

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)**

B E T W E E N :

**CONSEIL SCOLAIRE FRANCOPHONE DE LA COLOMBIE-BRITANNIQUE,
FÉDÉRATION DES PARENTS FRANCOPHONES DE COLOMBIE-BRITANNIQUE,
ANNETTE AZAR-DIEHL, STÉPHANE PERRON AND MARIE-NICOLE DUBOIS**

Appellants

and

**HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH
COLUMBIA, AND THE MINISTER OF EDUCATION OF BRITISH COLUMBIA**

Respondents

and

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PART I - INTRODUCTION

1. The David Asper Centre for Constitutional Rights (the **Asper Centre**) intervenes to address the important issue of whether this Honourable Court should extend a broad qualified immunity from damages when laws are struck under s. 52 of the *Constitution Act, 1982* to damages sought solely under s. 24(1) of the *Canadian Charter of Rights and Freedoms*.¹

2. The Asper Centre takes no position on the facts of the case where the evidence is in dispute; nor does it take a position on the outcome of the appeal. Consistent with the requirement that an intervener be useful to the Court in deciding the case, however, we will refer to certain facts that are not in dispute as they relate to and support our legal arguments.

3. After a lengthy and complex trial in which the trial judge assumed that the Appellants had standing under s. 24(1) of the Charter², the trial judge exercised her remedial discretion under s. 24(1) of the Charter (as distinct from s. 52(1) of the *Constitution Act, 1982*)³ to award \$6 million in damages in compensation for a now rescinded freeze on transportation costs between 2002 and 2012. The damage award was to be paid by the government over 10 years.⁴ The trial judge also found that the award of damages would not chill the legislative and policy-making functions of government.⁵

PART II - THE FACTS

The Asper Centre's Position on the Question in Issue

4. The Asper Centre will argue that extension of a qualified immunity will unnecessarily narrow the broad remedial discretion under s. 24(1) of the Charter and confuse the distinct remedial roles of s. 24(1) of the Charter and s. 52(1) of the *Constitution Act, 1982*. Requiring those whose Charter rights were infringed to establish that the government acted in bad faith, through an abuse of power or even with negligence will harm access to justice and access to

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 [Charter]; *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Constitution Act, 1982].

² *Conseil scolaire francophone de la Colombie-Britannique v British Columbia (Education)*, 2016 BCSC 1764 at para 1131 [Trial Judgment].

³ *Ibid* at paras 1115-1122.

⁴ *Ibid* at paras 1784-1798. The trial judge denied other claims by the Appellant for damages: *Ibid* at paras 3238 and 6502.

⁵ *Ibid* at para 1788.

remedies and will arm governments with a procedural weapon to challenge Charter claims not on their merits but on their pleadings. In the alternative, the Asper Centre will argue that this is not an appropriate case to extend a qualified immunity in a broad and categorical fashion.

PART III - ISSUES AND THE LAW

Statement of Argument

5. The Court of Appeal's extension of the *Mackin*⁶ qualified immunity was based on an erroneous understanding of the distinct remedial roles of ss. 24(1) and 52(1) and reliance on a 2006 Ontario Court of Appeal judgment⁷ that should no longer be considered good law. Moreover, such an extension would place an often impossible burden on individuals and groups who have established that their Charter rights have been violated to demonstrate that the government also acted in bad faith or through an abuse of process, including before discovery. The appropriate means of recognizing good governance interests under *Vancouver (City) v. Ward*⁸ is for the government to establish countervailing factors.

The Importance of Remedial Discretion under s. 24(1) of the Charter

6. This Court has consistently affirmed that s. 24(1) of the Charter contemplates a broad remedial discretion as a means of providing relief for those whose rights have been infringed by government acts and has recognized the danger of appellate courts cutting down remedial discretion by "some sort of binding formula for general application in all cases".⁹ The trial judge's remedy in this case – \$6 million to be contributed by the government over 10 years¹⁰ – was exactly the type of creative remedial discretion that s. 24(1) was intended to encourage.

7. Section 24(1) has special significance given the absence of remedies under the *Canadian Bill of Rights*¹¹, Canada's commitment to the rule of law¹² and Canada's obligations under

⁶ *Mackin v New Brunswick (Minister of Finance); Rice v New Brunswick*, 2002 SCC 13, [2002] 1 SCR 405 [*Mackin*].

⁷ *Wynberg v Ontario*, 2006 CanLII 22919, 82 OR 3d 561 (Ont CA) [*Wynberg*].

⁸ *Vancouver (City) v Ward*, 2010 SCC 27, [2010] 2 SCR 28 [*Ward*].

⁹ *R v Mills*, [1986] 1 SCR 863 at 965; *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3 at para 50 [*Doucet-Boudreau*]; *Ward*, *supra* at para 18.

¹⁰ Trial Judgment, *supra* at 1784-1798. For another recent innovative Charter damage remedy, see *Brazeau v Attorney General (Canada)*, 2019 ONSC 1888 at paras 426-445.

¹¹ *Canadian Bill of Rights*, SC 1960, c 44; *Magda v The Queen*, [1964] SCR 72 (affirming Crown immunity from damages).

international law¹³, all of which support the provision of effective remedies.

8. Damages awarded by provincial superior courts are a traditional judicial remedy that is fairly awarded against governments consistent with the analysis established by this Court in *Ward*.¹⁴ Damages can be particularly effective and meaningful to enforce Charter rights in response to violations that have not been authorized by legislatures. Charter damages are a unique public remedy that can help ensure that difficult, costly and successful Charter litigation results in some meaningful remedy. As Justice LeBel has stated, courts “should not forget to provide a remedy to the party who brought the challenge... Corrective justice suggests that the successful applicant has a right to a remedy. There will be occasions where the failure to grant the claimant immediate and concrete relief will result in an ongoing injustice.”¹⁵ Declaration of past violations can be a hollow victory.¹⁶

The Fundamental Distinction Between Remedies under s. 24(1) and s. 52(1)

9. This Court has consistently recognized the distinction between personal relief available to those whose rights have been infringed under s. 24(1) and more systemic relief provided under s. 52(1), including with respect to public interest litigants.¹⁷ Section 24(1) damages “are necessarily retroactive” and designed to “ensure that successful litigants will have the benefit of the ruling”¹⁸. As such, they differ from “the in rem remedy flowing from s. 52(1)”¹⁹ which can be suspended or made prospective for systemic reasons. Section 24(1) provides an important platform for imposing rule of law accountability on the executive and ensuring that the Charter is meaningful for those who have suffered Charter violations.

¹² *Roncarelli v Duplessis*, [1959] SCR 121; *Reference re Secession of Quebec*, [1998] 2 SCR 217.

¹³ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, art 2.

¹⁴ *Supra*.

¹⁵ These comments were made in dissent, but we submit that the remedy-centred approach that Justice LeBel advocated has been recognized in subsequent cases including *Ward, supra* and *Carter v Canada*, 2015 SCC 5, [2015] 1 SCR 331.

¹⁶ *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 SCR 1120; *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 SCR 38.

¹⁷ *R v Ferguson*, 2008 SCC 6, [2008] 1 SCR 96 at para 61 [*Ferguson*]; *R v Demers*, 2004 SCC 46, [2004] 2 SCR 489; *Schachter v Canada*, [1992] 2 SCR 679 [*Schachter*].

¹⁸ *Canada (Attorney General) v Hislop*, 2007 SCC 10, [2007] 1 SCR 429.

¹⁹ *Ravndahl v Saskatchewan*, 2009 SCC 7, [2009] 1 SCR 181 at para 27.

10. Democratically enacted legislation by its nature affects large and indeterminate numbers of people, whereas s. 24(1) actions aimed at government acts will generally be brought by vulnerable individuals and groups. In many cases, individuals will be the singular antagonist of the state. Section 52(1) cases raise institutional issues of good faith and reasonable reliance on legislation, fairness to other litigants, respect for Parliament's role, and substantial changes to the law which do not apply to the case at bar or to most other s. 24(1) cases.

The Origins of Qualified Immunity in Relation to s. 52(1)

11. In *Schachter v. Canada*²⁰, Chief Justice Lamer recognized the existence of cases “where the statute or provision in question is not in and of itself unconstitutional, but some action taken under it infringes a person's *Charter* rights. Section 24(1) would there provide for an individual remedy for the person whose rights have been so infringed.” In *Guimond v. Quebec*²¹, the Court relied on academic authorities that clearly limited the qualified immunity as it applies to damage claims “arising from legislation which has been declared constitutionally invalid.”

12. In *Mackin v. New Brunswick*, the Court made reference to “a general rule of public law, [that] absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional.”²² Although there is a potentially ambiguous reference to qualified immunity applying if government officials have “their acts found to be unconstitutional”²³, the unanimous Court stated in *Ward*²⁴ that: “*Mackin* stands for the principle that state action taken under a statute which is subsequently declared invalid will not give rise to public law damages because good governance requires that public officials carry out their duties under valid statutes without fear of liability in the event that the statute is later struck down.”

13. The bulk of authority, including prior decisions of the British Columbia Court of

²⁰ *Supra* at 719-720.

²¹ *Guimond v Quebec (Attorney General)*, [1996] 3 SCR 347 at paras 14, 19.

²² *Mackin*, *supra* at para 78.

²³ *Ibid* at para 79. This was subsequently qualified by a reference to “Laws must be given their full force and effect as long as they are not declared invalid.”

²⁴ *Supra* at para 41. See also *Henry v British Columbia (Attorney General)*, 2015 SCC 24, [2015] 2 SCR 214 at paras 42, 124.

Appeal²⁵, has limited the qualified immunity to actions “for damages arising from the enactment or enforcement of laws subsequently determined to be unconstitutional.”²⁶ The Court of Appeal extended the *Mackin* qualified immunity in this case by placing extensive reliance²⁷ on the Ontario Court of Appeal’s 2006 decision in *Wynberg*²⁸, a decision that the Asper Centre submits has been overtaken by subsequent decisions of this Court and should not be followed.

The Ontario Court of Appeal’s 2006 Decision in *Wynberg* Should Not be Followed

14. In *Wynberg*, the Ontario Court of Appeal concluded that the “general prohibition against damages where declaratory relief is granted apply with equal force whether the declarations are made as a result of a challenge to legislation under s. 52 of the *Constitution Act, 1982* or, as in this case, where the challenge is to some action taken under legislation that is said to infringe a *Charter* right and relief is sought pursuant to s. 24(1) of the *Charter*.” This conclusion reached in 2006 understandably ignores the distinction elaborated on by this Court in 2008 between the role of s. 24(1) as a remedial route for concerns about unconstitutional governmental acts and s. 52(1) as the remedial route to target unconstitutional laws.²⁹ It also ignores the unanimous 2010 decision in *Ward* to recognize a more proportionate and tailored manner to accommodate competing governmental and societal issues by allowing the state to justify limiting either the award or the quantum of damages after an applicant had established a *Charter* violation and a functional need related to compensation, vindication or deterrence for *Charter* violations.

²⁵ *Vancouver (City) v Zhang*, 2010 BCCA 450 at para 77; *Mullins v Levy*, 2009 BCCA 6 at para 88; *British Columbia v Bolster*, 2007 BCCA 65 at para 63.

²⁶ *Canada (Procureur général) v Hijos*, 2007 FCA 20 at para 56; *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at para 29; *Zundel v Canada*, 2006 FCA 356 at para 5; *Procureure générale du Canada c Sarrazin*, 2018 QCCA 1077, at para 15 [Sarrazin]; *Procureur général des Territoires du Nord-Ouest c Fédération Franco-Ténoise*, 2008 NWTCA 5; *Elder Advocates of Alberta Society v Alberta*, 2009 ABCA 403; *Sagharian v Ontario (Education)*, 2008 ONCA 411 [Sagharian]; *Saskatchewan v Ravndahl*, 2007 SKCA 66.

²⁷ *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia (Education)*, 2018 BCCA 305 at para 295.

²⁸ *Supra*. Given that neither the Ontario Court of Appeal nor this Court has disapproved of *Wynberg*, it is understandable that some lower courts in Ontario have applied the qualified immunity to policy as well as legislation. See for example *Abbey v Ontario (Community and Social Services)*, 2018 ONSC 1899 [Abbey]. But for a contrary approach that did not apply the *Mackin* qualified immunity to correctional policies see *Brazeau, supra* at para 433.

²⁹ *Ferguson, supra*.

15. The *Ward* approach appropriately assigns the burden to the government to demonstrate what should be within their distinct knowledge and capabilities: namely the harms that damage awards will cause to an open-ended list of good government concerns. Assigning this burden to the government is both fair and consistent with the separation of powers³⁰ given that the applicant will already have established a Charter violation and the need for damages.

16. In this case, the trial judge evaluated the need for damages entirely on the basis of compensation. She selected the lowest range of calculated damages and structured the government's obligation over a ten-year period in order to reflect the nature of the violation and concluded, based on her experience in hearing a trial that started in 2013 and ended in 2016, that the award of damages would not chill good governance.³¹

The Pleading and Evidentiary Burdens that an Expanded Qualified Immunity Would Place on Section 24(1) Applicants

17. Extending the *Mackin* qualified immunity to all governmental policy-making would impede access to justice and access to remedies for many Charter applicants who challenge governmental action. Governments would have an incentive to claim that most Charter violations had been authorized by policy. This would then mean that the Charter applicant would have to allege and then prove on a balance of probabilities that the government acted in bad faith. Governments could bring motions to strike before the close of pleadings, or motions for summary judgment before discovery, delaying a trial on the merits and eventual recovery.³²

18. This Court should take notice that damages have rarely been awarded under the qualified immunity established by *Mackin* because it places a high threshold on applicants to prove bad faith or abuse of power by the government in enacting legislation.³³ Even in cases where

³⁰ *Doucet-Boudreau*, *supra* at para 33.

³¹ Trial Judgment, *supra* at para 1788.

³² *Doe v Metropolitan Toronto (Municipality) Commissioners of Police* (1990), 74 OR (2d) 225, 1990 CanLII 6611 (Div Ct) leave to appeal ref'd 1 OR 416 (Ont CA) [*Doe*] (striking out claims); *Doe v Metropolitan Toronto (Municipality) Commissioners of Police* (1998), 39 OR (3d) 487, 1998 CanLII 14826 (Ont Ct) (decision and damage award on the merits).

³³ See for example *Saskatchewan Federation of Labour v Saskatchewan*, 2016 SKQB 365 at para 61; *Roach v Canada (Attorney General)*, [2009] OJ No 737 at paras 56-57 (QL); *Roach v Canada (Attorney General)*, 2012 ONSC 3521; *British Columbia Teachers' Federation v British Columbia*, 2016 SCC 49, [2016] 2 SCR 407; *Abbey*, *supra*.

Attorneys General have conceded that laws violate the Charter, applicants have been unable to prove that governments acted in bad faith or through an abuse of power.³⁴

19. The American federal courts have extensive experience with broad qualified immunities with respect to constitutional torts. Fortunately, Canada need not replicate this experience because governments can be found directly liable under ss. 24(1) and 32(1) of the Charter.³⁵ The American experience is that qualified immunities increase preliminary litigation that, even if not resolved in the government's favour, places additional access to justice costs on claimants. It encourages litigation over the scope of qualified immunities as opposed to the merits. It often fails to produce tangible and effective remedies for litigants.³⁶

20. The *Mackin* qualified immunity has resulted in governments challenging Charter applicants in preliminary litigation.³⁷ To be sure, such governmental challenges do not always succeed and courts have recently granted Charter applicants leave to amend their pleadings to reflect the need to prove governmental fault in addition to Charter violations.³⁸ Amending pleadings after preliminary litigation and appeals to allow litigation under qualified immunities is somewhat akin to Charter plaintiffs being “ground to bits in a slow mill...roasted at a slow fire...stung to death by single bees...being drowned by drops.”³⁹

21. Qualified immunity shifts litigation from the merits (including whether Charter rights are violated, whether damages are required and whether a damages award will harm good

³⁴ *Webb v Webb*, 2016 NSSC 180 at para 43.

³⁵ *Ward*, *supra* at para 22; *Doucet-Boudreau*, *supra* at paras 43-44.

³⁶ *White v Pauly*, 580 US (2017), 137 S Ct 548 at 553 (Ginsberg J. concurring); Joanna Schwartz, “How Qualified Immunity Fails” (2017) 117 Yale LJ 2 at 42, 60; James Pfander, *Constitutional Torts and the War on Terror*, (New York: Oxford University Press, 2017) at 25-27, 43-46, 149-50.

³⁷ *Grant v Winnipeg Regional Health Authority et al*, 2015 MBCA 44 at para 69; *1515545 Ontario Ltd v Niagara Falls (City)*, (2006) 78 OR (3d) 783, 006 CanLII 264 (Ont CA); *Sarrazin*, *supra*; *Canada (Royal Mounted Police) v Canada (Attorney General)*, 2015 FC 1372; *Inlakhana v Canada (Attorney General)*, 2017 ONSC 821; *Ontario v Satschko*, 2007 CanLII 54972 (Ont Sup Ct) (preliminary litigation not on the merits on qualified immunity issues); *Ciling c. Québec (Attorney General)*, 2004 CanLII 39136 (QCCA) (affirming decision to deny leave to institute a class action against the Attorney General of Québec).

³⁸ *Canada (Attorney General) v Liang*, 2018 FCA 39; *Canada (Attorney General) v Whaling*, 2018 FCA 38 (confirming leave to amend pleadings to reflect Macklin qualified immunity) [*Whaling*]. See also *Doe*, *supra* leave to appeal refused: 1 OR 416 (CA).

³⁹ Charles Dickens, *Bleak House* (planetetebook.com) at 85.

governance), to whether the required governmental fault has been pled and then established. Qualified immunities are a litigation magnet. It is striking that the exact scope of the *Mackin* qualified immunity still seems unclear, at least to litigants and lower courts.⁴⁰

22. Expanding the *Mackin* qualified immunity would increase the costs of access to justice for Charter litigation brought solely under s. 24(1). It would give governments a loaded procedural weapon to challenge any s. 24(1) claim plausibly related to a government policy.

The Good Governance Burden Placed on Governments under *Ward* is Appropriate

23. The Court of Appeal suggested that the trial judge erred by engaging in a case specific analysis and suggested that the more efficient approach may be simply to determine whether “the government’s action was ‘clearly wrong, in bad faith or an abuse of power’ so as to vitiate the immunity”.⁴¹ This approach discounts the access to justice costs that such a qualified immunity and its invitation to preliminary litigation would impose on Charter applicants. Section 24(1) applicants can be disadvantaged and are often racialized individuals who seek modest damages⁴² for failures in the criminal process that did not result in charges.

24. Legitimate concerns that damage awards may harm good governance can adequately be respected by an analysis of countervailing factors under *Ward*. Such an approach has the advantage of placing the burden on government, with its deeper pockets and better access to the facts. Analogous to s. 1 of the Charter, requiring governments to raise countervailing factors to damage awards would require governments to prove matters particularly within their knowledge and abilities, including concerns about competing budgetary priorities.

⁴⁰ Barnes J has observed that “[a]t various places in the judgment the Court indicates that legislative immunity for *Charter* damages may not be available for the exercise of governmental action that is ‘clearly wrong,’ ‘in bad faith,’ ‘an abuse of power,’ ‘negligent,’ brought with an ‘unreasonable attitude’ or for ‘ulterior motives,’ or ‘with knowledge of ... unconstitutionality,’ or that fails to ‘respect the “established and indisputable” laws that define the constitutional rights of individuals.’ Whether the test is subjective, objective or something in between is left unanswered.” *Whaling v Canada (Attorney General)*, 2017 FC 121 at para 15, overturned in part (on a different issue) in *Whaling, supra*. See also *Sagharian, supra* at para 34, noting negligence as potentially sufficient to overcome qualified immunity.

⁴¹ Court of Appeal Judgment, *supra* at para 299.

⁴² WH Charles, *Understanding Charter Damages* (Toronto: Irwin Law, 2016) at Appendices 5-6, 9-10, 15.

Section 24(1) as a Form of Public Law Liability Compared to Tort Law

25. Expanding the *Mackin* qualified immunity would blur a critical distinction between government liability under the Charter and in tort. The distinction between policy matters, for which governments are not liable in tort, and operational matters⁴³, which attract liability, has generated critical commentary and litigation. Bringing such concerns into s. 24(1) would confuse the tort issue of establishing a duty of care with the constitutionalized duty that governments have to respect Charter rights and the role of ss. 1 and countervailing factors under s. 24(1) as a means to justify reasonable and proportionate limits on rights and remedies. It is more consistent with the effects-based nature of Charter rights and the obligation on governments to justify limits on rights (and remedies) to recognize legitimate state interests against liability in the countervailing policies and good governance analysis contemplated in *Ward*.

In the Alternative: the Inappropriateness of Extending Qualified Immunities in this Case

26. In the alternative, the Asper Centre submits that the possible expansion of the *Mackin* qualified immunity should be developed in a case with a more focused record and argument.

27. This Court's extension of qualified immunity in cases subsequent to *Ward* have been limited to prosecutorial duties of disclosure⁴⁴ and specific legislative immunities for specific adjudicative purposes.⁴⁵ Section 23 of the Charter imposes positive funding duties on the state that are less present with respect to most other Charter rights.

28. The extension of immunities from legislative attempts to policy raises concerns about the vagueness and breadth of what constitutes a policy.⁴⁶ It also raises the complex and novel issue of the degree to which s. 24(1) itself is a constitutional entitlement and whether it is subject to

⁴³ *Just v British Columbia*, [1989] 2 SCR 1228; *R v Imperial Tobacco Canada*, 2011 SCC 42, [2011] 3 SCR 45 at paras 61-102; Lewis Klar, "Falling Boulders, Falling Trees and Icy Highways: The Policy Operational Test Revisited" (1994) 33 Alta L Rev 167; Lewis Klar, "*R. v. Imperial Tobacco*: More Restrictions on Public Authority Liability" (2012) 50 Atla L Rev 157; Bruce Feldthusen, "Public Authority Immunity from Negligence Liability: Uncertain, Unnecessary and Unjustified" (2013) 92 Can Bar Rev 211; Lorain Hardcastle, "Government Tort Liability for Negligence in the Health Care Sector: A Critique of the Canadian Jurisprudence" (2012) 37 Queens LJ 525; Mayo Moran, "Case Comment *Jane Doe v. Board of Commissioners*" (1993) 6 CJWL 491.

⁴⁴ *Henry*, *supra*.

⁴⁵ *Ernst v Alberta Energy Regulator*, 2017 SCC 1, [2017] 1 SCR 3.

⁴⁶ For a recent and very broad legislative definition see the *Crown Liability and Proceedings Act*, S.O. 2019 c.7, Sched. 17, s 11(5).

s. 1 limits. These issues were not raised squarely in this case. As such, it would not be appropriate to expand *Mackin* qualified immunity without constitutional questions on this issue.

Conclusion

29. Extending qualified immunity to apply to all government decisions that can be characterized as authorized by policy as opposed to law would place an unfair burden on those who have already established a Charter violation and a functional need for damages. It would generate preliminary litigation on the nature of policy and the need to plead sufficient levels of fault as opposed to the merits. It would fetter the remedial discretion of trial judges.

30. Fortunately, there is a principled basis, based on the rule of law and the importance of representative democracy, for the *Mackin* qualified immunity to be limited to governmental acts that are authorized by legislation as opposed to a much more nebulous, litigation-attracting, open-ended and less democratically restrained and transparent category of acts that are taken pursuant to governmental “policies”.

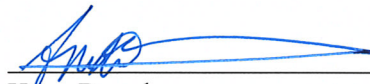
PART IV - SUBMISSIONS ON COSTS

31. The Asper Centre does not seek costs and respectfully requests that none be awarded against it.

PART V - NATURE OF THE ORDER

32. The Asper Centre requests that pursuant to the Order of Justice Martin it be allowed to provide oral argument. The Asper Centre takes no position on the outcome of the appeal but asks that this Court not extend the qualified immunity that applies to s. 52(1) actions in relation to unconstitutional laws to unconstitutional acts challenged solely under s. 24(1) of the Charter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of September, 2019.



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PART VI - LIST OF AUTHORITIES

#	Jurisprudence	Para ref. in
1.	<i>1515545 Ontario Ltd v Niagara Falls (City)</i> , (2006) 78 OR (3d) 78, <u>2006 CanLII 264</u> at para 69 (Ont CA).	20
2.	<i>Abbey v Ontario (Community and Social Services)</i> , <u>2018 ONSC 1899</u> .	13, 18
3.	<i>Brazeau v Attorney General (Canada)</i> , <u>2019 ONSC 1888</u> at paras 426-445.	6, 14
4.	<i>British Columbia v Bolster</i> , <u>2007 BCCA 65</u> at para 63.	13
5.	<i>British Columbia Teachers' Federation v British Columbia</i> , <u>2016 SCC 49</u> , [2016] 2 SCR 407.	18
6.	<i>Canada (Attorney General) v Hislop</i> , <u>2007 SCC 10</u> , [2007] 1 SCR 429.	9
7.	<i>Canada (Attorney General) v Liang</i> , <u>2018 FCA 39</u> .	20
8.	<i>Canada (Attorney General) v Whaling</i> , <u>2018 FCA 38</u> .	20, 21
9.	<i>Canada (Procureur général) v Hijos</i> , <u>2007 FCA 20</u> at para 56.	13
10.	<i>Canada (Royal Mounted Police) v Canada (Attorney General)</i> , <u>2015 FC 1372</u> .	20
11.	<i>Carter v Canada</i> , <u>2015 SCC 5</u> , [2015] 1 SCR 331.	8
12.	<i>Ciling c. Québec (Attorney General)</i> , <u>2004 CanLII 39136</u> (QCCA).	20
13.	<i>Conseil scolaire francophone de la Colombie-Britannique v British Columbia (Education)</i> , <u>2016 BCSC 1764</u> , at paras 1115-1122, 1784-1798, 3238 and 6502.	3, 6, 16
14.	<i>Conseil scolaire francophone de la Colombie-Britannique v. British Columbia (Education)</i> , <u>2018 BCCA 305</u> at paras 295, 299.	13, 23
15.	<i>Doe v Metropolitan Toronto (Municipality) Commissioners of Police</i> (1990), 74 OR (2d) 225, <u>1990 CanLII 6611</u> (Div Ct).	17
16.	<i>Doe v Metropolitan Toronto (Municipality) Commissioners of Police</i> (1998), 39 OR (3d) 487, <u>1998 CanLII 14826</u> (Ont Ct).	17
17.	<i>Doucet-Boudreau v Nova Scotia (Minister of Education)</i> , <u>2003 SCC 62</u> ,	6, 14, 19

	[2003] 3 SCR 3 at paras 33, 43-44, 50.	
18.	<i>Elder Advocates of Alberta Society v Alberta</i> , <u>2009 ABCA 403</u> .	13
19.	<i>Ernst v Alberta Energy Regulator</i> , <u>2017 SCC 1</u> , [2017] 1 SCR 3.	27
20.	<i>Grant v Winnipeg Regional Health Authority et al</i> , <u>2015 MBCA 44</u> .	20
21.	<i>Guimond v Quebec (Attorney General)</i> , [1996] 3 SCR 347 at paras 14, 19.	11
22.	<i>Henry v British Columbia (Attorney General)</i> , <u>2015 SCC 24</u> , [2015] 2 SCR 214 at paras 42, 124.	12, 27
23.	<i>Inlakhana v Canada (Attorney General)</i> , <u>2017 ONSC 821</u> .	20
24.	<i>Just v British Columbia</i> , [1989] 2 SCR 1228.	25
25.	<i>Little Sisters Book and Art Emporium v Canada (Minister of Justice)</i> , <u>2000 SCC 69</u> , [2000] 2 SCR 1120.	8
26.	<i>Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)</i> , <u>2007 SCC 2</u> , [2007] 1 SCR 38.	8
27.	<i>Mackin v New Brunswick (Minister of Finance)</i> ; <i>Rice v New Brunswick</i> , <u>2002 SCC 13</u> , [2002] 1 SCR 405 at paras 78, 79.	5, 12
28.	<i>Magda v The Queen</i> , [1964] SCR 72.	7
29.	<i>Mancuso v Canada (National Health and Welfare)</i> , <u>2015 FCA 227</u> at para 29.	13
30.	<i>Mullins v Levy</i> , <u>2009 BCCA 6</u> at para 88.	13
31.	<i>Ontario v Satschko</i> , <u>2007 CanLII 54972</u> (Ont Sup Ct).	20
32.	<i>Procureure générale du Canada c Sarrazin</i> , <u>2018 QCCA 1077</u> at para 15.	13, 20
33.	<i>Procureur général des Territoires du Nord-Ouest c Fédération Franco-Ténoise</i> , <u>2008 NWTCA 5</u> .	13
34.	<i>Quebec (Commission des droits de la personne et des droits de la jeunesse) v Communauté urbaine de Montréal</i> , <u>2004 SCC 30</u> , [2004] 1 SCR 789.	11
35.	<i>R v Demers</i> , <u>2004 SCC 46</u> , [2004] 2 SCR 489 at para 61.	9
36.	<i>R v Ferguson</i> , <u>2008 SCC 6</u> , [2008] 1 SCR 96.	9, 14

37.	<i>R v Imperial Tobacco Canada</i> , <u>2011 SCC 42</u> , [2011] 3 SCR 45 at paras 61-102.	25
38.	<i>R v Mills</i> , <u>[1986] 1 SCR 863</u> at 965.	6
39.	<i>Ravndahl v Saskatchewan</i> , <u>2009 SCC 7</u> , [2009] 1 SCR 181 at para 27.	9
40.	<i>Reference re Secession of Quebec</i> , <u>[1998] 2 SCR 217</u> .	7
41.	<i>Roach v Canada (Attorney General)</i> , [2009] OJ No 737 at paras 56-57 (QL).	18
42.	<i>Roach v Canada (Attorney General)</i> , <u>2012 ONSC 3521</u> .	18
43.	<i>Roncarelli v Duplessis</i> , <u>[1959] SCR 121</u> .	7
44.	<i>Sagharian v Ontario (Education)</i> , <u>2008 ONCA 411</u> .	13
45.	<i>Saskatchewan v Ravndahl</i> , <u>2007 SKCA 66</u> .	13
46.	<i>Saskatchewan Federation of Labour v Saskatchewan</i> , <u>2016 SKQB 365</u> at para 61.	18
47.	<i>Schachter v Canada</i> , <u>[1992] 2 SCR 679</u> at 719-720.	9, 11
48.	<i>Vancouver (City) v Ward</i> , <u>2010 SCC 27</u> , [2010] 2 SCR 28 at para 18.	5, 12, 14, 19, 24, 25, 27
49.	<i>Vancouver (City) v Zhang</i> , <u>2010 BCCA 450</u> at para 77.	13
50.	<i>Webb v Webb</i> , <u>2016 NSSC 180</u> at para 43.	18
51.	<i>Whaling v Canada (Attorney General)</i> , <u>2017 FC 121</u> .	21
52.	<i>White v Pauly</i> , 580 US (2017), <u>137 S Ct 548</u> .	19
53.	<i>Wynberg v Ontario</i> , <u>2006 CanLII 22919</u> , 82 OR 3d 561 (Ont CA).	5, 14
54.	<i>Zundel v Canada</i> , <u>2006 FCA 356</u> at para 5.	13
#	Legislation and International Treaties	Para ref. in
1.	<i>Canadian Bill of Rights</i> , SC 1960, c 44 (<u>EN</u> <u>FR</u>).	7
2.	<i>Canadian Charter of Rights and Freedoms</i> , Part I of the <i>Constitution Act, 1982</i> , being Schedule B to the <i>Canada Act 1982</i> (UK), 1982, c 11, ss. 1	1, 3, 4, 5, 6, 9, 10, 11, 14, 19, 22,

	(EN FR), 23 (EN FR), 24 (EN FR), 32 (EN FR).	23, 24, 25, 27, 28, 32
3.	<i>Constitution Act, 1982</i> , being Schedule B to the <i>Canada Act 1982</i> (UK), 1982, c 11, s. 52 (EN FR).	1, 3, 4, 5, 9, 10, 14, 32
4.	<i>Crown Liability and Proceedings Act</i> , S.O. 2019 c.7, Sched. 17, s 11(5) (EN FR)	28
5.	<i>International Covenant on Civil and Political Rights</i> , 19 December 1966, 999 UNTS 171, art 2 .	7
#	Books and Periodicals	Para ref. in
1.	Bruce Feldthusen, “Public Authority Immunity from Negligence Liability: Uncertain, Unnecessary and Unjustified” (2013) 92 Can Bar Rev 21.	25
2.	Charles Dickens, <i>Bleak House</i> (planetebok.com) at 85.	20
3.	James Pfander, <i>Constitutional Torts and the War on Terror</i> , (New York: Oxford University Press, 2017) at 25-27, 43-46, 149-50.	19
4.	Joanna Schwartz, “How Qualified Immunity Fails” (2017) 127 Yale LJ 2 at 42, 60.	19
5.	Lewis Klar, “Falling Boulders, Falling Trees and Icy Highways: The Policy Operational Test Revisited” (1994) 33 Alta L Rev 167.	25
6.	Lewis Klar, “ <i>R. v. Imperial Tobacco</i> : More Restrictions on Public Authority Liability” (2012) 50 Atla L Rev 157.	25
7.	Lorain Hardcastle, “Government Tort Liability for Negligence in the Health Care Sector: A Critique of the Canadian Jurisprudence” (2012) 37 Queens LJ 525.	25
8.	Mayo Moran, “Case Comment <i>Jane Doe v. Board of Commissioners</i> ” (1993) 6 CJWL 491.	25
9.	WH Charles, <i>Understanding Charter Damages</i> (Toronto: Irwin Law, 2016) at Appendices 5-6, 9-10, 15.	23