

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

BETWEEN:

JESSICA ERNST

Appellant

- and -

ALBERTA ENERGY REGULATOR

Respondent

**MEMORANDUM OF ARGUMENT OF THE INTERVENER,
CANADIAN CIVIL LIBERTIES ASSOCIATION
(Rules 37 and 42 of the Rules of the Supreme Court of Canada)**

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PART I – OVERVIEW OF THE CCLA’S POSITION

1. The Canadian Civil Liberties Association (“CCLA”) intervenes in this Appeal to argue that the constitutional entitlement to a remedy for a breach of the *Canadian Charter of Rights and Freedoms* (“*Charter*”) cannot be ousted by a general statutory immunity clause. The interpretation made by the courts below is contrary to our system of constitutional supremacy and to long-standing jurisprudence of this Honourable Court.
2. Section 52 of the *Constitution Act, 1982* provides that “[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect”.¹ Section 32(1)(b) of the *Charter* provides that the *Charter* applies “to the legislature and government of each province in respect of all matters within the authority of the legislature of each province”.² Taken together, the two provisions mean that a province lacks the authority to enact legislation that runs counter to, or conflicts with, the *Charter*.
3. In this case, the courts below have interpreted and applied section 43 of the *Alberta Energy Resources Conservation Act*³ (“Section 43”) to prevent the Appellant from seeking to vindicate her rights under section 2(b) of the *Charter* by pursuing a properly pleaded claim that the Respondent breached those rights. Section 43 cannot be construed or applied in that manner.
4. Under section 24(1) of the *Charter*⁴, a court of competent jurisdiction has the power to order an appropriate and just remedy for the breach of an individual’s *Charter* rights, including

¹ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, (U.K.) 1982, c.11.

² *Canadian Charter of Rights and Freedoms*, s. 32(1)(b), Part I of the *Constitution Act, 1982*.

³ R.S.A. 2000, c E-10.

⁴ *Canadian Charter of Rights and Freedoms*, s. 24(1), Part I of the *Constitution Act, 1982*.

the authority to award monetary damages where necessary. That remedial power creates a constitutional entitlement that cannot be undermined or ousted by statute.

5. The courts below concluded that the Appellant had pleaded a tenable claim that the provincial regulator breached her rights under section 2(b), but dismissed her *Charter* claim on the ground that the remedy she was seeking was barred by Section 43. That ruling is inconsistent with this Court's cases holding that there must be an effective remedy for any *Charter* breach.

6. The courts below also failed to follow the framework devised by this Court in *Vancouver (City) v. Ward* ("Ward"). Under *Ward*, a plaintiff who pleads a viable claim that her *Charter* rights have been breached is entitled to proceed to discovery. Considerations of good governance, such as concerns that awards of monetary damages against the government may impede governmental functions, relate to what remedy is appropriate and just, not to whether a *Charter* breach has taken place. Those considerations should be addressed on a fully developed factual record after the plaintiff has established a breach, not at the pleadings stage.

PART II – CCLA'S POSITION ON THE QUESTIONS AT ISSUE

7. The CCLA maintains that Section 43 cannot be interpreted or applied to bar a claim against the provincial regulator for breaching the Appellant's rights under section 2(b) of the *Charter* or to bar the Appellant from seeking an appropriate and just remedy for that breach under section 24(1) of the *Charter*. The CCLA accordingly submits that the constitutional question posed in this appeal should be answered in the affirmative.

PART III – ARGUMENT

A Statute Cannot Bar A Claim For An “Appropriate and Just” *Charter* Remedy

8. A statutory provision cannot be interpreted or applied to immunize a province from a claim seeking a remedy for a breach of an individual’s *Charter* rights. If it could be, a province would be free to insulate itself from any consequences for breaching individuals’ *Charter* rights. That would fundamentally undermine the purpose of the *Charter*, which is to protect the rights and liberties of individuals from infringement by government action.⁵ Section 43 must be interpreted or read down so as not to apply to a claim for a breach of the Appellant’s rights under the *Charter*, including a claim for an appropriate and just remedy under section 24(1).

9. From the early days of the *Charter*, this Court has recognised that section 24(1) is framed in the broadest of terms. In *Mills v. The Queen*, McIntyre J. underscored the expansive range of remedies at a court’s disposal under section 24(1):

What remedies are available when an application under s. 24(1) of the Charter succeeds? Section 24(1) again is silent on the question. It merely provides that the appellant may obtain such remedy as the court considers “appropriate and just in the circumstances”. It is difficult to imagine language which could give the court a wider and less fettered discretion. It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion.⁶

10. Sections 24(1), 32(1)(b) and 52(1) of the *Charter* – as interpreted in prior decisions of this Court – establish that a provincial legislature may not grant itself absolute immunity from a claim for a breach of an individual’s *Charter* rights, including a claim under section 24(1) for a

⁵ *Hunter v. Southam*, [1984] 2 S.C.R. 145, at 155-156, CCLA Book of Authorities (“Authorities”), Tab 1.

⁶ *Mills v. The Queen*, [1986] 1 S.C.R. 863 at 965, Authorities, Tab 2.

remedy for such a breach. In *Nelles v. Ontario* (“*Nelles*”), Lamer J. found that a grant of absolute Crown immunity “is not justified in the interests of public policy”⁷, writing as follows:

Granting an absolute immunity ... is akin to granting a license to subvert individual rights. Not only does absolute immunity negate a private right of action, but in addition, it seems to me, it may be that it would effectively bar the seeking of a remedy pursuant to s. 24(1) of the *Charter*. ... When a person can demonstrate that one of his *Charter* rights has been infringed, access to a court of competent jurisdiction to seek a remedy is essential for the vindication of a constitutional wrong.⁸

11. Lamer J.’s reasons in *Nelles* were subsequently invoked by the Ontario Court of Appeal in support of the proposition that:

... a statutory enactment cannot stand in the way of a constitutional entitlement. Section 32(1)(b) of the *Charter* provides that the *Charter* applies to the legislature and government of each province. The remedy section of the *Charter* would be emasculated if the provincial government, as one of the very powers the *Charter* seeks to control, could declare itself immune.⁹

12. Likewise, in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, this Court held that section 24(1) affords judicial discretion to fashion remedies for *Charter* breaches that are appropriate and just in the circumstances, free from any statutory restrictions:

The power of the superior courts under s. 24(1) to make appropriate and just orders to remedy infringements or denials of *Charter* rights is part of the supreme law of Canada. It follows that this remedial power cannot be strictly limited by statutes or rules of the common law.¹⁰ [Emphasis added.]

⁷ *Nelles v. Ontario*, [1989] 2 S.C.R. 170 (“*Nelles*”) at 199, Authorities, Tab 3.

⁸ *Nelles* at 195-96, Authorities, Tab 3.

⁹ *Prete v. Ontario*, 16 O.R. (3d) 161 (C.A.) at para. 8, Authorities, Tab 4.

¹⁰ *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 (“*Doucet-Boudreau*”) at para. 51, Authorities, Tab 5.

13. In *Ward*, which is discussed further below, this Court emphasized that “the language of the grant [in section 24(1)] is broad,” and that “it is improper for courts to reduce this discretion by casting it in a strait-jacket of judicially prescribed conditions.”¹¹

14. In order to give effect and meaning to the guarantees contained in the *Charter*, it must be open to a court to determine whether a *Charter* right has been breached and, if so, what remedy is appropriate and just. The full complement of remedial options, including declaratory relief, injunctive relief and monetary damages, must be available. That remedial power cannot be extinguished *ab initio* by a blanket immunity provision that applies to all cases regardless of their facts and circumstances.

The Courts Below Assume That The Appellant Has Rights Without A Remedy

15. In this case, the courts below divorced *Charter* rights from *Charter* remedies in a manner that runs counter to this Court’s jurisprudence and to a proper interpretation of section 24(1).

16. The Court of Queen’s Bench determined that the Appellant had pleaded a tenable claim that her rights under section 2(b) of the *Charter* had been breached by the provincial regulator.¹² Having made that determination, it nevertheless went on to dismiss that claim. The court did so based on a conclusion that a particular remedy being sought by the Appellant – an award of monetary damages – was barred by Section 43, notwithstanding that the Appellant’s statement of

¹¹ *Vancouver (City) v. Ward*, 2010 SCC 27 (“*Ward*”) at paras. 17-18, Authorities, Tab 6.

¹² *Ernst v. EnCana Corporation*, 2013 ABQB 537 (“Queen’s Bench Decision”) at para. 42, Authorities, Tab 7; *Ernst v. Energy Resources Conservation Board*, 2014 ABCA 285 (“ABCA Decision”) at para 23, Authorities, Tab 8.

claim also sought such “further and other relief as seems just to this Honourable Court”.¹³ The Court of Appeal concluded that the Queen’s Bench decision disclosed no reviewable error.¹⁴

17. The dismissal of the Appellant’s *Charter* claim on the basis that Section 43 bars a remedy for any breach of her rights contradicts this Court’s rulings in earlier cases that a full, effective and meaningful remedy must be available for any *Charter* breach.¹⁵ In *Doucet-Boudreau*, the Court described the purposive approach to remedies under section 24(1) in the following terms:

A purposive approach to remedies in a *Charter* context gives modern vitality to the ancient maxim *ubi jus, ibi remedium*: where there is a right, there must be a remedy. More specifically, a purposive approach to remedies requires at least two things. First, the purpose of the right being protected must be promoted: courts must craft responsive remedies. Second, the purpose of the remedies provision must be promoted: courts must craft effective remedies.¹⁶

18. Earlier, in *Dunedin*, the Court concluded that “[s]ection 24(1)’s interpretation necessarily resonates across all *Charter* rights, since a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach.”¹⁷ Before that, in *Nelles*, Lamer J. observed that “[t]o create a right without a remedy is antithetical to one of the purposes of the *Charter* which is surely to allow courts to fashion remedies when constitutional infringements occur”.¹⁸

19. By concluding that the Appellant had a tenable claim that her section 2(b) rights had been breached, and then determining that her claim could not be adjudicated because a particular remedy was not available, the lower courts extinguished the Appellant’s *Charter* rights before

¹³ Queen’s Bench Decision at paras. 59-89, Authorities, Tab 7; ABCA Decision at para. 23, Authorities, Tab 8. The relief language from the Appellant’s Statement of Claim is quoted in the Appellant’s Factum at para. 23.

¹⁴ ABCA Decision at para. 30, Authorities, Tab 8.

¹⁵ *Henry v. B.C. (A.G.)*, [2015] 2 S.C.R. 214 (“*Henry*”) at para. 64, Authorities, Tab 9; *R. v. 974649 Ontario Ltd. c.o.b. as Dunedin Construction*, 2001 SCC 81 (“*Dunedin*”) at paras. 18-20, Authorities, Tab 10.

¹⁶ *Doucet-Boudreau* at para. 25, Authorities, Tab 5.

¹⁷ *Dunedin* at para. 20, Authorities, Tab 10.

¹⁸ *Nelles* at 196, Authorities, Tab 3.

determining whether a breach had in fact occurred. Section 43 cannot be interpreted or applied to have that effect – for at least two reasons. First, the government cannot use a legislative enactment to shield itself from any and all liability for infringing an individual’s *Charter* rights. Second, because the rights and freedoms guaranteed under the Charter are only as meaningful as the remedies available to enforce them, an immunity statute cannot be interpreted or applied in such a way as to make the government completely unaccountable – in terms of remedies – in circumstances where it has committed such a breach.¹⁹

20. The approach taken by the courts below is particularly problematic in the context of an alleged breach of section 2(b). Freedom of expression is the grievance procedure in a democratic society. It is vital that individuals have an opportunity to address deficiencies and breakdowns in that procedure. In circumstances where the state is denying an individual the opportunity to exercise her freedom of expression, or where state action effectively bars her from doing so, denying that individual an effective remedy constitutes an additional breach. Given that the time to engage meaningfully in the expression at issue may have passed, vindication of the right through a remedy assumes heightened significance.

The Courts Below Failed To Follow *Ward*

21. In *Ward*, this Court articulated a four-part framework for determining when an award of monetary damages for breach of a *Charter* right is appropriate and just. That framework consists of (1) the claimant seeking to establish the existence of a *Charter* breach; (2) the determination

¹⁹ For these reasons, the analogy drawn by the courts below between statutes of limitation and statutory immunity provisions is inapposite. A statute of limitation serves a different purpose, and has a different effect, than an immunity provision. Applying a limitations provision to an individual’s *Charter* claim does not prevent an individual from asserting a claim or rob her of her rights; it simply requires that she bring her claim on a timely basis, within the specified limitations period. By contrast, applying an immunity provision in the manner done by the courts below operates to bar the claim altogether; that is, an immunity provision as applied would prevent an individual’s *Charter* claim from being heard at any time, and would accordingly completely eviscerate the rights in question. That result is not permissible under the *Charter*.

by the court of whether damages are an appropriate and just remedy, having regard to whether they would fulfil the related functions of compensation, vindication and/or deterrence; (3) the government seeking to establish that “countervailing factors,” such as the existence of alternative remedies or concerns for good governance, render an award of damages inappropriate or unjust; and (4) the court assessing the quantum of damages, if any, to be awarded.²⁰

22. As noted above, the courts below accepted that the Appellant had pleaded a viable claim for breach of her *Charter* rights. On that basis, she met her burden at the pleadings stage under the first step of the *Ward* framework. The courts below then departed from *Ward* by dismissing the claim on the ground that Section 43 precluded any award of damages.

23. The application of the *Ward* framework is necessarily context and fact specific. As the Court observed in *Ward*, “[w]hat is appropriate and just will depend on the facts and circumstances of the particular case”.²¹ In this case, however, the courts below cut the Appellant’s claim off at the knees, before the parties had an opportunity to develop the factual record necessary to apply the *Ward* framework.

24. A plaintiff’s burden under step one of the *Ward* framework, in the context of a motion to strike out her pleading, is to plead a tenable claim that her *Charter* rights have been infringed.²² If she succeeds in doing so, as the Appellant did in this case, the motion must be dismissed and her claim must be allowed to proceed to discovery. At that stage, the parties can develop the evidentiary record that the court will require to determine whether a breach in fact occurred and, if so, what remedy is appropriate and just in the circumstances.

²⁰ *Ward* at paras. 4, 23-57, Authorities, Tab 6; *Henry* at paras. 36-37, Authorities, Tab 9.

²¹ *Ward* at para. 19, Authorities, Tab 6.

²² *Henry* at para. 43, Authorities, Tab 9.

25. In many cases, a court that applies the *Ward* framework properly, based on a well-developed factual record, may conclude that the plaintiff's *Charter* rights have been breached, but that an award of monetary damages is not warranted. In some cases, that result may flow from a determination, at the third stage of the analysis, that such an award would run counter to considerations of good governance. There may be reasons in a particular case why imposing a damages award against the government would be inappropriate and unjust. But it is at the third stage of the *Ward* analysis – not at a preliminary point before the plaintiff has been afforded an opportunity to establish a breach of her rights – that countervailing considerations such as good governance or protection of the public purse properly come into play.

26. There is no doubt that statutory immunity provisions such as Section 43 reflect valid policy concerns. In the context of private law disputes, the government may have a legitimate interest in limiting its exposure to damages awards. Such policy concerns do not, however, oust the constitutional rights and freedoms guaranteed by the *Charter*. Further, as this Court held in *Ward* and reaffirmed in *Henry*, constitutional damages are a unique public law remedy.²³ As a result, while a statutory immunity provision may apply to bar private law claims against the government, it cannot apply to bar claims and remedies under the *Charter*.

27. Sections 32(1) and 52(1) of the *Charter* mandate that the government's legislative authority ends where a breach of rights guaranteed under the *Charter* begins. Section 24(1), as interpreted by this Court in *Ward*, mandates that a plaintiff who pleads a tenable claim that her rights under the *Charter* have been violated must have the opportunity to establish on an evidentiary record that she is entitled to an appropriate and just remedy for that breach. The government cannot legislate away either the rights or the remedy.

²³ *Ward* at paras. 22, 31, Authorities, Tab 6; *Henry* at para. 35, Authorities, Tab 9.

PART IV – COSTS

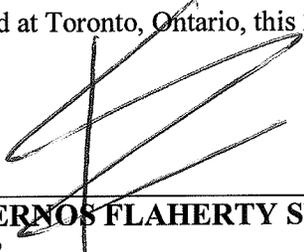
28. The CCLA does not seek costs and asks that no costs awards be made against it.

PART V – REQUEST FOR ORAL ARGUMENT AND ORDER SOUGHT

29. The CCLA requests permission to present oral argument for 10 minutes at the hearing of the appeal.

30. The CCLA asks that the constitutional question framed by the Court be answered in the affirmative.

Dated at Toronto, Ontario, this 22nd day of December 2015



**CHERNOS FLAHERTY SVONKIN
 LLP**

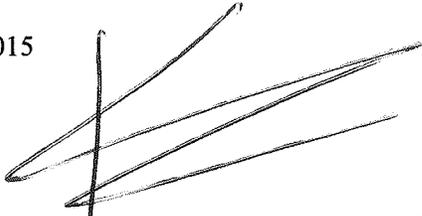
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PART VI – TABLE OF AUTHORITIES

<u>No.</u>	<u>Authority</u>	<u>Paragraph(s)</u>
1.	<i>Doucet-Boudreau v. Nova Scotia (Minister of Education)</i> , 2003 SCC 62	12 (FN 10) 17 (FN 16)
2.	<i>Ernst v. EnCana Corporation</i> , 2013 ABQB 537	16 (FN 12), (FN 13)
3.	<i>Ernst v. Energy Resources Conservation Board</i> , 2014 ABCA 285	16 (FN 12), (FN 13), (FN 14)
4.	<i>Henry v. B.C. (A.G.)</i> , [2015] 2 S.C.R. 214	17 (FN 15) 21 (FN 20) 24 (FN 22) 26 (FN 23)
5.	<i>Hunter v. Southam</i> , [1984] 2 S.C.R. 145	8 (FN 5)
6.	<i>Mills v. The Queen</i> , [1986] 1 S.C.R. 863	9 (FN 6)
7.	<i>Nelles v. Ontario</i> , [1989] 2 S.C.R. 170	10 (FN 7), (FN 8) 18 (FN 18)
8.	<i>Prete v. Ontario</i> , 16 O.R. (3d) 161 (C.A.)	11 (FN 9)
9.	<i>R. v. 974649 Ontario Ltd. c.o.b. as Dunedin Construction</i> , 2001 SCC 81	17 (FN 15) 18 (FN 17)
10.	<i>Vancouver (City) v. Ward</i> , 2010 SCC 27	5 13 (FN 11) 21 (FN 20) 22 23 (FN 21) 24 25 26 (FN 23) 27

PART VII – STATUTES RELIED ON

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

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

GUARANTEE OF RIGHTS AND FREEDOMS

FUNDAMENTAL FREEDOMS

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

...

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

Application of Charter

32. (1) This Charter applies

- o (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the

CHARTRE CANADIENNE DES DROITS ET LIBERTÉS

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

GARANTIE DES DROITS ET LIBERTES

LIBERTES FONDAMENTALES

Libertés fondamentales

2. Chacun a les libertés fondamentales suivantes :

- a) liberté de conscience et de religion;
- b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;
- c) liberté de réunion pacifique;
- d) liberté d'association.

...

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

Application de la charte

32. (1) La présente charte s'applique :

- o a) au Parlement et au gouvernement du Canada, pour tous les domaines relevant du Parlement, y compris ceux qui concernent le territoire du Yukon et les territoires du Nord-

Yukon Territory and Northwest Territories; and

- o (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

...

Ouest;

- o b) à la législature et au gouvernement de chaque province, pour tous les domaines relevant de cette législature.

...

GENERAL

Primacy of Constitution of Canada

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

DISPOSITIONS GÉNÉRALES

Primauté de la Constitution du Canada

52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

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.