File No. 36167

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

BETWEEN:

JESSICA ERNST

APPELLANT

- and -

ALBERTA ENERGY REGULATOR

RESPONDENT

- and -

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BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION
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(Pursuant to the Order of Abella J. dated November 4, 2015)

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RESPONDENT'S REPLY FACTUM

1. Contrary to the assertions of the Interveners Canadian Civil Liberties Association (the "**CCLA**"), and the David Asper Centre for Constitutional Rights (the "**David Asper Centre**"), a statutory limit on the ability to seek personal monetary damages under s. 24(1) of the *Canadian Charter of Rights and Freedoms* (the "***Charter***")[1] does not "undermine the purpose of the *Charter*" and leave individuals without any recourse to challenge the constitutionality of legislation or government action.[2] The right to seek a general constitutional remedy is inalienable; the right to obtain personal monetary damages is not. Although s. 43 of the *Energy Resources Conservation Act* ("***ERCA***")[3] limits the Appellant's claim for damages under s. 24(1) of the *Charter*, she had a meaningful remedy available to her: judicial review.

A. Section 43 Does Not Intrude Upon the Court's Core Jurisdiction

2. The Intervener British Columbia Civil Liberties Association (the "**BCCLA**") states in its factum that legislation that "substantially affects" the "core jurisdiction" of the superior court will be declared invalid.[4] The BCCLA argues that this Court, in *Canada (Attorney General) v. McArthur*,[5] held that the court's core jurisdiction extended beyond reviewing the constitutional validity of statutes and government acts, and encompassed personal claims for damages under the *Charter***.** [6]

3. *McArthur*, which was the companion case of *TeleZone Inc. v. Canada (Attorney General)*,[7] stands for no such proposition. *McArthur* related to whether a prisoner seeking damages in a superior court against a federal prison authority was required to first seek judicial review in the federal court.[8] This Court's statement, as quoted in the BCCLA factum,[9] that "the provincial superior court clearly has jurisdiction to hear Mr. McArthur's claim for compensation under s. 24(1) of the *Charter*," was made in the context of whether the federal court had exclusive jurisdiction in respect of Mr. McArthur's *Charter* claim:

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[1] *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.
[2] Factum of the Canadian Civil Liberties Association, at paras. 8 & 19, footnote 19 ("CCLA Factum"); Factum of the Intervener, The David Asper Centre for Constitutional Rights, at para. 16 ("David Asper Centre Factum").
[3] RSA 2000, c E-10 ("*ERCA*").
[4] Factum of the Intervener, British Columbia Civil Liberties Association, at para. 12 ("BCCLA Factum").
[5] 2010 SCC 63, [2010] 3 SCR 626 ("*McArthur*") [Respondent's Reply Book of Authorities ("Reply BOA"), Tab 3].
[6] BCCLA Factum, at paras. 11-12.
[7] 2010 SCC 62, [2010] 3 SCR 585 [Reply BOA, Tab 9].
[8] *McArthur*, *supra*, at para 1 [Reply BOA, Tab 3].
[9] BCCLA Factum, at para. 11.

> Moreover, the provincial superior court clearly has jurisdiction to hear Mr. McArthur's claim for compensation under s. 24(1) of the *Charter*. In *Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307 (S.C.C.), an argument was made on behalf of the federal Crown that because constitutional relief was sought against federal officials (including the Director of Investigation and Research under the federal *Combines Investigation Act*, R.S.C. 1970, c. C-23, now repealed), all of whom fell within the definition of "federal board, commission or other tribunal", the *Federal Courts Act* (at the time titled *Federal Court Act*) had successfully ousted the jurisdiction of the British Columbia Supreme Court. This Court concluded that Parliament could not, by giving exclusive jurisdiction to the Federal Court over federal officials, deny the provincial superior courts their traditional subject matter jurisdiction over constitutional issues. In my opinion, the *Federal Courts Act* equally cannot operate to prevent provincial superior court scrutiny of the constitutionality of the conduct of federal officials. Section 101 of the *Constitution Act, 1867*, authorizes the creation of "additional Courts for the better Administration of the Laws of Canada". The provincial superior courts retain their historic jurisdiction over the Constitution. This does not preclude concurrent jurisdiction over constitutional subject matters in the Federal Court, of course, but it is not and cannot be made exclusive. Accordingly, quite apart from s. 17 of the *Federal Courts Act*, the Ontario Superior Court had jurisdiction to deal with Mr. McArthur's *Charter* claim.[10]

McArthur and the cases related to it teach that superior courts, created by virtue of s. 96 of the *Constitution Act*, cannot be robbed of their constitutional jurisdiction by statutory courts created under s. 101 of the *Constitution Act*, although concurrent constitutional jurisdiction between the superior and statutory courts can be established.

4. The BCCLA further states that, pursuant to this Court's decision in *Crevier v Quebec (Attorney General)*,[11] "privative clauses purporting to totally preclude judicial review, while generally valid, will be ineffective insofar as they would detract impermissibly from what s. 96 reserves for the courts – namely jurisdictional and constitutional review".[12] The BCCLA argues that s. 43 of the *ERCA* "intuitively attracts the *Crevier* mode of analysis," in that by purporting to limit personal claims for damages under s. 24(1) of the *Charter*, s. 43 "trespasses upon the 'core jurisdiction' of the s. 96 court."[13]

5. In *Crevier*, this Court held that "a provincially-constituted statutory tribunal cannot constitutionally be immunized from review of decisions on questions of jurisdiction."[14] The Court held that this limitation arose out of s. 96 and stood "on the same footing as the well-accepted limitation on the power of provincial statutory tribunals to make unreviewable

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[10] *McArthur*, *supra,* at para 14 [Reply BOA, Tab 3].
[11] [1981] 2 SCR 220, 38 NR 541 ("*Crevier*") [Reply BOA, Tab 4].
[12] BCCLA Factum, at para. 12.
[13] BCCLA Factum, at para. 13.
[14] *Crevier*, *supra,* at 236 [Reply BOA, Tab 4].

determinations of constitutionality."[15] Section 43 of the *ERCA* is not a privative clause, nor does it preclude judicial review. Indeed, the Alberta Energy Regulator ("**AER**") has consistently said that, if the Appellant felt that she was entitled to (1) require the AER to receive her letter, (2) a more timely or different response to her letters, or (3) an unrestricted audience from the AER, she should have sought public law relief. There is no privative clause that would have restricted her from doing so.

6. The concept of jurisdiction in the context of judicial review has been dramatically revised by this Court in the years since *Crevier* was decided. As it stands, the category of true questions of jurisdiction is narrow, to say the least. Writing for the majority in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, Rothstein J. questioned "whether, for purposes of judicial review, the category of true questions of jurisdiction exists".[16] A discussion of the evolving state of the law in this regard would provide little insight into the present matter. It is sufficient for these purposes to say that, constitutionally, the legislature cannot completely remove an administrative action or decision from judicial review.[17] It has not done so in this case – judicial review of any of the AER's actions was available to Ms. Ernst.

7. The core of the judicial review function – "the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government" - may not be removed by the legislative branch of government.[18] However, outside of that core function, the legislature has a role in defining the scope of judicial oversight in respect administrative bodies. A privative clause "is evidence of Parliament or a legislature's intent that an administrative decision maker be given greater deference and that interference by reviewing courts be minimized."[19] As this Court held in *Crevier*:

> It is now unquestioned that privative clauses may, when properly framed, effectively oust judicial review on questions of law and, indeed, on other issues not touching jurisdiction. […]
>
> This Court has hitherto been content to look at privative clauses in terms of proper construction and, no doubt, with a disposition to read them narrowly against the long history of judicial review on questions of law and questions of jurisdiction. Where, however, questions of law have been specifically covered in a privative enactment, this

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[15] *Crevier*, *supra,* at 236 [Reply BOA, Tab 4].
[16] *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 SCR 654, 2011 SCC 61 at paras. 33-34 ("*ATA*") [Reply BOA, Tab 1].
[17] *New Brunswick (Board of Management) v Dunsmuir*, [2008] 1 SCR 190, 2008 SCC 9 at paras. 31 & 52 ("*Dunsmuir*") [Reply BOA, Tab 7]; See also: *ATA*, *supra,* at para. 43 [Reply BOA, Tab 1].
[18] *Dunsmuir, supra,* at para. 31 [Reply BOA, Tab 7].
[19] *Dunsmuir, supra,* at para. 52 [Reply BOA, Tab 7].

> Court, as in *Farrah*, has not hesitated to recognize this limitation on judicial review as serving the interests of an express legislative policy to protect decisions of adjudicative agencies from external correction. Thus, it has, in my opinion, balanced the competing interests of a provincial Legislature in its enactment of substantively valid legislation and of the courts as ultimate interpreters of the *British North America Act* and s. 96 thereof. The same considerations do not, however, apply to issues of jurisdiction which are not far removed from issues of constitutionality. It cannot be left to a provincial statutory tribunal, in the face of s. 96, to determine the limits of its own jurisdiction without appeal or review.[20]

8. This distinction is similar to the well-established distinction recognized by this Court (and discussed in the Factum of the Respondent, AER) between systemic remedies required to restore the constitutional order, and personal remedies which provide monetary relief to individual litigants.[21] A statutory immunity provision such as s. 43 of the *ERCA* is one of the many valid limits on the right to obtain personal damages under the *Charter*.

9. Just as the legislative branch cannot completely remove judicial oversight in respect of the decisions and actions of administrative bodies, it cannot remove the right to seek a general constitutional remedy. However, just as the legislature plays a role in defining the scope of judicial review through the enactment of privative clauses, it also has a role to play in determining the availability of personal remedies under the *Charter*.

10. The Intervener David Asper Centre argues that "there is no distinction in law" between a personal monetary remedy and a general constitutional remedy.[22] However, as noted in the Respondent's factum, this distinction is well established. Indeed, this Court drew such a distinction in both *Ravndahl v Saskatchewan* and *Manitoba Métis Federation Inc v Canada (Attorney General)*.[23]

B. The Immunity Granted by Section 43 is not Absolute

11. The David Asper Centre argues that because the limits on personal *Charter* claims in respect of judicial and quasi-judicial decisions, actions taken under statutes subsequently declared invalid, and prosecutorial misconduct are qualified, and not absolute, immunities, a statutory immunity provision cannot be interpreted to bar *Charter* claims, because such a bar

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[20] *Crevier*, *supra,* at 237-238 [Reply BOA, Tab 4], cited with approval in *Dunsmuir, supra,* at para. 31 [Reply BOA, Tab 7].
[21] See: Factum of the Respondent, Alberta Energy Regulator ("Respondent's Factum"), paras. 35-40.
[22] David Asper Centre Factum, at para. 25.
[23] *Ravndahl v Saskatchewan,* [2009] 1 SCR 181, 2009 SCC 7 ("*Ravndahl*") at paras. 16-17 [Respondent's Original Book of Authorities ("ROBOA"), Tab 35]; *Manitoba Métis Federation Inc. v Canada (Attorney General)*, [2013] 1 SCR 623, 2013 SCC 14 ("*Manitoba Métis*") at paras. 134-137 and 143 [ROBOA, Tab 21].

would represent an absolute immunity.[24] To be sure, the immunities relating to judicial and quasi-judicial decisions, prosecutorial misconduct and actions taken under statutes subsequently declared invalid are not absolute. However, neither is the immunity granted by s. 43 of the *ERCA*. Section 43 does not (and cannot) limit the right to seek a general constitutional remedy. It only limits the right to seek a personal monetary remedy.

12. The David Asper Centre points to, *inter alia*, the fact that judges may face disciplinary proceedings in respect of their conduct to demonstrate that judicial immunity is qualified and limited.[25] Just as the remedy for incorrect judicial decisions is an appeal, and the remedy for inappropriate judicial conduct may be a disciplinary proceeding, the conduct of an administrative body is subject to oversight via judicial review. There is no unlimited right to sue a judge for damages, just as there is no unlimited right to sue the AER for damages, even if such damages are sought pursuant to s. 24(1) of the *Charter*.

13. The Intervener CCLA argues that if s. 43 of the *ERCA* could limit a claim for personal monetary damages under the *Charter*, *Charter* rights would be "eviscerate[d]", because "a province would be free to insulate itself from any consequences for [breaching] individuals' *Charter* rights."[26] The David Asper Centre argues that if s. 43 barred personal claims for monetary damages, "there would be no *Charter* protections available to participants in the AER's processes".[27] Such statements belie reality. A limit on the ability to seek personal monetary damages does not mean that the constitutionality of legislation or government action cannot be challenged. It only means that an individual is prevented from seeking monetary damages in respect of such conduct. The right to seek a general constitutional remedy cannot be limited by statute.

14. Although s. 43 of the *ERCA* precludes the Appellant from making a personal claim for monetary damages under the *Charter*, it does not operate to deprive her of an effective and meaningful remedy. Nothing prevented the Appellant from challenging the constitutionality of

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[24] David Asper Centre Factum, at paras. 6-12. The David Asper Centre states at paragraph 12 of its factum that the Respondent's reliance on *Taylor v Canada (Attorney General)*, 2003 FCA 55 ("*Taylor*") [Tab 38 of the ROBOA] is "misplaced," because the impugned actions of the AER in the present matter do not "pertain to the AER's adjudicative function." The Respondent referred to *Taylor* in the context of its discussion of judicial immunity as one constitutionally valid limit on personal claims for damages under s. 24(1).
[25] David Asper Centre Factum, at para. 11.
[26] CCLA Factum, at paras. 8 & 19, footnote 19.
[27] David Asper Centre Factum, at para. 16.

the AER's impugned conduct. The Appellant could have done so through judicial review, which would have allowed the Court to determine the lawfulness of the AER's actions, and to grant the appropriate public law remedy.

C. The Appellant's *Charter* Claim Should be Summarily Dismissed

15. The CCLA, BCCLA and the David Asper Centre all assert that the Appellant has made out a valid cause of action.[28] The BCCLA goes further, positing that the AER arguably engaged in conduct it had "no business" engaging in, and that the impugned conduct of the AER may have amounted to "an abuse of power".[29] This Appeal arises from an application to strike or to summarily dismiss the Plaintiff's fourth iteration of her Statement of Claim. The BCCLA should not, through an intervener's Factum, be seeking to redraft the Plaintiff's pleadings. An intervener has no place entering the fray by making new allegations of abuse of power.

16. In an article entitled "Interveners and the Supreme Court of Canada", Major J commented on the importance of objectivity in an Intervener's materials:

> The value of an intervener's brief is in direct proportion to its objectivity. Those interventions that argue the merits of the appeal and align their argument to support one party or the other with respect to the specific outcome of the appeal are, on this basis, of no value. That approach is simply piling on, and incompatible with a proper intervention.
>
> The anticipation of the court is that the intervener remains neutral in the result, but introduces points different from the parties and helpful to the court.[30]

17. The CCLA states that because the Appellant "plead a tenable claim that her *Charter* rights have been infringed" her claim "must be allowed to proceed to discovery."[31] The BCCLA argues that, because the Appellant's claim is "arguable," the "ultimate merit" of the claim should be "resolved at trial."[32] The validity of the Appellant's *Charter* claim was at issue before the Courts below, just as it is at issue before this Honourable Court. Section 3 of the *Judicature Act* confers jurisdiction upon the Court of Appeal of Alberta to "hear and determine all appeals respecting a

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[28] CCLA Factum, at paras. 16, 22 & 24; David Asper Centre Factum, at para 33; BCCLA Factum, at paras. 24-25.
[29] BCCLA Factum, at paras. 24-25, footnote 11. For other examples of the BCCLA entering the fray between the parties, see paragraphs 3 and 17-18 of the BCCLA Factum.
[30] The Honourable Justice J. Major, "Interveners and the Supreme Court of Canada," National 8: 3 (May 1999), 27 [Reply BOA, Tab 10]. See also: Rules of the Supreme Court of Canada, SOR/2002-156, r. 57 [Reply BOA, Tab 12].
[31] CCLA Factum, at para. 24.
[32] BCCLA Factum, at para. 24.

judgment, order or *decision*."[33] As Brown JA (as he then was) held in *R v Elliott*, the "key point is that an appeal to [the Court of Appeal of Alberta] is from *the disposition* of a matter, not from *the reasons* given for such disposition."[34] That is, an appeal is from the Order, not the reasons. A Respondent is entitled to raise any argument in support of the Order, whether or not such argument was the basis of the decision below:

> The appellant argues that the respondent is not allowed to raise on appeal the issue of whether it is an "inter-municipal bus service", because no cross-appeal was filed under Rule 509: "A respondent intending to contend that the decision of the court below should be varied, shall ... give notice of his intention ...". […]
>
> Any argument in support of the order under appeal that is different from the argument relied on by the chambers judge is not an attempt to "vary the decision of the court below"; it is merely an attempt to uphold that order for different reasons. Even if the respondent is unsuccessful in supporting the quashing of the Appeal Committee's decision under s. 153 of the *Traffic Safety Act*, it can nevertheless raise in support of the first paragraph of the chambers judge's order the alternative argument that it is exempt as an inter-municipal bus service. There is accordingly no impediment to the respondent raising the latter issue on appeal.[35]

The same is true in the proceedings before this Honourable Court.[36]

18. This Appeal has its genesis in an application to strike or summarily dismiss the Plaintiff's Fresh Statement of Claim – not some other claim that an Intervener might prefer. This Court, in *Hryniak v Mauldin*, directed that a cultural shift was necessary to ensure that summary judgment procedures can be effectively used as legitimate alternative means for adjudicating and resolving litigation disputes.[37] Summary judgment is appropriate in the present matter because the Appellant's *Charter* claim does not engage s. 2(b). The *Charter* does not guarantee an audience, nor does it guarantee a response from an audience, and the Appellant is clearly claiming a positive right but cannot satisfy the criteria for its protection.

19. Ms. Ernst claims that the AER banned her "from **engaging with the compliance and enforcement branch of the AER**" [emphasis added],[38] and states that her claim relates to

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[33] *Judicature Act*, RSA 2000, c J-2 [Reply BOA, Tab 11]; *R v Elliott*, [2015] 5 WWR 213, 2014 ABCA 431 at para. 4 (emphasis in original) [*R v Elliott*] [Reply BOA, Tab 8].
[34] *R v Elliott*, at para. 4 (emphasis in original) [Reply BOA, Tab 8].
[35] *Gateway Charters Ltd v Edmonton (City)*, 522 AR 56, 2012 ABCA 93 at paras. 27-28 [Reply BOA, Tab 5]. See also: *Belland v Belland*, 2008 ABCA 309 at para. 1 [Reply BOA, Tab 2]; *NAC Constructors Ltd v Alberta (Capital Region Wastewater Commission)*, 380 AR 318, 2005 ABCA 401 at para. 11 [Reply BOA, Tab 6].
[36] *Rules of the Supreme Court of Canada*, SOR/2002-156, r. 29(3) [ROBOA, Tab 74].
[37] *Hryniak v Mauldin*, [2014] 1 SCR 87, 2014 SCC 7 at paras. 2, 5 and 49 [ROBOA, Tab 14].
[38] Appellant's Reply Factum, at para. 26.

"withdrawing government services,"[39] and being "barred from **communicating with key offices of the AER**" [emphasis added].[40] The Appellant states that she is not making a positive rights claim, but then states that the "key consideration" in her case is whether a regulator "having **established a public complaints mechanism** and invited members of the public to communicate with the government through it" may ban a person from "**engaging with that mechanism**" [emphasis added].[41] The Appellant seeks access to a platform or particular means of expression: a positive right.[42] Being excluded from a particular statutory platform that she previously had access to does not change the nature of her claim.[43] Given that the Appellant has not pleaded, and in any event cannot satisfy, the criteria for the protection of a positive right,[44] s. 2(b) is simply not engaged.[45]

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of January, 2016.

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[39] Appellant's Reply Factum, at para. 24.
[40] Appellant's Reply Factum, at para. 28.
[41] Appellant's Reply Factum, at para. 29.
[42] *Greater Vancouver Transportation Authority v Canadian Federation of Students*, [2009] 2 SCR 295, 2009 SCC 31 at para 29 [ROBOA, Tab 10].
[43] *Baier v Alberta*, [2007] 2 SCR 673, 2007 SCC 31 at paras. 36-38 ("*Baier*") [ROBOA, Tab 3].
[44] Respondent's Factum, at para. 121.
[45] *Baier*, at para. 30 [ROBOA, Tab 3].

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Energy Resources Conservation Act, RSA 2000, c E-10 ..... 1, 8, 11, 13

[Relevant statutory provisions are reproduced in Part VII of Respondent's main response factum]