

Nelligan

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

BETWEEN:

JESSICA ERNST

APPELLANT

AND

ALBERTA ENERGY REGULATOR

RESPONDENT

AND

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(Rule 42 of the *Rules of the Supreme Court of Canada*)**

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PART I: OVERVIEW

1. Section 43 of the *Energy Resources Conservation Act* (the “ERCA”) purports to bar *all* actions or proceedings brought against the Alberta Energy Regulator (the “AER”), including claims for a remedy made pursuant to s. 24(1) of the *Charter*. It would be contrary to longstanding common law traditions and well-established principles of constitutional law to allow government bodies enabled by statutes with similar general immunity provisions to claim this absolute immunity from *Charter* liability. These bodies often exercise complex and overlapping functions. Accordingly, it is in the public interest to ensure that the government cannot simply insulate itself from the *Charter* through the mere stroke of a legislative pen.

2. Allowing a statutory provision to grant absolute immunity would be an unwarranted expansion of this Honourable Court’s reasoning in *Mackin*¹ and *Henry*². Such an interpretation would also be anomalous given that only qualified immunity is available at common law, even in circumstances where there are much stronger policy justifications for granting immunity than there are here.

3. It is the courts’ inherent jurisdiction to determine appropriate and just remedies under s. 24(1) of the *Charter*, not the government’s. *Charter* damages are a unique public remedy, driven by the objectives of compensation, vindication and deterrence. Judicial review alone is incapable of meaningfully addressing the harms resulting from the breach of a *Charter* right. Moreover, good governance concerns do not justify the enactment of statutory immunity provisions to insulate government bodies from *Charter* claims; these concerns are more appropriately addressed through the framework set out by this Court in *Ward*.³ General immunity provisions cannot pre-empt the courts’ determination of a *Charter* claim on its merits.

PART II: THE ASPER CENTRE’S POSITION ON THE QUESTION IN ISSUE

4. The Asper Centre submits that s. 43 of the *ERCA* is constitutionally inapplicable or inoperable to the extent that it bars a claim against the AER for a breach of s. 2(b) of the *Charter*

¹ *Mackin v New Brunswick (Minister of Finance)*, [2002] 1 SCR 405 [*Mackin*].

² *Henry v British Columbia (Attorney General)*, [2015] 2 SCR 214 [*Henry*].

³ *Vancouver (City) v Ward*, [2010] 2 SCR 28 [*Ward* 1].

and an application for a remedy under s. 24(1) of the *Charter*. It takes no position on the ultimate disposition of the appeal.

PART III: STATEMENT OF ARGUMENT

5. Subsection 24(1) of the *Charter* confers the widest possible discretion on a court to craft remedies for violations of *Charter* rights. For the reasons that follow, the government cannot be permitted to rely on a statutory immunity clause to shield itself from *Charter* claims altogether and prevent courts from exercising their discretion under s. 24(1):

- A. Absolute immunity from *Charter* liability is not available at common law.
- B. Section 33 of the *Charter* illustrates that the *Charter* will tolerate only limited immunity for government.
- C. Allowing statutory immunity provisions to bar *Charter* claims undermines public accountability and effectively usurps the courts' role.

A. ABSOLUTE IMMUNITY FROM CHARTER LIABILITY IS NOT AVAILABLE AT COMMON LAW

6. It would be an anomaly if statutory immunity provisions like s. 43 of the *ERCA* were interpreted as absolute bars to *Charter* claims because this would provide the government with even greater immunity from *Charter* liability than the limited protection currently available to it at common law.

(i) This Court Has Taken a Nuanced and Qualified Approach to Immunity

7. This Court has steered away from absolute immunity and taken a nuanced and qualified approach that is absent in the legislation at issue. As articulated in *Henry*, the courts must attain a “reasonable balance” between respect for the serious policy issues that may justify extending immunity, and the importance of remedying rights violations.⁴ Interpreting s. 43 of the *ERCA* as an absolute bar to claims for *Charter* remedies would upset that balance by placing undue weight on policy factors favouring the government while ignoring the claimant’s rights entirely.

⁴ *Supra* note 2 at para 81.

8. Applying this “qualified” approach to immunity in the criminal context, this Court’s decision in *Henry*⁵ illustrates that the common law provides the government with only limited protection from claims for *Charter* damages. In *Henry*, this Court addressed the Crown’s liability under the *Charter* for wrongful non-disclosure in criminal prosecutions.⁶ It held that although the claimant must overcome a “high threshold” to make out a successful *Charter* damages claim, the claim is not barred absolutely.⁷ The effect of this threshold is to provide some protection to the Crown in fulfilling its prosecutorial function. However, the Crown’s conduct is still subject to a degree of *Charter* scrutiny.

9. The courts’ preference for granting only limited immunity to the government is not unique to the *Charter* context. In *Mackin*, this Honourable Court ruled that damages may be awarded for harm suffered as a result of state action under a law that is subsequently declared to be unconstitutional if the state’s conduct was “clearly wrong, in bad faith or an abuse of power.”⁸ Accordingly, public officials enjoy only limited protection from liability for damages, and claimants are not completely barred from bringing an action or proceeding.

10. Furthermore, as *Taylor*⁹ indicates, even judicial independence has its own constraints. In *Taylor*, the Federal Court of Appeal considered an application for judicial review of the Canadian Human Rights Commission’s decision not to deal with a complaint against a judge.¹⁰ Its decision was based on the common law principle of absolute immunity for judges.¹¹ The Court recognized a narrow “bad faith” exception to judicial immunity where it is shown that a judge knowingly acts beyond his or her jurisdiction.¹² Moreover, it ultimately disagreed with the proposition that placing a limit on judicial immunity would “open the flood-gates to vexatious claims.”¹³

11. Additionally, judges face disciplinary proceedings and potential removal from the bench where their conduct is so “manifestly and totally contrary to the impartiality of the judiciary that the confidence of individuals appearing before the judge, or of the public in the justice system,

⁵ *Supra* note 2.

⁶ *Ibid* at para 31.

⁷ *Ibid*.

⁸ *Supra* note 1 at para 78.

⁹ *Taylor v Canada (Attorney General) (CA)*, [2000] 3 FCR 298 [*Taylor* 1].

¹⁰ *Ibid* at paras 20-21.

¹¹ *Ibid* at para 21.

¹² *Ibid* at para 41.

¹³ *Ibid* at paras 64-66.

would be undermined....”¹⁴ Such conduct renders the judge “incapable of performing the duties of his [or her] office”.¹⁵ Although protections for judges are an essential feature of our constitutional system, *Taylor*¹⁶ demonstrates that even judicial immunity must be limited to preserve the integrity of the judiciary.

12. While the respondent points to *Henry*¹⁷, *Mackin*¹⁸ and *Taylor*¹⁹ as evidence of circumstances in which immunity has been granted, the immunity illustrated by these cases is limited rather than absolute. Furthermore, the Respondent’s reliance on *Taylor* is misplaced, as the Appellant’s claim does not pertain to the AER’s adjudicative function.

(ii) Compelling Policy Considerations Justifying Immunity are Absent

13. The courts have carefully limited not only *how much* immunity is awarded to the government in any given circumstance, but also *when* this qualified immunity should be granted. The common law has only granted immunity from the *Charter* in very narrow circumstances where there are compelling policy reasons for doing so. Writing for the majority in *Henry*, Moldaver J. (Abella, Wagner and Gascon JJ., concurring) emphasized that there are real concerns that militate in favour of circumscribing the availability of *Charter* damages in the context of prosecutorial misconduct.²⁰ In particular, providing the Crown with too little protection in carrying out its prosecutorial duty of disclosure would have “adverse consequences for the administration of justice”.²¹ Prosecutors would become more defensive in their decision-making, “motivated by fear of civil liability, rather than their sworn duty to fairly and effectively prosecute crime.”²²

14. Moreover, judicial independence raises one of the strongest justifications for immunity. It allows judges to perform their duty with “complete independence and free from fear” for the “benefit of the public.”²³ The Court in *Taylor* concluded that judicial immunity “is not

¹⁴ *Taylor v Canada (Attorney General) (CA)*, 2003 FCA 55 at para 63 [*Taylor 2*].

¹⁵ *Ibid.*

¹⁶ *Taylor 1*, *supra* note 9; *Taylor 2*, *supra* note 14.

¹⁷ *Supra* note 2.

¹⁸ *Supra* note 1.

¹⁹ *Taylor 1*, *supra* note 9; *Taylor 2*, *supra* note 14.

²⁰ *Supra* note 2 at para 41.

²¹ *Ibid* at para 39.

²² *Ibid* at para 40.

²³ *Taylor 1*, *supra* note 9 at para 29.

inconsistent with the *Charter*, since judicial immunity itself is a fundamental constitutional principle.”²⁴ Yet, even here it is clear that an exception to immunity must be recognized.

15. Any policy reasons for affording immunity to statutory bodies such as the AER would not be as compelling. The AER is a government entity responsible for, among other things, regulating the oil and gas industry in Alberta and responding to public complaints in relation to that industry.²⁵ There is no indication that exposing the AER and other statutory bodies like it to *Charter* scrutiny would substantially impede their ability to fulfill their functions in the same way that subjecting Crown prosecutors or judges to scrutiny would undermine their efforts to uphold the integrity of the justice system.

16. Furthermore, the Court’s decision in *Henry* to create a high threshold for claims for *Charter* damages reflects the criminal context in which it was situated. In criminal cases, the Crown’s conduct is scrutinized by the *Charter* at several points in the process. The accused’s legal rights under ss. 7 to 14 of the *Charter* are a prominent feature of the criminal justice system and protect the accused in a number of ways, including through instructions to the jury or the exclusion of evidence. Even if a claim for *Charter* damages for wrongful non-disclosure was barred absolutely, a wide range of other *Charter* protections would still be available. In contrast, there would be no *Charter* protections available to participants in the AER’s processes if s. 43 of the *ERCA* functioned as an absolute bar to *Charter* claims. Accordingly, since absolute immunity for Crown prosecutors was rejected in a context where numerous other *Charter* protections were available, the complete absence of other protections in this case suggests that the AER should not be granted immunity.

(iii) This Court Has Held that Statutory Bodies Should Not Be Shielded from Charter Liability

17. This Honourable Court has already presented compelling reasons for *not* immunizing statutory bodies from the *Charter*. In *Blencoe*, this Court found that “bodies exercising statutory authority are bound by the *Charter* even though they may be independent of government.”²⁶ The underlying reasoning was that if statutory bodies could be insulated from the *Charter*, then the

²⁴ *Taylor 1*, *supra* note 9 at para 57.

²⁵ Statement of Claim at para 27 [Appellant’s Record, Tab 5 at 65-66].

²⁶ *Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307 at para 35 [*Blencoe*].

legislature could avoid the *Charter*'s constraints by establishing statutory bodies to fulfill government functions.²⁷

18. In *Godbout*, La Forest J. expressed concern that allowing the government to escape the *Charter* in this way would "indirectly narrow the ambit of protection afforded the *Charter* in a manner that could hardly have been intended and with consequences that are, to say the least, undesirable."²⁸ A government's attempt to restrict access to appropriate and just remedies by granting itself immunity from *Charter* claims should not be given greater effect than the limitations on immunity already imposed by this Court.

19. There are compelling reasons why the government should not be able to grant itself greater immunity than what the common law provides. The *Charter* is a check on government power. It is the courts that have the ultimate jurisdiction to determine how far the *Charter* can go in constraining government action. Not only are *Charter* rights constitutionally entrenched, which prevents the government from legislating away these protections at whim, but it would defeat the purpose of having limitations on government if government were allowed to narrow the scope of those limitations beyond what the courts have permitted. The sanctity of *Charter* rights is frustrated if the very institution from which the *Charter* provides protection is given the leeway to undermine those protections.

B. SECTION 33 OF THE CHARTER ILLUSTRATES THAT THE CHARTER WILL TOLERATE ONLY LIMITED IMMUNITY FOR GOVERNMENT

20. Section 33 of the *Charter* grants government the power to legislatively shield itself from certain *Charter* rights and freedoms. However, section 33 provides only a qualified immunity.

21. Section 33 illustrates that the *Charter* can tolerate only minimal – *not* absolute – protection for government. First, the immunity provided by s. 33 takes effect when the legislature "expressly declares" that it will be acting notwithstanding the *Charter*. This Court should be wary of the government's reliance on a legislative provision to immunize itself from the *Charter* when that provision does not expressly declare that this is the intended effect. Second, the immunity provided by a declaration of immunity under s. 33 continues for a period

²⁷ *Blencoe*, *supra* note 26 at para 40.

²⁸ *Godbout v Longueuil (City)*, [1997] 3 SCR 844 at para 48 [*Godbout*].

of only five years, after which the declaration can be renewed. To the extent that a statutory immunity provision is the government's attempt to shield itself *indefinitely* without the need for subsequent re-enactment, this runs contrary to the temporal limitation on immunity contemplated by s. 33. Third, s. 33 applies to only sections 2 and 7 to 15. It does not extend to s. 24(1). Accordingly, the immunity that s. 33 provides does not oust the jurisdiction of courts to provide remedies or limit the range of remedies available.

22. Section 33's limited scope is the standard against which government's other attempts to claim immunity should be measured. Government cannot rely on a general immunity provision to grant itself absolute protection when the *Charter* contemplates only limited protection.

C. ALLOWING STATUTORY IMMUNITY PROVISIONS TO BAR CHARTER CLAIMS UNDERMINES PUBLIC ACCOUNTABILITY AND EFFECTIVELY USURPS THE COURTS' ROLE

(i) Public Accountability Would Be Undermined

23. A grant of absolute immunity would undermine public confidence in government bodies, which are mandated to act in the public interest. Accountability, public confidence and the public interest are at risk when government bodies with broad mandates and operational, administrative and quasi-judicial functions can restrict members of the public from pursuing valid *Charter* claims. Contrary to what the respondent suggests, it would be improper to grant a government body with administrative and operational functions – which bring it into frequent and close communication with members of the public – absolute immunity simply because it also has a quasi-judicial decision-making role.²⁹

24. In *Ward*, this Court considered the object of vindication underlying an award of *Charter* damages.³⁰ It adopted the idea that “violations of constitutionally protected rights harm not only their particular victims, but society as a whole.”³¹ This is because they “impair public confidence and diminish public faith in the efficacy of constitutional protection.”³² Preventing recourse to the *Charter* for these violations further impairs public confidence and public faith.

²⁹ Respondent's Factum at para 56.

³⁰ *Ward* 1, *supra* note 3 at para 28.

³¹ *Ibid.*

³² *Ibid.*

25. Despite the respondent's claims, there is no distinction in law between a "personal monetary remedy" and a "general remedy which restores the constitutional order".³³ The respondent conflates private law and public law remedies by attempting to equate the nature of the appellant's claim with a tort action for damages. While s. 24(1) of the *Charter* provides a personal remedy, it is distinctly public in nature and addresses public liability: "The nature of the remedy is to require the state (or society writ large) to compensate an individual for breaches of the individual's constitutional rights. An action for public law damages – including constitutional damages – lies against the state and not against individual actors."³⁴

26. Furthermore, the plain meaning of s. 43 of the *ERCA* must be taken into account to understand the extent of its reach. It purports to bar *all* actions and proceedings, not only claims for damages. The consequences of allowing absolute immunity are also far-reaching in terms of the types of rights that could be potentially involved. *Charter* claims that arise out of interactions with regulatory bodies could easily engage not only s. 2(b) freedom of expression rights, but also s. 7 rights to life, liberty and security of the person, or s. 15 equality rights.

27. This Court must consider the effect of granting absolute immunity through general statutory provisions, many of which are found in provincial statutes across Canada. Various government bodies that owe duties to the public and that are responsible for a vast array of functions could potentially be insulated from any valid *Charter* claim. For instance, immunity provisions are often found in correctional services legislation. Subsection 58(1) of Manitoba's *The Correctional Services Act* provides:

No action lies against the government, the minister or the commissioner [...] for anything done or omitted to be done in good faith in the administration of this Act or in the discharge of any powers or duties that under this Act are intended or authorized to be executed or performed.

Although a small exception for bad faith conduct is provided in this case, unlike under the *ERCA*, this legislation reveals how the application of statutory immunity clauses to the *Charter* could allow the government as a whole to be immunized from *Charter* liability at the expense of persons in custody whose *Charter* rights are potentially engaged.

³³ Respondent's Factum at para 1.

³⁴ *Ward 1*, *supra* note 3 at para 22.

28. *Ward*³⁵ is illustrative of the importance of holding government to account, even when individuals acting in good faith are protected from liability. Mr. Ward brought an action against the City, the Province and individual police and corrections officers for his arrest, detention strip search and car seizure.³⁶ The individual officers were shielded from tort liability by s. 21 of British Columbia's *Police Act* because their actions did not amount to wilful misconduct, and were not malicious or in bad faith.³⁷ However, the Province and the City were still liable for breach of Mr. Ward's s. 8 *Charter* rights, and damages were awarded against the Province.³⁸ It is appropriate for s. 43 of the *ERCA* to protect individuals who are acting in good faith from private liability, but it would be unwarranted for it to provide absolute immunity to government bodies.

29. Accountability requires that government should face the consequences when its conduct violates rights that are protected by the *Charter*. By allowing governments to completely avoid *Charter* claims through the implementation of a statutory provision, governments would no longer have to adjust their rights-violating behaviour, and accountability to the public would be critically undermined.

(ii) The Government Would Be Permitted to Intrude Upon the Courts' Jurisdiction Under Subsection 24(1) of the Charter

30. In *Ward*, this Court established how the government's liability for *Charter* damages would be determined.³⁹ After the claimant has established that *Charter* damages would be an appropriate and just remedy, the third branch of the *Ward* framework gives the government the opportunity to demonstrate that a damage award would be inappropriate or unjust by pointing to countervailing factors, including good governance concerns.⁴⁰

31. By using s. 43 of the *ERCA* to pre-emptively bar *Charter* claims, the Alberta government has avoided its obligation under the *Ward* analysis to present good governance concerns that can support the withholding of a damages award. This Court should be cautious about accepting the government's attempts to pre-empt an analysis of what would justify granting it protection.

³⁵ *Ward* 1, *supra* note 3.

³⁶ *Ibid* at para 10.

³⁷ *Ward v City of Vancouver*, 2007 BCSC 3 (CanLII) at paras 97, 104 [*Ward* 2].

³⁸ *Ward* 1, *supra* note 3 at para 79.

³⁹ *Ward* 1, *supra* note 3.

⁴⁰ *Ibid* at para 4.

32. It is ultimately the courts, *not* the government, that are responsible for determining whether damages are an appropriate and just remedy under s. 24(1) of the *Charter*. The *Ward* analysis confirms that government's role in the process of finding appropriate and just remedies is limited. It can point to reasons for withholding *Charter* damages, but does not have the jurisdiction to make the final determination or bar them outright.

33. Section 43 of the *ERCA* is an attempt to displace the courts' constitutionally guaranteed jurisdiction under s. 24(1) of the *Charter*, substituting a legislative decision for what should be a judicial decision about whether damages are an appropriate and just remedy. The courts below recognized that the appellant's *Charter* claim makes out a valid cause of action. The determination of an appropriate and just remedy is called for after such a case is heard on its merits. It should not be determined in advance by legislative fiat.


34. Remedies cannot be illusory. For rights to be meaningful, violations of rights must be capable of being remedied. In *Dunedin*, this Honourable Court stated that "a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach."⁴¹ An individual who has had a violation of his or her *Charter* rights must be allowed access to an effective remedy. The government should not be empowered to interfere with that process.

PARTS IV AND V: COSTS AND ORDER REQUESTED

35. The Asper Centre seeks no costs, and requests that none be awarded against it.

36. The Asper Centre respectfully requests that it be granted ten (10) minutes to provide oral submissions to this Court.

All of which is respectfully submitted this 22nd day of December, 2015.


 Per Raj Anand and Cheryl Milne
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PART VI: TABLE OF AUTHORITIES

⁴¹ *R v 974649 Ontario Inc*, [2001] 3 SCR 575 at para 20 [*Dunedin*].

Jurisprudence	Paragraph(s)
<i>Blencoe v British Columbia (Human Rights Commission)</i> , [2000] 2 SCR 307 http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1808/index.do	17
<i>Godbout v Longueuil (City)</i> , [1997] 3 SCR 844 http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1560/index.do	18
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PART VII: LEGISLATION CITED

Canadian Charter of Rights and Freedoms, Part I of The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

GUARANTEE OF RIGHTS AND FREEDOMS

Rights and freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[...]

ENFORCEMENT

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.

[...]

APPLICATION OF CHARTER

Exception where express declaration

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

GARANTIE DES DROITS ET LIBERTÉS

Droits et libertés au Canada

1. La Charte canadienne des droits et libertés garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

[...]

RECOURS

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.

[...]

APPLICATION DE LA CHARTE

Dérogation par déclaration expresse

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

Operation of exception

- (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

Five year limitation

- (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

Re-enactment

- (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

Five year limitation

- (5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Effet de la dérogation

- (2) La loi ou la disposition qui fait l'objet d'une déclaration conforme au présent article et en vigueur a l'effet qu'elle aurait sauf la disposition en cause de la charte.

Durée de validité

- (3) La déclaration visée au paragraphe (1) cesse d'avoir effet à la date qui y est précisée ou, au plus tard, cinq ans après son entrée en vigueur.

Nouvelle adoption

- (4) Le Parlement ou une législature peut adopter de nouveau une déclaration visée au paragraphe (1).

Durée de validité

- (5) Le paragraphe (3) s'applique à toute déclaration adoptée sous le régime du paragraphe (4).

ENERGY RESOURCES CONSERVATION ACT, RSA 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.

THE CORRECTIONAL SERVICES ACT, CCSM c C230.**No liability**

58. (1) No action lies against the government, the minister or the commissioner [...] for anything done or omitted to be done in good faith in the administration of this Act or in the discharge of any powers or duties that under this Act are intended or authorized to be executed or performed.

THE POLICE ACT, RSBC 1996, c 367.

Personal Liability

21. (2) No action for damages lies against a police officer or any other person appointed under this Act for anything said or done or omitted to be said or done by him or her in the performance or intended performance of his or her duty or in the exercise of his or her power or for any alleged neglect or default in the performance or intended performance of his or her duty or exercise of his or her power.

(3) Subsection (2) does not provide a defence if

- (a) the police officer or other person appointed under this Act has, in relation to the conduct that is the subject matter of action, been guilty of dishonesty, gross negligence or malicious or wilful misconduct, or
- (b) the cause of action is libel or slander.