

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

JESSICA ERNST

Appellant
(Appellant)

and

ALBERTA ENERGY REGULATOR

Respondent
(Respondent)

and

ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF CANADA,
ATTORNEY GENERAL FOR SASKATCHEWAN and ATTORNEY GENERAL OF
QUEBEC

Interveners

MOTION FOR INTERVENTION TO A JUDGE
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, APPLICANT
(Rules 47 and 55 of the *Rules of the Supreme Court of Canada*)

British Columbia Civil Liberties Association,
Applicant

Agent for the Applicant

Ryan D.W. Dalziel
Emily C. Lapper
Bull, Housser & Tupper LLP
1800 – 510 West Georgia Street
Vancouver, British Columbia V6B 0M3
Tel: (604) 641-4881
Fax: (604) 646-2671
E-mail: rdd@bht.com

David P. Taylor
Power Law
1103 – 130 Albert Street
Ottawa, Ontario K1P 5G4
Tel: (613) 702-5563
Fax: (613) 702-5563
E-mail: dtaylor@powerlaw.ca

Jessica Ernst, Appellant

Murray Klippenstein and W. Cory Wanless
Klippensteins, Barristers & Solicitors
160 John Street, Suite 300
Toronto, Ontario M5V 2E5
Tel: (416) 598-0288
Fax: (416) 598-9520
E-mail: murray.klippenstein@klippensteins.ca

Agent for the Appellant

Christopher Rootham
Nelligan, O'Brien Payne LLP
1500-50 O'Connor Street
Ottawa, Ontario K1P 6L2
Tel: (613) 231-8311
Fax: (613) 788-3667
E-mail: christopher.rootham@nelligan.ca

Alberta Energy Regulator, Respondent

Glenn Solomon, Q.C. and Laura Warner
Jensen Shawa Solomon Duguid Hawkes LLP
800-304 8th Street S.W.
Calgary, Alberta T2P 1C2
Tel: (403) 571-1520
Fax: (403) 571-1528
E-mail: gsolomon@jssbarristers.ca

Agent for the Respondent

Jeffrey W. Beedell
Gowling Lafleur Henderson LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario K1P 1C3
Tel: (613) 786-0171
Fax: (613) 788-3587
Email: jeff.beedell@gowlings.com

Attorney General of British Columbia, Intervener

Jonathan G. Penner
Attorney General of British Columbia
1001 Douglas Street, 6th Floor
Victoria, British Columbia V8W 9J7
Tel: (250) 952-0122
Fax: (250) 356-9154
E-mail: jonathan.penner@gov.bc.ca

Agent for Intervener

Robert E. Houston, Q.C.
Burke-Robertson
441 MacLaren Street
Suite 200
Ottawa, Ontario K2P 2H3
Tel: (613) 236-9665
Fax: (613) 235-4430
E-mail: rhouston@burkerobertson.com

Attorney General of Canada, Intervener

Michael H. Morris
Attorney General of Canada
130 King Street West, Suite 3400, Box 36
Toronto, Ontario M5X 1K6
Tel: (416) 973-9704
Fax: (416) 973-0809
E-mail: michael.morris@justice.gc.ca

Agent for Intervener

Christopher M. Rupar
Attorney General of Canada
50 O'Connor Street, Suite 500, Room 557
Ottawa, Ontario K1A 0H8
Tel: (613) 670-6290
Fax: (613) 954-1920
E-mail: christopher.rupar@justice.gc.ca

Attorney General for Saskatchewan, Intervener

Graeme G. Mitchell, Q.C.

Attorney General for Saskatchewan
820 – 1874 Scarth Street
Regina, Saskatchewan S4P 4B3
Tel: (306) 787-8385
Fax: (306) 787-9111
E-mail: graeme.mitchell@gov.sk.ca

Agent for Intervener

D. Lynne Watt
Gowling Lafleur Henderson LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario K1P 1C3
Tel: (613) 786-8695
Fax: (613) 788-3509
E-mail: lynne.watt@gowlings.com

Attorney General of Quebec, Intervener

Robert Desroches and Carole Soucy

Procureur général du Québec
1200, route de l'Église, 2e étage
Québec, Quebec G1V 4M1
Tel: (418) 643-1477
Fax: (418) 644-7030
E-mail: robert.desroches@justice.gouv.qc.ca

Agent for Intervener

Pierre Landry
Noël & Associés
111, rue Champlain
Gatineau, Quebec J8X 3R1
Tel: (819) 771-7393
Fax: (819) 771-5397
E-mail: p.landry@noelassociés.com

TABLE OF CONTENTS

<u>Tab</u>	<u>Document</u>	<u>Page</u>
1.	Notice of motion to a judge dated October 7, 2015	1
2.	Affidavit of Laura Track affirmed October 6, 2015	5
3.	Memorandum of argument dated October 7, 2015	13

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

JESSICA ERNST

Appellant
(Appellant)

and

ALBERTA ENERGY REGULATOR

Respondent
(Respondent)

and

ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF CANADA,
ATTORNEY GENERAL FOR SASKATCHEWAN and ATTORNEY GENERAL OF
QUEBEC

Interveners

NOTICE OF MOTION TO A JUDGE
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, APPLICANT
(Rules 47 and 55 of the Rules of the Supreme Court of Canada)

TAKE NOTICE that the British Columbia Civil Liberties Association (the "BCCLA") hereby applies to a judge pursuant to Rule 55 of the *Rules of the Supreme Court of Canada*, for an order granting leave to intervene in this proceeding, or any further or other order that the judge may deem appropriate;

AND FURTHER TAKE NOTICE that the motion shall be made on the following grounds:

1. The BCCLA is a non-profit, non-partisan advocacy group whose objects include the promotion, defence, sustainment and defence of civil liberties throughout Canada. These ends include supporting and enhancing the availability of

appropriate remedies for breaches of the *Canadian Charter of Rights and Freedoms*.

2. A constitutional question has been stated in these proceedings by the Chief Justice, in these terms:

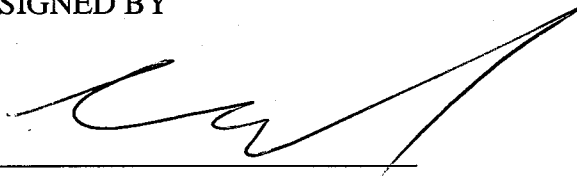
Is s. 43 of the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, constitutionally inapplicable or inoperable to the extent that it bars a claim against the regulator for a breach of s. 2(b) of the *Canadian Charter of Rights and Freedoms* and an application for a remedy under s. 24(1) of the *Canadian Charter of Rights and Freedoms*?

More broadly, this appeal raises questions about (1) a legislature's power to limit or bar a claim under s. 24(1) of the *Charter*; (2) the availability of *Charter* damages in claims against an administrative tribunal; and (3) the interaction between legislative provisions affecting *Charter* claims for personal remedies, and the framework for determining "appropriate and just" remedies under s. 24(1). The BCCLA has both a direct interest in, and a distinctive perspective about, these questions.

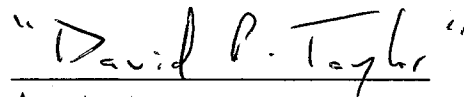
3. The affidavit of Laura Track, counsel at the BCCLA, sets out the nature of the BCCLA's interest in these questions, and its activities in respect thereto, including its role before this Court in previous cases concerning s. 24(1). That affidavit is enclosed herewith, behind Tab 2.
4. For the reasons given in the memorandum of argument enclosed herewith behind Tab 3, the BCCLA's submissions on the questions raised in this appeal will be relevant, useful, and distinct from the arguments of the other parties.

Dated at Vancouver, British Columbia, this 7th day of October, 2015.

SIGNED BY



Applicant to the motion
Ryan D.W. Dalziel
Emily C. Lapper
 Bull, Housser & Tupper LLP
 1800 – 510 West Georgia Street
 Vancouver, B.C. V6B 0M3
 Tel: (604) 641-4881
 Fax: (604) 646-2671
 E-mail: rdd@bht.com



Agent
 David P. Taylor
 Power Law
 1103 – 130 Albert Street
 Ottawa, Ontario K1P 5G4
 Tel: (613) 702-5563
 Fax: (613) 702-5563
 E-mail: dtaylor@powerlaw.ca

ORIGINAL TO: THE REGISTRAR

COPIES TO: JESSICA ERNST, APPELLANT

AND HER COUNSEL,
Murray Klippenstein and W. Cory Wanless
Klippensteins, Barristers & Solicitors
160 John Street, Suite 300
Toronto, Ontario M5V 2E5
Tel: (416) 598-0288
Fax: (416) 598-9520
E-mail: murray.klippenstein@klippensteins.ca

AND TO: ALBERTA ENERGY REGULATOR, RESPONDENT

AND ITS COUNSEL,
Glenn Solomon, Q.C. and Laura Warner
Jensen Shawa Solomon Duguid Hawkes LLP
800, 304 8th Street S.W.
Calgary, Alberta T2P 1C2
Tel: (403) 571-1520
Fax: (403) 571-1528
E-mail: gsolomon@jssbarristers.ca

AND TO: ATTORNEY GENERAL OF BRITISH COLUMBIA, INTERVENER

AND ITS COUNSEL,
Jonathan Penner
Attorney General of British Columbia
1001 Douglas Street, 6th Floor
Victoria, British Columbia V8W 9J7
Tel: (250) 952-0122
Fax: (250) 356-9154
E-mail: jonathan.penner@gov.bc.ca

AND TO: ATTORNEY GENERAL OF CANADA, INTERVENER

AND ITS COUNSEL,
Michael H. Morris
Attorney General of Canada
130 King Street West, Suite 3400, Box 36
Toronto, Ontario M5X 1K6
Tel: (416) 973-9704
Fax: (416) 973-0809
E-mail: michael.morris@justice.gc.ca

AND TO: ATTORNEY GENERAL FOR SASKATCHEWAN, INTERVENER

AND ITS COUNSEL,
Graeme G. Mitchell, Q.C.
Attorney General for Saskatchewan
820 – 1874 Scarth Street
Regina, Saskatchewan S4P 4B3
Tel: (306) 787-8385
Fax: (306) 787-9111
E-mail: graeme.mitchell@gov.sk.ca

AND TO: ATTORNEY GENERAL OF QUEBEC, INTERVENER

AND ITS COUNSEL,
Robert Desroches and Carole Soucy
Procureur général du Québec
1200, route de l'Église, 2e étage
Québec, Quebec G1V 4M1
Tel: (418) 643-1477
Fax: (418) 644-7030
E-mail: robert.desroches@justice.gouv.qc.ca

NOTICE TO THE RESPONDENT TO THE MOTION: A respondent to the motion may serve and file a response to this motion within 10 days after service of the motion. If no response is filed within that time, the motion will be submitted for consideration to a judge or the Registrar, as the case may be.

If the motion is served and filed with the supporting documents of the application for leave to appeal, then the respondent may serve and file the response to the motion together with the response to the application for leave.

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

JESSICA ERNST

Appellant
(Appellant)

and

ALBERTA ENERGY REGULATOR

Respondent
(Respondent)

and

ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF CANADA,
ATTORNEY GENERAL FOR SASKATCHEWAN and ATTORNEY GENERAL OF
QUEBEC

Interveners

AFFIDAVIT OF LAURA TRACK

(Rules 47, 55 and 89 of the *Rules of the Supreme Court of Canada*)

I, LAURA TRACK, barrister and solicitor, of 2nd floor, 900 Helmcken Street, Vancouver, British Columbia, AFFIRM THAT:

1. I am counsel at the British Columbia Civil Liberties Association (the "BCCLA"). I have personal knowledge of the matters to which I herein depose or have received the information from others, in which case I believe it to be true.

2. I affirm this affidavit in support of the BCCLA's motion for leave to intervene in *Ernst v. Alberta Energy Regulator*, SCC File No. 36167.

A. *The BCCLA*

3. The BCCLA is a non-profit, non-partisan, unaffiliated advocacy group. It was incorporated in 1963 pursuant to the *British Columbia Society Act*. The objects of the BCCLA

include the promotion, defence, sustainment and extension of civil liberties and human rights throughout British Columbia and Canada.

4. The BCCLA has approximately 1,500 members and donors involved in various professions, trades and callings. The BCCLA has ten employees, including an Executive Director, a Litigation Director and a Policy Director, who are responsible for the work of the organization. This gives the BCCLA a unique status in this country as the only truly grassroots citizens' organization with the resources of a full time staff devoted exclusively to civil liberties.

5. The BCCLA is distinguished by having a committed volunteer board of directors that directs the BCCLA's policy and agenda. It has been able to tap the expertise and energies of a wide range of academics, professionals, and lay persons with expertise in civil liberties work. The BCCLA has collective expertise in considering the sometimes very difficult issues that civil liberties involve.

6. The BCCLA has demonstrated a long-standing, genuine, and continuing concern with the rights of the citizens in British Columbia and Canada to liberty, democracy, and freedom. In various fora, we speak out on the principles that promote individual rights and freedoms, including freedom of thought, belief, conscience, religion, opinion and expression, equality, and autonomy generally.

7. The BCCLA works in furtherance of its objectives in a variety of ways:

- (a) The BCCLA engages in public education, by commenting on current civil liberties and human rights issues in various news media, by participating in conferences or other public events at which civil liberties and human rights are discussed, by publishing newsletters and producing books and other publications on civil liberties and human rights issues that are available to the general public, and by maintaining a web site containing many of our position papers and other public documents;
- (b) The BCCLA prepares position papers and makes submissions to various governmental bodies at the federal, provincial and municipal levels, concerning the advancement of civil liberties and human rights and the implications for civil liberties and human rights of proposed legislative or policy initiatives;

- (c) The BCCLA provides assistance to persons who complain to us about violations of their civil liberties or human rights, including assistance in pursuing administrative or informal remedies; and
- (d) The BCCLA takes action in its own right when it perceives violations of civil liberties or human rights, either by launching complaints with the government or other administrative agencies, or by appearing in court, sometimes as plaintiff, but most often as intervener in legal matters that raise civil liberties issues.

B. *The BCCLA's Specific Expertise and Experience Relating to the Issues on Appeal*

8. The BCCLA has a direct interest in the availability of appropriate *Charter* remedies. This flows necessarily from the BCCLA's fundamental interest in the rights and freedoms enshrined in the *Charter*. Remedies are what make rights meaningful in practical terms, both for individuals and for governments alike. In the view of the BCCLA, the remedies available for infringement of *Charter* rights should always be sufficiently robust to meaningfully vindicate the right, and to deter similar government conduct in the future. In many instances, damages may be the most effective means of achieving those objectives; in other instances, damages may be the only means of doing so.

9. For these reasons, the BCCLA has taken steps to support and enhance individuals' ability to obtain remedies, including damages, pursuant to s. 24(1) of the *Charter*. In particular, the BCCLA sought and obtained leave to intervene in the following cases:

- (a) *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 SCR 28, which set out the overarching principles applicable to claims for damages under s. 24(1); and
- (b) *Henry v. British Columbia (Attorney General)*, 2015 SCC 24, which concerned the availability of damages under s. 24(1) in the specific context of prosecutorial misconduct.

C. *The BCCLA's Experience in the Supreme Court of Canada*

10. The BCCLA has frequently made submissions to this court as an intervener, and occasionally as a party, in cases involving civil liberties or human rights. This court has granted the BCCLA leave to intervene in the following cases:

- (a) *R. v. Safarzadeh-Markhali*, SCC File No. 36162 (hearing scheduled November 4, 2015);
- (b) *R. v. Jordan*, SCC File No. 36068 and *R. v. Williamson*, SCC File No. 36112 (hearing scheduled October 7, 2015);
- (c) *Goodwin et al. v. British Columbia (Superintendent of Motor Vehicles)*, SCC File No. 35864 (heard May 19, 2015, judgment reserved);
- (d) *M.M. v. Minister of Justice Canada on behalf of the United States of America*, SCC File No. 35838 (heard March 17, 2015; judgment reserved);
- (e) *Appulonappa, et al. v. HMTQ, et al.*, SCC File No. 35958 (heard February 16 and 17, 2015, judgment reserved);
- (f) *R. v. Smith*, 2015 SCC 34;
- (g) *Henry v. British Columbia (Attorney General)*, 2015 SCC 24
- (h) *R. v. Nur* and *R. v. Charles*, 2015 SCC 15;
- (i) *Saskatchewan Federation of Labour v. Her Majesty the Queen*, 2015 SCC 4;
- (j) *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1;
- (k) *R. v. Fearon*, 2014 SCC 77;
- (l) *R. v. Hart*, 2014 SCC 52;
- (m) *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37;
- (n) *R. v. Carvery*, 2014 SCC 27 and *R. v. Summers*, 2014 SCC 26;

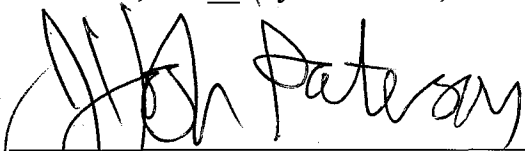
- (o) *Mission Institution v. Khela*, 2014 SCC 24;
- (p) *Canada (Attorney General) v. Whaling*, 2014 SCC 20;
- (q) *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62;
- (r) *Canada (Attorney General) v. Bedford*, 2013 SCC 72.
- (s) *R. v. Vu*, 2013 SCC 60;
- (t) *Wood et al. v. Schaeffer et al.*, 2013 SCC 71;
- (u) *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47;
- (v) *R. v. Pham*, 2013 SCC 15;
- (w) *R. v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43;
- (x) *R. v. Chehil*, 2013 SCC 49 and *R. v. Mackenzie*, 2013 SCC 50;
- (y) *R. v. Manning*, 2013 SCC 1;
- (z) *Agraira v. Minister of Public Safety and Emergency Preparedness*, 2013 SCC 36;
- (aa) *R. v. J.F.*, 2013 SCC 12;
- (bb) *Sriskandarajah v. United States*, 2012 SCC 70; *R. v. Khawaja*, 2012 SCC 69;
- (cc) *A.B. v. Bragg Communications*, 2012 SCC 46;
- (dd) *R. v. Davey*, 2012 SCC 75; *R. v. Cardoso*, 2012 SCC 73; *R. v. Yumnu*, 2012 SCC 73; *R. v. Duong*, 2012 SCC 73; and *R. v. Emms*, 2012 SCC 74;
- (ee) *R. v. Mabior*, 2012 SCC 47;
- (ff) *Attorney General (Canada) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45;

- (gg) *Penner v. Regional Municipality of Niagara Regional Police Services Board*, 2013 SCC 19;
- (hh) *R. v. Tse, et al.*, 2012 SCC 16;
- (ii) *R. v. Ladue*, 2012 SCC 13;
- (jj) *Les éditions Écosociété Inc., et al. v. Banro Corporation*, 2012 SCC 18;
- (kk) *Richard C. Breeden, et al. v. Conrad Black, et al.*, 2012 SCC 19;
- (ll) *PHS Community Services Society v. Canada (Attorney General) and Vancouver Area Network of Drug Users v. Canada (Attorney General)*, 2011 SCC 44;
- (mm) *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2;
- (nn) *R. v. Sinclair*, 2010 SCC 35; *R. v. McCrimmon*, 2010 SCC 36; and *R. v. Willier*, 2010 SCC 37;
- (oo) *R. v. Cornell*, 2010 SCC 31;
- (pp) *Vancouver (City) v. Ward*, 2010 SCC 27;
- (qq) *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23;
- (rr) *R. v. National Post*, 2010 SCC 16;
- (ss) *Canada (Prime Minister) v. Khadr*, 2010 SCC 3 and *Canada (Justice) v. Khadr*, 2008 SCC 28;
- (tt) *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31;
- (uu) *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19;
- (vv) *WIC Radio Ltd. v. Simpson*, 2008 SCC 40;


- (ww) *Charkaoui v Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9;
- (xx) *May v. Ferndale Institution*, 2005 SCC 82;
- (yy) *Reference re Same Sex Marriage*, 2004 SCC 79;
- (zz) *R. v. Malmo-Levine, R. v. Caine*, 2003 SCC 74, and *R. v. Clay*, 2003 SCC 75;
- (aaa) *Chamberlain et al. v. Surrey School District No. 36*, 2002 SCC 86;
- (bbb) *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68;
- (ccc) *Babcock v. Attorney General (Canada)*, 2002 SCC 57;
- (ddd) *R. v. O.N.E.*, 2001 SCC 77;
- (eee) *R. v. Sharpe*, 2001 SCC 2;
- (fff) *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31;
- (ggg) *Little Sisters Book and Art Emporium and the British Columbia Civil Liberties Association v. Minister of National Revenue and Minister of Justice*, 2000 SCC 69;
- (hhh) *R. v. Cuerrier*, [1998] 2 S.C.R. 371;
- (iii) *R. v. Butler*, [1992] 1 S.C.R. 452; and
- (jjj) *Reference Re Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158.

11. The BCCLA wishes to intervene in this case to preserve the availability of appropriate *Charter* remedies for individuals whose rights and freedoms guaranteed by the *Charter* have been infringed or denied, in accordance with the organization's commitment to civil liberties and constitutionally protected rights and freedoms.

AFFIRMED BEFORE ME at the City of)
Vancouver in the Province of British)
Columbia, this 6th day of October, 2015.)



A Commissioner for taking Affidavits for)
British Columbia)



Laura Track

Josh Paterson
Barrister & Solicitor - Executive Director
British Columbia Civil Liberties Association

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

JESSICA ERNST

Appellant
(Appellant)

and

ALBERTA ENERGY REGULATOR

Respondent
(Respondent)

and

ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF CANADA,
ATTORNEY GENERAL FOR SASKATCHEWAN and ATTORNEY GENERAL OF
QUEBEC

Interveners

MEMORANDUM OF ARGUMENT
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, APPLICANT
(Rules 47 and 55 of the *Rules of the Supreme Court of Canada*)

British Columbia Civil Liberties Association,
Applicant

Agent for the Applicant

Ryan D. W. Dalziel
Emily C. Lapper
Bull, Housser & Tupper LLP
1800 - 510 West Georgia Street
Vancouver, B.C. V6B 0M3
Tel: (604) 641-4881
Fax: (604) 646-2671
E-mail: rdd@bht.com

David P. Taylor
Power Law
1103 - 130 Albert Street
Ottawa, Ontario K1P 5G4
Tel: (613) 702-5563
Fax: (613) 702-5563
E-mail: dtaylor@powerlaw.ca

INDEX

PART I: STATEMENT OF FACTS	1
PART II: QUESTIONS IN ISSUE.....	3
PART III: ARGUMENT	3
A. <i>The BCCLA's Proposed Submissions</i>	4
B. <i>The Relevance of the Submissions to the Proceedings</i>	6
C. <i>The Submissions Will be Useful and Different</i>	6
PART IV: SUBMISSIONS REGARDING COSTS	7
PART V: ORDER SOUGHT	7
PART VI: TABLE OF AUTHORITIES	8
PART VII: STATUTORY PROVISIONS	9

PART I: STATEMENT OF FACTS

1. In this case, the Court of Appeal of Alberta held that a statutory provision limiting the liability of an administrative tribunal is a full answer to the claim of the appellant, Jessica Ernst, for damages pursuant to s. 24(1) of the *Charter*. The applicant, the British Columbia Civil Liberties Association (“BCCLA”), seeks leave to intervene to provide its distinctive perspective on the novel and complex constitutional and administrative law questions this case presents.

2. The controversy in this appeal stems from s. 43 of the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10 (now s. 27 of the *Responsible Energy Development Act*, S.A. 2012, C. R-17.3), which purported to preclude certain proceedings against the respondent’s predecessor, the Energy Resources Conservation Board. Ms. Ernst alleges the provision is constitutionally inapplicable or inoperable to the extent that it bars her claim against the regulator for a remedy under s. 24(1) of the *Charter*, arising from an alleged breach of s. 2(b) of the *Charter*. She asserts that the Legislature may not, through legislation, immunize government action from judicial oversight and sanction under s. 24(1).

3. The Court of Appeal disagreed, analogizing statutory immunity provisions like s. 43 to limitations laws, which it took this Court to have said may validly preclude claims for personal remedies under the *Charter* (at para. 26). The Court of Appeal was of the view that protecting administrative tribunals from liability is a constitutionally legitimate enterprise (at para. 29).

4. This appeal may therefore be said to engage questions about (1) a legislature’s power to limit or bar a claim under s. 24(1) of the *Charter*; (2) the availability of *Charter* damages in claims against an administrative tribunal; and (3) the interaction between legislative provisions affecting *Charter* claims for personal remedies, and the framework for determining “appropriate and just” remedies under s. 24(1). The BCCLA has both a direct interest in, and a distinctive perspective about, these questions.

A. *The BCCLA’s Interest in the Proceedings*

5. The affidavit of Laura Track, counsel with the BCCLA (behind Tab 2), sets out in detail the nature of the BCCLA’s interest in the proceedings, and its experience and expertise with

respect to civil liberties issues, including specifically civil liberties issues relating to *Charter* remedies. What follows is drawn from that affidavit.

6. Ms. Track deposes:

The BCCLA is a non-profit, non-partisan, unaffiliated advocacy group. It was incorporated in 1963 pursuant to the *British Columbia Society Act*. The objects of the BCCLA include the promotion, defence, sustainment and extension of civil liberties and human rights throughout British Columbia and Canada. [para. 3]

7. To that end, the BCCLA prepares position papers, engages in public education, assists individuals who complain about violations of their rights, and, most importantly for present purposes, takes legal action as a plaintiff or as an intervener (Track affidavit, para. 7). In this Court, the BCCLA has been granted intervener status in over 50 cases (or groups of cases) concerning civil liberties and human rights, making it one of the Court's most frequent non-governmental interveners (Track affidavit, para. 10).

8. The BCCLA's interest in these proceedings is linked to the BCCLA's basic commitment to the protection and advancement of the rights and freedoms enshrined in the *Charter*. As Ms. Track deposes:

The BCCLA has a direct interest in the availability of *Charter* remedies. This flows necessarily from the BCCLA's fundamental interest in the rights and freedoms enshrined in the *Charter*. Remedies are what make rights meaningful in practical terms, both for individuals and for governments alike. In the view of the BCCLA, the remedies available for infringement of *Charter* rights should always be sufficiently robust to meaningfully vindicate the right, and to deter similar government conduct in the future. In many instances, damages may be the most effective means of achieving those objectives; in other instances, damages may be the only means of doing so. [para. 8]

9. The statute books in B.C. and across the country contain provisions similar to s. 43, as Ms. Ernst demonstrated in her leave application, at p. 70, para. 31 of her argument. What is said by this Court about the immunity claimed by the regulator in the present case has the potential to

apply to all such provisions. In this way, the issues raised in this appeal may have a direct and wide-ranging impact on the interests that the BCCLA is mandated to protect.

10. In keeping with its direct interest in this area, the BCCLA was granted intervener status in *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28 (which set out a general framework governing the availability of damages under s. 24(1)), and *Henry v. British Columbia (Attorney General)*, 2015 SCC 24 (which considered the application of that framework in the specific context of prosecutorial misconduct) (Track affidavit, para. 9).

11. The perspective developed and the experience accumulated in those two interventions will help the BCCLA to assist the Court in the present case. This case likewise concerns the availability of *Charter* damages, but in this instance in the context of (1) a claim against an administrative tribunal, brought (2) in the face of a statutory provision purporting to limit the tribunal's liability. The BCCLA's perspective and experience may assist the Court in applying its existing jurisprudence to that distinctive and potentially complex context.

12. Accordingly, the BCCLA's mandate, goals, and activities give it a direct interest in the subject of this appeal. The BCCLA's execution of its mandate, and pursuit of its goals, will be impeded if it is not permitted to provide the Court with its perspective on the constitutional status of statutory immunity provisions, and on the appropriate impact such clauses may have on the court's analysis of the availability of *Charter* remedies.

PART II: QUESTIONS IN ISSUE

13. The issue raised by this motion is whether the BCCLA should be granted leave to intervene in this appeal.

PART III: ARGUMENT

14. Rule 57(2) requires an applicant such as the BCCLA to:

set out the submissions to be advanced by the person interested in the proceeding with respect to the questions on which they propose to intervene, their relevance to the proceeding and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties.

15. There are three elements to the sub-rule. The BCCLA must (1) set out its submissions with reference to the questions on which it proposes to intervene; (2) explain the relevance of those submissions to the proceeding; and (3) provide reasons to believe the submissions will be useful and different from those of the parties.

16. Each of those elements will be addressed in turn.

A. *The BCCLA's Proposed Submissions*

17. Ms. Ernst has framed the question in issue in narrow terms: whether s. 43 of the Alberta legislation is “constitutionally inapplicable or inoperable to the extent that it bars a claim against the regulator” for remedies under s. 24(1) (appellant’s factum, para. 41)? (The Chief Justice has stated a constitutional question in the same terms.) More broadly, Ms. Ernst says the question is, “can a statutory immunity clause bar any and all *Charter* claims for a personal remedy made pursuant to s. 24(1)” (para. 42)? However, as Ms. Ernst acknowledges later in her factum, this framing of the question does not completely communicate the issues on appeal. Also in play are, *inter alia*, the analogy, or lack thereof, between statutory immunity provisions and limitation periods (paras. 70-74); the significance of statutory immunity clauses to the “good governance” element of the *Ward* test (paras. 75-82); the exclusivity of court jurisdiction in respect of *Charter* remedies (paras. 91-97); and whether the regulator in this case was acting in a quasi-judicial or adjudicative capacity, and the significance of such categorizations to the availability of damages (paras. 103-105).

18. The BCCLA will address the constitutional question stated by the Chief Justice, as well as a number of the other facets of the problem this case presents. Four points are likely to be central to the BCCLA’s submissions.

19. First, with respect to the constitutional question, the BCCLA says Parliament and the Legislatures are incapable of derogating from the constitutional right of access (*per* s. 24(1)) to a “court of competent jurisdiction” to obtain the remedies the court considers “appropriate and just”. The BCCLA will argue that to understand the constitutional limits on the application of statutory immunity provisions, the closest comparator is not limitation statutes; rather, it is privative clauses. Privative clauses, like statutory immunity provisions, purport to preclude

access to court, and, insofar as they oust a judicial function that is constitutionally vested in the court, are inoperative according to this Court's reasoning in *Crevier v. A.G. (Québec) et al.*, [1981] 2 S.C.R. 220.

20. Second, with respect to the *Ward* framework for damages, the BCCLA's submissions will consider the acceptable role and function of statutory provisions in the court's analysis under s. 24(1), with particular reference to the "good governance" element of that analysis. Under the framework established by this Court in *Mackin v New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405, and *Ward*, applicable statutory provisions are germane to the court's assessment of what is "appropriate and just". In *Mackin*, for instance, this Court held that actions pursuant to statute will not be the subject of *Charter* damages claims absent conduct that is clearly wrong, in bad faith, or an abuse of power (at para. 79; and see *Ward*, at para. 39). The BCCLA will explain why statutory immunity provisions like s. 43, which confer *blanket* immunity for actions of a regulator taken pursuant to statute, ought not generally to affect the court's determination of what would otherwise be "appropriate and just".

21. The BCCLA will also address the related question of the role of limitation periods in the s. 24(1) analysis. *Ravndahl v. Saskatchewan*, 2009 SCC 7, [2009] 1 S.C.R. 181, loomed large in the Court of Appeal's reasoning, as it was taken as authority for the proposition that the Legislature could limit personal *Charter* claims (at para. 26). There are two points in this regard. First, the BCCLA will explain why limitation periods could theoretically be regarded, at least in some circumstances, as defining what is "appropriate and just". Second, the BCCLA will show that this Court has in fact never held that limitation periods extinguish *Charter* damages claims, and that the reasoning of the Alberta courts was to at least some extent based on a misreading of *Ravndahl*.

22. Finally, with respect to the capacity in which this regulator acted, it is notable that the defendant here is an administrative tribunal, and potentially, there is a corresponding need to ensure the decision-making of such bodies remains independent and is not impeded by threats of damages claims, under the *Charter* or otherwise. The BCCLA will address the application of *Mackin*, *Ward*, and *Henry* in the administrative law context in particular, explaining why the

Mackin rule provides sufficient protection for the work carried out by decision-makers such as the regulator in the present case, when acting as such.

23. All of that said, the above description of the BCCLA's proposed submissions must remain subject to review and consideration of the factum to be filed by the respondent regulator, which will no doubt play a role in shaping the issues before the Court.

B. *The Relevance of the Submissions to the Proceedings*

24. The BCCLA's submissions are directly relevant to this appeal. The submissions will speak to the issues raised in the appeal, but without widening the debate to encompass matters that are not specifically germane to these parties' dispute.

C. *The Submissions Will be Useful and Different*

25. Although the BCCLA generally supports the position taken by Ms. Ernst, the content of the BCCLA's analysis will strive to avoid duplication of the points made in the appellant's factum, and to assist the Court by providing the BCCLA's wider perspective on s. 24(1) of the *Charter*.

26. The BCCLA's proposed argument is analytically distinct from the approach taken in the appellant's factum, and involves a number of unique elements. Four such elements may be highlighted here.

27. The first is the analogy proposed by the BCCLA above, between statutory immunity provisions and privative clauses. The BCCLA's discussion of *Crevier* will be distinctive.

28. Second, BCCLA's submissions will look beyond the specific context of statutory immunity, to consider more broadly and at the level of principle the role of statutory provisions in the *Ward* framework, in light of the *Mackin* decision in particular. The BCCLA's discussion of *Mackin*'s implications will be distinctive.

29. Third, unlike Ms. Ernst, the BCCLA does not accept the lower courts' premise that it is necessarily constitutionally legitimate to constrain *Charter* claims by way of limitation periods. The BCCLA's discussion of *Ravndahl* will be distinctive.

30. Fourth, the BCCLA will address the application of *Mackin* and *Ward* to administrative tribunals, in a manner going beyond Ms. Ernst's argument that this case does not involve quasi-judicial conduct. The BCCLA's discussion of the interplay among s. 24(1), administrative law principles, and the *Mackin* rule, will be distinctive.

31. In addition, because the BCCLA has no direct interest in the outcome of this specific case, it possesses a certain impartiality that may help to differentiate its submissions from those of Ms. Ernst.

32. The BCCLA's submissions will be useful not merely for their distinctiveness, but also because of the expertise and experience in civil liberties litigation that the BCCLA can bring to bear on the issues on this case. The BCCLA's submissions will be useful because they will provide a different perspective on the questions before the Court, from an intervener with a proven track record that includes cases dealing with the interpretation and application of s. 24(1) of the *Charter*, and the availability of *Charter* remedies more generally.

33. Finally, the BCCLA's perspective will of course be different from that of the Alberta Energy Regulator, with whom it is opposed on the constitutional question raised in this appeal, if not also on the subsidiary issues discussed above.

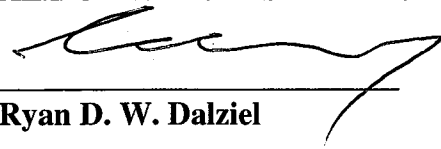
PART IV: SUBMISSIONS REGARDING COSTS

34. In accordance with this Court's usual practice, all parties should bear their own costs of this application. If leave to intervene is granted, the BCCLA will seek no order as to costs, and will ask that no award of costs be made against it.

PART V: ORDER SOUGHT

35. The BCCLA seeks an order granting it intervener status in this appeal, including the right to file a single factum not exceeding 10 pages in length, and the right to make oral argument at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 7th day of October, 2015.


Ryan D. W. Dalziel


Emily C. Lapper

PART VI: TABLE OF AUTHORITIES

CASE	PARAS. CITED
<i>Crevier v. A.G. (Québec) et al.</i> , [1981] 2 S.C.R. 220	19, 27
<i>Henry v. British Columbia (Attorney General)</i> , 2015 SCC 24	10, 22
<i>Mackin v. New Brunswick (Minister of Finance)</i> , 2002 SCC 13, [2002] 1 S.C.R. 405	20, 22, 28, 30
<i>Ravndahl v. Saskatchewan</i> , 2009 SCC 7, [2009] 1 S.C.R. 181	21, 29
<i>Vancouver (City) v. Ward</i> , 2010 SCC 27, [2010] 2 S.C.R. 28	10, 20, 22, 28, 30
STATUTES	
<i>Energy Resources Conservation Act</i> , R.S.A. 2000, c. E-10	2
<i>Responsible Energy Development Act</i> , S.A. 2012, C. R-17.3	2

PART VII: STATUTORY PROVISIONS

Canadian Charter of 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.

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.

Energy Resources Conservation Act, R.S.A. 2000, c. E-10

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.

Responsible Energy Development Act, S.A. 2012, C. R-17.3

Protection from action

27 No action or proceeding may be brought against the Regulator, a director, a hearing commissioner, an officer or an employee of the Regulator, or a person engaged by the Regulator, in respect of any act or thing done or omitted to be done in good faith under this Act or any other enactment.