (R.F., heading of para. 94). An assertion of privilege must be particularized in the circumstances of the claim.

[91] To be clear though, parliamentary privilege may prevent claimants from adducing certain types of evidence relating to the legislative process. In this way, parliamentary privilege may limit a claimant's practical ability to satisfy the threshold in a given case. Indeed, it may well be that a claimant will not be able to lead any evidence. But this possibility does not foreclose the availability of such a cause of action in principle. While a claimant obviously cannot, for example, subpoena members of Parliament to establish a claim for damages, the claimant could lead other evidence related to the parliamentary process and relevant to the claim. There are many kinds of legislative documents routinely relied upon by courts in the context of public law litigation. For example, in *Brazeau*, Sharpe and Jursiansz JJ.A. relied on government memoranda and reports, public records and social science and expert reports in assessing a s. 24(1) claim for damages (paras. 74-86). Thus, while it is beyond question that the conduct and speech protected by parliamentary privilege is not subject to review under the *Charter* by the judiciary (*New Brunswick Broadcasting*, at p. 384), we do not agree that parliamentary privilege inherently precludes *Charter* damages for unconstitutional legislation.

[92] It does not improperly undermine parliamentary privilege for the courts, engaged in a proper judicial task, to examine evidence and adjudicate an assertion of privilege in the context of a claim for damages. Courts regularly assess such evidence, including Hansard, in determining the background and purpose of legislation under a s. 1 analysis (see, e.g., *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 484; *R. v. Moriarty*, 2015 SCC 55, [2015] 3

S.C.R. 485, at para. 31; *R. v. Sharma*, 2022 SCC 39, at paras. 88-90). Indeed, this Court has in other contexts assessed whether the legislature acted in good faith in enacting a law (see, e.g., *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, at para. 63; *Ell v. Alberta*, 2003 SCC 35, [2003] 1 S.C.R. 857, at paras. 3 and 38), or whether the state had actual or constructive knowledge of the unconstitutional effects of a law (*Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17, at para. 114). Granted, the purpose of the review may be different in a claim for *Charter* damages. But these examples reveal that the judicial assessment of the nature of legislation and Parliament’s purpose or objective in enacting it can be accomplished without violating parliamentary privilege.

[93] Fourth, an absolute immunity does not accommodate the principles recognized in this Court’s jurisprudence on constitutional remedies. It leaves little room for the principles that underpin legislative accountability — including the broad and purposive approach to rights and remedial provisions in the *Charter*, as well as constitutionalism and the rule of law. All these principles militate against absolute immunity. We agree in this respect with Mr. Power, who submits that “[a]n absolute immunity is . . . incompatible with the remedial discretion of the courts — ‘a fundamental feature of the *Charter*’ — and with the idea that ‘flexibility is necessary to arrive at appropriate remedies involving legislation’” (R.F., at para. 81, citing *G*, at paras. 101 and 146).

[94] As discussed above, the *Charter* effected a “revolutionary transformation of the Canadian polity” under which courts were “mandated to bring the entire legal system into conformity with a complex new structure of rights-protection” (L. E. Weinrib, “Canada’s *Charter of Rights*: Paradigm Lost?” (2002), 6 *Rev. Const. Stud.* 119, at p. 120). Even before the *Charter*, the court’s role in holding the legislature accountable was recognized as part of the fabric of Canada’s constitutional order. As Dickson J. (as he then was) explained in *Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576, at p. 590:

A state, it is said, is sovereign and it is not for the Courts to pass upon the policy or wisdom of legislative will. As a broad statement of principle that is undoubtedly correct, but the general principle must yield to the requisites of the constitution in a federal state. By it the bounds of sovereignty are defined and supremacy circumscribed. The Courts will not question the wisdom of enactments which, by the terms of the Canadian Constitution are within the competence of the Legislatures, but it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power. [Emphasis added.]

(See also *Manitoba Language Rights*, at p. 745.)

[95] The *Charter* demands that legislative power be constrained by constitutional rights. Courts are constitutionally obliged to hold the government accountable when it breaches such rights, including by providing meaningful remedies in the face of their violation. An absolute immunity would undermine the purpose and text of s. 24(1), which asks courts to look at the specific context of a given violation to determine whether a remedy is appropriate and just. The *Charter* requires courts to enforce constitutional rights. Enforcement means ensuring that remedies are

commensurate with the extent of the violation (*Corbiere*, at para. 46). In this way, the separation of powers also protects the judiciary's independence to carry out its constitutional duties: "Nothing less [is] required to maintain the normative ordering of the Canadian legal system" (*Doucet-Boudreau*, at para. 109).

[96] An absolute immunity would protect the government from any claim for damages for *any* unconstitutional legislation, no matter how egregious. We accept Mr. Power's assertion that an absolute immunity allows a narrow set of constitutional interests to dominate the analysis (R.F., at para. 81).

[97] In setting a high bar for immunity, *Mackin* has stood the test of time. It has been good law for over two decades. It has resulted neither in chilling good governance, nor in a floodgate of claims against the state for damages. The state will continue to benefit from immunity unless the high threshold is satisfied. This exacting threshold functions to limit the scope of causes of action for damages. And, as always, the state can apply for a s. 24(1) claim to be dismissed summarily if the claimant fails to plead circumstances which could, if accepted, satisfy the *Mackin* threshold for liability (*Henry* (2015), at para. 43).

[98] This Court may depart from precedent where there is a compelling reason to do so, including if the precedent was inconsistent with a binding authority or statute, it has proven unworkable, or its rationale has been eroded by significant social or legal change (*R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 44; *R. v. Kirkpatrick*,

2022 SCC 33, at para. 202). There are no compelling reasons to overrule *Mackin*. The state's immunity has been and remains qualified.

(2) Clarifying the *Mackin* Threshold

[99] The question remains how to best articulate the qualified immunity threshold. The parties and interveners point to a number of different descriptions within *Mackin* and ask us to clarify the threshold.

[100] In *Mackin*, Gonthier J. used several formulations to describe the circumstances in which damages may be an appropriate and just remedy for legislation later declared unconstitutional. Gonthier J. initially sets out the threshold as capturing state conduct that was “clearly wrong, in bad faith or an abuse of power” (paras. 78-79). Later, in applying the threshold, he looked to whether the state enacted the unconstitutional law “negligently”, or with “wilful blindness with respect to its constitutional obligations at that time” (para. 82). He concluded there was no evidence “the legislation was enacted wrongly, for ulterior motives or with knowledge of its unconstitutionality” (para. 83).

[101] These different formulations reflect different lines of inquiry aimed at assessing the context of the enactment of the *Charter*-infringing law in that case. Gonthier J. focused on the state of the law at the time of enactment, and on any evidence of the state's motives, conduct, and knowledge in relation to its unconstitutionality.

[102] Gonthier J.’s various formulations, with the exception of negligence, describe instances in which the enactment would have been clearly wrong, in bad faith or an abuse of power. In our view, however, negligence does not connote the gravity of misconduct this threshold was designed to capture. While Gonthier J.’s statements indicate that there was no evidence that would meet even this lower standard in that case, in our view, the use of the term negligence was not intended to lower the general threshold. It does not form part of the threshold. The concept of “negligence” is unhelpful as it does not reflect the high standard demanded by the constitutional principles underlying the analysis.

[103] Nonetheless, an objective assessment of the unconstitutionality of the legislation can assist in identifying whether the threshold is met, provided the standard remains high. Indeed, like negligence, the French translation in *Mackin* of “clearly wrong” — “*clairement fautif*” — signals such an objective standard. A number of interveners favoured a threshold that focussed on an objective review of the legislation under the “clearly wrong” component of the threshold. Other interveners point out that the concept of “wrongfulness” has led to some confusion. We would clarify that this inquiry is better understood as a focus on whether the legislation is “clearly unconstitutional”, which directs a judge to look objectively at the legislation itself, particularly the nature and extent of its constitutional invalidity. Underlying this objective assessment is a presumption of the legislature’s knowledge of and respect for basic *Charter* rights.

[104] However, we would reject any of the formulations suggested by the interveners that would set the threshold so high that it immunizes the government from liability for unprecedented but egregious constitutional breaches. Thus, the threshold will be met where the legislation was “clearly unconstitutional” in the sense that, at the time of its enactment, it would clearly violate *Charter* rights (M. L. Pilkington, “Monetary Redress for *Charter* Infringement”, in R. J. Sharpe, ed., *Charter Litigation* (1987), 307, at pp. 319-20, cited with approval in *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347, at para. 15; R. J. Sharpe and K. Roach, *The Charter of Rights and Freedoms* (7th ed. 2021), at p. 511). Such egregious or obvious violations of *Charter* rights are clearly wrong. We would not set the test as high as Jamal J.’s proposed articulation of the clearly unconstitutional threshold.

[105] A finding of clear unconstitutionality will usually imply that the state either knew that the law was clearly unconstitutional, or was reckless or wilfully blind as to its unconstitutionality. As Sharpe and Juriensz JJ.A. helpfully explained in *Brazeau*, where the law is clearly unconstitutional, the state may have shown a “‘clear disregard’ for *Charter* rights” by “proceeding with a course of action in the face of a known risk that the *Charter* will be violated or by deliberately failing to inquire about the likelihood of a *Charter* breach when the state knows that there is a good reason to inquire” (para. 87, citing *Ward*, at para. 43).

[106] While the clearly unconstitutional standard will likely resolve most issues of whether the limited immunity applies, other rare situations may require judges to ask

whether there is evidence that the state acted in bad faith or abused its power in enacting the invalid law. Principles of constitutionalism and legality require that the threshold leaves room for meaningful recourse for breach of constitutional rights involving such intentional state misconduct.

[107] We would not attempt to define bad faith or abuse of power in the law-making process with exactitude without the benefit of a full record and submissions. This standard may, for example, be met in cases where the state acted for an improper purpose, or was dishonest. We would not, however, limit the concepts of bad faith and abuse of power to an examination of the legislation's purpose.

[108] When it comes time to assess an allegation of bad faith or abuse of power on the basis of specific facts, other contexts of bad faith and abuse of power may provide guidance (see, e.g., *Roncarelli*, at p. 141; *Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17, at para. 39; *Hinse v. Canada (Attorney General)*, 2015 SCC 35, [2015] 2 S.C.R. 621, at paras. 48-53; see also *Special Lectures of the Law Society of Upper Canada 1979 — The Abuse of Power and the Role of an Independent Judicial System in Its Regulation and Control* (1979)). However, we note that these concepts are “flexible” and their “content will vary from one area of law to another” (*Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, 2004 SCC 61, [2004] 3 S.C.R. 304, at para. 25). In the context of the state's law-making function, in which Parliament and legislative bodies are entitled to enact any law within their constitutional confines, bad faith and abuse of power may require a higher degree of misconduct than in other

contexts. These are legal standards applied by courts, they are not means of evaluating the wisdom or policy of the enactment process or the enacted law.

[109] Our colleague Jamal J. accepts the clearly unconstitutional standard but rejects bad faith and abuse of power. He reasons that while clearly unconstitutional is an objective standard, based on the enactment of the legislation, bad faith and abuse of power inherently implicate conduct that is beyond judicial review. We disagree. In our view, bad faith or abuse of power could be satisfied without violating parliamentary privilege. Moreover, like bad faith and abuse of power, the clearly unconstitutional standard implicates Parliament's conduct in enacting legislation. As we explained, a finding of clear unconstitutionality amounts to a conclusion that in "enacting" the legislation, lawmakers knew the law was unconstitutional, or were reckless or wilfully blind as to its unconstitutionality. Changing the verb "enacting" to the noun "enactment" does not change the nature of the inquiry.

[110] We appreciate that discerning institutional motivation or the knowledge of legislative bodies when enacting legislation is a difficult task. We further appreciate that although *Charter* damages lie against the state and not individual lawmakers or government officials, the state acts through the vehicle of individuals. As with other contexts of institutional state conduct, whether it is possible to attribute the bad faith or abuse of power of an individual or group to the institution itself will depend on the facts of a given case. It bears repeating here that the basis for liability under s. 24(1) is the state's breach of a *Charter* right. In cases like Mr. Power's claim, it is the invalid law

that breached his right. Any inquiry into state misconduct in enacting the invalid law is to assess whether damages are just and appropriate for that breach, not to create an independent basis for liability.

[111] Where the claimant puts forward a particularized allegation that the *Mackin* threshold has been met, the claim must be assessed on the basis of evidence obtained in a way that does not violate parliamentary privilege, such as statements made outside of the parliamentary process.

[112] Thus, we would clarify that “clearly wrong” reflects an objective assessment into whether the legislation was clearly unconstitutional at the time it was enacted, and that bad faith and abuse of power remain part of the threshold. To that extent we would restate the *Mackin* threshold relating to the enactment of legislation later found to be unconstitutional: the good governance defence will prevail unless the law was clearly unconstitutional, in bad faith or an abuse of power. The exacting nature of the threshold means that an applicant’s failure to provide detailed particulars will be fatal to their claim at the pleadings stage (*Henry* (2015), at para. 43). Bald or vague assertions will necessarily fall short.

(3) The Threshold Is Assessed at Step Three of the *Ward* Framework

[113] Canada submits that the immunity threshold should be a preliminary matter, before engaging with the *Ward* framework. In the alternative, it submits that the threshold can operate within the third step of the *Ward* test. Mr. Power asserts that

the countervailing considerations raised by Canada in this appeal should be considered and balanced at the third step of the *Ward* test.

[114] In our view, the four-part test in *Ward* governs all claims for *Charter* damages. Immunity is not a preliminary question in a claim for *Charter* damages based on invalid legislation. The state's limited immunity defence fits best as a consideration at the third step of the *Ward* test. In order for an inquiry into the state's limited immunity to arise under s. 24(1), a claimant must first demonstrate that their rights were violated as a result of an unconstitutional law, and that damages are an otherwise appropriate and just remedy for that violation (*Ward*, at paras. 23-24). This Court and others have recognized that the *Mackin* threshold and other immunity considerations are an expression of the principles underlying the good governance concerns considered at the third stage of *Ward* (*Ward*, at paras. 39 and 68; *Ernst*, at para. 42; *Brazeau*, at paras. 46-48; Roach, *Constitutional Remedies*, at §§ 11:11 and 11:20; P. W. Hogg, P. J. Monahan and W. K. Wright, *Liability of the Crown* (4th ed. 2011), at pp. 204-5; Hogg and Wright, at § 40:19). Like good governance concerns in other contexts, the limited immunity threshold functions to ensure damages that may otherwise interfere with effective government are not awarded unless the state conduct meets a minimum threshold of gravity (*Ward*, at para. 39; *Henry* (2015), at paras. 39-41).

[115] Limited immunity ends at the point where it no longer strikes a justifiable constitutional balance. If the state enacts legislation that is subsequently declared

invalid and that is clearly unconstitutional, in bad faith or in an abuse of power, good governance concerns can no longer justify shielding the government from liability for violating *Charter* rights. Damages may instead “promote good governance” by supporting the “foundational principle of good governance” that state action must comply with the Constitution (*Ward*, at para. 38). If the *Mackin* threshold is not met, the balance of constitutional principles tilts in favour of state immunity. In such cases, the constitutional imperative that the government be afforded the autonomy to govern effectively will defeat the claim to damages.

VI. Conclusion

[116] State immunity for the exercise of legislative power remains limited. There is no absolute immunity for the enactment of legislation later found to be unconstitutional. This conclusion answers both of the constitutional questions posed by Canada. In reaching this conclusion, we have explained that the state may be liable for *Charter* damages for enacting invalid legislation only if it is clearly unconstitutional or was in bad faith or an abuse of power. Because the first question implicates a broader range of state conduct and actors than the second question — indeed it implicates matters far beyond those raised by Mr. Power’s claim — the answer must be the same.

[117] To approach the first question separately in this case would have raised issues of the accountability of public servants who form part of the executive. Parliamentary privilege attaches to Parliament as a separate branch of government and shields certain spheres of parliamentary activity from judicial review. If the conduct of

public servants related to the preparation of legislation is included within parliamentary privilege and attracts absolute immunity, it would inevitably risk extending the privilege to the executive, with far-reaching and unforeseeable consequences. Thus, we disagree with our colleagues' answer to the first question.

[118] Accordingly, the constitutional questions are answered as follows:

Answer to question 1: Yes.

Answer to question 2: Yes.

[119] The appeal is dismissed with costs.

The reasons of Kasirer and Jamal JJ. were delivered by

JAMAL J. —

I. Overview

[120] This appeal presents two questions of law posed by the Attorney General of Canada. First, can the Crown, in its executive capacity, be held liable in damages under s. 24(1) of the *Canadian Charter of Rights and Freedoms* for government officials and Ministers preparing and drafting a bill that is enacted by Parliament but subsequently declared inconsistent with the *Charter* and of no force or effect under s.

52(1) of the *Constitution Act, 1982*? Second, can the Crown, in its executive capacity, be held liable in damages under s. 24(1) of the *Charter* for Parliament enacting a bill into law that is later declared inconsistent with the *Charter* and of no force or effect under s. 52(1) of the *Constitution Act, 1982*?

[121] The New Brunswick Court of Queen's Bench and Court of Appeal answered both questions in the affirmative. They followed this Court's decision in *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405, which held that a court may award damages under s. 24(1) of the *Charter* for harms suffered because of a law that is later declared unconstitutional when the law is "clearly wrong, in bad faith or an abuse of power" (para. 78). Although the Attorney General of Canada had argued that there can be no Crown liability for the enactment of legislation because of parliamentary privilege, the separation of powers, and parliamentary sovereignty, the Court of Appeal said that "until the Supreme Court overrules [*Mackin*] or limits its application, we are duty-bound to apply it" (2022 NBCA 14, 471 D.L.R. (4th) 68, at para. 20).

[122] I accept that the courts below were bound to follow *Mackin* as a precedent of this Court. However, the parties in *Mackin* did not raise parliamentary privilege and the Court did not address the privilege in its reasons. In my respectful view, *Mackin* should now be clarified. Aspects of *Mackin* conflict with the constitutional doctrine of parliamentary privilege, principles of justiciability, and the separation of powers.

Applying *Mackin* without clarification or modification would intrude into the constitutionally-assigned domain of Parliament.

[123] Parliamentary privilege includes “the sum of the privileges, immunities and powers enjoyed by the Senate, the House of Commons and provincial legislative assemblies, and by each member individually, without which they could not discharge their functions” (*Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667, at para. 29(2) (citation omitted)). It includes the privileges of freedom of speech in the legislative process and Parliament’s exclusive control over parliamentary proceedings. This Court has recognized that, in principle, parliamentary privilege can extend to members of Parliament or a legislative assembly, and to parliamentary officers, employees, and officials (*Vaid*, at paras. 29(11) and 41). The issue is not the nature of the individual but whether their activities are necessary to the legislative functions that parliamentary privilege was originally designed to protect (*Vaid*, at paras. 4 and 44). Courts have jurisdiction to determine the existence of a recognized category of parliamentary privilege, but they have no jurisdiction to review the exercise of the privilege, even for compliance with the *Charter*. Because the privilege is part of the Constitution of Canada, it cannot be abrogated or diminished by another part of the Constitution, including the *Charter*. Parliamentary privilege is a corollary to the separation of powers because it gives the legislative branch of government the autonomy it requires to perform its constitutionally-assigned functions.

[124] Against this backdrop, the first question posed by the Attorney General should be answered in the negative for two reasons. First, the doctrine of parliamentary privilege creates an exception to the possibility of Crown liability for the conduct of government officials and Ministers in preparing and drafting legislation. The preparation and drafting of legislation is core legislative conduct that is necessarily incidental to proceedings in Parliament. Such conduct is protected from judicial interference by the established categories of parliamentary privilege of freedom of speech and control over parliamentary proceedings. The courts have no jurisdiction to review or assign liability for the exercise of these established categories of privilege, even after the legislative process has concluded, and even when it is alleged that the legislation infringed the *Charter*.

[125] Second, the Crown, in its executive capacity, cannot be liable for the legislative work of Ministers and the government officials supporting them in preparing and drafting legislation because this is legislative rather than executive conduct, and thus cannot be attributed to the Crown in its executive capacity. The Crown cannot be liable for legislative conduct in an action brought under s. 23(1) of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, which provides the statutory basis for suing the Crown in right of Canada by taking proceedings in the name of the Attorney General of Canada.

[126] The second question should be answered in the affirmative, but in a qualified manner. *Mackin* should be clarified to eliminate “bad faith” and “abuse of

power” in enacting primary legislation as grounds for damages under s. 24(1) of the *Charter*. These grounds would inevitably trench on the established categories of parliamentary privilege of freedom of speech and control over parliamentary proceedings. They would draw the courts into scrutinizing whether the substance of the legislation is in “bad faith” or an “abuse of power” *after* that legislation has already been found to be unconstitutional. This question is not justiciable and would strain the separation of powers.

[127] Although “bad faith” and “abuse of power” are unavailable as grounds for damages under s. 24(1) of the *Charter*, the “clearly wrong” threshold contemplated in *Mackin* remains available under the second question. I would, however, reformulate that threshold by holding that the Crown could be liable for damages under s. 24(1) for harms caused by “clearly unconstitutional” enactments, if the unconstitutionality was readily or obviously demonstrable at the time of enactment and could not have been subject to any serious debate.

[128] The standard of “clearly unconstitutional” is a justiciable standard that allows a court to consider whether legislation had the unconstitutional purpose of infringing a *Charter* right in evaluating whether damages would be an “appropriate and just” remedy under s. 24(1) of the *Charter*. This is analytically distinct from the non-justiciable standard of whether the legislation involved “bad faith” or an “abuse of power”.

[129] In addition, the “bad faith” and “abuse of power” standards are not anchored in considerations relating to the constitutionality of legislation and would therefore inevitably stray into judging the wisdom or policy of the law, which is not the proper role of the courts. The “clearly unconstitutional” standard, on the other hand, protects parliamentary privilege as a rule of curial jurisdiction and upholds the separation of powers, while allowing individuals whose rights have been breached by clearly unconstitutional enactments to seek *Charter* damages in appropriate cases.

II. Background

[130] It is common ground from the pleadings that the respondent, Joseph Power, was convicted of two indictable offences of sexual assault in 1996 and sentenced to two eight-month terms of incarceration to be served concurrently. He served his sentence and was released from custody in 1996.

[131] Mr. Power further pleads that, in 2010, he inquired about obtaining a pardon, now called a record suspension, but he did not apply for one at that time. In 2011, Mr. Power’s employer, a hospital, learned of his criminal record and suspended him from his job as a medical radiation technologist because it saw his criminal record as a risk in his work.

[132] In 2013, Mr. Power applied for a record suspension but was refused. In 2010, Parliament had enacted the *Limiting Pardons for Serious Crimes Act*, S.C. 2010, c. 5, and in 2012, it had enacted the *Safe Streets and Communities Act*, S.C. 2012, c. 1.

These statutes made individuals convicted of certain criminal offences permanently ineligible for a record suspension. The transitional provisions of both statutes applied the legislation retrospectively to offences committed before they came into force, making Mr. Power permanently ineligible for a record suspension.

[133] The transitional provisions were successfully challenged in unrelated litigation as being contrary to s. 11(h) and (i) of the *Charter*¹ and were declared to be of no force or effect (*Chu v. Canada (Attorney General)*, 2017 BCSC 630, 347 C.C.C. (3d) 449; *P.H. v. Canada (Attorney General)*, 2020 FC 393, [2020] 2 F.C.R. 461). It is no longer disputed that the transitional provisions unjustifiably infringe the *Charter*.

[134] In May 2018, Mr. Power sued the Crown in right of Canada. He alleged that his inability to receive a record suspension caused him to lose his job and made him ineligible for membership in the governing bodies for medical radiation technologists. Relying on this Court's decision in *Mackin*, he asserted that the enactment and application of the transitional provisions was conduct that was clearly wrong, undertaken in bad faith, and an abuse of power, and claimed damages against the Crown under s. 24(1) of the *Charter*.

¹ Section 11(h) of the *Charter* provides that any person charged with an offence has the right "if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again". Section 11(i) states that any person charged with an offence has the right "if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment".

[135] The Crown sought particulars of Mr. Power's claim. Mr. Power responded that the transitional provisions were "clear violations" of the *Charter* and "were imposed in bad faith, with the intention to add to the punishment of offenders who had been sentenced prior to the passing of the legislation" (Statement of Particulars of Joseph Power, reproduced in A.R., at p. 85). He also alleged the Attorney General of Canada "knew that the effect" of the transitional provisions "would be to increase punishment of certain convicted persons after the fact", which violated the *Charter* (p. 85). Finally, Mr. Power asserted that "it was an abuse of power to impose these provisions despite being aware of their unconstitutional effect" on him and "other persons convicted of crimes prior to the passing of the legislation" (p. 85).

[136] The Attorney General of Canada then applied to the courts for the determination of two questions of law: whether the Crown, in its executive capacity, could be held liable in damages for (i) government officials and Ministers preparing and drafting a proposed bill enacted by Parliament, and (ii) Parliament enacting a bill into law, when a court later declares the law to be unconstitutional under s. 52(1) of the *Constitution Act, 1982*.

[137] The New Brunswick Court of Queen's Bench and Court of Appeal blended these questions into a single question: Do the Crown and its officials enjoy absolute immunity when exercising a legislative function? Relying on this Court's decision in *Mackin*, both courts held that the Crown enjoys a limited and not an absolute immunity.

Accordingly, they answered the two questions posed by the Attorney General's motion in the affirmative.

[138] In its reasons, the Court of Appeal remarked that the Attorney General of Canada "forcefully argues that there can be no Crown liability for the enactment of legislation that may be found to be unconstitutional because of immunity arising from the separation of powers, parliamentary sovereignty, and parliamentary privilege" (para. 20). The court acknowledged that *Mackin* did not expressly address these issues, but considered itself "duty-bound to apply" *Mackin* as precedent unless and until this Court overturns it or limits its application (para. 20). Applying *Mackin*, the Court of Appeal said that "the legislative branch and those within it are free to make policy choices and adopt laws, although they may have to pay a price if they do so in circumstances that are clearly wrong, or where bad faith or abuse of power is proven" (para. 23).

III. Analysis

[139] Although Mr. Power's claim is principally concerned with his ability to obtain damages as a remedy for unconstitutional legislation under s. 24(1) of the *Charter*, the doctrine of parliamentary privilege forms the essential undercurrent of the Attorney General of Canada's appeal before this Court. Accordingly, I will first set out the relevant law on parliamentary privilege, and will then explain how this doctrine informs the answers to the two questions of law posed by the Attorney General.

A. *The Constitutional Doctrine of Parliamentary Privilege*

(1) Definition

[140] Parliamentary privilege refers to the sum of the privileges, powers, and immunities of the federal Houses of Parliament or provincial legislative assemblies, and of their individual members, that are “necessary to their capacity to function as legislative bodies” (P. W. Hogg and W. K. Wright, *Constitutional Law of Canada* (5th ed. Supp.), at § 1:7, citing *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, at p. 385, and W. J. Newman, “Parliamentary Privilege, the Canadian Constitution and the Courts” (2008), 39 *Ottawa L. Rev.* 573; see also *Vaid*, at paras. 29(2), 29(4) and 29(5); *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 S.C.R. 687, at para. 19; F. Chevrete and H. Marx, *Droit constitutionnel: Principes fondamentaux: Notes et jurisprudence* (2nd ed. rev. 2021), at p. 401). “The idea of necessity is . . . linked to the autonomy required by legislative assemblies and their members to do their [legislative work]” (*Vaid*, at para. 29(4)). Necessity is “to be read broadly”, based on what the “dignity and efficiency” of Parliament or the legislative assembly requires (*Vaid*, at para. 29(7), quoting *New Brunswick Broadcasting*, at p. 383).

[141] Parliamentary privilege provides a legal exemption “from some duty, burden, attendance or liability to which others are subject” (*Chagnon*, at para. 19, citing J. P. J. Maingot, *Parliamentary Immunity in Canada* (2016), at p. 13; see also *New Brunswick Broadcasting*, at p. 378). As noted by Joseph Maingot, a former law clerk

and parliamentary counsel to the House of Commons of Canada, “parliamentary privilege, though part of the general and public law of Canada, is an exemption from the ordinary law” ((2016), at p. 289 (footnotes omitted)). As will be seen, this includes an exemption from review under the *Charter*.

(2) History and Sources

[142] Parliamentary privilege has been part of the *lex parliamentis* or the law of Parliament and subsequently part of the common law and statute law of the United Kingdom for centuries (*New Brunswick Broadcasting*, at pp. 344-45, per Lamer C.J.; Hogg and Wright, at § 1:7). Although the doctrine can be traced to the eleventh century (Maingot (2016), at p. 19), it developed most significantly in the seventeenth century “through the struggle of the House of Commons for independence from the other branches of government”, including the Crown and the judiciary, which did not hesitate to interfere in the workings of Parliament, such as by arresting and prosecuting members of Parliament for allegedly speaking seditious words in debate in the House of Commons (*Chagnon*, at para. 22; see also *New Brunswick Broadcasting*, at pp. 344-45). The doctrine was partly codified in England by art. 9 of the *Bill of Rights* of 1689 (Eng.), 1 Will. & Mar. Sess. 2, c. 2, which affirms that “[t]he freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament” (see *Vaid*, at para. 21; *Chagnon*, at para. 22; *New Brunswick Broadcasting*, at p. 345).

[143] Before Confederation, the colonial legislatures in Canada enjoyed parliamentary privilege at common law as an inherent and necessary part of their legislative functions, known as “inherent privileges” (*Chagnon*, at paras. 18 and 23; see also *Kielley v. Carson* (1842), 4 Moo. 63, 13 E.R. 225 (P.C.), at pp. 234-35, discussed in *New Brunswick Broadcasting*, at p. 346, per Lamer C.J., and at pp. 381-82, per McLachlin J. (as she then was); *Chagnon*, at para. 108, per Côté and Brown JJ., dissenting; Maingot (2016), at pp. 272 and 307). At Confederation, parliamentary privilege became part of the Constitution of Canada through the preamble of the *Constitution Act, 1867*, which states that Canada has “a Constitution similar in Principle to that of the United Kingdom” (*New Brunswick Broadcasting*, at p. 377; *Vaid*, at paras. 21 and 29(3); *Chagnon*, at paras. 18 and 23).

[144] At the federal level, unlike the provincial level, s. 18 of the *Constitution Act, 1867* authorizes Parliament to define by legislation the parliamentary privileges of the Senate and House of Commons and their members. Section 18 provides:

18 The privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities, and powers shall not confer any privileges, immunities, or powers exceeding those at the passing of such Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof.

[145] Parliament exercised its power under s. 18 by enacting s. 4 of the *Parliament of Canada Act*, R.S.C. 1985, c. P-1, which states that the Senate and House

of Commons and their members hold the privileges, immunities, and powers held by the U.K. House of Commons at the time of the passing of the *Constitution Act, 1867*, as well as those defined by statute, which cannot exceed those held by the Parliament at Westminster at the time the statute is enacted.

[146] Through s. 4 of the *Parliament of Canada Act*, the Senate and House of Commons now enjoy “the full extent of the privileges permitted under the Constitution” (*Vaid*, at para. 35). Thus, at the federal level, the “main body” of the parliamentary privileges are “legislated privileges”, rather than “inherent privileges”, and unlike provincial parliamentary privileges, have an express constitutional foundation in s. 18 of the *Constitution Act, 1867* (*Vaid*, at paras. 36-37; see also H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (6th ed. 2014), at para. V-1.226).

[147] Section 5 of the *Parliament of Canada Act* further states that the “privileges, immunities and powers” of Parliament are “part of the general and public law of Canada” and “shall” be judicially noticed by all courts in Canada (see Maingot (2016), at pp. 272, 274 and 281-82).

(3) Parliamentary Privilege Is a Corollary to the Separation of Powers

[148] Parliamentary privilege helps Canada’s constitutional democracy maintain the fundamental separation of powers between the legislative, executive, and judicial branches of government (*Vaid*, at para. 21; *Chagnon*, at para. 21). As this Court has

noted, “[t]here are few issues as important to our constitutional equilibrium as the relationship between the legislature and the other branches of the State on which the Constitution has conferred powers, namely the executive and the courts” (*Vaid*, at para. 4). Parliamentary privilege has been called a “corollary to the separation of powers” because it “help[s] to protect each branch’s ability to perform its constitutionally-assigned functions” (*British Columbia (Attorney General) v. Provincial Court Judges’ Association of British Columbia*, 2020 SCC 20, [2020] 2 S.C.R. 506, at para. 66). The privilege does this “[b]y shielding some areas of legislative activity from external review” and by granting “the legislative branch of government the autonomy it requires to perform its constitutional functions” (*Chagnon*, at para. 1; see also *Vaid*, at para. 41).

(4) Two-Step Test for Parliamentary Privilege at the Federal Level

[149] Questions of parliamentary privilege at the federal level are subject to a two-step test. At the first step, a court asks whether the existence and scope of the claimed privilege has been authoritatively established under Canadian or British precedent, and if so, the court must accept the privilege without further inquiry into the necessity of the privilege or the merits of its exercise (*Vaid*, at paras. 37 and 39). If the proposed category has not been authoritatively established, then, at the second step, the court asks whether the privilege claimed is justified under a “necessity” test. The court must consider whether the activity is “so closely and directly connected” with the functions of the legislative assembly or its members that “outside interference would undermine the level of autonomy required to enable the assembly and its members to

do their work with dignity and efficiency” (*Vaid*, at para. 46; see also *Chagnon*, at paras. 29 and 31). The party invoking parliamentary privilege bears the burden at both steps, but once the privilege is established the “propriety” of its exercise is beyond the review of the courts (*Vaid*, at paras. 5, 29(8) and 53; *Chagnon*, at para. 32).

[150] In *Vaid*, Binnie J. identified the categories of parliamentary privilege that have been authoritatively established by precedent as including: (a) freedom of speech; (b) control by the Houses of Parliament over “debates or proceedings in Parliament”, including the day-to-day procedure in the House; (c) the power to exclude “strangers” from proceedings; (d) disciplinary authority over members; (e) disciplinary authority over non-members who interfere with the discharge of parliamentary duties; and (f) immunity of members from subpoena during parliamentary session (para. 29(10)).

(5) Parliamentary Privilege Is a Rule of Curial Jurisdiction

[151] Parliamentary privilege “is a rule of curial jurisdiction” (*Duffy v. Canada (Senate)*, 2020 ONCA 536, 151 O.R. (3d) 489, at para. 35). When a matter falls within the scope of parliamentary privilege, the exercise of the privilege cannot be reviewed by any external body, including a court (*Vaid*, at paras. 29(9) and 34; *Chagnon*, at paras. 19 and 24; *New Brunswick Broadcasting*, at p. 350, per Lamer C.J., and at pp. 382-84, per McLachlin J.). Parliamentary privilege recognizes “Parliament’s *exclusive* jurisdiction to deal with complaints within its privileged sphere of activity” (*Vaid*, at paras. 4, 29(9) and 30 (emphasis in original); see also *New Brunswick Broadcasting*, at pp. 383-84; Maingot (2016), at p. 277; the Hon. M. Rowe and M. Oza, “Structural

Analysis and the Canadian Constitution” (2023), 101 *Can. Bar Rev.* 205, at pp. 225-27; A. Marcotte, “Structural Analysis, Unwritten Principles and Constitutional Remedies: *Charter* Damages for the Enactment of Legislation by Parliament” (2024), 18 *J.P.P.L.* 69, at pp. 78-79).

[152] When a claim of parliamentary privilege is made, the courts have jurisdiction to determine the *existence* and *scope* of a claimed privilege, but they have no jurisdiction to adjudicate its *exercise* (*Vaid*, at paras. 40-41 and 47-48; *Chagnon*, at paras. 2 and 32; *New Brunswick Broadcasting*, at p. 350, per Lamer C.J., and at pp. 384-85, per McLachlin J.). Ascertaining the *existence* and the *scope* of parliamentary privilege falls within the exclusive domain of the judiciary, while the *exercise* of this constitutional power falls within the exclusive domain of the legislature (see Maingot (2016), at p. 304; Brun, Tremblay and Brouillet, at para. V-1.221). Thus, questions relating to the existence and scope of parliamentary privilege are justiciable, but questions as to its exercise are not justiciable (L. Sossin and G. Kennedy, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (3rd ed. 2024), at § 7:7).

[153] As stated by McLachlin J. for the majority in *New Brunswick Broadcasting*, parliamentary privileges “must be held absolutely and constitutionally if they are to be effective; the legislative branch of our government must enjoy a certain autonomy which even the Crown and the courts cannot touch” (p. 379). The effect of parliamentary privilege is to confer an immunity from judicial review over the privileged matter (p. 342, per Lamer C.J.; Marcotte, at p. 79).

[154] However, immunity from judicial review does not mean that parliamentary privilege conflicts with the rule of law in the sense that parliamentary institutions and their members lack accountability. Parliamentary privilege “does not create a gap in the general public law of Canada but is an important part of it” (*Vaid*, at para. 29(3)). Although the courts may not review conduct or activity protected by parliamentary privilege, the House of Commons, Senate, and provincial and territorial legislative assemblies each have their own powers of judicature and can examine such conduct or activity (*Vaid*, at paras. 20, 29(9), 30 and 41; *New Brunswick Broadcasting*, at pp. 379-80; Maingot (2016), at pp. 20, 197, 282-85 and 299-304). As Binnie J. remarked in *Vaid*: “[t]he House, ‘with one voice, accuses, condemns, and executes’” (para. 30, citing *Stockdale v. Hansard* (1839), 9 Ad. & E. 1, 112 E.R. 1112 (Q.B.), at p. 1171). Lord Rodger of the United Kingdom Supreme Court also explained this point well in *R. v. Chaytor*, [2010] UKSC 52, [2011] All E.R. 805, at para. 105:

The expression, “the High Court of Parliament”, makes the point that Parliament has a certain power of judicature — as do the two Houses in their separate capacities. In exercising this jurisdiction the Houses apply the law and custom of Parliament (*lex et consuetudo parliamenti*).

[155] Our Court has also noted that “while legislative assemblies are not accountable to the courts for the ways in which they exercise their parliamentary privilege, they remain accountable to the electorate” (*Chagnon*, at para. 24, citing S. R. Chaplin, “*House of Commons v. Vaid: Parliamentary Privilege and the Constitutional Imperative of the Independence of Parliament*” (2009), 2 *J.P.P.L.* 153, at p. 164; see also *New Brunswick Broadcasting*, at p. 365, per Lamer C.J.).

(6) The Exercise of Recognized Categories of Parliamentary Privilege Is Not Subject to the *Charter*

[156] Parliamentary privilege is not a mere principle of interpretation, rule of evidence, or constitutional convention — rather, it is part of the Constitution of Canada. As a result, although the *Charter* applies to Parliament or a provincial or territorial legislature under s. 32(1) of the *Charter*, actions or conduct protected by parliamentary privilege are not subject to the *Charter* (*New Brunswick Broadcasting*, at pp. 382-84; *Vaid*, at para. 33; *Chagnon*, at para. 2; Hogg and Wright, at §§ 1:7 and 37:7; Brun, Tremblay and Brouillet, at paras. V-1.219, IX-7, XII-2.7 and XII-2.11; Maingot (2016), at pp. 290-91; Marcotte, at p. 79). This is because one part of the Constitution, such as the doctrine of parliamentary privilege, “cannot be abrogated or diminished by another part of the Constitution”, such as the *Charter* (*New Brunswick Broadcasting*, at p. 373, citing *Reference re Bill 30, An Act to amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148; see also *Vaid*, at para. 30; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 42; *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876, at p. 917, per McLachlin J., concurring in the result; Hogg and Wright, at § 37:7; Maingot (2016), at pp. 290-91).

[157] The seminal decision on this point is *New Brunswick Broadcasting*. This Court held that the Nova Scotia House of Assembly had an inherent parliamentary privilege to exclude the media from accessing the Assembly’s public gallery in order to film proceedings, and that the freedom of the press guaranteed under s. 2(b) of the *Charter* did not apply to the exercise of this parliamentary privilege. Speaking for the

majority, McLachlin J. accepted that the *Charter* generally applies to a legislative assembly under s. 32(1) (at pp. 370-71), but she added that the unwritten constitutional doctrine of parliamentary privilege is also part of the Constitution of Canada under s. 52(2) of the *Constitution Act, 1982*, through the preamble to the *Constitution Act, 1867*. As McLachlin J. explained:

... given the clear and stated intention of the founders of our country in the *Constitution Act, 1867* to establish a constitution similar to that of the United Kingdom, the Constitution may also include such privileges as have been historically recognized as necessary to the proper functioning of our legislative bodies. [p. 377]

[158] Justice McLachlin emphasized that recognizing the doctrine of parliamentary privilege as part of the Constitution of Canada is “not a case of importing an unexpressed concept into our constitutional regime, but of recognizing a legal power fundamental to the constitutional regime which Canada has adopted in its *Constitution Acts, 1867 to 1982*” (*New Brunswick Broadcasting*, at p. 377). The proper application of the doctrine of parliamentary privilege is thus as fundamental to the Canadian constitutional regime of the *Charter* as it is to the *Constitution Act, 1867*.

[159] Justice McLachlin also noted that once a court determines that parliamentary conduct or actions are protected by parliamentary privilege, and thus within the legislature’s exclusive jurisdiction, the privilege is “held absolutely” and is immune from intrusion by other branches of government (*New Brunswick Broadcasting*, at pp. 379, 383 and 387-88). Furthermore, the effect of recognizing the constitutional status of the right to exclude “strangers” such as the media from the

chamber was that “the *Charter* cannot cut down on that right, on the principle that one part of the Constitution cannot abrogate another part of the Constitution” (p. 390). She concluded that because the Nova Scotia House of Assembly had exercised its parliamentary privilege to exclude strangers from its deliberations, “the *Charter* does not apply to its conduct” (p. 393 (emphasis added); see also p. 390).

[160] In *Doucet-Boudreau*, this Court cited *New Brunswick Broadcasting* in support of the proposition that “if there is some constitutional limit to the remedial power . . . in s. 24(1)” of the *Charter*, “the judge ordering a remedy must respect this boundary”, because “no part of the Constitution can abrogate or diminish another part of the Constitution” (para. 42). As will be developed, and as implicitly recognized in *Doucet-Boudreau*, the authority of the courts to award damages under s. 24(1) is subject to the “constitutional limit” imposed by parliamentary privilege.

[161] This Court’s decision in *Vaid* confirmed the principle enunciated in *New Brunswick Broadcasting* that although the *Charter* applies to Parliament and the provincial and territorial legislatures and all matters within their authority, actions or conduct protected by parliamentary privilege are not subject to review under the *Charter*. The Court in *Vaid* extended this principle from the inherent parliamentary privileges of provincial legislatures at issue in *New Brunswick Broadcasting* to the legislated parliamentary privileges of Parliament. In *Vaid*, Justice Binnie said that this point “must now be taken as settled” (para. 33). Professors Hogg and Wright have explained that, after *Vaid*, “there is no difference in constitutional status between

legislated privilege and inherent privilege. Both are exempt from the Charter of Rights” (§ 1:7 (emphasis added); see also Brun, Tremblay and Brouillet, at para. XII-2.13).

[162] *Vaid* also highlighted how parliamentary privilege functions as a rule of curial jurisdiction and is shielded from *Charter* review. Justice Binnie explained that *New Brunswick Broadcasting* held that “the press freedom guaranteed by s. 2(b) of the *Charter* did not prevail over parliamentary privilege”, and affirmed that “[o]ne part of the Constitution cannot abrogate another part of the Constitution” (para. 30). He added that “[i]n matters of privilege, it would lie within the exclusive competence of the legislative assembly itself to consider compliance with human rights and civil liberties” (para. 30). He illustrated how parliamentary privilege is not subject to review under the *Charter* with the following example:

It would be intolerable, for example, if a member of the House of Commons who was overlooked by the Speaker at question period could invoke the investigatory powers of the Canadian Human Rights Commission with a complaint that the Speaker’s choice of another member of the House discriminated on some ground prohibited by the *Canadian Human Rights Act*, or to seek a ruling from the ordinary courts that the Speaker’s choice violated the member’s guarantee of free speech under the *Charter*. [Emphasis added; para. 20.]

[163] Most recently, in *Chagnon*, Karakatsanis J., for a majority of the Court, held that “courts cannot review the exercise of parliamentary privilege, even on *Canadian Charter of Rights and Freedoms* grounds” (para. 2 (emphasis added)). As she explained, “[j]udicial review of the exercise of parliamentary privilege, even for

Charter compliance, would effectively nullify the necessary immunity this doctrine is meant to afford the legislature” (para. 24 (emphasis added; citations omitted)).

[164] To sum up, parliamentary privilege is an integral part of the Constitution of Canada. Once the existence of a category of parliamentary privilege is established, conduct or activities that are themselves an exercise of that privilege are not subject to review by the courts, even when such conduct or activities are alleged to violate the *Charter*. As elaborated below, this means that such conduct or activities cannot be the basis of a *Charter* breach and, accordingly, cannot give rise to a *Charter* remedy such as damages under s. 24(1).

[165] I now turn to the two questions posed by the Attorney General of Canada.

B. *Question One: The Crown Cannot Be Liable for Damages Under Section 24(1) of the Charter For Preparing and Drafting Legislation Later Found to Infringe the Charter*

[166] The first question posed by the Attorney General of Canada asks whether the Crown in its executive capacity can be held liable in damages under s. 24(1) of the *Charter* for government officials and Ministers *preparing and drafting* a bill that is validly enacted but later declared unconstitutional. The second question asks whether the Crown in its executive capacity can be liable in damages for Parliament *enacting* a bill into law when that law is later declared unconstitutional.

[167] Before this Court, the Attorney General of Canada submits that “the answer to both questions . . . turns on a single issue, namely 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” (A.F., at para. 24). This approach seeks to answer both questions by posing a third. The respondent submits that while the Attorney General’s “formulation is imperfect”, “the ultimate answer [to the question posed] is yes” (R.F., at para. 20).

[168] In my view, both questions raise distinct parliamentary privilege considerations relating, in question 1, to the legislative process of *preparing and drafting* legislation, and in question 2, to the grounds on which legislation, *once enacted*, may be reviewed. The two questions do not lend themselves to a single, blended analysis with a uniform answer and, accordingly, each should be addressed separately as originally posed. This Court is well equipped to address the two questions separately, having received extensive submissions on all the relevant considerations of parliamentary privilege and the separation of powers from both parties and no fewer than 21 interveners.

[169] As I will explain, the answer to the first question must be “no”. Parliamentary privilege, through the established categories of privilege of freedom of speech and control over parliamentary proceedings, precludes Crown liability for the legislative process. The authorities establish that parliamentary privilege extends to “members” of Parliament or a legislative assembly, and conduct by “parliamentary

officers and employees”, “officials”, and “the public”, when they are engaged in proceedings in Parliament. Whether the privilege is engaged is determined not by the nature of the relevant individual but by the conduct in which they are engaged, and in particular, whether that conduct is necessary to the core legislative functions that parliamentary privilege protects. In addition, because persons participating in the legislative process act in a legislative rather than an executive capacity, the Crown in its executive capacity cannot be liable for such conduct in an action brought under s. 23(1) of the *Crown Liability and Proceedings Act*.

[170] Before turning to these points, I briefly address three uncontroversial points regarding the framing of the Attorney General’s questions that guide the analysis that follows.

(1) Three Uncontroversial Points

(a) *The Crown “in its Executive Capacity” Refers to the State or Government*

[171] Each of the questions posed by the Attorney General in this appeal inquire as to the Crown’s liability “in its executive capacity”. There is no debate that this refers to the liability of the Canadian government *qua* executive, to be distinguished from the legislature.

[172] As Professors Hogg and Wright note, “the legal system of Canada recognizes the state as a legal person, capable of acquiring rights and liabilities under

common law or statute law, capable of suing and being sued, and bound by the decisions of courts and other properly constituted tribunals” (§ 10:1). In Canada, the state is often called “the Crown”, in recognition of the Queen or King as the formal head of state (§ 10:1). The Crown in its executive capacity is also commonly described as “the state” or “the government” (P. W. Hogg, P. J. Monahan and W. K. Wright, *Liability of the Crown* (4th ed. 2011), at p. 12-13; see also *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 598). At the federal level, s. 23(1) of the *Crown Liability and Proceedings Act* provides that “[p]roceedings against the Crown may be taken in the name of the Attorney General of Canada”. This is the statutory basis for suing the Crown in right of Canada.

[173] In our constitutional system, however, the Crown acts at the federal and provincial and territorial levels, and in distinct executive, legislative, and judicial capacities. At the federal level, the “Crown” refers to: (a) the head of the executive authority or government of Canada (*Constitution Act, 1867*, s. 9); (b) the sovereign in the exercise of his formal legislative role in assenting to, refusing to assent to, or reserving parliamentary bills (*Constitution Act, 1867*, ss. 17, 55 and 91); and (c) the sovereign in the exercise of the judicial authority of the courts (see generally *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765, at paras. 16, 18 and 33, per Karakatsanis J., at paras. 128-33, per Brown J., concurring, and at para. 148, per Rowe J., concurring; *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069, at para. 28; *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2

S.C.R. 49, at pp. 103-4; Hogg, Monahan and Wright, at pp. 11-13; and Brun, Tremblay and Brouillet, at paras. II.84, II.89 and II.96).

[174] Although the “state” is recognized as a legal person capable of acquiring liabilities, it is also settled that Parliament, the House of Commons, the Senate, and the provincial legislative assemblies, as parts of the legislative branch of government, are not legal entities and cannot sue or be sued (Maingot (2016), at pp. 163 and 198; see also J. P. J. Maingot, *Parliamentary Privilege in Canada* (2nd ed. 1997), at p. 179). Therefore, even though this Court has said that s. 24(1) *Charter* remedies are awarded against “the state” rather than any particular branch of government (*Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28, at para. 22), state liability involves the liability of the Crown in its executive capacity, not in its legislative capacity.

(b) *The Charter Applies to Parliament and the Government of Canada*

[175] There is also no debate that the *Charter*, including s. 24(1), applies to Parliament and the government of Canada. Section 32(1)(a) of the *Charter* states that the “*Charter* applies . . . to the Parliament and government of Canada in respect of all matters within the authority of Parliament”. As this Court has recognized, “the *Charter* applies broadly to the legislative, executive, and administrative branches of government in respect of all matters within their authority” (*Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10, at para. 41, citing *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295, at para. 14, and *RWDSU*, at p. 598). Still, an established

exception to this principle is that conduct protected by parliamentary privilege is not subject to review under the *Charter*.

(c) *Remedies Under Section 52(1) of the Constitution Act, 1982 and Section 24(1) of the Charter Can Be Combined*

[176] Lastly, recent jurisprudence of this Court has emphasized there is “no hard-and-fast rule” against combining remedies under s. 52(1) of the *Constitution Act, 1982* (such as a declaration of invalidity) with an individual remedy under s. 24(1) of the *Charter* (such as damages) when the individual remedy is “appropriate and just” in the circumstances (*Ontario (Attorney General) v. G*, 2020 SCC 38, [2020] 3 S.C.R. 629, at para. 142; *R. v. Albashir*, 2021 SCC 48, at paras. 62-67; see also Hogg and Wright, at § 40:13).

[177] A remedy will be “appropriate and just” within the meaning of s. 24(1) when it furthers the general objectives of the *Charter* by compensating the plaintiff for any loss, vindicating rights, or deterring future breaches (*Ward*, at para. 25). This Court in *Ward* established a four-step inquiry for *Charter* damages under s. 24(1):

The first step in the inquiry is to establish that a *Charter* right has been breached. The second step is to show why damages are a just and appropriate remedy, having regard to whether they would fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches. At the third step, the state has the opportunity to demonstrate, if it can, that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust. The final step is to assess the quantum of the damages. [para. 4]

(2) The Crown Cannot Be Liable for Preparing and Drafting Legislation

(a) *Parliamentary Privilege Precludes Crown Liability for the Legislative Process*

[178] The doctrine of parliamentary privilege entails that the Crown cannot be liable for the conduct of government officials and Ministers when carrying out core legislative work or work that is closely and necessarily related to proceedings in Parliament (Maingot (2016), at pp. 7 and 75). Preparing and drafting proposed legislation is undoubtedly core legislative work and is protected from judicial interference and supervision by the established categories of parliamentary privilege of freedom of speech and control over parliamentary proceedings. The courts have no jurisdiction to review the exercise of these parliamentary privileges, even after the legislative process has concluded, and even when it is alleged that the legislation infringed the *Charter*. And because there can be no judicial review of such privileged conduct under the *Charter*, this question must be resolved as a threshold jurisdictional issue, not as a countervailing “good governance” concern at the third step of the *Ward* framework. If parliamentary privilege applies in respect of the legislative process, the *Charter* does not apply.

(i) Freedom of Speech

[179] Government officials and Ministers involved in preparing and drafting proposed legislation enjoy the established parliamentary privilege of freedom of speech

for words or conduct connected to their legislative work. Freedom of speech, which protects robust legislative debate, is the lifeblood of Parliament's day-to-day business. As a result, words and conduct connected to the legislative process are necessarily protected by parliamentary privilege.

[180] This Court has affirmed unequivocally that “the freedom of Speech and Debates or Proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament” (*New Brunswick Broadcasting*, at p. 345, per Lamer C.J., citing the *Bill of Rights* of 1689; see also *Vaid*, at paras. 29(10) and 39; *Chagnon*, at para. 22). The free speech privilege includes an “immunity from civil proceedings with respect to any matter arising from the carrying out of the duties of a member of the House” through a “constitutional right . . . to speak freely in the House without fear of civil reprisal” (*New Brunswick Broadcasting*, at p. 385). The privilege applies not only to speech in the House of Commons and the Senate, but also to speech before their committees, none of which is “actionable in the ordinary courts, whether or not it is said in good faith” (Maingot (2016), at p. 31; see also Brun, Tremblay and Brouillet, at para. V-1.186).

[181] An established category of privilege such as freedom of speech applies to the “conduct by Parliament or its officers and employees” within its necessary scope (*Vaid*, at para. 29(11) (emphasis added)). It also protects “members and officials in the exercise of their functions” that are necessary to allow a legislature “to discharge its duties with efficiency or to assure its independence and dignity” (*Vaid*, at para. 41,

citing J. G. Bourinot, *Parliamentary Procedure and Practice in the Dominion of Canada* (4th ed. 1916), at p. 37 (emphasis added; emphasis in original deleted)). On the parliamentary privilege of freedom of speech, see generally *Ontario v. Rothmans Inc.*, 2014 ONSC 3382, 120 O.R. (3d) 467 (“*Rothmans Inc.*”), at paras. 9-20; *Lavigne v. Ontario (Attorney General)* (2008), 91 O.R. (3d) 728, at paras. 23 and 47-55; *Gagliano v. Canada (Attorney General)*, 2005 FC 576, [2005] 3 F.C.R. 555, at paras. 62-97 and 108-11, aff’d 2006 FCA 86, 268 D.L.R. (4th) 190; *Canada (Deputy Commissioner, Royal Canadian Mounted Police) v. Canada (Commissioner, Royal Canadian Mounted Police)*, 2007 FC 564, [2008] 1 F.C.R. 752, at paras. 63-65; and *Prebble v. Television of New Zealand Ltd.*, [1995] 1 A.C. 321 (P.C.), at pp. 332-34).

[182] Maingot adds that *all persons*, even members of “the public”, exercising the privilege of freedom of speech while participating in proceedings in Parliament are accountable only to Parliament regardless of their false or malicious intent or conduct ((2016), at pp. 71-72):

While taking part in such proceedings [in Parliament], officers of Parliament, Members of Parliament, and the public are immune from being called to account in the courts or elsewhere, save the Houses of Parliament, for any act done or words uttered in the course of participating, however false or malicious the act and however malicious the words might be; and any member of the public prejudicially affected is without redress.

[183] A useful illustration of the relevant principles is the decision of the Ontario Superior Court of Justice in *Rothmans Inc.*, which recognized that the privilege can

extend beyond members of Parliament, officers, and employees to the public more broadly. In *Rothmans Inc.*, the Crown sued tobacco companies for damages under Ontario's *Tobacco Damages and Health Care Costs Recovery Act, 2009*, S.O. 2009, c.

13. The Crown's statement of claim alleged that the companies repeatedly misrepresented the risks of smoking before House of Commons committees and federal legislative committees. One of the companies brought a motion to strike those claims on the basis of parliamentary privilege. The court agreed that the paragraphs should be struck because statements made before those committees were absolutely protected by the privilege over free speech. The court rejected the Crown's argument that it was premature to strike the claims at the pleadings stage on the basis that an evidentiary context was required to determine whether the speech was privileged:

... as can be seen from the authorities, the [free speech] privilege applies broadly to those who participate in parliamentary proceedings — a witness, counsel, a “stranger”, “the public”, a “person”, “those who participate”, or “others whose assistance the House considers necessary for conducting its proceedings”. . . . Indeed, art. 9 of the *Bill of Rights* does not refer to any particular class of individuals, but rather insulates parliamentary “freedom of speech”, “debates” and “proceedings” from external review. [Footnote omitted; para. 29.]

[184] The critical point is that, as I have said, whether the privilege applies is not determined by the nature of the relevant individual, but by the activities in which they are engaged and the necessity of those activities to core legislative functions. Thus, the claim of privilege in *Vaid* was rejected not because Mr. Vaid was the chauffeur to the Speaker of the House of Commons rather than a member of Parliament, but because his activities at the relevant time (driving the speaker) were found to be “remote from

the legislative functions that parliamentary privilege was originally designed to protect” (para. 4). In the context of members or government officials engaged in preparing and drafting legislation, the privilege necessarily applies to their words and conduct not simply because they are members of Parliament or government officials, but because the core legislative activities in which they are engaged (the preparation and drafting of legislation) is absolutely protected by an established category of parliamentary privilege, namely the freedom of speech.

[185] The first question posed by the Attorney General of Canada must therefore be answered in the negative. Exposing the Crown, in its executive capacity, to liability in damages for the conduct of government officials and Ministers in preparing and drafting legislation would inevitably intrude upon the parliamentary privilege of freedom of speech for words or conduct connected to Parliament’s legislative work. It does not matter that liability would be deferred until after the legislation is enacted (*Mikisew Cree*, at para. 38; see also *Marcotte*, at p. 83). The purpose of imposing liability would be to discourage a certain type of speech by requiring the government to “pay a price” for it, to use the New Brunswick Court of Appeal’s words (para. 23). This would inevitably trench on the parliamentary privilege of freedom of speech and upset the delicate constitutional equilibrium among the branches of government.

(ii) Control Over Parliamentary Proceedings

[186] A second authoritatively established category of parliamentary privilege is the House of Commons’ exclusive control over its own proceedings, often called the

privilege over “proceedings in Parliament”. Like the privilege over freedom of speech, the privilege over proceedings in Parliament was recognized in art. 9 of the *Bill of Rights* of 1689, which states that “proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament”.

[187] The privilege over proceedings in Parliament is broad. It was recognized by this Court in *Vaid* as including “control by the Houses of Parliament over ‘debates or proceedings’”, including the “day-to-day procedure in the House” (*Vaid*, at para. 29(10); see also *Mikisew Cree*, at para. 37, per Karakatsanis J.). Maingot adds that, as a “technical parliamentary term, ‘proceedings’ are the events and steps leading up to some formal action, including a decision, taken by the House in its collective capacity” ((2016), at p. 74, citing *Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (21st ed. 1989), by C. J. Boulton, ed., at p. 92; see also Brun, Tremblay and Brouillet, at paras. V-1.232 and V.1-240). This privilege includes “everything said or done by a Member in the exercise of his functions as a Member in committee of either House, as well as everything said or done in either House in the transaction of parliamentary business” (Maingot (2016), at pp. 92-93). It encompasses voting, making amendments, asking questions, presenting petitions, as well as any papers or other material connected with parliamentary proceedings, such as notices of motion, reports, and drafts (Maingot (2016), at pp. 74-75 and 93-94; see also Brun, Tremblay and Brouillet, at paras. V-1.232 and V.1-240).

[188] The privilege also extends to matters taking place outside the houses of Parliament and the provincial or territorial legislatures. The words and conduct of Members who are “occupied in something closely and necessarily related to a proceeding in Parliament” are “accorded absolute privilege” (Maingot (2016), at p. 7). This Court has recognized that in matters “so closely and directly connected with proceedings in Parliament[,] intervention by the courts would be inconsistent with Parliament’s sovereignty as a legislative and deliberative assembly” (*Vaid*, at para. 44 (emphasis deleted), citing U.K., Joint Committee on Parliamentary Privilege, vol. 1, *Report of Proceedings of the Committee* (1999), at para. 247; see also *Canada (Board of Internal Economy) v. Boulerice*, 2019 FCA 33, [2019] 3 F.C.R. 145, at para. 104). It cannot reasonably be suggested that preparing and drafting legislation is not “closely and necessarily related” to proceedings in Parliament.

[189] As with the free speech privilege, the spectre of the Crown’s liability for the words or conduct of government officials and Ministers in preparing and drafting legislation would unavoidably trench on the established privilege over the proceedings of Parliament. Quite apart from the evidentiary difficulties that may arise in seeking to admit such evidence at trial, the courts are, more fundamentally, without jurisdiction to adjudicate the exercise of this privilege, whether under the *Charter* or otherwise.

(iii) Parliamentary Privilege Is a Threshold Jurisdictional Issue Under the *Ward* Framework

[190] It is worth addressing where parliamentary privilege fits in the four-part *Ward* framework for *Charter* damages under s. 24(1). Is it a threshold jurisdictional question, as urged by the Attorney General of Canada? Or is it a “good governance” consideration to be considered at the third step of *Ward*, as urged by Mr. Power? In my view, parliamentary privilege raises a threshold jurisdictional question.

[191] The reason is straightforward. If the existence of a recognized category of parliamentary privilege is proved, there can be no judicial review of the exercise of the privilege, even on *Charter* grounds. Words or conduct protected by parliamentary privilege is simply not subject to the *Charter*. There is no sense in which privileged words or conduct can result in a breach of a *Charter* right to satisfy the first step of *Ward*.

[192] This conclusion is a direct consequence of the constitutional nature of parliamentary privilege and its status as a rule of curial jurisdiction. The privilege cannot be the subject of a judicial balancing as to whether countervailing good governance concerns at step three of *Ward* “defeat the functional considerations that support a damage award and render damages inappropriate or unjust” (para. 4). Instead, the existence of the privilege means that the courts lack jurisdiction to undertake any further inquiry.

(b) *The Crown Cannot Be Liable for Participating in the Lawmaking Process*

[193] The relationship between parliamentary privilege and the legislative process leads to a related conclusion: the Crown in its executive capacity cannot be held liable for the work of Ministers and other government officials participating in the legislative process because, in doing so, they act in a legislative rather than an executive capacity. Such conduct is not Crown conduct that can be attributed to the executive for which the Crown can be liable in an action brought under s. 23(1) of the *Crown Liability and Proceedings Act*. This provision itself reflects the separation of powers.

[194] This Court confirmed these principles in *Mikisew Cree* in rejecting the view that the Crown has a duty to consult Aboriginal peoples under s. 35(1) of the *Constitution Act, 1982* during the legislative process. A key issue was whether the conduct of the executive during the legislative process is “Crown conduct” that could trigger a duty to consult under s. 35(1). This turned partly on whether the Federal Court has jurisdiction over executive actors during the legislative process under s. 17(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, which provides that the “Federal Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown”, defined in s. 2(1) of the Act as “Her Majesty in right of Canada”.

[195] Speaking for the majority on this point, Karakatsanis J. held that “the law-making process does not constitute ‘Crown conduct’ that triggers the duty to consult” (*Mikisew Cree*, at para. 2). She ruled that the term the “Crown” or “Her Majesty in right of Canada” “does not extend to executive actors when they are exercising ‘legislative power’” (para. 16 (citation omitted)). As a result, she concluded, the Federal Court has

no jurisdiction under s. 17(1) of the *Federal Courts Act* to consider claims involving the exercise of legislative power in the law-making process.

[196] In separate reasons, Brown J. agreed that s. 17 of the *Federal Courts Act* provides a “jurisdictional bar” to the Federal Court entertaining claims involving the exercise of legislative power in the legislative process, because such claims do not involve Crown conduct. As he explained:

This conclusion is . . . compelled by Part IV of the *Constitution Act, 1867* — entitled “Legislative Power”. Part IV sets out, *inter alia*, the powers of both houses of Parliament — the House of Commons and the Senate — in respect of whose exercise Parliament is sovereign, subject only to the limits of its legislative authority as set out in the *Constitution Act, 1867*. The development, introduction and consideration of bills in the House of Commons are all necessary exercises of legislative power in the law-making process. While Cabinet ministers are members of the executive, they participate in this process — for example, by presenting a government bill — not in an executive capacity, but in a legislative capacity. [Emphasis added.]

(*Mikisew Cree*, at para. 113)

[197] The statutory bar against the Federal Court entertaining claims involving exercises of legislative power during the legislative process reflects the separation of powers. Although courts of inherent jurisdiction do not face such a statutory jurisdictional limitation, the underlying separation of powers rationale of this provision remains relevant. Speaking for a plurality of the Court on this point, Brown J. noted that “the entire law-making process — from initial policy development to and including royal assent — is an exercise of legislative power which is immune from judicial interference” (*Mikisew Cree*, at para. 117). In support of this proposition, he cited this

Court's decision in *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 559, where Sopinka J. stated that "[t]he formulation and introduction of a bill are part of the legislative process with which the courts will not meddle". Justice Karakatsanis cited the same passage in her reasons in *Mikisew Cree*, in support of her view that "[t]he development of legislation by ministers is part of the law-making process, and this process is generally protected from judicial oversight" (para. 34). She also cited *Reference re Resolution to amend the Constitution*, [1981] 1 S.C.R. 753, to the effect that "[c]ourts come into the picture when legislation is enacted and not before" (p. 785). Importantly, Justice Karakatsanis added that the same separation of powers concerns would arise *even if* the duty to consult doctrine were to be enforced *only after* the legislation has been enacted:

Applying the duty to consult doctrine during the law-making process would lead to significant judicial incursion into the workings of the legislature, even if such a duty were only enforced post-enactment. . . . Directly transposing such *executive* requirements into the *legislative* context would be an inappropriate constraint on legislatures' ability to control their own processes. [Emphasis in original; para. 38.]

[198] I conclude that the Crown, in its executive capacity, cannot be held liable in an action brought under s. 23(1) of the *Crown Liability and Proceedings Act* for the conduct of government officials and Ministers preparing and drafting legislation because such conduct is legislative rather than executive conduct.

(3) Conclusion

[199] The first question posed by the Attorney General of Canada should be answered in the negative. The Crown cannot be held liable in damages under s. 24(1) of the *Charter* for alleged harms stemming from the legislative process of preparing or drafting legislation.

C. *Question Two: The Crown Cannot Be Liable for Damages Under Section 24(1) of the Charter for Enacting Legislation, but Can Be Liable Under Section 24(1) for Harm Caused by Enacted Legislation That Is “Clearly Unconstitutional”*

[200] The Attorney General of Canada’s second question asks whether the Crown, in its executive capacity, can be held liable for damages under s. 24(1) of the *Charter* for enacting a law that is later found unconstitutional under s. 52(1) of the *Constitution Act, 1982*. If this question is interpreted, like the first question, as relating to conduct during the legislative process of *enacting* a bill into law, then I would answer it in the negative. The Crown cannot be liable for words or conduct during the legislative process in preparing, drafting, or enacting legislation.

[201] If, however, the second question is interpreted as relating to whether an *enactment* that violates the *Charter* can give ever rise to *Charter* damages under s. 24(1), after a bill has become law and the legislative process is complete, then I would answer with a qualified “yes”. I would reject the Attorney General of Canada’s call to overrule the limited immunity rule in *Mackin* and replace it with an absolute immunity. Instead, I would modify *Mackin* to clarify that the Crown can be liable in damages for the breach of *Charter* rights caused by legislation only when the legislation is shown to have been “clearly unconstitutional” at the time it was enacted. “Bad faith” and

“abuse of power” are inappropriate thresholds for Crown liability in relation to the enactment of primary legislation. They would inevitably trench on parliamentary privilege and would threaten the separation of powers by requiring the courts to consider questions that are not justiciable. Nevertheless, some of the same facts that would be considered in evaluating whether the legislation is “clearly unconstitutional”, such as whether legislation has an unconstitutional purpose, could be said to relate to “bad faith” or an “abuse of power”. The difference is, when considering primary legislation, “clearly unconstitutional” is a justiciable standard that does not trench on parliamentary privilege, whereas “bad faith” and “abuse of power” are not justiciable standards and would trench on the privilege.

(1) The *Mackin* Limited Immunity Standard

[202] In *Mackin*, this Court had to decide whether provincial legislation abolishing the system of supernumerary judges and replacing it with a *per diem* system contravened the constitutional guarantee of judicial independence in s. 11(d) of the *Charter* and the preamble to the *Constitution Act, 1867*, and if so, whether the Court should award damages under s. 24(1) of the *Charter* to the judges who challenged the legislation. Justice Gonthier, for a majority of the Court, approached the issue of whether *Charter* damages are available for the “enactment or application” of unconstitutional legislation by drawing on general principles of public law. He formulated a rule that would allow for damages only if there is “conduct that is clearly wrong, in bad faith or an abuse of power”:

According 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 (*Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957; *Central Canada Potash Co. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42). In other words “[i]nvalidity of governmental action, without more, clearly should not be a basis for liability for harm caused by the action” (K. C. Davis, *Administrative Law Treatise* (1958), vol. 3, at p. 487). In the legal sense, therefore, both public officials and legislative bodies enjoy limited immunity against actions in civil liability based on the fact that a legislative instrument is invalid. [Emphasis in original; para. 78.]

[203] Justice Gonthier held that the legislation at issue in *Mackin* violated the guarantee of judicial independence, but rejected the claim for *Charter* damages. Applying the rule he had formulated allowing for *Charter* damages when legislation is “clearly wrong, in bad faith or an abuse of power”, Gonthier J. saw no evidence that the provincial government knew about the unconstitutionality of the legislation or that it had acted negligently, in bad faith, or abused its powers in adopting the legislation (para. 82).

(2) This Court Has Interpreted *Mackin* Inconsistently

[204] This Court’s subsequent decisions have interpreted *Mackin* inconsistently. At times, this Court has recognized that *Mackin* allows for damages or other remedies under s. 24(1) of the *Charter* for the enactment of unconstitutional primary legislation (see *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489, at para. 62; *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429, at para. 102; *Conseil scolaire*

francophone de la Colombie-Britannique v. British Columbia, 2020 SCC 13, [2020] 1 S.C.R. 678, at paras. 166-69).

[205] On another occasion, this Court has cited *Mackin* for the opposite proposition, stating that “well-established principles of public law rule out the possibility of awarding damages when legislation is declared unconstitutional . . . on the grounds of . . . non-compliance with the *Canadian Charter*” (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30, [2004] 1 S.C.R. 789, at para. 19).

[206] Most often, however, this Court has cited *Mackin* as holding that damages under s. 24(1) of the *Charter* are available for the enforcement of a law later declared unconstitutional only if the state’s conduct under the law was clearly wrong, in bad faith, or an abuse of power (see *Ward*, at paras. 39 and 43; *Henry v. British Columbia (Attorney General)*, 2015 SCC 24, [2015] 2 S.C.R. 214, at para. 124, per McLachlin C.J. and Karakatsanis J., concurring in the result; *Ernst v. Alberta Energy Regulator*, 2017 SCC 1, [2017] 1 S.C.R. 3, at para. 174, per McLachlin C.J. and Moldaver, Côté and Brown JJ., dissenting; *Kosoian v. Société de transport de Montréal*, 2019 SCC 59, [2019] 4 S.C.R. 335, at para. 71; *Albashir*, at para. 40).

[207] Despite this Court’s inconsistent interpretation of *Mackin*, the decision cannot reasonably be interpreted as limited to post-enactment Crown conduct under a law. The reasons of the New Brunswick Court of Appeal leave no doubt that the case involved a claim for damages for the New Brunswick government’s alleged bad faith

in enacting an unconstitutional law (see *Rice v. New Brunswick* (1999), 235 N.B.R. (2d) 1, at paras. 54-55 and 59, per Ryan J.A. for the majority, and at paras. 73-74, per Drapeau J.A., concurring). In this Court’s decision in *Mackin*, Justice Gonthier applied the standard of “clearly wrong, in bad faith or an abuse of power” to the government itself in adopting the legislation, and not simply to government conduct taken under the legislation (para. 82).

(3) “Bad Faith” and “Abuse of Power” Are Inappropriate Standards for Awarding *Charter* Damages for Unconstitutional Primary Legislation

[208] The Attorney General of Canada, as a party to this appeal, expressly asks this Court to overrule or limit the application of *Mackin* on this point. This Court can therefore entertain whether to do so (see *R. v. McGregor*, 2023 SCC 4, at para. 23). Several interveners also ask this Court to revisit *Mackin*, including the Attorneys General of Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Ontario, Prince Edward Island, Quebec, and Saskatchewan, as well as the Speaker of the House of Commons and the Speaker of the Senate.

[209] I recognize that this Court should be very slow to accede to requests to overturn its prior decisions. The doctrine of precedent or *stare decisis* (“we stand by the things that have been decided”) is fundamental to the certainty and predictability on which our system of law depends (R. J. Sharpe, *Good Judgment: Making Judicial Decisions* (2018), at pp. 146-47). It is not enough to overturn precedent that a judge of this Court, or a different panel of this Court, happens to think that the earlier decision

was wrongly decided (*Plourde v. Wal-Mart Canada Corp.*, 2009 SCC 54, [2009] 3 S.C.R. 465, at para. 13; Sharpe, at p. 163). This Court’s practice is “against departing from its precedents unless there are compelling reasons to do so” (*R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 44). Such reasons can include where the prior decision overlooked binding authority or a relevant statute (a decision rendered *per incuriam*), has proven unworkable, or if its rationale has been eroded by significant societal or legal change (*R. v. Kirkpatrick*, 2022 SCC 33, at para. 202, per Côté, Brown and Rowe JJ., concurring in the result).

[210] In my view, there are compelling reasons to revisit *Mackin* to provide appropriate clarification. None of the authorities cited in *Mackin* support awarding *Charter* damages against the Crown for harms caused by unconstitutional primary legislation. The test enunciated in *Mackin* also conflicts with the doctrine of parliamentary privilege, as well as the separation of powers and principles of justiciability. None of these points was argued in *Mackin*, and this Court did not consider them in its reasons. The limited immunity rule adopted in *Mackin* would, in my view, have been materially different had the Court considered these matters.

(a) *None of the Authorities Cited in Mackin Supports Awarding Charter Damages for Harm Arising From Unconstitutional Legislation*

[211] In *Mackin*, Justice Gonthier cited two pre-*Charter* cases, *Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957, and *Central Canada Potash Co. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42, to ground the possibility of

awarding *Charter* damages for unconstitutional legislation that is clearly wrong, in bad faith, or an abuse of power. With respect, neither case supports awarding *Charter* damages for injury caused by unconstitutional legislation. None of the principles or cases cited in *Mackin* address civil liability for enacting primary legislation (see Marcotte, at p. 86).

[212] In *Welbridge*, this Court dismissed a claim for damages in negligence against a municipality for harm arising from a zoning by-law subsequently declared *ultra vires*. Justice Laskin, as he then was, stated that “[i]t would be incredible to say in such circumstances that [the municipality] owed a duty of care giving rise to liability in damages for its breach” (p. 969). As he noted: “Invalidity is not the test of fault and it should not be the test of liability” (p. 969 (citation omitted)). *Welbridge* dealt with potential civil liability flowing from a zoning by-law. The decision provides no basis for awarding *Charter* damages for unconstitutional primary legislation.

[213] In *Central Canada Potash*, this Court dismissed a tort action against a government official alleging intimidation for threatening enforcement action under regulations later found to be *ultra vires* the province. Justice Martland held that the government was entitled to enforce the law unless it was found to be *ultra vires*. He said that “it would be unfortunate, in a federal state such as Canada, if it were to be held that a government official, charged with the enforcement of legislation, could be held to be guilty of intimidation because of his enforcement of the statute whenever a statute whose provisions he is under a duty to enforce is subsequently held to be *ultra*

vires” (p. 90). The decision equally provides no basis for awarding *Charter* damages for unconstitutional primary legislation.

[214] In *Mackin*, Gonthier J. also cited, at para. 78, René Dussault and Louis Borgeat’s leading treatise, *Administrative Law: A Treatise* (2nd ed. 1990), vol. 5, at p. 177, which states that “[i]n our parliamentary system of government, Parliament or a legislature of a province cannot be held liable for anything it does in exercising its legislative powers.” This text, on its face, plainly described “an absolute, not a qualified, immunity” (Marcotte, at p. 86). It does not support the rule in *Mackin* of limited immunity for the harms caused by unconstitutional primary legislation.

[215] At the same time, I acknowledge that *Mackin* is not a case about parliamentary privilege. As noted above, parliamentary privilege was not argued by the parties or addressed by the Court. Justice Gonthier’s reasons in *Mackin* simply did not address the impact of the rule he enunciated on parliamentary privilege. He drew on “the general rule of public law” that there is no state liability absent conduct that is “clearly wrong, in bad faith or an abuse of power”, or, in French, “[un] comportement clairement fautif, de mauvaise foi ou d’abus de pouvoir”. These are standards for the liability of public officials that had never previously been applied to primary legislation. This focus on the conduct of government officials taken under a law is also apparent in Gonthier J.’s discussion of *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347, to the effect that if “the government and its representatives . . . 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” (*Mackin*, at para. 79 (emphasis added)).

[216] All these factors suggest that what is called for in the present circumstances is to clarify the scope of *Mackin* rather than to completely overrule it.

(b) *Bad Faith and Abuse of Power Are Inappropriate Thresholds for Charter Damages for Unconstitutional Primary Legislation*

[217] The bad faith and abuse of power thresholds in *Mackin* are inappropriate thresholds in respect of damages under s. 24(1) of the *Charter* for unconstitutional primary legislation because they conflict with the doctrine of parliamentary privilege and principles of justiciability, and strain the separation of powers. The parties did not raise these matters in *Mackin*, nor did this Court consider them in its reasons. This has been criticized as being a “significant oversight” given the importance of these matters to this Court’s jurisprudence, both before and after *Mackin* (Marcotte, at p. 87).

[218] Asking courts to adjudicate whether legislation has *indicia* of “bad faith” or an “abuse of power”, as part of an assessment under s. 24(1) of the *Charter*, would inevitably draw courts into judging the legislative process. It would also require courts to evaluate the substance of legislation based on criteria other than constitutionality, which are not justiciable and are therefore outside our proper role. In my view, the only appropriate threshold for awarding damages under s. 24(1) of the *Charter* for the harms

caused by unconstitutional primary legislation is when the legislation is “clearly unconstitutional”.

- (i) “Bad Faith” and “Abuse of Power” as Thresholds for *Charter* Damages for Unconstitutional Primary Legislation Conflict With Established Categories of Parliamentary Privilege

[219] Bad faith and abuse of power as thresholds for awarding *Charter* damages for unconstitutional legislation would draw the courts into evaluating the legislative process and would inevitably trench on the parliamentary privilege over freedom of speech and control by the Houses of Parliament over “debates or proceedings”.

[220] At one level, it is of course impossible to evaluate the motives of a collective body such as the House of Commons or the Senate. As Binnie J. once wrote, “[t]he motives of a legislative body composed of numerous persons are ‘unknowable’ except by what it enacts” (*Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3, at para. 45). A court cannot know the motives of Parliament or of a provincial or territorial legislature; it can only examine the content of the legislation they enact.

[221] The doctrine of parliamentary privilege also prevents courts from passing judgment on the process of enacting legislation. Scrutinizing legislation for evidence of bad faith or abuse of power, even once the law has already been enacted, would inevitably pull the courts back into judging the legislative process which, as I explained under question one, is beyond the jurisdiction of the courts. The courts cannot put

Parliament or a provincial or territorial legislature “on trial”. As the authorities establish, words, conduct, procedures, or anything that legitimately falls within the process of enacting legislation would be “necessarily incidental” or “closely and necessarily related” to proceedings in Parliament (Maingot (2016), at pp. 7 and 76). They are captured by the well-established categories of privilege over freedom of speech and debates and proceedings in Parliament. Matters within these established categories attract *absolute* immunity. As noted by Maingot, “[w]hen part of parliamentary business, . . . whatever is said in the Senate or the House of Commons or in one of the committees is not actionable in the ordinary courts, whether or not it is said in good faith” ((2016), at p. 31 (emphasis added)). Similarly, in an authority cited approvingly by this Court in *Vaid*, at para. 29(10), *Prebble*, Lord Browne-Wilkinson stated categorically (at p. 337):

. . . their Lordships are on the view that parties to litigation, by whomsoever commenced, cannot bring into question anything said or done in the House by suggesting (whether by direct evidence, cross-examination, inference or submission) that the actions or words were inspired by improper motives or were untrue or misleading.

(See also *Duffy*, at para. 64; *Janssen-Ortho Inc. v. Amgen Canada Inc.* (2005), 256 D.L.R. (4th) 407 (Ont. C.A.), at para. 78; *Club Pro Adult Entertainment v. Ontario* (2006), 150 C.R.R. (2d) 1 (Ont. S.C.J.), at paras. 1-7 and 119, rev’d in part on other grounds 2008 ONCA 158, 42 B.L.R. (4th) 47; *Rothmans Inc.*, at para. 31).

[222] Once the focus moves from the legislative process to the content of primary legislation, different but equally insurmountable problems arise. Judging the content of

legislation on a basis other than constitutionality, such as whether the legislation is in “good faith” or involves an “abuse of power”, raises non-justiciable questions and strains the separation of powers, which I address next.

(ii) “Bad Faith” and “Abuse of Power” as Standards for Awarding *Charter* Damages for Unconstitutional Primary Legislation Are Not Justiciable Questions and Strain the Separation of Powers

[223] Justiciability refers to “a set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life” (L. M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (2nd ed. 2012), at p. 7, cited in *Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750, at para. 33; see also *Bruker v. Marcovitz*, 2007 SCC 54, [2007] 3 S.C.R. 607, at para. 41). It is “first and foremost, a normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding a given issue or, instead, deferring to other decision-making institutions” (*Canada (Auditor General)*, at pp. 90-91).

[224] A court may decline to answer a question on the ground of justiciability when doing so would take it beyond its proper constitutional role, or if the court cannot provide an answer within its area of expertise, such as its expertise in interpreting legislation or determining its constitutionality (*Reference re Canada Assistance Plan (B.C.)*, at p. 545; see also *La Rose v. Canada*, 2023 FCA 241, 488 D.L.R. (4th) 340, at paras. 24-36; *Turner v. Canada*, [1992] 3 F.C. 458 (C.A.), at pp. 460-62; Marcotte, at pp. 83-84). Writing before his appointment to the bench, Justice Cromwell explained

that whether a question is justiciable “may be determined according to both institutional and constitutional standards. It includes both the question of the adequacy of judicial machinery for the task as well as the legitimacy of using it” (T. A. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (1986), at p. 192 (emphasis added)).

[225] I obviously accept that the question of whether the conduct of government officials in implementing a law or policy is in bad faith or involves an abuse of power is a justiciable question. Courts routinely undertake such inquiries (see *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 141; *Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17, at para. 39; *Hinse v. Canada (Attorney General)*, 2015 SCC 35, [2015] 2 S.C.R. 621, at paras. 48-53). The question of whether legislation is constitutional is also justiciable.

[226] Courts also routinely examine the purpose of legislation in evaluating whether it infringes the *Charter*. As noted by Professors Hogg and Wright, “[i]f the *purpose* of a law is to abridge a Charter right, then the law will be unconstitutional” (§ 36:13 (emphasis in original)). The leading authority on this point is *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 334, where Dickson J., as he then was, held that the Sunday observance legislation infringed the freedom of religion guarantee of the *Charter* because it had the unconstitutional purpose of compelling observance with the Christian Sabbath.

[227] The difficulty arises, however, after legislation has been judged to be unconstitutional. At this point, asking the further questions of whether the legislation is in “bad faith” or constitutes an “abuse of power” inevitably requires the court to pass judgment on the content of the legislation on grounds other than its constitutionality, which strays into evaluating the wisdom or policy of the law and is not the proper role of the courts (see *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, at pp. 424-25; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at pp. 496-99; *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at para. 5; *R. v. Clay*, 2003 SCC 75, [2003] 3 S.C.R. 735, at para. 4; Hogg and Wright, at § 12:8). Such matters are not justiciable. As Justice Lorne Sossin and Gerard Kennedy explain, “[w]here the judgment of the legislature or executive branch is called into question, it falls to the electorate and the democratic process to resolve such disputes”, not the courts (§ 6:8).

[228] Once legislation has been found to be unconstitutional, there is simply no legal yardstick to measure whether the legislation was in “good faith” or involved an “abuse of power”. Countenancing judicial assessment of such matters brings to mind the dictum of Professor Bora Laskin, before his appointment to the bench, that “[l]aw at this point dissolves into politics” (“Case and Comment” (1955), 33 *Can. Bar Rev.* 215, at p. 219).

(iii) Hansard Remains Available to Aid Statutory Interpretation When Determining the Constitutionality of Primary Legislation

[229] Removing “bad faith” and “abuse of power” as criteria for awarding *Charter* damages under s. 24(1) does not mean that Hansard evidence is unavailable to aid statutory interpretation when determining the constitutionality of legislation, such as in determining whether legislation has the unconstitutional purpose of infringing a *Charter* right (see, for example, *R. v. Sharma*, 2022 SCC 39, at paras. 88-91 and 98-99; *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392, at paras. 66-69), or in determining whether legislation is constitutional on federalism grounds (see, for example, *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, [2020] 2 S.C.R. 283, at paras. 40-45). Using Hansard for this purpose does not seek to impugn speech or proceedings before Parliament, but rather seeks to give effect, whenever possible, to what was said or done there.

[230] Although this Court now generally permits the cautious use of Hansard in statutory interpretation, it has warned that “the court [should be] mindful of the limited reliability and weight of [such] evidence” (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 35; see also *Sharma*, at paras. 88-89). Marcotte helpfully notes that “[t]his practice is not in tension with parliamentary privilege because it assists in interpreting Parliament’s actions rather than frustrating its functions as a legislative and deliberative body” (pp. 80-81). He cites in support Lord Browne-Wilkinson’s speech in the House of Lords in *Pepper (Inspector of Taxes) v. Hart*, [1993] A.C. 593, at p. 638, that “[f]ar from questioning the independence of Parliament and its debates, the courts would”, to the extent possible, “be giving effect to what is said and done there”.

[231] The appropriate use of Hansard as proof of historical context or purpose in statutory interpretation must therefore be distinguished from its inappropriate use to “prove” that legislation is in bad faith. The former does not impugn the freedom of speech or the integrity of parliamentary proceedings; the latter does (see Marcotte, at p. 81).

(iv) Conclusion

[232] Courts cannot adjudge whether parliamentary conduct or speech in the legislative process or the content of legislation are in “bad faith” or involve an “abuse of power”. Such inquiries would infringe parliamentary privilege, threaten the separation of powers, and invite consideration of non-justiciable matters.

[233] This leaves the question of whether the “clearly wrong” threshold in *Mackin* is an appropriate threshold for *Charter* damages under s. 24(1). In my view, the “clearly wrong” threshold is justiciable and can apply without diminishing parliamentary privilege, but should be modified to the standard of “clearly unconstitutional”. I address this issue next.

(4) “Clearly Unconstitutional” Is the Only Appropriate Threshold for Awarding *Charter* Damages for Unconstitutional Primary Legislation

[234] Although “bad faith” and “abuse of power” are inappropriate standards for awarding damages under s. 24(1) of the *Charter* for unconstitutional primary

legislation, a rule of absolute immunity is also inappropriate. Absolute immunity overshoots what is required to protect parliamentary privilege and the separation of powers. Both these constitutional imperatives can be respected by a test that focuses not on legislative *inputs*, which inevitably involves judging the legislative process, but on legislative *outputs*, namely whether the enactment itself clearly violated established constitutional norms at the time it was enacted. In my view, therefore, the central insight of *Mackin* remains good law: the state enjoys a limited, not absolute, immunity from liability in damages when unconstitutional legislation harms an individual. Such individuals may sue the Crown in right of Canada by taking proceedings in the name of the Attorney General of Canada for harms caused by clearly unconstitutional legislation.

[235] I will first discuss why an absolute state immunity from damages is untenable and then address the “clearly unconstitutional” standard.

(a) *Absolute State Immunity Is Inconsistent With the Broad Remedial Discretion of the Courts under Section 24(1) of the Charter*

[236] Section 24(1) of the *Charter* gives the courts broad, remedial discretion to fashion meaningful remedies that they consider appropriate and just in the circumstances. In *Mills*, McIntyre J. observed that “[i]t is difficult to imagine language which could give the court a wider and less fettered discretion” (*Mills v. The Queen*, [1986] 1 S.C.R. 863, at pp. 965-66; see also *Ward*, at para. 17; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575, at para. 18 (“*Dunedin Construction*”).

[237] Even so, the discretion under s. 24(1) of the *Charter* is not unfettered (*Ward*, at para. 19). As this Court has highlighted, “an appropriate and just remedy . . . is one that meaningfully vindicates the rights and freedoms of the claimants” and “employ[s] means that are legitimate within the framework of our constitutional democracy” (*Doucet-Boudreau*, at paras. 55-56 (emphasis added)). Courts must apply s. 24(1) to facilitate access to appropriate remedies, while respecting the existing jurisdictional scheme of the courts and not intruding on legislative powers “more than necessary to achieve the aims of the *Charter*” (*Dunedin Construction*, at para. 23).

[238] The Attorney General of Canada urges an absolute state immunity from damages under s. 24(1) of the *Charter*, largely based on parliamentary privilege. Yet doing so would subordinate the broad remedial power of the courts under s. 24(1) to a blanket assertion of privilege. An absolute immunity is unnecessary because it would overshoot what is required to protect parliamentary privilege. As Warren Newman explains, parliamentary privilege is not “a substantive end in itself”, and “must operate within — and never trump — the constitutional framework from which [parliamentary institutions] have emerged, and upon which they depend for their lawful authority and powers” (p. 609).

[239] Both the constitutional doctrine of parliamentary privilege and an individual’s right to seek *Charter* damages under s. 24(1) can be protected by a test that focuses not on *legislative inputs*, that is, on speech or conduct in the legislative process, but rather on *legislative outputs*, as reflected in the text of the legislation. The former

inevitably trenches on parliamentary privilege by inviting judicial scrutiny of speech and conduct in Parliament; the latter does not. Although courts often consider speech or conduct in the legislative process (such as speech recorded in Hansard) when evaluating the constitutionality of legislation, in such cases the courts are applying the justiciable standard of constitutionality, rather than the non-justiciable standard of whether the legislation is in bad faith or constitutes an abuse of power.

[240] Our country's history highlights that laws themselves, rather than just conduct under laws, can cause significant harm to targeted individuals. For example, the so-called "Chinese head tax" imposed by *An Act to restrict and regulate Chinese immigration into Canada*, S.C. 1885, c. 71, s. 4, required every person of Chinese origin entering Canada to pay a fee or "head tax" solely because of their Chinese heritage. It is an example of legislated discrimination, rather than simply discriminatory state conduct under legislation. If absolute immunity for legislative enactments were upheld, a court would be barred from considering whether it could ever be just and appropriate to provide damages in similar circumstances today.

[241] Another example highlights the dangers of a rule of absolute immunity. Consider hypothetical legislation mandating a person found guilty of shoplifting to be automatically subject to corporal punishment. This legislation would be manifestly unconstitutional, yet the absolute immunity rule sought by the Attorney General of Canada would categorically prevent the courts from awarding *Charter* damages to affected individuals, even if no other "appropriate and just" remedy were available.

Faced with such a clear and serious *Charter* violation, the courts cannot be so restricted. Some may say that such an extreme hypothetical is unhelpful as it is unlikely to arise. I disagree. When the government seeks a rule giving it absolute immunity, as it does in this appeal, it is not only appropriate to test the rule with an extreme case, it is essential.

[242] Unlike absolute immunity, a qualified or limited immunity preserves the courts' power under s. 24(1) to craft remedies that meaningfully vindicate *Charter* rights and freedoms, while ensuring that effective government is not jeopardized by overbroad state liability that trenches on parliamentary privilege. In the context of legislative enactments rather than state conduct under legislation, the “clearly wrong” or “clearly unconstitutional” threshold best advances both aims.

(b) *The “Clearly Wrong” or “Clearly Unconstitutional” Standard*

[243] It remains to consider the content of the “clearly wrong” standard in *Mackin*. In my view, the Crown may be liable in damages for harms caused by unconstitutional primary legislation when the impugned legislation was “clearly wrong”, in the sense that its unconstitutionality was readily or obviously demonstrable at the time of enactment and could not be subject to any serious debate.

[244] At the outset, I recall this Court’s instruction in *Ward* that “[d]ifferent situations may call for different thresholds” of liability under s. 24(1) of the *Charter* (para. 43). For example, in *Guimond*, in the context of governmental action, this Court asked whether there was evidence of “wrongful conduct, bad faith, negligence or

collateral purpose” (para. 17). In cases involving damages for malicious prosecution, intentional misconduct or “malice” may be the proper threshold, while in instances of negligent police investigation, “negligence” may be apt (see *Ward*, at para. 43).

[245] The Attorney General of Alberta argues that absent “indistinguishable binding precedent” on the constitutionality of an enactment, *Charter* damages for unconstitutional primary legislation will never be appropriate (I.F., at para. 22). The Attorney General of Ontario similarly says there must be “binding authority that directly determines the constitutional issue”, and allows for liability only if the defending government “does not have a credible legal argument for distinguishing that authority” (I.F., at paras. 3 and 19). These thresholds are overly restrictive. As the Court of Appeal for Ontario explained in *Francis v. Ontario*, 2021 ONCA 197, 154 O.R. (3d) 498, at para. 74, a government “cannot turn a blind eye to overwhelming evidence of the unconstitutionality of its actions just because a court has yet to pronounce on that which is obvious”. Professor Kent Roach similarly observes that “[g]overnments should not aggressively fly into Charter danger zones simply on the basis that there is no decided case that indicates that what they proposed to do is unconstitutional. That type of behavior is corrosive to the rule of law” (*Constitutional Remedies in Canada* (2nd ed. (loose-leaf)), at § 11:20). I agree.

[246] In my view, the appropriate standard for harms caused by an unconstitutional enactment is this: to overcome the good governance concerns at step three of the *Ward* framework, a claimant must show that the legislation was clearly

unconstitutional in the sense that the unconstitutionality was readily or obviously demonstrable at the time the legislation was enacted and could not be subject to any serious debate.

[247] Such a standard focuses on legislative outputs rather than legislative inputs. It allows claimants to advance *Charter* damages claims without having to “struggle in discovery or be faced with claims of Cabinet or solicitor-client privilege in trying to discover what was in the subjective minds of Ministers and other key players when they enacted a law or refused to amend a law in the face of mounting *Charter* warnings” (Roach, at § 11:11). And it focuses on how the impugned legislation must be significantly wide of the constitutional mark before damages will be an appropriate and just remedy under s. 24(1) of the *Charter*.

[248] I hasten to add that the “clearly unconstitutional” standard allows courts to consider whether legislation has an unconstitutional purpose as a factor in a damages assessment. As this Court recognized in *Big M Drug Mart*, legislation that has the purpose of infringing a *Charter* will be unconstitutional. Although I agree with Professors Hogg and Wright that “Canadian legislative bodies rarely enact laws that have the purpose of abridging a *Charter* right” (at § 36:14), this possibility cannot be completely discounted. In cases where a legislature enacts legislation with the purpose of infringing a *Charter* right, courts can consider this fact in evaluating whether the legislation is “clearly unconstitutional”, and thus, in deciding whether damages are “appropriate and just” under s. 24(1) of the *Charter*. Assessing whether legislation has

an unconstitutional purpose might well involve reviewing some of the same facts and referring to *Hansard* as would be involved in assessing whether legislation is in “bad faith” or involves an “abuse of power”. Those facts would, however, be used to measure the legislation against the justiciable standard of whether the legislation has a constitutional purpose, rather than against the non-justiciable standards of whether the legislation is in “bad faith” or involves an “abuse of power”.

[249] I am sensitive to the concerns of those who say the mere possibility of damages for unconstitutional legislation will chill the lawmaking function of Parliament and the provincial and territorial legislatures. They suggest it will cause lawmakers to be timid in discharging their responsibilities and lead to inaction on contentious issues for fear that laws will not pass constitutional muster. In my view, these concerns highlight why “clearly unconstitutional” is the proper threshold. As Professor Marilyn L. Pilkington has explained, “since a primary purpose of imposing liability in damages is to deter unconstitutional acts, it makes sense to limit liability to those acts which are clearly unconstitutional” (“Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms” (1984), 62 *Can. Bar Rev.* 517, at p. 558 (emphasis added)).

[250] On the other hand, there will be those who say that the standard of “clearly unconstitutional” is too high. It will, they say, be too difficult for claimants to demonstrate that a law was clearly unconstitutional, and thus successful claims for *Charter* damages will be rare. In my view, “clearly unconstitutional” is an

appropriately high but not insurmountable bar for claimants to meet. If an enactment was clearly unconstitutional at the time of enactment, this should be readily or obviously demonstrable.

D. *Conclusion*

[251] The Crown enjoys an absolute immunity from damages under s. 24(1) of the *Charter* when preparing and drafting primary legislation later found to be unconstitutional. At the same time, the Crown has only a limited immunity from damages under s. 24(1) for harms flowing from “clearly unconstitutional” enactments. “Clearly unconstitutional” is a nuanced standard that appropriately protects parliamentary privilege as a rule of curial jurisdiction, while allowing recovery for harms caused by clearly unconstitutional legislation. It protects the autonomy of Parliament and the limited immunity necessary for legislators to carry out their work, while employing a purposive approach to s. 24(1) remedies to vindicate *Charter* rights.

IV. Disposition

[252] I would answer the two questions of law posed by the Attorney General of Canada as follows:

1. Question: Can the Crown, in its executive capacity, be held liable in damages for government officials and Ministers preparing and drafting

a proposed bill later enacted by Parliament, and declared invalid by a court under s. 52(1) of the *Constitution Act, 1982*?

Answer: No.

2. Question: Can the Crown, in its executive capacity, be held liable in damages for Parliament enacting a bill into law, which legislation was later declared invalid by a court under s. 52(1) of the *Constitution Act, 1982*?

Answer: Yes.

[253] I would allow the appeal in part. I would grant costs to the respondent.

The reasons of Côté and Rowe JJ. were delivered by

ROWE J. —

[254] In the words of Cicero, “*Hanc retinete, quaeso, Quirites, quam vobis tanquam hereditatem, majores vestry reliquerunt*”. In translation: “Preserve, I beseech you, these liberties that your ancestors have left you as an inheritance”.

[255] Parliamentary privilege flows from pragmatism and historical practice, serving to protect freedoms that are necessary for the exercise of legislative authority (*New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*), [1993] 1 S.C.R. 319, at pp. 378-90; M. Rowe and M. Oza, “Structural Analysis and the

Canadian Constitution” (2023), 101 *Can. Bar Rev.* 205). Though it dates from the earliest days of Canada’s constitutional inheritance, parliamentary privilege is no less integral today than are other components of Canada’s Constitution.

[256] The protection of this privilege is essential for the public interest. This necessity is firmly established in this Court’s jurisprudence. In *New Brunswick Broadcasting*, at p. 389, Justice McLachlin (as she then was) stated that it is “fundamental to the working of government” for the judicial branch not to “overstep its bounds” and to “show proper deference for the legitimate sphere of activity of the other [branches]”. This fundamental verity, however, requires more than acknowledgment: parliamentary privilege, and the constitutional scheme of which it is an integral component, must be preserved or else, perhaps unwittingly, we will undo the coherence, completeness, and integrity of that constitutional scheme, one on which this country has relied as it was formed, as it has grown, and as it has matured.

[257] In this appeal, the Court is to determine: first, whether the Crown in its executive capacity can be liable for damages under s. 24(1) of the *Canadian Charter of Rights and Freedoms* for government officials and Ministers preparing and drafting legislation that is subsequently declared invalid pursuant to s. 52(1) of the *Constitution Act, 1982*; and, second, whether the Crown in its executive capacity can be liable under s. 24(1) for Parliament enacting legislation later declared invalid pursuant to s. 52(1). Because the preparation, drafting, and enactment of legislation necessarily implicates parliamentary privilege, this Court must decide whether this privilege is compatible

with such damages under s. 24(1). For the reasons that follow, I would hold that parliamentary privilege is fundamentally at odds with awarding damages against the Crown in the manner sought. As a consequence, I would allow the Crown's appeal.

[258] My conclusion follows from a simple premise: The *Charter* must, as a matter of constitutional law, be given effect in a manner that is compatible with parliamentary privilege. Because parliamentary privilege enjoys constitutional status it is not "subject to" the *Charter*, as are ordinary laws. As this Court said in *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876, it is "a well accepted principle that one part of the Constitution cannot be used to invalidate a provision in another part" (para. 31). Both parliamentary privilege and the *Charter* constitute components of the Constitution of Canada. Neither one subordinates the other.

[259] Unwritten components of Canada's Constitution, including parliamentary privilege, continue to fulfill a necessary role in Canada's constitutional order. This case is about two elements of parliamentary privilege: freedom of speech in Parliament, and the exclusive control the legislature has over its proceedings. Without these privileges, the legislature would not be able to freely do its work. The respondent calls on us to detract from these privileges, unmindful (or indifferent) of the effect this will have on the legislative function. But the unimpeded functioning of Parliament is not an anachronism; rather, it is foundational to liberal democracy.

I. Framework of Analysis

[260] Before considering the nature and role of parliamentary privilege, it is useful to situate it among other written and unwritten components of Canada's Constitution. After doing so, I explain the constitutional nature and origins of parliamentary privilege, and the function that it plays in Canada's contemporary constitutional order, including how it supports the parliamentary autonomy necessary for the legislature to carry out its work, structures the constitutional dialogue between Parliament and the courts, and undergirds the separation of powers between the judicial and legislative branches. Parliamentary privilege, including the privileges related to free speech and proceedings in Parliament, has received considerable judicial attention; this jurisprudence instructs us as to the absolute nature of parliamentary privilege and the broad manner in which it is construed.

[261] Parliamentary privilege is rooted in the earliest chapters of Canada's constitutional history, and reflects an inherited legacy of struggle between the Crown and Parliament in the United Kingdom, one that reaches back to Parliament's origins. The ancient lineage of this component of our constitutional order does not diminish its role or significance in the present day — the opposite is true. The passage of the *Constitution Act, 1982* and the *Charter* modified Canada's constitutional structure in certain respects, most notably by qualifying the principle of Parliamentary supremacy that Canada had inherited from the U.K. But it did not displace other components of our constitutional order, including parliamentary privilege. As such, the present appeal requires this Court to give meaning to two components of Canada's Constitution — parliamentary privilege, and s. 24(1) of the *Charter* — in a compatible way.

[262] I conclude by explaining how absolute immunity in respect of the preparation, drafting, and enactment of legislation flows necessarily from the need for the Crown to be able to act freely in its legislative capacity to develop and adopt legislation. By this means the *Charter* and parliamentary privilege work together, neither subordinating the other. This absolute immunity has an end point. It is when legislation has been enacted. Laws and their implementation are always open to challenge before the courts. Parliamentary privilege does not insulate laws and their implementation from judicial scrutiny; rather it does so for the process of developing and adopting legislation. Judges can no more oversee the consideration of legislation than can members of Parliament oversee the preparation of our judgments. The Crown's appeal should be allowed, and the questions posed to this Court answered in the negative.

II. The Structural Foundations of Parliamentary Privilege

[263] The Canadian Constitution consists of written and unwritten components. They set out how sovereign authority is constituted, who can exercise that authority, for what purposes, by which means, and with what limitations. The written constitution is defined in s. 52(2) of the *Constitution Act, 1982* to include:

- (a) the *Canada Act 1982*, including this Act;
- (b) the Acts and orders referred to in the schedule; and
- (c) any amendment to any Act or order referred to in paragraph (a) or (b).

Section 52(2) refers to the “Constitution” as the instruments that are constitutional in nature. It does not refer to all of the constitutional arrangements by which Canada is governed.

[264] Canada’s constitutional arrangements (aside from Aboriginal and treaty rights) consist of four components:

- (1) *Constitution Acts* of 1867 and 1982;
- (2) constitutional conventions;
- (3) Crown prerogative; and
- (4) parliamentary privilege.

[265] In addition, there are underlying (unwritten) principles that contribute to giving effect to Canada’s constitutional arrangements. These principles are not themselves components of the Constitution. Rather, they assist in: (a) interpreting the Constitution, e.g., in the *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 (“*P.E.I. Judges Reference*”), where the principles of the rule of law and the independence of the judiciary assisted in interpreting s. 96 of the *Constitution Act, 1867*; and (b) arriving at answers to questions not otherwise provided for in the Constitution, the leading example being the *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (“*Secession Reference*”), in which the

Court had regard to the principles of democracy, federalism and the protection of minorities in order to describe the conditions under which a province could secede from Confederation. These underlying/unwritten principles do not have a substantive policy content. Rather, in their interpretative role (*P.E.I. Judges Reference*) and their “gap-filling” role (*Secession Reference*) they are ascertained from the relationship between the institutions of the state and, having been so ascertained, they are used to give further definition to those relationships. This method of reasoning, though the Court did not use this term, is structural analysis. As was confirmed in *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, [2021] 2 S.C.R. 845, these underlying/unwritten principles cannot be the basis to challenge the validity of legislation. This is because, while being descriptive of the Constitution, they are not themselves components of the Constitution.²

[266] Norms expressed in the underlying/unwritten principles of constitutionalism and the rule of law do not constitute a basis to override parliamentary privilege, any more than they can constitute a basis to invalidate legislation; instead, such principles are to be understood in light of constitutional structures, including those governing the preparation, drafting, and enactment of legislation. Parliamentary privilege is foremost amongst these structures.

² For a more complete description of the relationship between the unwritten *components* of the Constitution and underlying/unwritten *principles*, see M. Rowe and N. Déplanche, “Canada’s Unwritten Constitutional Order: Conventions and Structural Analysis” (2020), 98 *Can. Bar Rev.* 430, and Rowe and Oza.

[267] Returning to the unwritten components of the Constitution, conventions, Crown prerogative and parliamentary privilege are no less a part of the “Constitution” than are the two *Constitution Acts*. This was recognized in *New Brunswick Broadcasting*, as well as in the *Secession Reference*. While “parliamentary sovereignty” and the “separation of powers” (plus “constitutionalism” and the “rule of law”) are underlying/unwritten principles that inform interpretation of the constituent components of the Constitution, “parliamentary privilege” is different in that it is itself part of the Constitution. This distinction is fundamental.

[268] Parliamentary privilege was inherited from the U.K. The framing of the *Constitution Act, 1867*, and the third resolution of the Quebec Conference of 1864, which laid out the framework for the *Constitution Act, 1867* specifically, made clear that a “key objective of Confederation was to give effect to the Westminster system” (Rowe and Oza, at p. 210). This resolution spoke to the linkages in the eyes of the framers between “the promotion of the best interests of the people of these Provinces” and their “desire to follow the model of the British Constitution, so far as our circumstances will permit” (Quebec Resolutions, clause 3).

[269] The *Constitution Act, 1867* established that this privilege, which was and remains essential to the operation of the largely unwritten constitution of the U.K., would also be part of Canada’s Constitution; the preamble states that Canada will have “a Constitution similar in Principle to that of the United Kingdom”. Thereby, parliamentary privilege, along with constitutional conventions and Crown prerogative,

became unwritten components of the Canadian Constitution. In addition to what was set out in the preamble, parliamentary privilege was also specifically dealt with in s. 18 of the *Constitution Act, 1867*, which provides that “[t]he privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada.” Thus, in this “belt-and-suspenders” approach (the preamble, plus s. 18), parliamentary privilege was from the outset a component of Canada’s Constitution and continues to be so today.

[270] This Court’s reasons in *Secession Reference* affirm the importance of the unwritten components of the Constitution:

The “Constitution of Canada” . . . includes the constitutional texts enumerated in s. 52(2) of the *Constitution Act, 1982*. Although these texts have a primary place in determining constitutional rules, they are not exhaustive. The Constitution also “embraces unwritten, as well as written rules” [T]he Constitution of Canada includes

the global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state.

These supporting principles and rules, which include constitutional conventions and the workings of Parliament, are a necessary part of our Constitution because problems or situations may arise which are not expressly dealt with by the text of the Constitution. In order to endure over time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government. Such principles and rules emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning. [para. 32]

That our Constitution “embraces unwritten, as well as written rules” (*P.E.I. Judges Reference*, at para. 92) reflects this Court’s understanding of an architecture of the institutions of state and of their relationship to citizens based on certain underlying principles (para. 93; *Toronto (City)*, at para. 49, per Wagner C.J. and Brown J.). These rules have “full legal force” and may give rise to substantive legal obligations (*Secession Reference*, at para. 54, quoting *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, at p. 845; *Toronto (City)*, at para. 49, per Wagner C.J. and Brown J.).

[271] Unwritten components of our Constitution — including parliamentary privilege — have continued to be given faithful effect (see, e.g., *Alford v. Canada (Attorney General)*, 2024 ONCA 306, at para. 46 (CanLII), describing the “independence of Parliament from executive and judicial interference” as “one of the basic principles of Canadian democracy”). This is because, as I explain below, they continue to play a crucial role in Canada’s constitutional order.

III. What Is Parliamentary Privilege?

[272] Chief among the functions of parliamentary privilege is that it ensures that Parliament and provincial legislatures are able to carry out their work effectively. I return to this point in the section that follows, but first I examine here the scope and content of parliamentary privilege, including the privileges associated with free speech and proceedings, as well as the consideration of these privileges in the courts of this country and the U.K. Because the appeal at bar requires this Court to consider the

impact of the proposed view of liability under s. 24(1) on the privileges associated with Parliament, I focus in these reasons on the judicial and academic treatment of the privileges associated with the federal legislature, rather than those attaching to the provincial legislatures.

[273] As described in *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (25th ed. 2019), at p. 239:

Parliamentary privilege is the sum of certain rights enjoyed by each House collectively as a constituent part of the High Court of Parliament and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals.

[274] As noted above, legislatures in Canada were modelled on the British Parliament, and like it, they enjoy certain privileges. In the U.K., parliamentary privilege “developed through the struggle of the House of Commons for independence from the other branches of government”, i.e., the Crown and the other courts (*Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 S.C.R. 687, at para. 22).

[275] The struggle has deep historical roots in the hard-won independence of Parliament. Initially, “the Crown and the courts showed no hesitation to intrude into the sphere of the Houses of Parliament. . . . For example, in 1629, Charles I had Sir John Eliot and two other members charged and imprisoned for sedition for words

spoken in debate in the House” (*New Brunswick Broadcasting*, at p. 344, per Lamer C.J.; see also Rowe and Oza, at p. 225).

[276] But the inaction in response to violations of Parliament’s privileges was not to last; by 1641, Parliament was resolved. The King, determined to crush dissent in the Commons, ordered the arrest of five members and of one of the Lords. The Lords refused to order the arrests. On January 4, 1642, the King went to the Commons and demanded that the House produce the fugitive members:

. . . [the King] did what none of his predecessors had ever dared do: he went to the House of Commons with three or four hundred armed men. One who was present that day described the scene:

Then the Kinge stepped upp to his place and stood upon the stepp, but sate not down in the [Speaker’s] chaire. And, after hee had looked a greate while, hee told us, hee would not breake our priviledges, but treason had noe priviledge; hee came for those five gentlemen, for hee expected obedience yeasterday, and not an answer. Then hee calld [two of the members], by name, but noe answer was made. Then hee asked the Speaker if they were heere, or where they were.

Uppon that the Speaker fell on his knees, and desired his excuse, for hee was a servant to the House, and had neither eyes, nor tongue, to see or say anything but what they commanded him. Then the King told him, hee thought his owne eyes were as good as his, and then said his birds were flown [First text in brackets in original.]

(J. Trueman, *Britain: The Growth of Freedom* (1960), at pp. 250-51)

This violation of parliamentary privilege triggered the English Civil War.

[277] Though the English Civil War and the events that preceded it are far behind us, parliamentary privilege, and conventions such as those that deal with the operation

of Cabinet, continue to represent foundational rules that “deal with practical problems” (M. Rowe and M. Collins, “The Constitution of Canada” (2017-18), 49 *Ottawa L. Rev.* 93, at p. 98).

[278] In *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667, this Court considered the nature and role of parliamentary privilege in detail, in the context of a human rights commission complaint by an employee of the House of Commons who alleged that he had been dismissed on the basis of race, colour, and national or ethnic origin. The Speaker of the House of Commons challenged the jurisdiction of the Canadian Human Rights Commission, based on the view that the Speaker’s power to hire, manage, and dismiss employees fell under the scope of parliamentary privilege and, thus, outside of the Commission’s jurisdiction. Although the Court rejected the Speaker’s privilege claim, because the Speaker was unable to establish that a privilege related to “management of employees” covered the case in question, Justice Binnie clarified that “[t]he purpose of privilege is to recognize Parliament’s *exclusive* jurisdiction to deal with complaints within its privileged sphere of activity” (para. 4 (emphasis in original)). “Parliamentary privilege, therefore, is one of the ways in which the fundamental constitutional separation of powers is respected” (para. 21). As such, Justice Binnie held that the court below was in error to focus on the grounds on which the asserted privileged was exercised, rather than whether the privilege itself had been established. I emphasize this distinction made by Justice Binnie. I am in full agreement.

[279] Although the substance of the asserted privilege in *Vaid* differs greatly from the free speech and control proceedings privileges at issue in this case, both of which are widely recognized and the existence of which is not contested by the respondent, Justice Binnie's reasons notably summarized "a number of propositions that are now accepted both by the courts and by the parliamentary experts", several of which are of particular relevance for the present appeal (at para. 29):

2. Parliamentary privilege in the Canadian context is the sum of the privileges, immunities and powers enjoyed by the Senate, the House of Commons and provincial legislative assemblies, and by each member individually, without which they could not discharge their functions

3. Parliamentary privilege does not create a gap in the general public law of Canada but is an important part of it, inherited from the Parliament at Westminster by virtue of the preamble to the *Constitution Act, 1867* and in the case of the Canadian Parliament, through s. 18 of the same Act

. . .

5. The historical foundation of every privilege of Parliament is necessity. If a sphere of the legislative body's activity could be left to be dealt with under the ordinary law of the land without interfering with the assembly's ability to fulfill its constitutional functions, then immunity would be unnecessary and the claimed privilege would not exist

. . .

7. "Necessity" in this context is to be read broadly. The time-honoured test, derived from the law and custom of Parliament at Westminster, is what "the dignity and efficiency of the House" require [T]he references to "dignity" and "efficiency" are also linked to autonomy. A legislative assembly without control over its own procedure would, said Lord Ellenborough C.J. almost two centuries ago, "sink into utter contempt and inefficiency" "Inefficiency" would result from the delay and uncertainty would inevitably accompany external intervention. Autonomy is therefore not conferred on Parliamentarians merely as a sign of respect but because such autonomy from outsiders is necessary to enable Parliament and its members to get their job done.

8. Proof of necessity may rest in part in “shewing that it has been long exercised and acquiesced in” (*Stockdale v. Hansard*, at p. 1189). . . .

9. Proof of necessity is required only to establish the existence and scope of a category of privilege. Once the category (or sphere of activity) is established, it is for Parliament, not the courts, to determine whether in a particular case the exercise of the privilege is necessary or appropriate. In other words, within categories of privilege, Parliament is the judge of the occasion and manner of its exercise and such exercise is not reviewable by the courts: “Each specific instance of the exercise of a privilege need not be shown to be necessary” (*New Brunswick Broadcasting*, at p. 343 . . .).

. . .

10. “Categories” include freedom of speech . . . ; control by the Houses of Parliament over “debates or proceedings in Parliament” (as guaranteed by the Bill of Rights of 1689) including day-to-day procedure in the House . . . ; [and] immunity of members from subpoenas during a parliamentary session Such general categories have historically been considered to be justified by the exigencies of parliamentary work. [Emphasis deleted.]

[280] The application of these established propositions led Justice Binnie to conclude that a two-step process applies when courts are confronted with a privilege claim. First, the court must assess whether the existence and scope of the claimed privilege have been authoritatively established (*Vaid*, at para. 39). If the privilege is so established, then the court’s inquiry stops, “without further inquiry into the necessity of the privilege or the merits of its exercise in the particular case” (*Duffy v. Canada (Senate)*, 2020 ONCA 536, 151 O.R. (3d) 489, at para. 33, citing *Vaid*). The second step, which is not relevant in this appeal given the established nature of the privileges in question, requires the court to assess whether the privilege “is so closely and directly connected with the fulfilment by the assembly or its members of their functions as a legislative and deliberative body . . . that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their work

with dignity and efficiency” (*Vaid*, at para. 46; see also *Duffy*, at para. 33). I emphasize the implications of parliamentary privilege for the boundaries of judicial scrutiny of the asserted privilege in this appeal.

A. *The Constitutional Function of Parliamentary Privilege*

[281] Despite the constitutional nature of parliamentary privilege, one might be tempted to see it as a historical artifact that can safely be diminished to accommodate s. 24(1) damages, as urged on us by the respondent. To the contrary, courts have long recognized the critical constitutional function of parliamentary privilege. In this regard, I would note the constitutional functions relating to parliamentary autonomy, structuring the constitutional dialogue, and undergirding the separation of powers.

(1) Parliamentary Autonomy

[282] As I observed in *Chagnon*, at para. 65:

Parliamentary privilege is “one of the ways in which the fundamental constitutional separation of powers is respected” (*Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667, at para. 21).

[283] Parliamentary privilege ensures that the legislature is safeguarded from interference by the other two branches of the state, the executive and the judiciary. It “protects the operation of the legislature from outside interference, where such

interference would impede the fulfillment of [Parliament's] constitutional role” (*Chagnon*, at para. 65).

[284] As this Court held in *Vaid*, intervention by the executive or by the courts in the working of legislatures “would inevitably create delays, disruption, uncertainties and costs which would hold up the nation’s business and on that account would be unacceptable” (para. 20). Protection from such interventions is reflected in the test for parliamentary privilege, which asks whether the privilege asserted is necessary for the legislature to do its work. “Necessity” in this context is to be read broadly (para. 29). The time-honoured test, derived from the law and custom of Parliament at Westminster, is what “the dignity and efficiency of the House” require (para. 29(7)):

If a matter falls within this necessary sphere of matters without which the dignity and efficiency of the House cannot be upheld, courts will not inquire into questions concerning such privilege. All such questions will instead fall to the exclusive jurisdiction of the legislative body.

(*New Brunswick Broadcasting*, at p. 383)

It is for this reason that “[t]he idea of necessity is thus linked to the autonomy required by legislative assemblies and their members to do their job” (*Vaid*, at para. 29(4)). But, the court’s role ends when it describes the “four corners” of parliamentary privilege. Having described the “box”, courts have always understood that it is not their role to take the cover off the box and reach inside it.

[285] Canadian courts have also considered the degree of autonomy required for Parliament to do its work. This approach is illustrated in *Janssen-Ortho Inc. v. Amgen Canada Inc.* (2005), 256 D.L.R. (4th) 407 (Ont. C.A.), which concerned a question in the House of Commons based on allegedly libellous broadcasts. In that case, the court dealt with what was properly “the work of a legislator”, “potential interference in internal matters of the House”, as well as the potential for “delay, disruption, and uncertainty” in upholding the decision of the motions judge to strike the claim for defamation arising from statements in the House (para. 78).

(2) Structuring the Constitutional Dialogue

[286] Parliamentary privilege also structures the dialogue between the courts and the legislature. By delineating the scope of what is open to review, this privilege ensures that legislatures are able to respond to decisions in which courts exercise their role to give meaning to the Constitution, and where necessary, invalidate legislation. As Justice R. J. Sharpe explained in *Good Judgment: Making Judicial Decisions* (2018):

. . . judicial decisions striking down laws under the *Charter* rarely end the debate. More often than not, Parliament or the legislature is free to enact another law that has the same objective but that pays proper heed to the fundamental right or freedom at issue. [p. 245]

[287] On the dialogue metaphor, Justice Sharpe then wrote:

What the dialogue metaphor describes is “less like a conversation and more like a complex division of labour where each branch has its own distinct, though complementary, role to play in a joint enterprise.” I suggest that the dialogue is the sort of conversation one can imagine between an architect and an engineer on the design and construction of a building. They both have their own distinctive role and expertise, but they must work together, and the building will not be built without a dialogue between the two of them.

(p. 248, quoting A. Kavanagh, “The Lure and the Limits of Dialogue” (2016), 66 *U.T.L.J.* 83, at p. 120.)

[288] The dialogical nature of constitutional development in Canada is reflected in the “second look” cases in which this Court has wrestled with what weight to afford Parliament’s attempt to reformulate legislation in response to a decision under s. 52(1). One might compare the perspective of Justices McLachlin (as she then was) and Iacobucci in *R. v. Mills*, [1999] 3 S.C.R. 668, at para. 58, wherein they expressed the view that the “[c]ourts do not hold a monopoly on the protection and promotion of rights and freedoms” with how Chief Justice McLachlin expressed the view subsequently in *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519, at para. 17: “The healthy and important promotion of a dialogue between the legislature and the courts should not be debased to a rule of ‘if at first you don’t succeed, try, try again’.” In *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, she further held (at para. 11) that “[t]he mere fact that the legislation represents Parliament’s response to a decision of this Court does not militate for or against deference”. Consistent in Chief Justice McLachlin’s consideration of the “second look” cases is the principle that Parliament should not be

discouraged from “trying again” to reformulate legislation so that it is consistent with the *Charter*.

(3) Undergirding the Separation of Powers

[289] Respect for the separation of powers precludes judicial scrutiny of the legislative process. The separation of powers underpins the Westminster system (Rowe and Oza, at p. 226; see also M. Rowe, C. Puskas and A. Cruise, “The Separation of Powers in Canada” (2024), 1 *S.C.L.R.* (3d) 323). Parliamentary privilege accords with the operation of the separation of powers: it “grants the legislative branch of government the autonomy it requires to perform its constitutional functions”, and, “[b]y shielding some areas of legislative activity from external review, [it] helps preserve the separation of powers” (*Chagnon*, at para. 1). Parliamentary privilege is “one of the ways in which the fundamental constitutional separation of powers is respected” (*Vaid*, at para. 21; *Chagnon*, at para. 65).

[290] The principle of separation of powers, as highlighted in the U.K. in *R. (on the application of SC and others) v. Secretary of State for Work and Pensions*, [2021] UKSC 26, [2022] 3 All E.R. 95, at para. 165, is characterized as follows:

. . . so far as relating to the courts and Parliament, [it] requires each of them to abstain from interference with the functions of the other, and to treat each other’s proceedings and decisions with respect. It follows 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.

[291] The doctrine of justiciability, “a set of largely judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life”, is noteworthy insofar as it reflects the recognition on the part of the courts of the need to respect the boundaries of judicial power where they run up against the operation of the legislatures (L. M. Sossin and G. Kennedy, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (3rd ed. 2024), at § 1:2). The doctrine recognizes that not every subject is suitable for judicial determination, and imposes limits on the reach of judicial oversight:

. . . the legislative branch, so long as it observes the constitutional norms prescribed by the *Constitution Act* may exercise its legislative power in any manner it chooses. The courts may review legislation in relation to constitutional limitations on legislative power, but may not review it to test its intrinsic merit. The courts will not concern themselves with the wisdom of legislation or the possibility of abuse of legislative power.

(B. L. Strayer, *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review* (3rd ed. 1988), at pp. 219-20)

[292] The separation of powers has been repeatedly affirmed as a constitutional principle (*P.E.I. Judges Reference*, at para. 138; *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, at para. 52; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 107; *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, at paras. 3 and 10, all cited by Côté J. in *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, [2021] 1 S.C.R. 175, at para. 279).

[293] In my reasons in *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765, I wrote about the risk of the courts being drawn into a “supervisory role” over the legislative process:

As surely as night follows day, if such a duty were to be imposed, disagreements would arise as to the foregoing questions and many others. How would such disagreements be resolved? Where a constitutionally mandated duty exists, affected parties would inevitably turn to the courts. Thus, courts would be drawn into a supervisory role as to the operation of a duty to consult in the preparation of legislation (as well as, in all likelihood, other matters, notably budgets, requiring approval by the legislature). I agree with Justice Brown’s discussion on the impact of imposing a duty to consult on the separation of powers. [para. 169]

The same concern holds true with respect to subordinating parliamentary privilege in order to impose s. 24(1) damages for the preparation, drafting, and enactment of legislation.

B. *Parliamentary Privilege Is Absolute in Nature and Has Been Broadly Construed*

[294] Throughout these reasons, I refer to “parliamentary privilege” to refer to these “certain rights” with which the House of Commons and the Senate are endowed. However it is helpful to specify the privileges that have been invoked by the Attorney General of Canada: the House’s exclusive control over its proceedings, often referred to as the privilege bearing on “proceedings in Parliament”, and the privilege related to freedom of speech (A.F., at para. 58). As such, I explain here the meaning and application of these privileges, which have been extensively examined by courts in Canada and in the U.K. This judicial consideration has shown that parliamentary

privilege is absolute in nature, and broadly construed in light of the function it plays in Canada's constitutional arrangements.

(1) Free Speech and Proceedings

[295] The parliamentary privileges related to free speech and control of proceedings are both well established — there is no serious debate today that each “has been long exercised and acquiesced in” (*Stockdale v. Hansard* (1839), 9 Ad. & E. 1, 112 E.R. 1112 (Q.B.), at p. 1189). They are rooted in art. 9 of the *Bill of Rights* of 1689 (Eng.), 1 Will. & Mar. Sess. 2, c. 2, which established that “[t]he freedom of speech and debates, or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament” (J. P. J. Maingot, *Parliamentary Privilege in Canada* (2nd ed. 1997), at p. 77). As noted by Sir William Blackstone in his *Commentaries on the Laws of England* (17th ed. 1830), Book I, at pp. 162-63, “whatever matter arises concerning either house of parliament ought to be examined, discussed, and adjudged in that house to which it relates, and not elsewhere”.

[296] Canada's Parliament has claimed these privileges for itself, as provided by s. 18 of the *Constitution Act, 1867* (see H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (6th ed. 2014), at paras. V-1.217 and V-1.226). Parliament's decision to claim the full extent of the privileges enjoyed by the Parliament in London removes any doubt that these privileges apply in the present appeal:

4 The Senate and the House of Commons, respectively, and the members thereof hold, enjoy and exercise

(a) such and the like privileges, immunities and powers as, at the time of the passing of the *Constitution Act, 1867*, were held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof, in so far as is consistent with that Act; and

(b) such privileges, immunities and powers as are defined by Act of the Parliament of Canada, not exceeding those, at the time of the passing of the Act, held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof.

(*Parliament of Canada Act*, R.S.C. 1985, c. P-1, s. 4)

That Parliament opted to claim the full extent of these privileges is unsurprising. As Justice McLachlin (as she then was) noted, in *New Brunswick Broadcasting*, at p. 385 “[t]he need for the right of freedom of speech is so obvious as to require no comment.” And yet, as shown by this case, the need for freedom of speech in Parliament *does* require not just “comment”, but firm, resounding, and unequivocal confirmation. Confident legislative assemblies are cradles of popular liberty; timorous ones are instrumentalities of control by the well-situated.

[297] In cases where the extent of parliamentary privileges has been raised, courts have consistently interpreted them broadly. In *New Brunswick Broadcasting*, Justice McLachlin (as she then was) held that “[i]t has also long been accepted that these privileges must be held absolutely and constitutionally if they are to be effective; the legislative branch of our government must enjoy a certain autonomy which even the Crown and the courts cannot touch” (p. 379 (emphasis added)).

[298] In *Duffy*, at paras. 66-68 and 112-13, the Court of Appeal for Ontario considered a claim by a member of the Senate alleging that representatives of the Prime Minister's Office and individual senators improperly interfered with a Senate investigation into his expenses. The Senate moved to dismiss the action for want of jurisdiction, arguing that the impugned conduct fell within its established parliamentary privileges related to discipline and internal affairs, Parliamentary proceedings, and freedom of speech. In concluding that the action was properly dismissed, Jamal J.A. (as he then was), found that Senator Duffy's allegations about political interference in the Senate's internal investigation and the decision to suspend him fell within the established privilege over proceedings in Parliament and that as a consequence "the courts ha[d] no jurisdiction to evaluate their propriety, fairness, or legality" (para. 61).

[299] The privilege of freedom of speech also applied, Jamal J.A. wrote, because

[w]hile taking part in [proceedings in Parliament], officers of Parliament, Members of Parliament, and the public are immune from being called to account in the courts or elsewhere, save the Houses of Parliament, for any act done or words uttered in the course of participating, however false or malicious the act and however malicious the words might be; and any member of the public prejudicially affected is without redress. [Text in brackets in original.]

(para. 65, quoting J. P. J. Maingot, *Parliamentary Immunity in Canada* (2016), at pp. 71-72.)

I adopt this statement by Jamal J.A. It identifies with clarity the need for immunity by Parliament from interference by courts in the proceedings of Parliament, even where

those proceedings are alleged to be tainted by falsehood or malice. It also underscores the reason why, as noted by Maingot, the freedom of speech privilege,

though of a personal nature, is not so much intended to protect the Members against prosecutions for their own individual advantage, but to support the rights of the people by enabling their representatives to execute the functions of their office without fear of either civil or criminal prosecutions. [p. 26]

The functional explanation provided by Maingot illustrates the fallacy in the respondent's suggestion that s. 24(1) liability against the Crown (rather than individual parliamentarians) does not raise parliamentary privilege concerns. In either case, it is the ability of parliamentarians to carry out their work effectively that is at issue.

[300] In *Ontario v. Rothmans Inc.*, 2014 ONSC 3382, 120 O.R. (3d) 467, the court considered a claim by a defendant tobacco company that statements about the risks of smoking before House of Commons committees could not be relied upon to support allegations of misrepresentation and conspiracy. At issue was whether the parliamentary privilege related to freedom of speech extended to members of the public appearing before Parliamentary committees. In concluding that the parliamentary privilege did so apply, the court noted that “while questions may arise about the precise scope of the privilege from time to time, it is clear from the authorities that, at minimum, statements made by a person in the course of participating in a parliamentary proceeding cannot be used against that person in a civil action” (para. 20). The “absolute” nature of the protection shields statements made by a person during the course of parliamentary proceedings from being used against them in a civil action

(para. 14, quoting *Janssen-Ortho Inc. v. Amgen Canada Inc.*, 2004 CanLII 8595 (Ont. S.C.J.), at para. 31).

[301] Canadian and Commonwealth courts have elsewhere determined that the following elements are under the umbrella of “proceedings in Parliament”:

- (a) Formal action by the House (see *Vaid*, at para. 29(10); *Duffy*, at para. 59; *Club Pro Adult Entertainment Inc. v. Ontario* (2006), 150 C.R.R. (2d) 1 (Ont. S.C.J.), at para. 119, rev’d in part on other grounds 2008 ONCA 158, 42 B.L.R. (4th) 47);
- (b) Formal interventions by members (including introducing legislation, voting, debates) (see *Duffy*, at paras. 59-61; *Canada (Board of Internal Economy) v. Boulerice*, 2019 FCA 33, [2019] 3 F.C.R. 145, at paras. 104-11; *Prebble v. Television New Zealand Ltd.*, [1994] 3 All E.R. 407 (P.C.), at p. 413);
- (c) Testimony of witnesses (see *Gagliano v. Canada (Attorney General)*, 2005 FC 576, [2005] 3 F.C.R. 555, at paras. 62-97; *Canada (Deputy Commissioner, Royal Canadian Mounted Police) v. Canada (Commissioner, Royal Canadian Mounted Police)*, 2007 FC 564, [2008] 1 F.C.R. 752, at para. 65); and

- (d) Incidental documents or actions which include those related to the consideration of draft legislation (see *Vaid*, at para. 44; *Guergis v. Novak*, 2022 ONSC 3829, at paras. 75-77 (CanLII)).

[302] Also captured in this definition of proceedings are matters taking place outside of Parliament provided that they are “so closely and directly connected with proceedings in Parliament that intervention by the courts would be inconsistent with Parliament’s sovereignty as a legislative and deliberative assembly” (*Vaid*, at para. 44 (emphasis deleted), quoting U.K., Joint Committee on Parliamentary Privilege, vol. 1, *Report and Proceedings of the Committee* (1999), at para. 247).

[303] This brief canvass of judicial consideration of the free speech and proceedings privileges shows that courts have recognized that the broad shelter afforded by the operation of parliamentary privilege is agnostic towards the content of what is protected. It matters not *what* was said or *what* the impugned conduct involved — what matters is whether the conduct in question relates to “the assembly’s ability to fulfill its constitutional functions” (*Vaid*, at para. 29(5)). The wide berth afforded to Parliament’s control over its own proceedings and speech is reflected in the broad manner in which they have been construed by Canadian courts, and the deference towards their operation shown by the courts.

(2) The Scope of the Parliamentary Privileges

[304] The privileges related to free speech and proceedings in Parliament are well established, and constitutional in nature. However, the question remains — how far do these privileges extend? And do they reach the actions of ministers and officials who would ordinarily be considered to be part of the executive branch as they prepare and draft legislation?

[305] This Court’s jurisprudence provides an answer: parliamentary privilege attaches to the entire process through which legislation is developed and adopted, and protects ministers and officials when they carry out legislative duties.

[306] In *Vaid*, Justice Binnie confirmed that parliamentary privilege extends to “control by the Houses of Parliament over ‘debates or proceedings in Parliament’”, including “day-to-day procedure in the House” (para. 29(10)). *Mikisew Cree* further clarifies that parliamentary privilege also extends to the law-making process more broadly (para. 37, per Karakatsanis J., paras. 122-26, per Brown J., and paras. 165(g) and 171, per Rowe J.).

[307] *Mikisew Cree* affirmed that “[t]he process of law-making does not only take place in Parliament. Rather, it begins with the development of legislation” — and notably, for the purposes of the present appeal insofar as it considers liability attaching to the process of developing legislation, Justice Karakatsanis confirmed that “[w]hen ministers develop legislation, they act in a parliamentary capacity” (para. 2). So, despite an inevitable overlap between executive and legislative functions inherent in the work of Ministers in developing legislation, because they are engaged in the “law-making

process” when they develop legislation, the “process is generally protected from judicial oversight” (paras. 33-34).

[308] Though the Court in *Mikisew Cree* was divided on the reasoning, seven of the nine members of the Court either wrote or concurred in reasons affirming that the preparation and drafting of legislation implicates the separation of powers and is protected from judicial review by parliamentary privilege. In her reasons, which were joined in by Chief Justice Wagner and Justice Gascon, Justice Karakatsanis held that:

Two constitutional principles — the separation of powers and parliamentary sovereignty — dictate that it is rarely appropriate for courts to scrutinize the law-making process. The process of law-making does not only take place in Parliament. Rather, it begins with the development of legislation. When ministers develop legislation, they act in a parliamentary capacity. As such, courts should exercise restraint when dealing with this process. Extending the duty to consult doctrine to the legislative process would oblige the judiciary to step beyond the core of its institutional role and threaten the respectful balance between the three pillars of our democracy. It would also transpose a consultation framework and judicial remedies developed in the context of executive action into the distinct realm of the legislature. Thus, the duty to consult doctrine is ill-suited to the law-making process; the law-making process does not constitute “Crown conduct” that triggers the duty to consult. [para. 2]

[309] Justice Brown, concurring in the result, underscored that ministers of the Crown engaged in the preparation and drafting of legislation are acting pursuant to the power conferred on them by Part IV of the *Constitution Act, 1867*. He noted that the entirety of the law-making process, including policy decisions leading to the development of a legislative proposal to be considered by Cabinet, is an exercise of legislative power which is immune from judicial interference:

I agree with the majority of the Court of Appeal that the entire law-making process — from initial policy development to and including royal assent — is an exercise of legislative power which is immune from judicial interference. As this Court explained in *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 28, the making of “policy choices” is a legislative function, while the implementation and administration of those choices is an executive function. This precludes judicial imposition of a duty to consult in the course of the law-making process.

...

... Ministers of the Crown play an essential role in, and are an integral part of, the legislative process The fact that “except in certain rare cases, the executive frequently and *de facto* controls the legislature” (*Wells*, at para. 54) does not, however, mean that ministers’ dual membership in the executive and legislative branches of the Canadian state renders their corresponding executive and legislative roles indistinguishable for the purposes of judicial review. . . .

As a matter of applying this Court’s jurisprudence, then, the legislative process begins with a bill’s formative stages, even where the bill is developed by ministers of the Crown. [paras. 117 and 119-20]

[310] I adopted the reasons of Justice Brown (Justices Moldaver and Côté in turn concurred in my reasons). I further explained the consequences for the separation of powers of imposing a duty to consult on the process of preparing legislation for consideration by the legislature. I outlined the “many steps involved” in this process, and explained the steps at which Ministers and their officials are engaged (para. 160).

[311] Parliamentary privilege thus extends to the range of Parliamentary actors who are involved in the legislative process. Parliament has the right to “exercise unfettered freedom in the formulation, tabling, amendment, and passage of legislation”

(*Galati v. Canada (Governor General)*, 2015 FC 91, [2015] 4 F.C.R. 3, at para. 34). In applying parliamentary privilege, the court must have regard to:

- (a) the breadth of the process of legislative development; and
- (b) the stages at which parliamentarians and their staff, individual ministers, the Cabinet, members of the civil service, witnesses before Parliament, and the Governor General (or Lieutenant Governors, in the case of the provinces), interact to develop and pass legislation (*Mikisew Cree*, at paras. 160-64, per Rowe J., concurring (describing the steps that lead to the preparation, drafting, and enactment of legislation)).

[312] Because of the interlocking nature of the process of legislative development which involves many participants at each step, the definition of proceedings in Parliament necessarily captures “everything said or done by a member in the exercise of his functions as a member of a committee of either House, as well as everything said or done in either House with the transaction of parliamentary business” (Maingot (1997), at p. 81; see also Brun, Tremblay and Brouillet, at paras. V-1.186, V-1.232 and V-1.240).

(3) The Judiciary and Parliamentary Privilege

[313] The absolute nature of the immunities related to free speech and proceedings in Parliament has been maintained by this Court and courts in the United Kingdom. See, e.g., *Stockdale v. Hansard*, at p. 1191, per Patteson J.: “Beyond all dispute, it is necessary that the proceedings of each House of Parliament should be entirely free and unshackled; that whatever is done or said in either House should not be liable to examination elsewhere” While the existence and limits of parliamentary privilege are justiciable, their operation is not (Brun, Tremblay and Brouillet, at para. V-1.221). Once a court finds that a privilege exists and describes its extent, the court’s role ends. It is for the legislature itself to determine whether the exercise of the privilege was proper; such matters are not reviewable by the courts.

[314] Where parliamentary privilege applies, the subject matter falls within the authority of the legislative assembly. Courts lack jurisdiction over the privileged matter (*Vaid*, at para. 4; *Chagnon*, at para. 19).

[315] As aptly stated by Jamal J.A. in his reasons for the Court of Appeal for Ontario in *Duffy*:

Parliamentary privilege is a rule of curial jurisdiction. The effect of a matter falling within the scope of parliamentary privilege is that its exercise cannot be reviewed by any external body, including a court: *Vaid*, at paras. 29(9), 34; *Chagnon*, at paras. 19, 24; *New Brunswick Broadcasting*, at pp. 350, 382-84 S.C.R.; and *Boulerice*, at para. 54. Parliamentary privilege recognizes “Parliament’s *exclusive* jurisdiction to deal with complaints within its privileged sphere of activity”: *Vaid*, at paras. 4, 29(9) and 30 (emphasis in original); *New Brunswick Broadcasting*, at pp. 383-84 S.C.R.; and *Boulerice*, at para. 55. The principles of parliamentary privilege are “a means of distinguishing areas of judicial and legislative body jurisdiction”: *New Brunswick Broadcasting*, at pp. 383-84 S.C.R. Parliamentary

privilege thus provides an immunity from judicial review: *New Brunswick Broadcasting*, at p. 342 S.C.R. [Emphasis in original; para. 35.]

[316] That said, while courts properly consider the *extent* of parliamentary privilege, once a matter is found to come within that privilege, courts do not review the manner in which the privilege is exercised (*Fielding v. Thomas*, [1896] A.C. 600 (P.C.); *Brun, Tremblay and Brouillet*, at paras. V-1.219, IX.7, XII-2.7 and XII-2.11). Or, as this Court put it in *Reference re Resolution to Amend the Constitution*, at p. 785: “Courts come into the picture when legislation is enacted and not before (unless references are made to them for their opinion on a bill or a proposed enactment).” Thus, for example, legislative decision making is not subject to any duty of fairness. Legislatures “are subject to constitutional requirements for valid law-making [e.g. division of powers], but within their constitutional boundaries, they can do as they see fit” (*Wells*, at para. 59).

[317] The wide berth given to parliamentary privilege has been reflected in the manner in which this Court has approached apparent conflicts between parliamentary privilege and other components of the Constitution. The Court’s reasons in *Harvey*, at para. 70, are instructive; in that case, this Court considered a claim by an appellant who challenged his removal from the New Brunswick Legislative Assembly after being found guilty of committing an illegal act. In deciding that the removal was proper, this Court considered how to balance the appellant’s claim under s. 3 of the *Charter* with the legislature’s claim to parliamentary privilege, and concluded that a balance must be struck “by interpreting the democratic guarantees of s. 3 in a purposive way”. The Court

concluded that “[t]he purpose of the democratic guarantees in the *Charter* must be taken to be the preservation of democratic values inherent in the existing Canadian Constitution, including the fundamental constitutional right of Parliament and the legislatures to regulate their own proceedings” (para. 70). The Court affirmed that the constitutional nature of parliamentary privilege requires courts to interpret *Charter* provisions in a manner compatible with the scope of privilege.

[318] Constitutional norms govern our basic institutions, both their operation and interrelation. Where courts are required to ascertain the scope or effect of unwritten norms, on occasion they turn their minds to structural analysis (A. Marcotte, “Structural Analysis, Unwritten Principles and Constitutional Remedies: *Charter* Damages for the Enactment of Legislation by Parliament” (2024), 18 *J.P.P.L.* 69; Rowe and Oza, at p. 225). *Harvey* thus further clarifies that the solution, when a conflict emerges between parliamentary privilege and another component of the Constitution, is not to read down the protections afforded by parliamentary privilege — the solution is to read the relevant constitutional components in a compatible way.

[319] It is not open to the courts to intrude upon the *bona fides* of parliamentary debates and proceedings. The courts have long recognized the defining significance of Parliament’s work and the need for parliamentarians to debate and develop legislation freely. As the Speaker of the Senate submitted, these privileges are “vital to the separation of powers as they enable parliamentarians — both individually and collectively — to freely express themselves and to act on matters of importance to

Canadians, including controversial public policy issues, without fear of interference from the Crown or the courts” (I.F., at para. 21). In *Roman Corp. Ltd. v. Hudson’s Bay Oil & Gas Co. Ltd.*, [1971] 2 O.R. 418 (H.C.J.), at p. 139, aff’d [1972] 1 O.R. 444 (C.A.), the High Court of Justice for Ontario held that “[t]he Court has no power to inquire into what statements were made in Parliament, why they were made, who made them, [and] what was the motive for making them or anything about them” (p. 423). This approach is consistent in the jurisprudence.

C. *The Charter and Parliamentary Privilege*

[320] It is critical to be clear that the *Charter* did not negate the “fundamental constitutional tenets upon which British parliamentary democracy rested” (*New Brunswick Broadcasting*, at p. 377) and did not displace parliamentary privilege. It is helpful here to consider Canada’s constitutional development in a comparative manner. Our constitutional structure, as explained above, draws heavily on the constitutional structure and norms of the U.K. as they stood in 1867. That constitutional model, in turn, has been characterized as “one of immanent constitutionalism that emerges gradually by means of a process of accretion”, a process of “organic growth” that can be attributed to “factors peculiar to Britain and to its history” including, *inter alia*, “a cautious common-sense-oriented pragmatism that primes adaptation and abhors radical change and rupture” (M. Rosenfeld, “Constitutional Identity”, in M. Rosenfeld and A. Sajó, eds., *The Oxford Handbook of Comparative Constitutional Law* (2012), 756, at p. 764). This process of “organic growth” can be contrasted with the kind of

constitution making that occurs in the context of a “clean break” — wherein a revolutionary change in governance structure marks a fresh start in constitutional development (see V. C. Jackson and M. Tushnet, *Comparative Constitutional Law* (1999), at p. 333).

[321] So, to put the point in slightly more colloquial terms: the year 1982 in Canada was not like the year 1789 in France: the passage of the *Charter* did not mark a “clean break” with existing constitutional structures that came before the passage of the *Constitution Act, 1982*. Canada held true to its inherited tradition of incremental constitutional growth. Arrangements that were in place at the time of Confederation and that were not modified by constitutional documents remain largely in place and operative. The passage of the *Charter* must be understood within the broader context of Canada’s constitutional development; the *Charter* did not take aim at or displace the majority of the unwritten elements that comprise Canada’s Constitution, including parliamentary privilege. Instead, as this Court has previously established, the *Charter* must be read in a way that is compatible with other elements of Canada’s Constitution, including parliamentary privilege.

[322] Many consider the *Charter* to be the paramount constitutional instrument. This is incorrect. All parts of the Constitution must be read together, and no one can be subordinated to the others. Justice McLachlin (as she then was) explained this in *Harvey*:

The power of Parliament and the legislatures to regulate their procedures both inside and outside the legislative chamber arises from the *Constitution Act, 1867*. The preamble to the *Constitution Act, 1867* affirms a parliamentary system of government, incorporating into the Canadian Constitution the right of Parliament and the legislatures to regulate their own affairs. The preamble also incorporates the notion of the separation of powers, inherent in British parliamentary democracy, which precludes the courts from trenching on the internal affairs of the other branches of government. As I wrote in *New Brunswick Broadcasting*, *supra*, at p. 389:

Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.

Because parliamentary privilege enjoys constitutional status it is not “subject to” the Charter, as are ordinary laws. Both parliamentary privilege and the Charter constitute essential parts of the Constitution of Canada. Neither prevails over the other. While parliamentary privilege and immunity from improper judicial interference in parliamentary processes must be maintained, so must the fundamental democratic guarantees of the *Charter*. Where apparent conflicts between different constitutional principles arise, the proper approach is not to resolve the conflict by subordinating one principle to the other, but rather to attempt to reconcile them. [Emphasis added; paras. 68-69.]

[323] In other words, one part of the Constitution cannot abrogate another part of the Constitution (*Reference re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148; *New Brunswick Broadcasting*, at pp. 373 and 390).

[324] The Chief Justice and Justice Karakatsanis, at para. 94 of their reasons, state that “the *Charter* effected a ‘revolutionary transformation of the Canadian polity’” (quoting L. E. Weinrib, “Canada’s *Charter of Rights*: Paradigm Lost?” (2002), 6 *Rev. Const. Stud.* 119, at p. 120). With respect, I must disagree. The *Charter*, as I have

explained above, did not present a clean break with foundational elements of Canada's constitutional order.

[325] That said, the *Charter* was accompanied by a “revolutionary transformation” of sorts; not a revolution that, as my colleagues suggest, displaced longstanding elements of our constitutional order, but rather a revolution in the nature and extent of demands by litigants for courts to use their authority to advance goals that those litigants had not achieved through the electoral process. I do not read the reasons of Justice Dickson (as he then was) in *Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576, at p. 590, which my colleagues cite in support of their view, as heralding a “revolutionary transformation” of the Canadian polity. Rather, Justice Dickson's measured words in *Amax Potash* speak for themselves: “. . . it is not for the Courts to pass upon the policy or wisdom of legislative will” or “question the wisdom of enactments which, by the terms of the Canadian Constitution are within the competence of the Legislatures” (p. 590). I agree, and for that reason I eschew the invitation for the judiciary to “overstep its bounds” by subordinating parliamentary privilege to the *Charter* (*New Brunswick Broadcasting*, at p. 389). Temperance and moderation in the face of such invitations remain fundamental to “the appreciation by the judiciary of its own position in the constitutional scheme” (*Vaid*, at para. 24, quoting *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49, at p. 91, per Dickson C.J.; see also M. Rowe, “The Virtue of Judicial Restraint, or Who Guards the Guardians?” (2022), 55 *U.B.C. L. Rev.* 311).

IV. Crown-in-Parliament Versus Crown in its Executive Capacity

[326] Having established the constitutional nature and functions of parliamentary privilege, I now turn to the theory of liability endorsed by the courts below and the respondent in this appeal, and the incoherence of the suggestion that the Crown in its executive capacity can be held liable for the preparation, drafting, and enactment of legislation. Canada's Constitution, unlike that of our American neighbours, was not crafted by those leading colonial rebellions. Instead, it incorporates the Westminster system of government, which was varied for the circumstances of this country, notably a federal structure rather than a unitary state. Subsequent developments in our Constitution have built on this. A consequence of this is the distinctive roles of the "Crown" in both executive and legislative capacities. It is helpful to clarify and distinguish "the Crown" in these two functions.

[327] In the contemporary constitutional order, the Crown acts in multiple distinct capacities, federal and provincial, as well as executive and legislative. (For the sake of simplicity, I leave aside consideration of the Crown in its judicial capacity, other than to note *en passant* that the inherent authority of Superior Court judges is an offshoot of the Crown in its judicial capacity.) This Court has emphasized that the Crown in its executive capacity and the Crown in its legislative capacity are distinct. In *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069, at para. 28, this Court held that:

In one sense, the “Crown” refers to the personification in Her Majesty of the Canadian state in exercising the prerogatives and privileges reserved to it. The Crown also, however, denotes the sovereign in the exercise of her formal legislative role (in assenting, refusing assent to, or reserving legislative or parliamentary bills), and as the head of executive authority (*McAteer v. Canada (Attorney General)*, 2014 ONCA 578, 121 O.R. (3d) 1, at para. 51; P. W. Hogg, P. J. Monahan and W. K. Wright, *Liability of the Crown* (4th ed. 2011), at pp. 11-12; but see *Carrier Sekani*, at para. 44). For this reason, the term “Crown” is commonly used to symbolize and denote executive power.

[328] The *Constitution Act, 1867* establishes that “[p]lenary executive power is affirmed . . . to continue to repose in Her Majesty” (W. J. Newman, “The Crown, the Queen, and the Structure of the Constitution”, in D. M. Jackson and C. McCreery, eds., *A Resilient Crown: Canada’s Monarchy at the Platinum Jubilee* (2022), 13, at p. 17). The Crown in its executive capacity, thus, consists of the King (through the Governor General) exercising the “Executive Government and Authority of and over Canada”, as continued in the *Constitution Act, 1867* (s. 9). Today, as from before Confederation, those executive powers are, by constitutional convention, exercised by the Prime Minister, Cabinet, and public authorities in furtherance of statutory delegation of authority.

[329] The Crown-in-Parliament consists of the monarch (Governor General) acting in their legislative capacity. As Justice Brown explained in *Mikisew Cree*, the Crown-in-Parliament “embraces ‘three determinative acts that are part of Parliament’s core functions as a legislative body: royal recommendation, royal consent and royal assent’” (para. 130 (emphasis deleted), quoting C. Robert, “The Role of the Crown-in-Parliament: A Matter of Form and Substance”, in M. Bédard and P. Lagassé, eds., *The*

Crown and Parliament (2015), 95, at p. 96). The involvement of the Crown is essential to the operation of Parliament; as the opening words of s. 91 of the *Constitution Act, 1867* state: “It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada” Thus, Parliament consists of the House of Commons, the Senate and the Crown-in-Parliament.

[330] The respondent urges this Court to disregard the distinction between the Crown in its executive and legislative capacities, because, he suggests, “the executive and legislative branches are closely entangled in Canada” (R.F., at para. 73). This indicates a profound lack of understanding (or indifference to) Canada’s constitutional order. It also flies in the face of precedent. In *Minister of Energy, Mines and Resources*, this Court stated that while “the executive through its control of a House of Commons majority may in practice dictate the position the House of Commons takes . . . [this] is not . . . constitutionally cognizable by the judiciary” (p. 103). That the Crown is engaged at various stages of the legislative process is foundational to our constitutional order, but is dismissed by the respondent as “irrelevant” (R.F., at para. 72).

[331] In *Mikisew Cree*, this Court distinguished the role of the “Crown-in-Parliament” from the Crown in its executive capacity, and firmly rejected the notion of “Crown control of the process of legislative enactment” (para. 129). It found that the process by which laws are made is not in fact “Crown conduct” — which is to say, that the Crown in its executive capacity (the context in which “the Crown” is ordinarily

used) does not control the legislative process (paras. 33-34, per Karakatsanis J., paras. 101-2, 113, 117, 120 and 133, per Brown J., and paras. 148 and 160, per Rowe J.). This is true notwithstanding the fact that individual parliamentarians who are also members of the executive — i.e. parliamentarians who serve as ministers and the Prime Minister — are involved in, and in fact are integral to, the legislative process.

[332] The Crown, thus, is at the heart of both the executive and legislative branches of government, but plays different roles in each. While our constitutional order envisages some overlap as to the Crown in its various capacities, this Court has been clear that the law does not recognize executive control of the legislative branch. This is consistent with the scope of parliamentary privilege and its application across the various steps in the legislative process.

[333] As this Court's examination of the legislative process in *Mikisew Cree* shows, the preparation of legislation is a complex process involving multiple actors across government: "This is why the separation of powers operates the way it does. The courts are ill-equipped to deal with the procedural complexities of the legislative process" (para. 164, per Rowe J.). The distinctive roles played by the Crown reflects the separation of powers between the different branches of government, and the balance between them:

Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them

overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.

(*New Brunswick Broadcasting*, at p. 389, per McLachlin J.)

This is part of the explanation as to why absolute immunity is needed for the preparation, drafting, and enactment of legislation, but not (of course) for determination of the validity of legislation once it is enacted or the legality of acts taken pursuant to the legislation.

V. Application to the Present Appeal

A. *The Framing of the Issues*

[334] The questions posed by the Attorney General of Canada to the New Brunswick Court of Queen's Bench read as follows:

1. Can the Crown, in its executive capacity, be held liable in damages for government officials and Ministers preparing and drafting a proposed Bill that was later enacted by Parliament, and subsequently declared invalid by a court pursuant to s. 52(1) of the *Constitution Act, 1982*? and
2. Can the Crown, in its executive capacity, be held liable in damages for Parliament enacting a Bill into law, which legislation was later declared invalid by a court pursuant to s. 52(1) of the *Constitution Act, 1982*?

(2021 NBQB 107, at para. 3 (CanLII))

[335] The courts below concluded that the two questions could be “blended into a single question. . . . Do the Crown and its officials enjoy absolute immunity when

exercising a legislative function?” (2022 NBCA 14, 471 D.L.R. (4th) 68, at para. 16). The respondent frames his arguments by reference to the liability of “the state” (see, e.g., R.F., at para. 1) and argues that the distinction between the Crown in its legislative or executive capacity is “irrelevant in the *Charter* context” (para. 72).

[336] The majority adopts this framing, noting that “a minister’s legislative and executive powers can overlap and are sometimes difficult to disentangle in the law-making process” (para. 20). But, as I noted above, a plurality of the Court in *Mikisew Cree* established that the work of ministers and their officials in preparing legislation begins with policy development and implicates parliamentary privilege. The work of these actors does “not become ‘executive’ as opposed to ‘legislative’ simply because they were carried out by, or with the assistance of, public servants. . . . Their actions, rather, are directed to informing potential changes to legislative policy and are squarely legislative in nature” (para. 121, per Brown J.).

[337] I therefore disagree that the two questions can be blended. This formulation elides the distinction between the Crown in its various capacities, and muddies the analytical waters. As suggested by the framing of the questions referred by the Attorney General of Canada, the Crown manifests itself in multiple distinct capacities. Furthermore, I cannot agree that the fact that Ministers carry out both parliamentary and executive duties can justify sweeping ministerial conduct that is unquestionably legislative in nature into the scope of liability against “the state” (that is, the Crown in

its executive capacity). This amounts to a collateral attack on the legislative nature of the work of Ministers and their officials in developing legislation.

B. *The Respondent's Argument Runs Contrary to Constitutional Structure and Subordinates Unwritten Components of the Constitution*

[338] This Court is called on to consider how parliamentary privilege operates where someone seeks s. 24(1) damages for the preparation, drafting, and enactment of legislation. The respondent suggests that *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405, resolves this question — but the Court in *Mackin* did not turn its attention to how damages under s. 24(1) can be reconciled with giving effect to parliamentary privilege. My colleagues note that *Mackin* has been applied in the context of executive actions taken pursuant to statute (majority reasons, at paras. 68 et seq.). But they do not point to any examples of *Mackin* being applied as the basis for damages under s. 24(1) for the preparation, drafting, and enactment of legislation — and they cannot, because *Mackin* has never been applied in this way. In light of the constitutional nature of parliamentary privilege, and the fact that s. 24(1) is to be given effect in a manner that is compatible with parliamentary privilege, this Court cannot rely on a passing reference in *Mackin* as the basis, first, to depart from a substantial body of jurisprudence on parliamentary privilege and, second, to abandon the fundamental principle that components of the Constitution do not negate one another.

(1) *Mackin* Does Not Resolve the Questions Before the Court Today

[339] *Mackin* concerned a challenge to a New Brunswick bill that abolished the system of supernumerary judges in that province. This Court’s consideration of the matter focused on the constitutionality of the impugned bill; while the applicants sought damages under s. 24(1), this question was dispensed with, under the heading “other questions”, in seven paragraphs. The respondent and my colleagues in the majority rely on a single statement in this brief aside in Justice Gonthier’s reasons:

... while legislative bodies enjoy immunity from damages for the “mere enactment or application of a law that is subsequently declared to be unconstitutional” (para. 78 (emphasis added)), such immunity will give way to liability when the law was “clearly wrong, in bad faith or an abuse of power” (para. 79 (emphasis added)).

(majority reasons, at para. 61)

This selective reading of Justice Gonthier’s “drive by” analysis on the question of s. 24(1) damages cannot be the basis to decide the present appeal and the fundamental questions it raises about whether one component of Canada’s Constitution can subordinate another. To begin with, the statement was, in Justice Gonthier’s own view, representative only of the “general rule of public law” (para. 78). Additionally, the two cases cited by Justice Gonthier do not deal with the question of *parliamentary privilege* (see *Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957; *Central Canada Potash Co. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42).

[340] Moreover, the brief consideration of the availability of damages focused on “governmental action” (*Mackin*, at para. 78), i.e. actions of the executive pursuant to statutory authority and to the exercise of this authority “in good faith” (para. 79).

Justice Gonthier did not turn his mind to the question of whether liability could arise from the preparation and drafting of legislation and its consideration by Parliament. It is inconceivable that so careful and learned a jurist would determine so profound a question as that before us without considering parliamentary privilege. *Mackin*'s conclusion cannot be the basis for deciding that s. 24(1) damages can apply against the Crown in its executive capacity for the preparation, drafting, and enactment of legislation. Parliamentary privilege was never mentioned, much less discussed. It beggars reason to suggest that the Court intended to overturn its precedents affirming the centrality of parliamentary privilege to Canada's constitutional order without in any way adverting to this issue. To the contrary, I would note that he cited with approval R. Dussault and L. Borgeat's *Administrative Law: A Treatise* (2nd ed. 1990), vol. 5, at p. 177, which notes:

In our parliamentary system of government, Parliament or a legislature of a province cannot be held liable for anything it does in exercising its legislative powers. The law is the source of duty, as much for citizens as for the Administration, and while a wrong and damaging failure to respect the law may for anyone raise a liability, it is hard to imagine that either Parliament or a legislature can as the lawmaker be held accountable for harm caused to an individual following the enactment of legislation.

While the adoption of the *Charter* means that "a plaintiff is no longer restricted to an action in damages based on the general law of civil liability", Justice Gonthier noted that "the reasons that inform the general principle of public law are also relevant in a *Charter* context" (*Mackin*, at para. 79).

[341] This truncated consideration of the question of damages led Justice Gonthier to his real conclusion: an action for damages cannot normally be combined with an action seeking a declaration of invalidity based on s. 52(1) (see para. 80, citing *Schachter v. Canada*, [1992] 2 S.C.R. 679). Later cases applying *Mackin* are consistent with the conclusion that *Mackin* did not obliquely overturn a cornerstone of Canada's constitutional structure. In *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28, Chief Justice McLachlin confirmed that *Mackin* applies to "state action under valid statutes subsequently declared invalid" (para. 43). Such "state action" relates to what happens after legislation is adopted. Parliamentary privilege relates to matters that precede that point.

[342] To the extent, if any, that Justice Gonthier's brief reference to damages for the "mere enactment" of a law represents a holding of this Court, it should be treated as weak precedent at most. We need not speculate too much to be able to get to the root of Justice Gonthier's holding in *Mackin*. The methodology for answering that question is well settled. For all decisions, it is essential to identify the *ratio decidendi* and *obiter dicta* to understand whether and how the precedent applies. The Latin term *ratio decidendi* means "the reason for deciding" and *obiter dictum* means "something said in passing" (*Black's Law Dictionary* (11th ed. 2019), at pp. 569 and 1514; see also M. Rowe and L. Katz, "A Practical Guide to *Stare Decisis*" (2020), 41 *Windsor Rev. Legal Soc. Issues* 1).

[343] At this Court more than others, decisions can often be perceived as having a *ratio decidendi* broader than what decides the matter at hand, as cases that are accepted for leave at this stage reflect a consideration of broader legal questions and speak to the formulation of the law beyond what is required by the facts of the case (Rowe and Katz, at p. 9). However, in *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 56, Justice Binnie explained that “the notion of ‘binding effect’” as a matter of law was disavowed by this Court in *P.E.I. Judges Reference*. He went on to explain (at para. 57):

The issue in each case . . . is what did the case decide? Beyond the *ratio decidendi* . . . [,] [a]ll *obiter* do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not “binding” The objective of the exercise is to promote certainty in the law, not to stifle its growth and creativity. The notion that each phrase in a judgment of this Court should be treated as if enacted in a statute is not supported by the cases and is inconsistent with the basic fundamental principle that the common law develops by experience.

[344] In this appeal, the respondent’s (and the majority’s) characterization of the holding in *Mackin* and which elements of Justice Gonthier’s reasoning bind this Court go far beyond the conventional rationale for deciding what a case stands for. Though Justice Sharpe wrote that drawing the line between the *ratio* and *obiter dicta* is “a matter of argument and judgment” (pp. 149-50), it is my view that, to the extent a statement in a decision reflects the Court’s considered view of an area of law, it provides guidance that should be treated as binding (Rowe and Katz, at p. 10). But

Justice Gonthier’s examination of the question of damages for the preparation, drafting, and enactment of legislation was not, with all respect, “considered” — it was, instead, a footnote to a decision that was focused entirely elsewhere.

[345] My colleagues point to *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678, to suggest that this Court was unanimous in concluding that *Mackin* applies to the work of the legislature (para. 71). But, *Conseil scolaire* (a s. 23 case) did not deal with the question of whether and how *Mackin*’s standard can be reconciled with parliamentary privilege. In our joint reasons, Justice Brown and I argued that the rationale underlying *Mackin* — that “duly enacted laws should be enforced until declared invalid” — should be extended to the policy-making context in order to avoid an approach that focused on the vehicle of state action to the detriment of the broader good governance concerns that were at play (*Conseil scolaire*, at para. 284, quoting *Ward*, at para. 39). But the present appeal addresses a different set of actors (i.e., parliamentarians and others involved in the legislative process) and a different set of governance concerns (Parliament’s ability to carry out its work effectively). “[S]tate action taken pursuant to a law” is not at issue here (*Henry v. British Columbia (Attorney General)*, 2015 SCC 24, [2015] 2 S.C.R. 214, at para. 42). The “government”, the “state” and Parliament are not interchangeable for the purposes of s. 24(1) damages, and the democratic and separation of powers concerns that attach to each are not fungible.

[346] For the foregoing reasons, the matter being considered in this appeal must be seen as novel for the Court's consideration, not as an issue settled in *Mackin*.

(2) The Respondent's Argument Is Inconsistent With This Court's Jurisprudence

[347] To remain faithful to this Court's jurisprudence, this Court's role must be limited to establishing the existence of the privileges in question, rather than inquiring into their operation. The respondent asks this Court to go further, suggesting that the operation of parliamentary privilege is a mere evidentiary question, or one that can somehow be reconciled at a later stage when these proceedings — or the appeals inevitably spawned by it — return to this Court. This is a mistaken and dangerous view. In considering the respondent's submissions on this point, I cannot help but hear an echo of King Charles I's infamous challenge in 1642 — we are told that the respondent would not break Parliament's privileges, but that infidelity to the *Charter* has no privilege.

[348] To the contrary, parliamentary privilege stands without exception. As the Commons held this to be true in 1642, so it is true today: the privilege of Parliament is absolute or it is no privilege at all. What would arise if the respondent succeeds is a licence whereby the courts supervise the preparation and consideration of legislation to ensure consistency with an ill-defined standard of conduct or a retrospective assessment of what Parliament *should* have understood about the constitutionality of the impugned legislation. It is not sufficient to hold, as did the court below, that the legislative branch

simply “may have to pay a price” if they exercise their constitutional functions “in circumstances that are clearly wrong” (C.A. reasons, at para. 23). The undermining of privilege in this case is of a grave nature. More grave still: where damages are to be awarded based on the misconduct of legislators, then surely other remedies will follow. Section 24(1) of the *Charter* does not, after all, limit the forms of relief available. Injunctive relief cannot, therefore, be ruled out in giving effect to the view of the respondent. The effect would be to place supervision of the agenda and proceedings of Parliament in the control of judges. This would be profoundly undemocratic.

C. *The Crown in its Executive Capacity Cannot Be Liable for the Preparation, Drafting, or Enactment of Legislation*

[349] The respondent’s submissions display a disdain for Canada’s constitutional structure; this is evidenced, *inter alia*, by the logical incoherence of making the Crown in its executive capacity liable for the operation of Parliament. The Crown in its executive capacity is not part of the legislative process. Rather it is the Crown-in-Parliament which is so; legislation is approved by the Commons and the Senate, followed by royal assent. Seeking damages from the Crown in its executive capacity for the preparation, drafting, and enactment of legislation is conceptually incoherent. It betrays a profound misunderstanding of the constitutional arrangements to which the claim relates.

[350] It is entirely unclear how a suit as envisaged by the respondent would practically proceed. If the Attorney General were named the defendant, would this

officer of the executive be responsible for coordinating the legal defence of ministers acting in their legislative capacities? Of parliamentarians considering and voting on the legislation, or of parliamentarians who introduce a private member's bill that later becomes law? Of the speakers of the chambers in presiding over the legislation's passage? Who is to testify? Who can be subject to disclosure of documents? Who will be called on to explain alleged misconduct? These questions are not hypotheticals — they are the inevitable result of the respondent's theory of liability.

[351] The Attorney General of Canada is not the legal representative of Parliament. The theory of liability suggested in the decisions below thus overlooks a crucial fact: the Attorney General of Canada does not (and in fact, cannot) represent Parliament in legal proceedings. In previous cases where claims have been brought against one of the chambers of Parliament the Attorney General has represented the executive branch as an intervener (as in *Vaid*) or separate respondent (as in *Duffy*), rather than the chamber in question. The chambers are “of course, independent of the executive branch of government (and [are], accordingly, separately represented)” (I.F., Speaker of the Senate, at para. 13).

[352] As the Speaker of the House of Commons put it, “confidence in the executive branch is tested in the House: by convention, upon the loss of support of a majority of Members, the government is expected to resign or seek the dissolution of Parliament in order for a general election to be held” (I.F., at para. 10). The Speaker also notes that “there is no tenable theory by which the executive could be liable for

Charter damages for decisions taken during the law-making process. The Crown *qua* executive is not vicariously liable or otherwise liable for the actions or statements of Members of Parliament in the Senate or House of Commons” (para. 61). I agree.

[353] Properly characterized, the respondent is effectively seeking damages from the Crown-in-Parliament by imposing liability on the Crown in its executive capacity, a structural sleight of hand that the respondent does not and cannot explain. To do so, the respondent asks us to subordinate parliamentary privilege. These arguments are not sound in law. To the contrary, they depart fundamentally and incoherently from Canada’s settled constitutional arrangements.

D. *Absolute Immunity Is Necessary: Violating Parliamentary Privilege Will “Break the Egg”*

[354] I pause here to address what may seem a tempting compromise between the positions staked out by the appellant and respondent: why not enable litigants to subordinate parliamentary privilege only insofar as is necessary to establish well-founded claims for relief under s. 24(1)? The answer is that it cannot be done. Parliamentary privilege is like an eggshell; one cannot break it just a little.

[355] The problem with the theory of liability advanced by the respondent is that, in order for the Crown in its executive capacity to be held liable for the preparation, drafting, and enactment of legislation — even if that liability is limited to instances of bad faith, abuse of power, or clearly wrong conduct — courts will need to inquire into

the motivations and knowledge of those engaged in the legislative process. “Investigation by the courts into the propriety of conduct related to preparing, introducing and considering legislation would inevitably lead the courts to examine parliamentary proceedings or speech uttered in those proceedings” (I.F., Speaker of the Senate, at para. 5).

(1) Regarding Reliance on Hansard

[356] I note further that a fundamental distinction exists between reliance on parliamentary proceedings in the construction of statutes to assess their constitutionality and use of proceedings to ground liability in regard to the process of adopting a statute. As the Speaker of the Senate notes, “a declaration under s. 52 of the *Constitution Act, 1982* does not amount to an impeachment or questioning of debates or proceedings in Parliament. It is a determination about a law’s compliance with the Constitution — a role that clearly falls to and is within the jurisdiction of courts of competent jurisdictions — and not that of the legislators who developed, introduced, debated and adopted the law” (I.F., at para. 45 (emphasis deleted)).

[357] Though parliamentary debates can be of use to establish facts, and to assess the purpose of an enactment, this does not engage courts in questioning the propriety of proceedings in Parliament. It is suggested that as we rely on Hansard to assist in determining Parliamentary purpose, so too can we rely on Hansard here to determine whether Parliament was operating in bad faith (R.F., at paras. 100-102). But Hansard

can be relied on, at best, cautiously. As Justice Rennie held in *Mohr v. National Hockey League*, 2022 FCA 145, [2021] 4 F.C.R. 465:

I accept that legislative history may be used . . . as it may inform the purpose of the legislation (*Alberta (Attorney General) v. British Columbia (Attorney General)*, 2021 FCA 84, [2021] 2 F.C.R. 426, 41 C.E.L.R. (4th) 157, at paragraph 127). But even here, care must be taken not to confuse the evolution of the legislation, which is law, with what individual politicians or regulators think or hope the legislation says. There is a substantive difference between committee proceedings that shed light on the evolution and legislative history of a law on the one hand and on the other hand the testimony of academics and public servants which may be aspirational, disputable or of arguable relevance. [para. 63]

Statements of purpose in the legislative record may be rhetorical and imprecise, or poor indicators of purpose; what is to be identified is Parliament’s purpose, not the purposes of its individual members (*R. v. Sharma*, 2022 SCC 39, at para. 89; *R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 S.C.R. 180, at para. 36; R. Sullivan, *The Construction of Statutes* (7th ed. 2022), at p. 293). Statements by individual parliamentarians are therefore indicative only of the views of that legislator; they cannot establish Parliamentary intent in an institutional sense. The longstanding caution of courts in accepting this sort of evidence should bear on the respondent’s arguments here — and should give courts pause before attributing the words or actions of a given parliamentarian to a finding that the *Mackin* threshold has been met.

[358] Statements of purpose in this context also differ in kind from the statements that would be used to ascribe intent for the purposes of the *Mackin* test; in the former sense, they should be understood as interpretative aids to help courts give effect to

Parliament's purpose, not undermine it. See *Pepper v. Hart*, [1993] A.C. 593 (H.L.), at p. 646.

(2) The *Mackin* Standard Is Inapposite in the Legislative Context

[359] Neither the respondent nor my colleagues in the majority specify how the *Mackin* standard is to be applied in the context of the specifics of the legislative process. My colleagues in the majority, at paras. 105-11, conclude that “bad faith or abuse of power in the law-making process” is better defined on a case-by-case basis bearing in mind that “whether it is possible to attribute the bad faith or abuse of power of an individual or group to the institution itself [(the legislature)] will depend on the facts of a given case”. No doubt, this inquiry into “bad faith or abuse of power” can manifest itself in any variety of ways, many that cannot now be contemplated. Legislatures will have to ask themselves whether a court, sitting in judgment of their actions with the benefit of hindsight, will deem theirs to be “an improper purpose” (para. 107), and which of the “flexible” formulations of “bad faith and abuse of power” proffered by my colleagues in the majority will ultimately be applied when the day of judgment on the actions of legislators arrives (para. 108).

[360] In seeking to distinguish *Mikisew Cree*, my colleagues in the majority suggest that “post-enactment damages do not ‘unduly interfer[e]’ with Parliament, including its control over its own procedures Such damages do not compel the legislature to regulate its own internal affairs in a certain way” (para. 73). But the

imposition of liability as proposed by the respondent does invade the legislature's right to manage its own proceedings, as I explain above.

[361] Furthermore, the suggestion that parliamentary privilege is only implicated if the proposed liability “unduly interferes” with the operation of the privilege finds no support in the jurisprudence. Instead, *Vaid*'s two step test for questions of parliamentary privilege governs. The privileges claimed here are authoritatively established (para. 29). The courts thus have no jurisdiction to adjudicate the exercise of the privileges in question (paras. 40-41 and 47-48; *Chagnon*, at paras. 2 and 32; *New Brunswick Broadcasting*, at pp. 350 and 384-85).

[362] The fact that ministers and officials are implicated in the scope of liability sought by the respondent does not change that fact, as “[p]ublic servants making policy recommendations prior to the formulation and introduction of a bill are not ‘executing’ existing legislative policy or direction” (*Mikisew Cree*, at para. 121). There is no basis to derogate from our conclusion, in *Mikisew Cree*, that these actors exercise legislative rather than executive authority when they develop legislation. The scope of the privileges at issue is not in question; they protect Parliament's ability to fulfill its constitutional role, as they always have done. I cannot endorse the truncated view of parliamentary privilege advanced by my colleagues, which would seem to guarantee Parliament's ability to control its own proceedings only as long as those proceedings do not implicate Parliament's very *raison d'être*, that being the enactment of legislation.

[363] Justice Jamal suggests a standard that turns on whether “the unconstitutionality was readily or obviously demonstrable at the time of enactment and could not have been subject to any serious debate” (para. 127), but I fear that this standard will also undermine parliamentary privilege.

[364] My colleague notes that he is sensitive to the risk of chilling the lawmaking function (para. 249). But the “clearly unconstitutional” standard is fraught with risk in this regard as well. Whether the unconstitutionality of a given enactment was “readily or obviously demonstrable at the time the legislation was enacted” (para. 246) will necessarily depend on the eye of the beholder, and what is known to the court sitting in judgment of the legislature’s actions *ex post facto*. The potential for self-censorship, and the risk that this hindsight analysis will “preclud[e] unfettered and vigorous debate about the merits and wisdom of legislation” (I.F., Speaker of the House of Commons, at para. 63) is inescapable.

(3) Section 24(1) Liability Will Upset the Dialogical Balance and Create Unforeseen Consequences

[365] Enabling s. 24(1) damages, as called for by the respondent, would upset the dialogical balance between legislatures and the courts. Courts will be thrust into a position of overseeing the work of Parliament and the provincial legislatures, and inquiring into the motives and knowledge of parliamentarians and others involved in the legislative process. The same concern that arose in *Mikisew Cree*, i.e. that judicial

scrutiny of the legislative process would “undermine [Parliament’s] ability to act as the voice of the electorate” would come to fruition (para. 36, per Karakatsanis J.).

[366] Extending s. 24(1) damages to the preparation, drafting, and enactment of legislation would hamper the dialogue between courts and legislatures, by depriving Parliament of its ability to meaningfully respond to decisions in which the judiciary has determined the validity of laws or the legality of actions taken pursuant to those laws. While this Court has stated that the legislatures should not “try, try again” to overcome binding precedent from this Court, the respondent would seemingly do away with the ability of Parliament and the legislatures to “try” in the first case. The risk that an adverse decision under s. 52(1) invalidating a piece of legislation, or some portion of it, will suffice to meet the threshold for conduct under *Mackin* will be too high. Legislatures will need to insulate themselves against the risk. Some will ask whether proceeding under s. 33 is an option.

[367] The Speaker of the House of Commons warns that Members of Parliament will self-censor if liability is possible, “precluding unfettered and vigorous debate about the merits and wisdom of legislation. Similarly, Members worried about *Charter* damages would not be able to ‘proceed fearlessly’ and thus fail to act as a meaningful check on executive power” (I.F., at para. 63). Those proceedings and speech often deal with highly sensitive topics, on which members of the House and Senate are required to give their full and frank assessment in order for Parliament to be able to carry out its work: “Controversial issues, such as how legislative initiatives impact marginalized

groups or Charter rights, are often raised and sometimes form the basis for bills and amendments that senators put forward” (I.F., Speaker of the Senate, at para. 11).

[368] Further, given the number of parliamentary actors and the vagaries of the legislative process, the “conduct” surrounding any given legislation cannot be meaningfully ascribed to any one set of Parliamentarians. “As such, it is unclear whose alleged actions would be at issue in any claim seeking *Charter* damages for the drafting and enactment of any one statute” (I.F., Speaker of the House of Commons, at para. 65). And that is to say nothing of legislation introduced in minority governments, private members’ bills, amendments, committee reports etc., all of which implicate “[c]ountless parliamentary actors” (para. 66).

[369] The New Brunswick Court of Appeal said that “[c]laims attacking the *bona fides* of parliamentary action will be extremely rare, and those that are made will likely be subjected to motions to strike or for summary judgment to determine whether the allegations meeting the [*Mackin*] threshold can be proven” (para. 24). It is unclear what basis the New Brunswick Court of Appeal had for its speculation that future claims will be rare if this Court sanctions s. 24(1) damages for the preparation, drafting, and enactment of legislation. With this Court’s imprimatur, I expect that claims for such damages will proliferate.

[370] The effort to subordinate parliamentary privilege to s. 24(1) in this case parallels the effort to subordinate parliamentary privilege to s. 35(1) in *Mikisew Cree*. In that case, I addressed (at paras. 161-71) the serious but difficult to ascertain

consequences of doing this. (I would also rely on what Justice Brown set out in his reasons, which I adopted at para. 148.) At para. 165(h) I considered the impacts of the imposition of a duty to consult on the legislative process:

The relationship among the institutions of the executive and between them and Parliament are complex. What would be the impact on the operation of Cabinet, on the role of the Prime Minister or Premier as the head of Cabinet, and on the responsibility of the ministry to the legislature? Would there not be significant and likely unforeseeable consequences for the conventions, practices and procedures by which Cabinet operates and its relationship to the legislature?

If parliamentary privilege can be subordinated to one provision of the *Constitution Act, 1982*, then why not to other provisions? And, if damages can be awarded, then why not other forms of relief, notably interim injunctions? In this case, as in *Mikisew Cree*, courts are called on to start down the pathway of supervising the operation of legislative institutions. This has profound significance.

[371] In *Chagnon*, at para. 74, I similarly observed that violating parliamentary privilege could have unforeseen consequences, a caution which bears with equal force on the present appeal:

Parliamentary privilege, derived from centuries of conflict and diverse experience, should be circumscribed with great caution and after careful reflection. It is difficult sometimes to see the connections between what is necessary for the autonomy and proper functioning of the legislature and the extent of parliamentary privilege. The legislature is not like a department or a regulatory agency; it is the central pillar of representative democracy. Profound deference should be shown as to how it chooses to operate.

(4) The Respondent Asks the Court To Overturn Settled Precedent

[372] The respondent ignores an unbroken line of settled precedent. So, too, does the New Brunswick Court of Appeal, in suggesting that “the legislative branch and those within it are free to make policy choices and adopt laws, although they may have to pay a price if they do so in circumstances that are clearly wrong, or where bad faith or abuse of power is proven” (para. 23). This necessarily requires an inquiry into the state of mind and motivations of legislators. This is a frontal attack on parliamentary privilege. The logical implication is clear: parliamentary privilege is subordinate to the *Charter*. I do not agree.

[373] The New Brunswick Court of Appeal misread *Mackin* and failed to understand the clarification provided by *Ward*. I do not seek to overturn *Mackin* or *Ward*. I simply read them accurately.

[374] While not stated as such, the majority overrules *Vaid* and *New Brunswick Broadcasting*, at least as to s. 24(1). The legal *cordon sanitaire* around the internal operations of legislatures having been breached for one provision of the written Constitution, will it be breached for others? One cannot be certain, other than to anticipate that further efforts to do so will follow. We will then see whether this is the start of a progressive erosion. Even if confined to s. 24(1), one can expect any variety of efforts by counsel to utilize this as a means for courts to exercise oversight over legislative processes, e.g., by seeking injunctive relief to halt legislative proceedings where irreparable harm is alleged.

(5) Absolute Immunity Is Required

[375] To many, it seems difficult to reconcile the rule of law with the concept of absolute immunity. My colleague Justice Côté wrote in *Ontario (Attorney General) v. Clark*, 2021 SCC 18, [2021] 1 S.C.R. 607, that “*Roncarelli v. Duplessis*, [1959] S.C.R. 121,] is emblematic of a conception of the rule of law that is incompatible with absolute immunities. As this conception of the rule of law took hold in the second half of the 20th century, judges and legislators began to view absolute immunities with suspicion and to gradually erode them” (para. 63).

[376] In this view, absolute immunities are anachronistic, especially after the *Constitution Act, 1982*. But absolute immunities are not anachronistic where they are still required for certain institutions to function. This is exemplified by the fact that the judiciary enjoys an absolute immunity in the exercise of its adjudicative function. This too, is deeply rooted in history (*Morier v. Rivard*, [1985] 2 S.C.R. 716, at pp. 738-39, citing *Halsbury’s Laws of England* (4th ed. 1973), vol. 1, at pp. 197 et seq., Nos. 206 and 210; and H. Brun and G. Tremblay, *Droit constitutionnel* (1982), at p. 514). In *Ernst v. Alberta Energy Regulator*, 2017 SCC 1, [2017] 1 S.C.R. 3, Chief Justice McLachlin and Justices Moldaver and Brown, dissenting, but not on this point, determined that:

We acknowledge that our common law recognizes absolute immunity from personal liability for judges in the exercise of their adjudicative function. This is necessary to maintain judicial independence and impartiality (*Sirros v. Moore*, [1975] 1 Q.B. 118 (C.A.); *Gonzalez v. British Columbia (Ministry of Attorney General)*, 2009 BCSC 639, 95

B.C.L.R. (4th) 185; *Taylor v. Canada (Attorney General)*, [2000] 3 F.C. 298 (C.A.), leave to appeal refused, [2000] 2 S.C.R. xiv). Such immunity is not inconsistent with the *Charter*, as judicial immunity itself is a fundamental constitutional principle (*Taylor*, at para. 57). Similarly, we anticipate that compelling good governance concerns rendering *Charter* damages inappropriate or unjust will exist where the state actor has breached a *Charter* right while performing an adjudicative function. [para. 171]

[377] It is therefore clear that the recognition of absolute immunities — in specific contexts, attached to particular actors, is not inconsistent with the *Charter* after all.

[378] Seen another way, if a Parliamentary committee were to summon a judge to testify before the committee as to the deliberations leading to the rendering by the judge of a decision, the summons would be resisted as such questioning would be impermissible as part of the absolute immunity of judges relating to the exercise of the adjudicative function.

[379] The mirror image of this is that by virtue of parliamentary privilege, legislators have absolute immunity from being called to account before a court for their deliberations as legislators. Is there not a constitutional symmetry, in that legislators cannot require judges to justify how we make our decisions, nor can we require them to justify how they make their decisions? Or is the rule simply that judges are immune from such questioning of their *bona fides*, but parliamentarians are to be subject to such questioning? Would not this rule be somewhat self-serving?

VI. Remedies

[380] The jurisprudence is clear that remedies under s. 24(1) are available following the enactment of legislation, in relation to executive action pursuant to legislation. As the Attorney General of Canada points out, Mr. Power is not without recourse to a remedy, nor would others be. The respondent might have sought relief specific to his circumstances in addition to a declaration of invalidity. An example of this is given by Justice Roussel in *P.H. v. Canada (Attorney General)*, 2020 FC 393, [2020] 2 F.C.R. 461, at paras. 96-98:

I have concluded that this Court has the jurisdiction to grant the declaratory and injunctive relief sought by the parties, namely because the *ITO* test is met and P.H. has established that he has standing. This Court has sufficient evidence to support a declaration of invalidity because the constitutional question is essentially a matter of law. Moreover, based on the principles underlying judicial comity, this Court considered the reasoning in *Chu* to conduct its own legal analysis.

I conclude that the Transitional Provisions have the effect of increasing punishment, thus violating both paragraphs 11(*h*) and 11(*i*) of the Charter. In the absence of any evidence to justify the violation, I also conclude that these provisions cannot be saved under section 1 of the Charter. Consequently, section 10 of the [*Limiting Pardons for Serious Crimes Act*, S.C. 2010, c. 5] and section 161 of the [*Safe Streets and Communities Act*, S.C. 2012, c. 1] are declared to be constitutionally invalid and of no force or effect pursuant to subsection 52(1) of the *Constitution Act, 1982*.

Finally, to remedy P.H.'s individual situation, I will issue injunctive relief to require the Parole Board of Canada to consider his application for a record suspension in accordance with the provisions of the [*Criminal Records Act*, R.S.C. 1985, c. C-47] as they read at the time he committed the offence in June 2009.

[381] Mr. Power could have applied for judicial review on *Charter* grounds of the decision to deny his application for a criminal record suspension. That remedy accords fully with Canada's constitutional arrangements. It would in no way detract from parliamentary privilege.

VII. Conclusion

[382] This Court has a responsibility to preserve the "inheritance" of Canada's constitutional order. But, the respondent calls on us to discard this and to subordinate parliamentary privilege to s. 24(1) of the *Charter*. To do so would be to depart from precedent and to do so unwisely.

[383] I would allow the Attorney General of Canada's appeal, and answer the questions posed as follows:

(a) Question 1: No.

(b) Question 2: No.

Appeal dismissed with costs, KASIRER and JAMAL JJ. dissenting in part and CÔTÉ and ROWE JJ. dissenting.

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