Using the *Charter* to Repair the Damage of Unconstitutional Government Action

How does the *Charter of Rights and Freedoms* empower courts to repair the damage of unconstitutional government action? In a recent decision, *Conseil scolaire francophone de la Colombie-Britannique v British Columbia (Conseil Scolaire),* the Supreme Court of Canada (SCC) considered, *inter alia*, whether monetary damages can be awarded where government policy decisions are later held to violate fundamental rights under the *Charter*.[1] Prior to this decision, the SCC had held that "if [a government] act[s] 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."[2] By affording governments this kind of "limited immunity"[3] from monetary liability, the courts have sought "a means of creating a balance between the protection of constitutional rights and the need for effective government."[4] Such immunity is generally recognized where it is required by considerations[5] like "the existence of alternative remedies and concerns for good governance."[6] This prevents the "effectiveness and efficiency of government action" from being "excessively constrained" by potential liability.[7]

In *Conseil Scolaire*, the SCC assessed whether the above concerns for effective governance require that governments are shielded from liability "for decisions made in accordance with government policies."[8] The following sections explain what constitutional remedies are available under Canadian law, before providing a brief commentary on the Supreme Court's ruling in *Conseil Scolaire*.

The courts have access to three potential constitutional remedies

The *Constitution Act, 1982* contains three provisions that dictate the remedies available to the courts where there is a finding of unconstitutionality. Section 24(1) of the *Charter* provides remedies against unconstitutional government *action*;[9] section 24(2) provides for the exclusion of evidence obtained in violation of the *Charter*;[10] and section 52(1) provides that a *law* that is inconsistent with the Constitution is, "to the extent of the inconsistency, of no force or effect."[11] In other words, section 24(1) is available where a *Charter* violation occurs as a result of discretionary government action, but where the legislation that empowered the state actors is not itself unconstitutional.[12] Section 24(2) relates to the collection and admission of evidence. Section 52(1) applies when a *Charter* violation occurs because of unconstitutional legislation. Although possible, a claimant will rarely receive section 24(1) damages when a section 52(1) remedy has been granted.[13] As neither section 24(2) nor section 52(1) were at issue in *Conseil Scolaire*, they will not be discussed further in this article.

In *Conseil Scolaire*, the SCC determined that a *Charter* violation occurred as a result of

discretionary government policy, so they focused on section 24(1) *Charter* remedies. Section 24(1) states:

Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

If such an infringement or denial has been established, and if the government fails to justify the infringement, section 24(1) empowers courts to offer claimants a broad range of remedies.[14] This includes monetary remedies for *Charter* violations, also known as *Charter* damages or constitutional damages.[15] *Charter* damages encourage governments and state agents to avoid actions that violate the *Charter* by holding the government accountable for past actions.[16] Other forms of relief, such as injunctions, do not compensate victims of past violations; they only prevent violations from continuing in the future.[17]

Section 24(1) damages are uncommon, in part due to accessibility.[18] Provincial criminal courts do not have the jurisdiction to award damages, so at a minimum the claimant must bring a claim to the province's superior court, such as Alberta's Court of Queen's Bench.[19] The cost of bringing these claims is prohibitive, particularly because the amount of money received through *Charter* damages is usually relatively small compared to litigation costs.[20] For instance, in *Vancouver (City) v Ward* (*Ward*), Mr. Ward's eight-year legal battle culminated in an award of only $5,000 in damages under section 24(1) of the *Charter*.[21] Fortunately, Mr. Ward was represented for free (*pro bono*) at all levels of court, but not all complainants are so lucky.[22]

Charter damages are also uncommon because they are still a relatively "new endeavor."[23] Other remedies are available under section 24(1) that may be more appropriate for resolving a *Charter* breach, such as a declaration of invalidity.[24] The Supreme Court of Canada ("SCC") has suggested that the courts' approach to determining when *Charter* damages are appropriate should develop incrementally over time.[25] In the 2010 judgment mentioned above, *Ward*, the SCC began this process by developing the framework for awarding a monetary remedy through section 24(1).[26]

The *Ward* methodology for establishing section 24(1) *Charter* damages

Vancouver (City) v Ward paved the way for the legal recognition of damages as an appropriate and just remedy for *Charter* breaches. The Supreme Court determined that Mr. Ward's *Charter* rights were infringed when he was unnecessarily detained and strip-searched by police.[27] The SCC upheld the lower court's decision to award $5,000 in damages for the strip search (i.e. arbitrary detention),[28] and set out the following steps to help courts assess section 24(1) claims for *Charter* damages in the future:[29]

1. Establish a *Charter* breach.
2. Determine if damages are appropriate and just and fulfill at least one of the following objectives:

3. Compensate the claimant for personal loss;
4. Vindicate the *Charter* right by emphasizing the importance and gravity of the breach, and/or;
5. Deter state agents from committing future *Charter* breaches.
6. Determine if the state has established that other considerations render damages inappropriate or unjust (e.g. the existence of alternative remedies or concerns for good governance).
7. If appropriate and just, assess the amount of damages.

Steps two and three of this process address competing considerations. If the claimant demonstrates that damages are a just and appropriate remedy, then the government can attempt to show that other factors defeat the objectives of compensation, vindication, and deterrence, rendering *Charter* damages inappropriate or unjust.[30] The state can argue that damages are inappropriate or unjust due to the availability of alternate remedies, such as private law remedies for personal injury, or another public law remedy like a declaration of invalidity.[31] Where such countervailing considerations are present, the government will receive limited immunity from paying *Charter* damages.[32]

Granting governments limited immunity balances "the need for effective government" against the need to robustly protect constitutional rights.[33] The rationale behind this is to give state agents the ability to carry out their governmental functions without an overarching threat of monetary damages.[34] A full list of countervailing considerations does not exist, so judges may add new considerations as the law in this area matures.[35] In *Conseil Scolaire*, the case under examination here, the SCC examined whether limited government immunity could apply to "decisions made in accordance with government policies"[36] that are later found to violate fundamental rights under the *Charter*.[37]

The Supreme Court found that limited immunity does not apply to unconstitutional government policies

In *Conseil Scolaire*, the Supreme Court confirmed its general rule in *Ward*, that governments may avoid liability for the payment of damages by raising considerations such as the promotion of good governance or the existence of alternative remedies.[38] However, the Court found that limited government immunity from damages awards does not apply to decisions made in accordance with unconstitutional government policies.[39] The SCC differentiated between actions carrying out a law and actions based on discretionary policy. The Court wrote that "[w]hen the legislative branch enacts a law, it confers powers on the executive branch" to carry out actions pursuant to that law.[40] The legislative branch cannot be held liable for exercising its lawmaking powers,[41] so when it confers powers on the executive branch it also confers its limited immunity from liability.[42] According to the Court, this limited immunity is justified because "the legislature and those who enforce laws must be able to perform their functions without fear of reprisals."[43] Their conduct must cross a "minimum threshold of gravity"[44] including conduct that is "clearly wrong, in bad faith or an abuse of power"[45] before damages are awarded.[46] In contrast, "[w]hen the

executive branch adopts a government policy, it confers powers on itself," so it does not receive the immunity afforded to the legislative branch.[47] The Court reasoned that ""government policy" [as a] concept has not been defined,"[48] in contrast to legislation which is prepared through a "transparent public process that is central to the democratic process."[49] Granting governments immunity for their policies would be a "very broad" application of limited immunity that may "reduce [a claimant's] chances of obtaining access to justice" and a remedy for a violation of their *Charter* rights.[50] As such, the SCC determined that discretionary policy decisions do not receive the same limited immunity conferred on government actions stemming from laws.[51]

In the case under examination here, a Minister of the Government of British Columbia had made decisions regarding school transportation and grant funding that did not stem from a law about school funding; they were policy decisions made at the discretion of the executive.[52] The Court concluded that these funding decisions were not shielded from liability and that an appropriate remedy would be the payment of damages.[53]

The SCC assessed the amount of *Charter* damages owed and ordered the Government of British Columbia to pay the school board $6 million in damages for underfunding its school bus transportation system, and an additional $1.1 million for operations.[54]

Conclusion

The SCC has determined that "where there is a right, there must be a remedy."[55] To support this declaration, there are three constitutional provisions that allow courts to remedy a violation of fundamental rights. A key result from *Conseil Scolaire* is the court's finding that section 24(1) *Charter* damages may be available to compensate claimants for government policy decisions that are later found to violate the *Charter*. The Court's decision limited the scope of government immunity from paying damages and resulted in the Court ordering B.C. to pay additional *Charter* damages. These types of monetary awards are still uncommon, but the relatively large *Conseil Scolaire* award may encourage more litigants to pursue such damages despite the adverse cost of litigation.

[1] *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, 2020 SCC 13 at paras 164, 171 .

[2] *Mackin v New Brunswick (Minister of Justice)*, 2002 SCC 13 at para 79 .

[3] *Ibid* at para 78.

[4] *Ibid* at para 79.

[5] See *Conseil Scolaire*, *supra* note 1, at para 167. New considerations for limited immunity "may be identified over time".

[6] *Ibid* at para 167.

[7] *Ibid*.

[8] *Ibid* at para 166.

[9] *Canadian Charter of Rights and Freedoms*, s 24(1), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[10] *Ibid*, s 24(2).

[11] *Ibid*, s 52(1).

[12] *Schachter v Canada*, [1992] 2 SCR 679, 1992 CanLII 74 (SCC) at 720.

[13] *Ibid.*

[14] *Vancouver (City) v Ward*, 2010 SCC 27 at paras 16-17 .

[15] *Ibid* at para 21.

[16] See Marilyn L Pilkington, "Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms," (1984) 62 Can Bar Rev 517 at 540.

[17] *Ibid.*

[18] See Akash Toprani, "A tale of two section twenty-fours: towards a comprehensive approach for Charter remedies," (2012) 70:2 UT Fac L Rev 141 at 163.

[19] *Ibid.*

[20] *Ibid.*

[21] *Ibid* at 143.

[22] *Ibid* at 163.

[23] *Ward, supra* note 14 at para 21.

[24] *Ibid.*

[25] *Ibid.*

[26] *Ibid* at para 15.

[27] *Ibid* at paras 65, 66.

[28] *Ibid* at paras 11, 73.

[29] *Ibid* at paras 15, 31.

[30] *Ibid* at para 33.

[31] *Ibid* at para 34.

[32] *Ibid* at paras 33, 40.

[33] *Mackin*, *supra* note 2 at para 79.

[34] *Conseil Scolaire*, *supra* note 1 at para 164.

[35] *Ward*, *supra* note 14 at para 33.

[36] *Conseil Scolaire*, *supra* note 1 at para 164.

[37] *Ibid* at para 171.

[38] *Ibid* at paras 167-168.

[39] *Ibid* at para 179.

[40] *Ibid* at para 177.

[41] *Ibid* at para 176.

[42] *Ibid* at para 177.

[43] *Ibid* at para 168.

[44] *Ibid*, citing *Ward*, *supra* note 14 at para 39.

[45] *Conseil Scolaire*, *supra* note 1 at para 168, citing *Mackin*, *supra* note 2 at para 78.

[46] *Ibid* at para 168.

[47] *Ibid*.

[48] *Ibid* at para 173.

[49] *Ibid*.

[50] *Ibid*.

[51] *Ibid*.

[52] *Ibid*.

[53] *Ibid* at para 180.

[54] *Ibid* at paras 185-186.

[55] *Doucet Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 23.