

**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

**ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF
CANADA, ATTORNEY GENERAL FOR SASKATCHEWAN, AND ATTORNEY
GENERAL OF QUEBEC**

INTERVENERS

**MOTION RECORD OF THE PROPOSED INTERVENER
THE DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS,
UNIVERSITY OF TORONTO FACULTY OF LAW**
Pursuant to Rule 55 of the Rules of the Supreme Court of Canada

Raj Anand (ranand@weirfoulds.com)
4100 - 66 Wellington Street West
PO Box 35, Toronto-Dominion Centre
Toronto, ON M5K 1B7
Tel: 416-947-5091 Fax: 416-365-1876

Cheryl Milne (cheryl.milne@utoronto.ca)
University of Toronto Faculty of Law
39 Queen's Park Cres. East
Toronto, ON M5S 2C3
Tel: 416-978-0092 Fax: 416-978-8894

Counsel for the Proposed Intervener

Sally A. Gomery
NORTON ROSE FULBRIGHT CANADA LLP
45 O'Connor Street
Suite 1500
Ottawa, ON K1P 1A4
Tel: 613-780-8604
Fax: 613-230-5459
E-mail: sally.gomery@nortonrosefulbright.com

Agent for the Proposed Intervener

Michael H. Morris

Department of Justice Canada
130 King Street West, Suite 3400, Box 36
Toronto, ON
M5X 1K6
Tel: (416) 973-9704
Fax: (416) 973-0809

**Counsel for the Intervener
The Attorney General of Canada**

Graeme G. Mitchell, Q.C.

Saskatchewan Ministry of Justice
Constitutional Law Branch
820 – 1874 Scarth Street
Regina, SK
S4P 3V7
Tel: (306) 787-8385
Fax: (306) 787-9111
E-mail: graeme.mitchell@gov.sk.ca

**Counsel for the Intervener
The Attorney General for Saskatchewan**

Robert Desroches

Carole Soucy
Procureure Générale Québec
Direction du droit public
1200, route de l'Église, 2e étage
Québec, QC
G1V 4M1
Tél: (418) 643-1477
Télé.: (418) 644-7030

**Procureurs de la Procureure générale du
Québec**

Christopher Rupar.

Attorney General of Canada
50 O'Connor Street
Ottawa, ON
K1A 0H8
Tel: (613) 670-6290
Fax: (613) 954-1920
E-mail: christopher.rupar@justice.gc.ca

**Agent for the Intervener
The Attorney General of Canada**

D. Lynn Watt

Gowling Lafleur Henderson LLP
Barristers & Solicitors
160 Elgin Street, 26th Floor
Ottawa, ON
K1P 1C3
Tel: (613) 786-8695
Fax: (613) 788-3509
E-mail: lynne.watt@gowlings.com

**Agent for the Intervener
The Attorney General for Saskatchewan**

Pierre Landry

Noël & Associés s.e.n.c.r.l.
111, rue Champlain
Gatineau, QC
J8X 3R1
Tél: (819) 771-7393
Télé.: (819) 771-5397
Courriel: p.landry@noelassocies.com

**Correspondants pour les procureurs de la
procureure générale du Québec**

ORIGINAL TO: THE REGISTRAR OF THIS COURT

COPIES TO:

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

Counsel for the Appellant
Jessica Ernst

Glenn Solomon QC
Laura Warner
Jensen Shawa Solomon Duguid Hawkes LLP
800, 304 – 8 Avenue SW
Calgary, AB
T2P 1C2
Tel: (403) 571-1520
Fax: (403) 571-1528
E-mail: gsolomon@jssbarristers.ca

Counsel for the Respondent
Alberta Energy Regulator

Jonathan G. Penner
Attorney General of British Columbia
6th Floor - 1001 Douglas Street
Victoria, BC
V8W 9J7
Tel: (205) 952-0122
Fax: (205) 356-9154
E-mail: jonathan.penner@gov.bc.ca

Counsel for the Intervener
The Attorney General of British Columbia

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

Agent for the Appellant
Jessica Ernst

Jeffrey W. Beedell
Gowling Lafleur Henderson LLP
160 Elgin St., Suite 2600
Ottawa, ON
K1P 1C3
Tel: (613) 786-0171
Fax: (613) 563-9869
E-mail: jeff.beedell@gowlings.com

Agent for the Respondent
Alberta Energy Regulator

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

Agent for the Intervener
The Attorney General of British Columbia

INDEX

TABLE OF CONTENTS

	<u>Tab</u>
Notice of Motion dated October 8, 2015.....	1
Affidavit of Kent Roach affirmed October 8, 2015.....	2
Memorandum of Argument.....	3

TAB 1

**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

**ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF
CANADA, ATTORNEY GENERAL FOR SASKATCHEWAN, AND ATTORNEY
GENERAL OF QUEBEC**

INTERVENERS

**NOTICE OF MOTION OF THE PROPOSED INTERVENER
THE DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS,
UNIVERSITY OF TORONTO FACULTY OF LAW**
Pursuant to Rules 47 and 55-59 of the Rules of the Supreme Court of Canada

TAKE NOTICE that the **DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS** hereby applies to a Judge of this Honourable Court, pursuant to Rules 47 and 55-59 of the *Rules of the Supreme Court of Canada* for an order granting:

- a) leave to intervene in this appeal pursuant to Rule 55, upon condition that the David Asper Centre for Constitutional Rights (the "Asper Centre") shall not claim costs in the intervention from any other party to this appeal;
- b) permission to file a factum in this appeal in accordance with Rules 37 and 42;

- c) permission to make oral argument at the hearing of this appeal of such length as this Honourable Court may deem appropriate; and,
- d) such further and other order as this Honourable Court may deem just.

AND FURTHER TAKE NOTICE that the following documents will be referred to in support of the motion: (i) the Affidavit of Kent Roach, affirmed October 8, 2015; and (ii) Memorandum of Argument filed herewith.

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

- a) The Asper Centre has a direct and significant interest in the issues raised in this appeal.
- b) The Asper Centre seeks to promote greater awareness, understanding and acceptance of constitutional rights in Canada. The Centre is especially concerned with advocating access to *Charter* protections and *Charter* remedies for vulnerable individuals and groups. The issues raised in this appeal fall directly within the Centre's mandate, and deeply impact the Centre's focus on promoting consistent access to constitutional justice.
- c) The Asper Centre is uniquely situated to provide this Honourable Court with a distinct perspective and submissions that will be useful and different from those of the other parties.
- d) If granted leave to intervene, the Asper Centre will present the Court with legal arguments drawn from its expertise. The Asper Centre's Advisory Group consists of some of the leading academics in the area of constitutional rights.
- e) The Asper Centre's argument will generally support the position of the Appellant in this Appeal in respect of the analysis of the legal issues, but the Asper Centre would not take a position on the outcome of the appeal.
- f) If permitted to intervene, the Asper Centre will advance the arguments set out in our Memorandum of Argument filed in support of this motion.

- g) Granting leave to intervene to the Asper Centre will not prejudice any party.
- h) The Asper Centre will take the record as it finds it and will not seek to supplement the record.
- i) The Asper Centre will abide by any schedule set by this Honourable Court.
- j) The Asper Centre seeks no costs in the intervention and respectfully requests that none be awarded against it.
- k) The Asper Centre takes no position on the disposition of the appeal.
- l) Rules 47 and 55-59 of the *Rules of the Supreme Court of Canada*.
- m) Such further or other grounds as counsel may see fit and may be permitted.

DATED at Toronto, Ontario, this 9th day of October, 2015.

SIGNED BY Newton Rose Tulbriht Canada Lt
Raj Anand

Cheryl Milne

TAB 2

**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

**ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF
CANADA, ATTORNEY GENERAL FOR SASKATCHEWAN, AND ATTORNEY
GENERAL OF QUEBEC**

INTERVENERS

AFFIDAVIT OF KENT ROACH

Pursuant to Rule 57(1) of the Rules of the Supreme Court of Canada

I, KENT ROACH, of the City of Toronto in the Province of Ontario, **AFFIRM AS**

FOLLOWS:

1. I am the Chair of the Advisory Group for the David Asper Centre for Constitutional Rights ("the Asper Centre") at the University of Toronto and as such have knowledge of the matters deposed herein. This affidavit outlines the expertise of the Asper Centre regarding Canadian constitutional rights. Where facts are based on information obtained from others, I believe that information to be true.

I. BACKGROUND OF THE ASPER CENTRE

A. Description and Expertise of the Asper Centre

2. The Asper Centre is a part of the University of Toronto, Faculty of Law ("the Faculty of Law"). With the assistance of an endowment from alumnus David Asper, the Centre was established in 2008 to promote "greater awareness, understanding and acceptance of

constitutional rights in Canada” and to realize constitutional rights through advocacy, research and education. The Centre seeks to promote access to constitutional justice and human rights for vulnerable individuals and groups. As part of an academic institution, the Centre is committed to high quality research, intellectual engagement and scholarly rigour in its advocacy work.

3. The Asper Centre furthers its objectives in the following ways:
 - a. Appears at various levels of court as an intervener in legal matters that raise constitutional and access to justice issues.
 - b. Prepares position papers and makes written submissions to various governmental bodies, concerning the advancement of constitutional rights in Canada.
 - c. Engages in professional, academic and public education, including organizing and hosting conferences and symposia to explore cutting-edge constitutional ideas.
 - d. Maintains working groups of volunteer law students focused on constitutional rights projects. Students work with faculty members and the executive director to research and draft position statements on draft legislation and other constitutional issues of concern.
 - e. Operates a constitutional rights legal clinic, allowing law students to work with practitioners for academic credit on files involving innovative constitutional advocacy.
4. The Asper Centre is able to draw upon the extensive constitutional expertise and litigation experience of its Advisory Group. In addition, it draws upon the expertise of the large number of scholars specializing in constitutional rights at the Faculty of Law.

B. Advisory Group and Staff Expertise

5. The Executive Director of the Asper Centre, Cheryl Milne, joined the Asper Centre as its inaugural executive director in 2008. Prior to joining the Asper Centre, she was a legal advocate for Justice for Children and Youth for 17 years where she led its *Charter* litigation at this Honourable Court in *AC v Manitoba (Director of Child and Family Services)*, [2009] 2

SCR 181; *R v DB*, [2008] 2 SCR 3; and *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, [2004] 1 SCR 76. She represented the Asper Centre as counsel in *R v Kokopenace*, 2015 SCC 28; *R v Kokopenace & R v Spiers*, 2013 ONCA 389; *R v Davey*, [2012] 3 SCR 828, *R v Emms*, [2012] 3 SCR 810, *R v Yumnu*, [2012] 3 SCR 777 (“the Jury Vetting Cases”); *R v Caron*, [2011] 1 SCR 78; *R v Conway*, [2010] 1 SCR 765; and *Reference Re Section 293 of the Criminal Code of Canada (“Polygamy Reference”)*, [2011] BCSC 1588. She is a former Chair of the Ontario Bar Association’s Constitutional, Civil Liberties and Human Rights section and currently sits on its executive, as well as the executive of the National Constitutional and Human Rights section of the Canadian Bar Association. She also teaches the Asper Centre’s clinical course on constitutional advocacy and directs the joint JD and Master of Social Work program at the University of Toronto.

6. I, Kent Roach, am the Chair of the Asper Centre’s Advisory Group, and the Prichard-Wilson Chair of Law and Public Policy at the Faculty of Law. I have written numerous books, which include *False Security: The Radicalization of Canadian Anti-Terrorism* (with Craig Forcese); *Constitutional Remedies in Canada*, 2nd ed; *The 9/11 Effect: Comparative Counter-Terrorism*; *Due Process and Victims’ Rights*; *The New Law and Politics of Criminal Justice*; *The Supreme Court on Trial*; *Criminal Law*, 6th ed; and *The Canadian Charter of Rights and Freedoms*, 5th ed (with Robert J. Sharpe). I have represented intervening Aboriginal and civil liberties groups at this Honourable Court in the following cases: *Attorney General of Canada v Downtown Eastside Sex Workers United Against Violence Society, et al*, [2012] 2 SCR 524; *Khawaja v Her Majesty the Queen*, [2012] 3 SCR 555; *R v Ipeelee*, [2012] 1 SCR 433; *Vancouver (City) v Ward*, [2010] 2 SCR 28; *R v Conway*, [2010] 1 SCR 765; *Sauvé v Canada*, [2002] 3 SCR 519; *R v Golden*, [2001] 3 SCR 679; *R v Latimer*, [2001] 1 SCR 3; *R v 974649 Ontario Inc*, [2001] 3 SCR 575 (“Dunedin Construction”); *R v Wells*, [2000] 1 SCR 207; *R v Gladue*, [1999] 1 SCR 688; *Corbiere v Canada*, [1999] 2 SCR 203; *R v Williams*, [1998] 1 SCR 1128; *R v Stillman*, [1997] 1 SCR 607; and *Hill v Church of Scientology*, [1995] 2 SCR 1130.

7. Yasmin Dawood is an Assistant Professor at the Faculty of Law and holds a cross appointment with the Department of Political Science. Her research and teaching interests include election law and the law of democracy, American and Canadian constitutional law, and democratic theory. Her publications have appeared in the *University of Toronto Law Journal*, the *International Journal of Constitutional Law*, the *Georgetown Law Journal* and elsewhere. Professor Dawood holds a JD from Columbia Law School, where she was Articles

Editor of the *Columbia Law Review*, and an MA and PhD in Political Science from the University of Chicago, where she held a Mellon Fellowship and a University Fellowship. Professor Dawood is admitted to the Bar of New York and has practiced law with the firm of Cleary, Gottlieb, Steen & Hamilton LLP in New York. Professor Dawood has been on the Advisory Group since 2011 and is currently on sabbatical.

8. Lorraine Weinrib is a professor with the Faculty of Law and the Department of Political Science. Previously, she worked in the Crown Law Office - Civil, Ministry of the Attorney General (Ontario), holding the position of Deputy Director of Constitutional Law and Policy at the time of her departure. Her work included legal advice and policy development on constitutional issues, as well as extensive litigation, frequently before this Honourable Court. At the Faculty of Law, Professor Weinrib teaches advanced courses on the *Charter*, constitutional litigation, and comparative constitutional law. Her work on constitutional law has been published in the *University of Toronto Law Journal*, the *National Journal of Constitutional Law*, the *Supreme Court Law Review*, and elsewhere. Professor Weinrib has been on the Advisory Group since the Centre's inception and continues to work with the Centre while on sabbatical.

9. Malcolm Thorburn is an associate professor with the Faculty of Law. Prior to joining the Faculty of Law in 2013, he was Canada Research Chair in Crime, Security and Constitutionalism at Queen's University. His writing focuses on theoretical issues in and around criminal justice including criminal law and procedure, sentencing, policing, national security and surveillance. His work has appeared in such publications as the *Yale Law Journal*, the *Boston University Law Review*, the *University of Toronto Law Journal*, *Criminal Law and Philosophy* and several books at Oxford University Press and Hart Publishing.

10. Paul Schabas is an adjunct faculty member of the Faculty of Law and litigation partner at Blake, Cassels & Graydon LLP, Toronto. He is a bencher of the Law Society of Upper Canada, a Trustee of the Law Foundation of Ontario, and director of the Canadian Civil Liberties Association, the Osgoode Society for Canadian Legal History, and Lawyers Rights Watch Canada. He is past president and founding director of Pro Bono Law Ontario and past president of the Canadian Media Lawyers Association. Mr. Schabas has appeared before this Honourable Court in numerous cases, including *Breedon, et al v Black*, [2012] 1 SCR 666; *Crookes v Newton*, [2011] 3 SCR 269; *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, [2010] 1 SCR 815; *Toronto Star Newspapers v Canada*, [2010] 1 SCR 721; *Grant v Torstar Corp, et al*, [2009] 3 SCR 640; *Quan v Cusson, et al*,

[2009] SCC 62; *Provincial Court Judges' Association of New Brunswick v New Brunswick, et al*, [2005] 2 SCR 286; *Canadian Foundation for Children, Youth and the Law v Canada*, [2004] 1 SCR 76; and *R v Morgentaler, Smoling and Scott*, [1988] 1 SCR 30.

C. Work of the Asper Centre

11. The Asper Centre has been granted leave to intervene in a number of cases before the Supreme Court of Canada including:

- a. *B010 v Minister of Citizenship and Immigration*, SCC No 35388;
- b. *Henry v British Columbia (Attorney General)*, 2015 SCC 24;
- c. *R v Kokopenace*, 2015 SCC 28;
- b. *Trial Lawyers Association of British v British Columbia (Attorney General)*, [2014] 3 SCR 31;
- c. *R v Anderson*, [2014] 2 SCR 167;
- d. *Kazemi Estate v Islamic Republic of Iran*, [2014] 3 SCR 176;
- e. *Attorney General (Canada) v Bedford*, [2013] 3 SCR 1101;
- f. *Canada (Minister of Justice) v Zajicek*, (Case No 34767) [appeal quashed as moot];
- g. *Divito v Canada (Public Safety and Emergency Preparedness)*, [2013] 3 SCR 157;
- h. *R v Davey*, [2012] 3 SCR 828; *R v Yumnu*, *R v Cardoso* and *R v Duong*, [2012] 3 SCR 777; *R v Emms*, [2012] 3 SCR 810 [heard together as "the Jury Vetting Cases"];
- i. *Canada (AG) v Downtown Eastside Sex Workers United Against Violence*, [2012] 2 SCR 524;
- j. *R v Caron*, [2011] 1 SCR 78;
- k. *Canada (Prime Minister) v Khadr*, [2010] 1 SCR 44 (jointly with Human Rights Watch and the Faculty of Law's International Human Rights Program);
- l. *Vancouver (City) v Ward*, [2010] 2 SCR 28 (jointly with the British Columbia Civil Liberties Association); and
- m. *R v Conway*, [2010] 1 SCR 765 (jointly with the Criminal Lawyers' Association).

12. In addition to the above cases before the Supreme Court, the Asper Centre was granted "interested persons" standing in the *Polygamy Reference* at the British Columbia Supreme Court (with the Canadian Coalition for the Rights of Children). The Centre was also granted intervener standing before the Ontario Court of Appeal in *Tanudjaja et al v Canada*, 2014 ONCA 852, and in *R v Kokopenace*, 2013 ONCA 389.

13. In support of its academic and educational objectives, the Asper Centre hosts

conferences, panels and workshops bringing together constitutional experts from across Canada and abroad. Recent Asper Centre events have included the following:

- a. *Life, Liberty and Equality – Canadian Style: The Interplay Between Sections 7 and 15 of the Charter*, a one-day conference, held February 27, 2015;
- b. *R v Kokopenace, the Panel*, a panel discussion on *R v Kokopenace* with panelists who argued the case, held October 15, 2014;
- c. *Privacy at Risk*, a panel discussion on Canadian privacy law, held March 12, 2014;
- d. *Constitutional Remedies: Are They Effective and Meaningful?*, a one-day conference, held February 28, 2014;
- e. *Social Science Evidence in Charter Litigation*, held November 9, 2012;
- f. *Who Belongs? Rights, Benefits, Obligations and Immigration Status*, held September 24-25, 2010 (organized with the Canadian Civil Liberties Association).

14. The Asper Centre's Refugee and Immigration Law Working Groups have allowed law students to engage in supervised research and advocacy on constitutional issues. The Refugee and Immigration Law Working Group focused on the new legislation and policies that created designated countries and foreign nationals in the refugee determination system, reduced health benefits for refugee claimants, and created new barriers for citizenship. The group worked with the Canadian Association of Refugee Lawyers (CARL) in writing legal memoranda and creating a database of case summaries of current refugee law of strategic or precedential value to CARL lawyers. The Bedford Working Group researched the impact of bill C-36 which implemented the Federal Government's response to the decision of this Honourable Court in *AG v Bedford*. The students worked with a community organization and a number of faculty advisors to produce memoranda and informational resources related to the implementation of the new laws. Students have formed an Environmental Rights Working Group for the 2015-2016 academic year.

15. The Centre also operates a constitutional rights legal clinic during the academic year, allowing law students to work with practitioners for academic credit on files involving innovative constitutional advocacy. In the past, clinical students have worked with the Asper Centre on all of its court interventions (listed above), as well as with other organizations

engaged in constitutional rights advocacy, including the Refugee Law Office of Legal Aid Ontario, ARCH Disability Law Centre, LEAF and the Law Commission of Ontario. The Asper Centre also provides a practicum placement for a student in the combined law and social work program at the University of Toronto.

II. THIS MOTION FOR LEAVE TO INTERVENE

16. The Asper Centre has an interest and an expertise in the issues in these appeals. As noted above, the Asper Centre's principal mandate is to realize constitutional rights through advocacy, education and academic research. The Asper Centre is especially concerned with advocating access to constitutional rights for vulnerable individuals and groups, and the scope and extent of *Charter* protections. Through its Advisory Group and as evidenced by its record of interventions, the Asper Centre has significant expertise into the application of the *Charter* and constitutional remedies, including in such cases as:

- a. *Henry v British Columbia (Attorney General)*, 2015 SCC 24, which addressed the availability of *Charter* damages against the Crown for prosecutorial misconduct absent proof of malice;
- b. *Kazemi Estate v Islamic Republic of Iran*, [2014] 3 SCR 176, which addressed whether proceedings were barred, in whole or part, by application of the *State Immunity Act*, and in which the Asper Centre argued that the right to a remedy is a principle of fundamental justice;
- c. *Canada (Prime Minister) v Khadr*, [2010] 1 SCR 44, which addressed whether the respondent's s. 7 *Charter* rights were breached and whether the remedy sought was appropriate and just in the circumstances;
- d. *Vancouver (City) v Ward*, [2010] 2 SCR 28, which addressed whether damages are available for the infringement of a right or freedom guaranteed by the *Charter* in the absence of bad faith, an abuse of power, or tortious conduct on the part of the infringer;
- e. *R v Conway*, [2010] 1 SCR 765, which addressed whether the Ontario Review Board had jurisdiction to grant remedies under s. 24(1) of the *Charter*; and
- f. *Tanudjaja et al v Canada*, 2014 ONCA 852, in which the Asper Centre addressed the issue of whether the remedies sought were within the jurisdiction of the court.

17. If granted leave to intervene, the Asper Centre would not file any additional evidence

or extraneous material beyond a factum. The Asper Centre does seek leave to make oral submissions of such length as this Court deems appropriate. The Centre's submissions would focus on the limited immunity from *Charter* liability available in the common law and the anomaly which would result should a general statutory immunity clause be allowed to prevail over the *Charter*. Further, the Centre's submissions would highlight the distinction between "liability" and "remedy".

III. OUTLINE OF PROPOSED SUBMISSIONS

18. I have read the Memorandum of Argument and can confirm that this outline is an accurate reflection of the proposed submissions that the Asper Centre intends to make, should this Court grant the Asper Centre leave to intervene in this appeal.

IV. SUMMARY

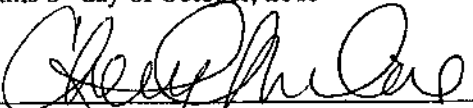
19. The Asper Centre offers significant expertise relating to *Charter* rights and values, and has significant interest and experience advocating for access to *Charter* rights and protections. In light of these considerations, the Centre's contribution to this appeal would, in my view, be both distinctive and valuable.

20. Granting leave to intervene to the Asper Centre will not prejudice any party or add expenses to any party. As noted, the Asper Centre will take the record as it finds it. The Centre will avoid duplication of submissions, and will abide by any schedule set by the Court. The Asper Centre seeks no costs in the proposed intervention and asks that none be awarded against it.

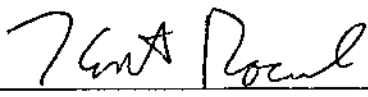
21. For these reasons, the Asper Centre respectfully requests leave to intervene to file a factum and to present oral argument at the hearing of this appeal.

22. I affirm this affidavit in support of the Asper Centre's motion for leave to intervene, and for no other or improper purpose.

Affirmed before me at the City of Toronto,)
in the Province of Ontario,)
this 8th day of October, 2015)



Lawyer, Commissioner for Taking Affidavits



KENT ROACH

TAB 3

**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

**ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF
CANADA, ATTORNEY GENERAL FOR SASKATCHEWAN, AND ATTORNEY
GENERAL OF QUEBEC**

INTERVENERS

**MEMORANDUM OF ARGUMENT OF THE APPLICANT INTERVENER
THE DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS,
UNIVERSITY OF TORONTO FACULTY OF LAW**

PART I - FACTS

A. Overview

1. In this motion, the David Asper Centre for Constitutional Rights (the "Asper Centre") seeks leave to intervene in this appeal pursuant to Rule 55 of the *Rules of the Supreme Court of Canada* (the "Rules").
2. The Asper Centre brings a unique perspective to this appeal. It meets the test for leave to intervene, and intends to make submissions that are distinct from those that will be made by the

parties and that will be useful to this Honourable Court. The Centre's submissions will focus on the limited immunity from *Charter* liability available in the common law and under s.24(1) of the Charter and the anomaly that would result should a general statutory immunity clause be allowed to prevail over the *Charter* and to fetter the remedial discretion of trial judges as supervised by appellate courts.

B. Description and Expertise of the Asper Centre

3. The Asper Centre was established by the University of Toronto, Faculty of Law ("the Faculty of Law") in 2008 with the assistance of an endowment from alumnus David Asper. The Asper Centre is dedicated to promoting "awareness, understanding and acceptance of constitutional rights in Canada". In particular, the Asper Centre is committed to promoting access to constitutional justice and human rights for vulnerable individuals and groups. Situated within an academic institution, the Asper Centre is committed to high quality research and scholarly rigour in its advocacy work.

Affidavit of Kent Roach, affirmed October 8, 2015.

4. The Asper Centre is able to draw on the extensive constitutional expertise and litigation experience of its Advisory Group, as well as the experience of scholars who research and write in the field of constitutional rights at the Faculty of Law. The Asper Centre also operates a constitutional rights legal clinic that engages students in the work of the Centre and instructs them in the practical skills of constitutional advocacy.

Affidavit of Kent Roach, affirmed October 8, 2015.

5. This Honourable Court has granted the Asper Centre leave to intervene in fifteen cases: *B010 v Minister of Citizenship and Immigration*, (SCC No 35388); *Henry v British Columbia (Attorney General)*, 2015 SCC 24; *R v Kokopenace*, 2015 SCC 28; *Trial Lawyers Association of British v British Columbia (Attorney General)*, [2014] 3 SCR 31; *R v Anderson*, [2014] 2 SCR 167; *Kazemi Estate v Islamic Republic of Iran*, [2014] 3 SCR 176; *Attorney General (Canada) v Bedford*, [2013] 3 SCR 1101; *Canada (Minister of Justice) v Zajicek*, (Case No 34767), appeal quashed as moot; *Divito v Minister of Public Safety and Emergency Preparedness*, [2013] 3 SCR 157; *R v Davey*, [2012] 3 SCR 828, *R v Emms*, [2012] 3 SCR 810, and *R v Yumnu*, [2012] 3 SCR 777 (“the Jury Vetting Cases”); *Canada (AG) v Downtown Eastside Sex Workers United Against Violence*, [2012] 2 SCR 524; *R v Caron*, [2011] 1 SCR 78; *R v Conway*, [2010] 1 SCR 765; *Vancouver (City) v Ward*, [2010] 2 SCR 28; and *Canada (Prime Minister) v Khadr*, [2010] 1 SCR 44. The Centre was also granted leave to intervene by the Ontario Court of Appeal in *R v Kokopenace*, 2011 ONCA 536, the Supreme Court of British Columbia in the *Reference re: Criminal Code, s 293*, 2010 BCSC 1308 (*The Polygamy Reference*) and by the Ontario Court of Appeal in *Tanudjaja v Attorney General (Canada)*, 2013 ONSC 1878.

Affidavit of Kent Roach, affirmed October 8, 2015.

6. The Asper Centre has demonstrated significant expertise in cases where the application of the *Charter* and constitutional remedies were at issue, as evidenced by its intervention in the following appeals: *Henry*, 2015 SCC 24; *Kazemi*, [2014] 3 SCR 176; *Khadr*, [2010] 1 SCR 44; *Ward*, [2010] 2 SCR 28; *Conway*, [2010] 1 SCR 765; and *Tanudjaja*, 2014 ONCA 852.

PART II – QUESTION IN ISSUE

7. The sole question in issue on this motion is whether the Asper Centre should be granted leave to intervene in the within appeal.

PART III – ARGUMENT

A. The Asper Centre's Interest in this Appeal

8. It is submitted that the Asper Centre meets the test for leave to intervene. The Centre has a strong interest in the subject matter of this appeal and can provide useful and different submissions to this Honourable Court.¹

9. The Asper Centre's expertise with respect to constitutional rights and access to justice issues would provide the Court with a distinctive perspective on the issue of how the common law's treatment of immunity from *Charter* liability should inform this Court's interpretation of s. 43 of the *Energy Resources Conservation Act* (the "ERCA).

10. As noted above, the Asper Centre's principal mandate is to promote constitutional rights through advocacy, education and academic research. By limiting its submissions to the common law's treatment of immunity from *Charter* liability and the distinction between liability and remedy, the Asper Centre will focus on issues that have potential consequences for future *Charter* challenges, touching on the Asper Centre's core values of promotion of constitutional rights and access to justice for *Charter* litigants.

¹ *Reference Re Workers' Compensation Act, 1983 (Nfld)* (Application to Intervene), [1989] 2 SCR 355 at 339.

B. Outline of Proposed Submissions

11. If granted leave to intervene, the Asper Centre will argue that the Court below has taken this Honourable Court's reasoning in *Mackin v New Brunswick (Minister of Finance)*² and *Henry v British Columbia (Attorney General)*,³ permitting qualified immunity under the common law to shield only a narrow range of government activity from a *Charter* damages claim, and erroneously expanded it to permit governments to thwart *Charter* liability altogether through a mere statutory enactment.

12. Absolute immunity from *Charter* scrutiny is not available at common law. This Honourable Court's decision in *Henry* illustrates that the common law provides government with very limited protection from claims for damages under the *Charter*.⁴ In addressing the Crown's liability under the *Charter* for wrongful non-disclosure in criminal prosecutions, this Court held that the claimant must overcome a "high threshold" to make out a successful *Charter* damages claim but does not bar absolutely any such claims.⁵ 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.

13. For the reasons that follow, the Asper Centre submits that it would be an anomaly if statutory immunity provisions like s. 43 of the *ERCA* could provide even greater immunity from *Charter* liability than the limited protection available at common law.

14. Immunity from the *Charter* is granted only in very narrow circumstances where there are compelling policy reasons for doing so. Writing for the majority in *Henry*, Moldaver J. (Abella,

² *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405

³ *Henry v British Columbia (Attorney General)*, 2015 SCC 24.

⁴ *Ibid*

⁵ *Ibid* at para 31.

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.⁶ 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”.⁷ 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.”⁸

15. It will be the Asper Centre’s submission that any policy reasons for affording immunity to statutory bodies such as the Alberta Energy Regulator (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.⁹ 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 the Crown to scrutiny would undermine its efforts to uphold the integrity of the criminal justice system.

16. Furthermore, 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.”¹⁰ The underlying reasoning was that if statutory bodies could be insulated from the

⁶ *Ibid* at para 41.

⁷ *Ibid* at para 39.

⁸ *Ibid* at para 40.

⁹ Statement of Claim at para 27 [Appellant’s Record, Tab 5 at 65-66].

¹⁰ *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, at para 35.

Charter, then the legislature could avoid the *Charter's* constraints by establishing statutory bodies to fulfill government functions.¹¹

17. In *Godbout*, La Forest J. expressed concern that allowing 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.”¹² 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 Honourable Court.

18. Even in those narrow circumstances where compelling policy considerations justify granting protection, 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 respecting the serious policy issues that may justify extending immunity and the importance of remedying rights violations.¹³ 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 while ignoring the claimant’s rights entirely.

19. Finally, the Asper Centre submits that this Court should be attuned to the consequences of allowing statutory immunity provisions to bar *Charter* claims: government would be capable of insulating itself from the *Charter* with the mere stroke of a legislative pen. In essence the government has through this provision attempted to pre-empt the analysis of what constitutes a good governance concern that justifies such protection and has substituted a legislative decision for a judicial decision about when and if damages are an appropriate and just remedy. The Asper

¹¹ *Ibid* at para 40.

¹² *Godbout v Longueuil (City)*, [1997] 3 SCR 844, at para 48.

¹³ *Henry*, *supra* note 3 at para 81.

Centre intends to argue that there is a presumption that such statutory articulations of good governance concerns, particularly where the immunity appears to be absolute, are overbroad and ought to be interpreted as incapable of ousting the constitutionally guaranteed s.24(1) jurisdiction.

20. 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. As explained by this Court in *Henry*, once a claimant has made out a breach of his or her *Charter* rights and has demonstrated that an award of damages would serve a compensation, vindication or deterrence function, the onus then shifts to the state to rebut the claim based on countervailing considerations (the existence of alternative remedies and good governance considerations).¹⁴

21. The language of s. 24(1) of the *Charter* confers the widest possible discretion on a court to craft remedies for violations of *Charter* rights. Courts must be able to exercise wide discretion to fashion remedies that are just and appropriate to the particular violation. In *Doucet-Boudreau*, Iacobucci and Arbour JJ. stated:

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. We note, however, that statutes and common law rules may be helpful to a court choosing a remedy under s. 24(1) insofar as the statutory provisions or common law rules express principles that are relevant to determining what is "appropriate and just in the circumstances".¹⁵

22. 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

¹⁴ *Henry*, *supra* note 3 at para 37.

¹⁵ *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, at para 27.

PART VI – TABLE OF AUTHORITIES

	Paragraph
<i>Blencoe v British Columbia (Human Rights Commission)</i> , 2000 SCC 44	16
<i>Doucet-Boudreau v Nova Scotia (Minister of Education)</i> , 2003 SCC 62	21
<i>Godbout v Longueuil (City)</i> , [1997] 3 SCR 844	17
<i>Henry v British Columbia (Attorney General)</i> , 2015 SCC 24	11, 12, 14, 18, 20
<i>Mackin v. New Brunswick (Minister of Finance)</i> , 2002 SCC 13, [2002] 1 S.C.R. 405	11
<i>R v 974649 Ontario Inc.</i> , 2001 SCC 81 [“Dunedin”]	22

expansive in theory, is only as meaningful as the remedy provided for its breach.”¹⁶ An individual who has had a violation of his or her *Charter* rights must be allowed access to an effective remedy.

PART IV – COSTS

23. The Asper Centre seeks no costs in the proposed intervention and requests that none be awarded against it.

PART V – ORDER REQUESTED

24. The Asper Centre respectfully requests that it be granted:
- a. leave to intervene in the within appeal;
 - b. leave to file a factum in accordance with Rules 37 and 42 and to make oral argument at the hearing of this appeal; and
 - c. such further or other order as this Honourable Court may deem just.

All of which is respectfully submitted, this 9th day of October, 2015.


Raj Anand

Cheryl Milne
Counsel for the Asper Centre

¹⁶ *R v 974649 Ontario Inc*, 2001 SCC 81, at para 20 [“Dunedin”].