

## MEMORANDUM OF ARGUMENT

Rule 60(1)<sup>1</sup> of the *Rules of the Supreme Court of Canada* (the “Rules”) states:

an appellant... shall make a motion to the Chief Justice or a judge to state a constitutional question if that appellant... intends to raise a question of

- (a) the constitutional validity or the constitutional applicability of a law of Canada or of a province or of regulations made under them,
- (b) the inoperability of a law of Canada or of a province or of regulations made under them,  
or
- (c) the constitutional validity or the constitutional applicability of a common law rule.  
[Emphasis added]

Stating constitutional questions plays an important role in the appeal. In particular, stating constitutional questions ensures that the attorneys general are made aware of constitutional issues so that they may decide whether to exercise their right to intervene. Stating a constitutional question also serves the useful function of signaling to the parties and other potential interveners the constitutional questions to be addressed.<sup>2</sup>

This appeal clearly involves a constitutional question. In her Notice of Motion to State a Constitutional Question, the Appellant posed the constitutional questions in the following terms:

Does s. 43 of Alberta’s *Energy Resources Conservation Act*,<sup>3</sup> which contains a general “protection from action” clause, bar a *Charter* claim for a personal remedy made pursuant s. 24(1) of the *Canadian Charter of Rights and Freedoms*?;

Does s. 43 of Alberta’s *Energy Resources Conservation Act* define or constrain what remedies are available under s. 24(1) of the *Canadian Charter of Rights and Freedoms*?

As noted by the Respondent Alberta Energy Regulator itself,<sup>4</sup> the question that was before the Court of Appeal (and that is before this Honourable Court) was “whether s. 43 of the *ERCA* [*Energy Resources Conservation Act*] can bar a *Charter* claim”. This question is substantively similar to the constitutional questions posed by the Appellant.

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<sup>1</sup> *Rules of the Supreme Court of Canada*, SOR/2002-156, r. 60(1).

<sup>2</sup> *Corbiere v. Canada (Minister of Indian & Northern Affairs)*, [1999] 2 S.C.R. 203 at para 45.

<sup>3</sup> *Energy Resources Conservation Act*, RSA 2000, c E-10. Section 43 of the *ERCA* reads “No action or proceeding may be brought against the Board or a member of the Board or a person referred to in section 10 or 17(1) in respect of any act or thing done purportedly in pursuance of this Act, or any Act that the board administers, the regulations under any of those Acts or a decision, order or direction of the Board.”

<sup>4</sup> Respondent’s Memorandum of Argument at para 15, [Respondent’s Response to the Motion to State a Constitutional Question (the “the Response”), Tab 1].

The Respondent takes the position that this appeal does not challenge the constitutional applicability or validity of a law of Alberta, but rather is simply a matter of statutory interpretation.<sup>5</sup> This position is unsupportable.

It is submitted that this appeal clearly raises questions of constitutional applicability and or operability of a law of Alberta.<sup>6</sup> The Appellant takes the position that owing to the paramountcy of the *Charter*, s. 43 of the *ERCA* does not and cannot apply to claims brought pursuant to the *Charter* without violating the right to a remedy for *Charter* breaches as guaranteed by s. 24(1) of the *Charter*. In other words, the issue to be determined by this Court is whether s. 43 is constitutionally inapplicable or inoperable to the extent that it bars claims brought pursuant to s. 24(1) of the *Charter*.

The present appeal is analogous to the case of *Ravndahl v. Saskatchewan*, 2009 SCC 7. In that case, as here, the Appellant brought a *Charter* claim alleging that her *Charter* rights had been breached. As here, before the claim could proceed to trial, a preliminary issue was raised regarding whether statutory bars (in that case, a limitation period) could bar a claim for personal relief brought pursuant to s. 24(1) of the *Charter*.<sup>7</sup> This preliminary issue was appealed to the Supreme Court of Canada.

The Supreme Court found that the issue of whether a limitation period could bar a claim brought pursuant to s. 24 of the *Charter* was a constitutional issue that raised a question of the constitutional applicability of Saskatchewan's *Limitations of Actions Act*. The issue to be determined in that appeal was stated by McLachlin C.J. as "whether a statutory limitation period applies to personal claims for constitutional relief, and if so, how the limitation period affects such claims".<sup>8</sup> The precise constitutional question that was stated by the Court was:

Is s. 3 of *The Limitation of Actions Act*, R.S.S. 1978, c. L-15, constitutionally inapplicable to the appellant's claims for personal relief, including damages, reinstatement and other monetary remedies, in an action alleging that s. 98.1(5) of *The Workers' Compensation Act*, 1979, S.S. 1979, c. W-17.1, and related legislation is of no force or effect to the extent that it breaches her rights under the Canadian *Charter* of Rights and Freedoms? [Emphasis added]<sup>9</sup>

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<sup>5</sup> Respondent's Memorandum of Argument at paras 2, 15 & 22 [Response, Tab 1].

<sup>6</sup> The appeal does not, however seek to challenge the constitutional validity of s. 43, and does not seek to strike down s. 43 of the *ERCA* as being unconstitutional.

<sup>7</sup> *Ravndahl v. Saskatchewan*, 2009 SCC 7 ("*Ravndahl*") at paras 1, 4 & 12-15.

<sup>8</sup> *Ravndahl* at para 1.

<sup>9</sup> *Ravndahl* at para 2.

The appeal at bar raises very similar constitutional issues. As in *Ravndahl*, Ms. Ernst brought a *Charter* claim alleging that her *Charter* right to freedom of expression had been breached. As in *Ravndahl*, before the claim could proceed to trial, a preliminary issue was raised before the Court of Queen's Bench regarding whether statutory bars (in this case a general "protection from action") can bar a *Charter* claim for personal relief brought pursuant to s. 24 of the *Charter*. This exact issue was considered again by the Court of Appeal of Alberta, and is now before this Honourable Court. This issue clearly raises the question of the constitutional applicability of s. 43 of the *ERCA*, and must be stated as a constitutional question.

***The constitutional questions posed in this appeal were squarely considered by the courts below***

The Respondent takes the position that issue of the constitutional applicability of s. 43 of the *ERCA* was not raised in the courts below.<sup>10</sup> This position is simply not accurate.

As noted in the Appellant's Memorandum of Argument filed in support of her Motion to State a Constitutional Question, the proposed *Charter* issues were squarely considered by the Alberta Court of Queen's Bench, and the Court of Appeal of Alberta.<sup>11</sup>

This is evidenced most clearly by the fact that both the Court of Queen's Bench and the Alberta Court of Appeal devoted substantial portions of their reasons to the issue of whether s. 43 of the *Energy Resources Conservation Act* can bar a *Charter* claim and made express findings regarding this issue.<sup>12</sup> This is not a case where a constitutional issue is raised for the first time on appeal. In fact, the entire reason that this Appeal is before the Supreme Court is because of the findings of the Court of Queen's Bench and the Court of Appeal with respect to this exact constitutional question.

***Section 24(1) of the Charter confers a constitutionally protected right to a remedy***

The Respondent takes the position that s. 24(1) of the *Charter* relates to "remedies and not rights" and further that s. 24(1) does not confer rights but rather is solely a "remedial provision that relates only to the enforcement of the rights and freedoms set out in the *Charter*".<sup>13</sup> The Respondent argues that the

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<sup>10</sup> Respondent's Memorandum of Argument at para 16 [Response, Tab 1].

<sup>11</sup> Appellant's Memorandum of Argument at para. 15 [Motion to the Chief Justice or a Judge to State a Constitutional Question ("Motion"), Tab 2]

<sup>12</sup> Reasons for Judgment of the Court of Appeal of Alberta, dated Sept 15, 2014 ("ABCA Reasons") at paras 23-30 [Motion, Tab 3C]; Reasons for Judgment of the Honourable Chief Justice Neil Wittmann of the Court of Queen's Bench of Alberta, dated September 16, 2014 ("ABQB Reasons") [Motion, Tab 3B]

<sup>13</sup> Respondent's Memorandum of Argument at paras 3 & 25, [Response, Tab 1].

constitutional questions fail to identify a *Charter* right that is infringed, and are therefore improper.

With respect, the position that s. 24(1) does not confer a *Charter* right is clearly incorrect. This court has repeatedly held that s. 24(1) specifically confers the constitutionally protected right to a remedy. For example, in *R. v. 974649 Ontario Inc.*, the Court held that s. 24(1) “establishes the right to a remedy as the foundation stone for the effective enforcement of *Charter* rights”.<sup>14</sup>

***Not all constitutional questions require evidence***

The Respondent takes the position that “evidence is required to make a determination of constitutional validity or applicability”.<sup>15</sup> This position is also incorrect. While many constitutional questions require evidence, there are some that do not. In fact this Court has repeatedly considered constitutional questions that raise purely legal issues (such as constitutional interpretation) without reference to evidence.

Again, *Ravndahl v. Saskatchewan* is instructive. As noted above, this case involved the question of “whether a statutory limitation period applies to personal claims for constitutional relief, and if so, how the limitation period affects such claims”. This question, which is very similar to the constitutional questions posed by this Appeal, was considered to be a question on a “point of law” and was resolved by the Supreme Court on the basis of law alone.<sup>16</sup>

Moreover, the Respondent has not indicated what evidence could possibly be of use to resolving the legal issue of whether the *ERCA*’s s. 43 “protection from action” clause can, as a constitutional matter, bar a claim for a personal remedy made pursuant s. 24(1) of the *Charter*.

***Sufficiency of notice of constitutional question in the courts below***

The Respondent repeatedly refers to an alleged failure by the Appellant to provide notice of constitutional questions at the Court of Queen’s Bench pursuant to s. 24(1) of the *Judicature Act*. These submissions are both misleading and irrelevant to this appeal.

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<sup>14</sup> *R. v. 974649 Ontario Inc.*, [2001] 3 SCR 575, 2001 SCC 81 at para 19 quoting with approval, *Mills v. The Queen*, [1986] 1 S.C.R. 863 at 881.

<sup>15</sup> Respondent’s Memorandum of Argument at para 18, [Response, Tab 1].

<sup>16</sup> *Ravndahl* at paras 1 & 12.

First, and as pointed out by the Respondent, notice of constitutional question was in fact provided to the Attorneys General of both Alberta and Canada in advance of the Court of Appeal hearing. Notice of constitutional question was not provided to the Attorney Generals in advance of the hearing before the Alberta Court of Queen’s Bench for the simple reason that the issue of whether s. 43 of the *ERCA* bars a *Charter* claim was not raised until the oral hearing itself.

Second, and consistent with the above submissions, s. 24 of the *Judicature Act* only requires that notice be provided in cases where the “constitutional validity of an enactment of ... the Legislature of Alberta is brought into question”. The Appellant’s position that s. 43 of the *ERCA* does not apply to *Charter* claims challenges only the constitutional applicability of s. 43 of the *ERCA* and specifically does not challenge the constitutional validity of s. 43, and therefore notice pursuant to the *Judicature Act* was not required in any event.

Finally, and as noted by Court of Appeal of Alberta the issue of whether sufficient notice was provided in the courts below was not an issue that was subject to appeal before the Court of Appeal of Alberta, and is therefore cannot have any bearing on the appeal before this Honourable Court.

The constitutional questions posed by the Appellant in the Notice of Motion to State a Constitutional Question raise clear issues of the constitutional applicability of s. 43 of the *ERCA*, and, in accordance with r. 60 of the *Rules of the Supreme Court of Canada*, must be stated. The Appellant therefore requests an order stating the constitutional questions as posed in the Notice of Motion to State a Constitutional Question filed in this Appeal. Further, the Appellant requests its costs of this motion, should the motion be granted.

All of which is respectfully submitted this 12<sup>th</sup> day of June, 2015.

**Klippensteins Barristers & Solicitors**

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Murray Klippenstein / W. Cory Wanless

**TABLE OF AUTHORITIES**

| <b>Authority</b>   | <b>Paragraph(s)</b> |
|--|---------------------|
| <i>Corbiere v. Canada (Minister of Indian &amp; Northern Affairs)</i> , [1999] 2 SCR 203 | 2                   |

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<http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1704/index.do>

*Ravndahl v. Saskatchewan*, 2009 SCC 7, [2009] 1 SCR 181

7, 8, 9, 16

<http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/6421/index.do>

*R. v. 974649 Ontario Inc.*, [2001] 3 SCR 575, 2001 SCC 81

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<http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1922/index.do>

**STATUES AND REGULATIONS RELIED UPON**

**CANADIAN CHARTER OF RIGHTS AND FREEDOMS**

**LA CHARTE CANADIENNE DES DROIT ET LIBERTÉS**

***The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982.***

***Loi constitutionnelle de 1982 (R-U), constituant l'annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 11.***

**Enforcement**

**Recours**

**Enforcement of guaranteed rights and freedoms**    **24. (1)** Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

**Recours en cas d'atteinte aux droits et libertés**    **24. (1)** Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

**Protection from action**

**43** No action or proceeding may be brought against the Board or a member of the Board or a person referred to in section 10 or 17(1) in respect of any act or thing done purportedly in pursuance of this Act, or any Act that the Board administers, the regulations under any of those Acts or a decision, order or direction of the Board.