

**COURT OF APPEAL FOR ONTARIO**

B E T W E E N:

**VALERIE JACOB**

Appellant/Plaintiff

- and -

**ATTORNEY GENERAL OF CANADA**

Respondent/Defendant

**FACTUM OF THE INTERVENER,  
CANADIAN CIVIL LIBERTIES ASSOCIATION**

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## **PART I - OVERVIEW**

1. The Court in this appeal is asked to review the decision of the Honourable Justice Dow of the Superior Court dated July 6, 2023 dismissing the Appellant's application for a declaration that the definition of "worker" in section 2 of the *Canada Emergency Response Benefit* ("CERB Act") and ss. 3(1)(d), 3(1)(e) and/or 3(1)(e.1) and 10(1)(d), 10(1)(e) and/or 10(1)(e.1) of the *Canada Recovery Benefits Act* ("CRB Act") violated section 15(1) of the *Charter of Rights and Freedoms* (the "Charter") and are therefore of no force and effect pursuant to section 52(1) of the *Constitution Act, 1982* (the "Constitution").

2. The impugned legislation instituted emergency income replacement benefits including the Canada Emergency Response Benefit ("CERB"), the Canada Recovery Benefit ("CRB"), and the Canada Recovery Sickness Benefit ("CRSB") during the global COVID-19 pandemic.

3. The Appellant argued that the \$5,000 income eligibility threshold and the omission of Canada Pension Plan Disability Benefit ("CPP-D") from the list of eligible income sources discriminated against disabled workers and/or CPP-D recipients who participated in the labour market. The combined effect prevented the Appellant from receiving emergency income replacement benefits.

4. The lower court dismissed the application, finding that the Appellant's claim under section 15(1) could not succeed because the eligibility threshold did "not differentiate her from non-disabled workers who are also unable to meet the \$5,000 earnings threshold".

5. Given the court's finding that the Appellant's section 15(1) claim could not succeed, the decision did not address the remedy sought and, in particular, the Appellant's request

for an order for compensatory damages pursuant to section 24(1) of the *Charter* for payment of CERB and CRB benefits, in addition to the declaration of invalidity.

6. The CCLA makes its submissions on the issue of constitutional remedies pursuant to section 52(1) of the *Constitution* and 24(1) of the *Charter*. In particular, an order requiring the enactment of retroactive remedial legislation as well as the availability of individual remedies in cases where a declaration of invalidity has also been granted.

7. The CCLA sought intervener status due to the significant public importance of these issues and their development within the jurisprudence, in particular, as it relates to the ability of those who successfully challenge the constitutionality of laws to obtain meaningful remedies. The outcome of this court's decision with respect to remedies will have an impact on the willingness and ability of individuals to assert their constitutional rights before courts, thereby contributing to the development of case law, accessing justice, and holding government to account.

8. The CCLA's interest in this case is to ensure that the court continues to develop the jurisprudence regarding constitutional remedies in a manner that recognizes the specific circumstances of the case, the claimant and other affected individuals, such that appropriate, just and meaningful remedies are provided to those who perform the public service of challenging the constitutionality of legislation.

## **PART II - THE FACTS**

### **A. The CCLA**

9. The CCLA accepts the facts as summarized by the parties.

## **PART III - ISSUES AND THE LAW**

### **A. The CCLA's Position on the Issues**

10. A declaration of invalidity under section 52(1) means that, henceforth, the impugned provision is of no force or effect. However, in general, a declaration of invalidity must also be retroactive since, most often, a prospective declaration of invalidity would leave those who have had their rights violated with no remedy at all. Where necessary to provide a meaningful remedy, it is also within the court's power to order the implementation of remedial legislation that is constitutionally compliant, with retroactive effect.

11. Furthermore, in addition to declaratory relief under section 52(1) of the *Constitution*, a claimant ought to be entitled to obtain an individual remedy pursuant to section 24(1) of the *Charter*, if they would otherwise be left without a meaningful vindication of their rights. The "classic doctrine" that individual remedies under section 24(1) of the *Charter* cannot be combined with declaratory relief under section 52(1) of the *Constitution* is outdated and should be revisited by this court in the civil context, as it has been in the criminal.<sup>1</sup>

### **B. Retroactive Application of a Declaration of Invalidity**

12. Section 52(1) of the *Constitution* states:

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

13. A declaration of invalidity under section 52(1) means that, henceforth, the impugned provision is of no force or effect. However, the Supreme Court of Canada has recognized that section 52(1) "may also operate retroactively so far as the parties are concerned,

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<sup>1</sup> *Ontario (Attorney General) v. G* [Ontario AG], [2020 SCC 38](#) [Ontario AG].

reaching into the past to annul the effects of an unconstitutional law.”<sup>2</sup> Retroactivity is the *general rule* with respect to remedies for successful litigants, to the extent necessary to ensure that successful litigants will have the benefit of the ruling.<sup>3</sup>

14. Although the Supreme Court of Canada carved out an exception to the general rule where the effect of the judgment of the court represented a “substantial change in the law”, the general rule of retroactivity applies when a court is “declaring the law as it existed”.<sup>4</sup>

15. In this case, if the impugned provisions were to be declared invalid, this would not reflect a substantial change in the law. The decision would simply affirm the existing law, namely, that benefits schemes cannot be designed in a way that discriminates against claimants on the basis of disability.<sup>5</sup> As such, here, there is no “clear break from the past” jurisprudence but, rather, a declaration of the law as it existed.<sup>6</sup>

16. However, even if this court were to find that a declaration of invalidity reflected a substantial change in the law, this would not be sufficient to justify a deviation from the general rule that declarations of invalidity apply retroactively. The court must also consider additional factors which include, *inter alia*, the fairness of the limitation of the retroactivity of the remedy to the litigants, good faith reliance by the government, and the constitutional role of the legislature in the allocation of public resources.<sup>7</sup> This is a non-exhaustive list.

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<sup>2</sup> *Canada (Attorney General) v Hislop*, [2007 SCC 10](#), at [para. 82](#), [*Hislop*], citing *Miron v Trudel*, [1995 CanLII 97 \(SCC\)](#).

<sup>3</sup> *Hislop*, at [para. 86](#).

<sup>4</sup> *Hislop*, at [para. 99](#); *Sivia v British Columbia (Superintendent of Motor Vehicles)*, [2012 BCSC 1030](#), at [paras. 67-68](#) [*Sivia*].

<sup>5</sup> *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003 SCC 54](#) [*Martin-Laseur*].

<sup>6</sup> *Hislop*, at [para. 99](#).

<sup>7</sup> *Hislop*, at [para. 100](#).

17. Limiting the declaration of invalidity to a prospective declaration in a case such as this would be inherently unfair due to the specific circumstances of the subject legislation. The income supports at issue in this case are no longer in existence, as the impugned legislation has been repealed, not in an effort to remedy any discriminatory impact, but because the COVID-19 pandemic is no longer threatening the income security of Canadians. As a result, a prospective declaration of invalidity would leave those who have had their rights violated with no remedy at all.

18. Importantly, courts have held that where the limitation of a retroactive declaration denies the claimant a meaningful remedy, it can have broader potential consequences, including a chilling effect on *Charter* litigation and a lack of legislative and government accountability. These factors weigh in favour of granting a retroactive declaration of invalidity.<sup>8</sup>

*i. Constitutionally Compliant Remedial Legislation*

19. Even if this Court found reason to decline to give retroactive effect to the declaration of invalidity, or if it is otherwise necessary, it is within this Court's power to grant a meaningful remedy by ordering the implementation of remedial legislation that is constitutionally compliant, with retroactive effect to the date that the impugned provisions came into force.

20. In cases where the declaration of invalidity has been suspended, it is incumbent on the legislature to pass constitutionally sound legislation to remedy the breach. However, the court can also order the legislature to ensure that such legislation has retroactive effect in order to give the rights claimant in the case, and all others affected by the unconstitutional

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<sup>8</sup> *Sivia*, at [paras. 67-68](#).



provisions, a meaningful remedy.<sup>9</sup>

21. The CCLA recognizes that courts may be reluctant to assume the role of the legislature when considering the institution of remedial legislation as an appropriate remedy. However, where there are “unique and unusual circumstances”, such as a global pandemic that resulted in the dissemination of income replacement benefits which no longer exist, intervention by this Court is appropriate.<sup>10</sup> This is a rare circumstance that warrants this Court’s intervention.<sup>11</sup>

22. Ultimately, the implementation of retroactive remedial legislation in cases where the benefit no longer exists is essential to ensure that claimants’ rights are meaningfully remedied. Because there will be no prospective version of the legislation, in the absence of retroactive remedial legislation, there would be no meaningful remedy for individuals who were unconstitutionally denied access to the benefits at issue, or who did not apply for them because they did not qualify.

### **C. Individual Remedies Pursuant to s. 24(1) of the *Charter***

23. Where there is a declaration of invalidity and/or an order for retroactive remedial legislation such that the claimant’s receipt of a benefit may be unduly delayed, the claimant ought to be entitled to monetary and personal remedies under section 24(1) of the *Charter* on the basis that the impugned provisions were invalid at the time that they applied to the claimant.<sup>12</sup>

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<sup>9</sup> *Fraser v Canada*, [2020 SCC 28](#), at [para. 138](#).

<sup>10</sup> *Nova Scotia (Attorney-General) v. Phillips*, [1986 CanLII 3941](#), at [para 5](#) [*Phillips*].

<sup>11</sup> *Phillips*, at [para. 5](#).

<sup>12</sup> *Sivia*, at [para. 74](#).

24. The *Charter* requires a generous and expansive interpretive approach.<sup>13</sup> Section 24(1) provides:

**24.** (1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

25. Section 24(1) of the *Charter* makes available an individual remedy to anyone whose rights or freedoms have been infringed or denied. This remedy must be “appropriate and just in the circumstances”.

26. The words “appropriate and just” imply flexibility. An appropriate and just remedy must *meaningfully* vindicate the rights of the claimant through constitutionally legitimate means. The remedies available under section 24(1) should evolve to meet the circumstances of the case before the court and be responsive to the needs of the individual.<sup>14</sup> The approach to remedies in the *Charter* context must include a purposive approach that is generous and expansive.<sup>15</sup> The Supreme Court of Canada has emphasized that “where there is a right, there must be a remedy”.<sup>16</sup> Courts must craft remedies that are responsive and effective and that fully protect rights guaranteed in the *Charter*.<sup>17</sup>

27. Effective remedies that meaningfully vindicate the rights of claimants will take into account the nature of the rights violation and be relevant to the claimant’s individual experience and, importantly, address the circumstances of the rights violation. In other words, each case must be analyzed on its own context – a “simple test or formula” cannot

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<sup>13</sup> *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003 SCC 62](#), at [para 9](#) [*Doucet*].

<sup>14</sup> *R v Donnelly*, [2016 ONCA 988](#), at [para. 148](#).

<sup>15</sup> *Doucet*, at [para. 9](#).

<sup>16</sup> *Doucet*, at [para. 25](#).

<sup>17</sup> *Doucet*, at [para. 25](#).

suffice.<sup>18</sup> In addition, meaningful remedies ought not to be “smothered” in procedural delays and difficulties.<sup>19</sup>

28. The court has recognized that these remedies can be novel and creative when compared to historical remedial practice. History and tradition ought not to be barriers to compelling notions of appropriate and just remedies of a given case.<sup>20</sup> Remedies awarded in response to breaches of the *Charter* can correct past injustices, and discourage the enactment of laws that are facially neutral.<sup>21</sup>

29. Immediate remedies for individual claimants who “braved the storm” including financial and personal costs associated with a constitutional challenge serve as an important incentive for potential rights claimants to bring cases that “carry substantial societal benefits.”<sup>22</sup>

30. In other words, successful litigation challenging constitutionality of laws must result in remedies that are meaningful for the claimants who bring them. After all, the claimant who brings a successful constitutional challenge has done the public interest a service by ensuring that an unconstitutional law is taken off the books.<sup>23</sup>

31. The Supreme Court of Canada has previously acknowledged that disability claimants can be entitled to an individual remedy in the context of a suspended declaration of invalidity where the impugned provision precluded access to benefits for which the

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<sup>18</sup> *Doucet*, at [para. 55](#).

<sup>19</sup> *Ontario AG* at [para. 144](#).

<sup>20</sup> *Doucet*, at paras. [55-59](#).

<sup>21</sup> *Doucet*, at [para. 26](#).

<sup>22</sup> *Ontario AG*, at [paras. 142, 148](#).

<sup>23</sup> *Ontario AG*, at [para. 148](#).

claimant was otherwise entitled to, but for the provision.<sup>24</sup>

32. In *Ontario (Attorney General) v G*, the court was clear that there must be a compelling reason to deny the claimant an immediately effective remedy. The court offered two examples of compelling reasons, in the context of a suspended declaration of invalidity. First, the court must consider whether and to what degree granting an exemption (or remedy) in the claimant's particular circumstances would undermine the interest motivating the suspension in the first place. The ability of the legislature to create policy responses to the declaration, as well as the public interest in the interim operation of the legislation will be important considerations.<sup>25</sup>

33. Where, such as in this case, the impugned legislation relates to income support benefits that are no longer in existence, an individual remedy is the most immediate and effective remedy. Doing so would not impede the role of the legislature or adversely impact the public interest, particularly as the immediate threat of the COVID-19 is over. Rather, it would place those who were denied access to benefits in the position they would have been in had they qualified.

34. Second, the court may have a compelling reason to refrain from granting an individual exemption when practical considerations, such as a lack of judicial economy, make it appropriate to do so. This may be, for example, where a large class of claimants requires individual assessments.<sup>26</sup>

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<sup>24</sup> *Martin-Laseur*, at [paras. 120-121](#).

<sup>25</sup> *Ontario AG*, at [paras. 149-152](#).

<sup>26</sup> *Ontario AG*, at [paras. 149-152](#).

35. In appropriate cases, granting remedies that vindicate the rights of an individual claimant, in addition to declaratory relief, will encourage claimants to assert their rights before the courts to uncover laws that are constitutional. This will enhance access to justice and protect important civil liberties, encourage government and legislative accountability and *Charter* compliance, and, ultimately, serve the public interest.

#### **PART IV - ORDER REQUESTED**

36. The CCLA takes no position on the outcome of the appeal but submits that the court's interpretation and application of constitutional remedies pursuant to section 24(1) of the *Charter* and section 52(1) of the *Constitution* should include the considerations outlined above and thereby encourage litigants to pursue *Charter* challenges and enhance access to justice.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23<sup>rd</sup> day of February, 2024.**



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## CERTIFICATE

I, Jennifer Hunter, counsel for the Intervener, Canadian Civil Liberties Association, certify that:

- (i) that an order under subrule 61.09 (2) is not required,
- (ii) that, in accordance with this Court's Order in the Reasons for Decision (Court File No's. M54745 and M54738), released February 5, 2024, paragraph 13 (5), the oral argument on behalf of the Canadian Civil Liberties Association will take 15 minutes,
- (iii) that the factum complies with subrule (3),
- (iv) Parts I to V contain 2,507 words inclusive of words used in citations, footnotes, headings or charts, diagrams or other visual aids, and
- (v) I am satisfied as to the authenticity of every authority listed in Schedule A.



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### SCHEDULE “A” - LIST OF AUTHORITIES

1. *Canada (Attorney General) v Hislop*, [2007 SCC 10](#)
2. *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992 CanLII 116](#) (SCC), [1992] 1 SCR 236
3. *Canada (Minister of Justice) v. Borowski*, [1981 CanLII 34](#) (SCC), [1981] 2 S.C.R. 575 (S.C.C.)
4. *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003 SCC 62](#)
5. *Fraser v Canada*, [2020 SCC 28](#)
6. *Miron v Trudel*, [1995 CanLII 97 \(SCC\)](#)
7. *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003 SCC 54](#)
8. *Nova Scotia (Attorney-General) v. Phillips*, [1986 CanLII 3941](#)
9. *Ontario (Attorney General) v. G [Ontario AG]*, [2020 SCC 38](#)
10. *R v Donnelly*, [2016 ONCA 988](#)
11. *Sivia v British Columbia (Superintendent of Motor Vehicles)*, [2012 BCSC 1030](#)

**SCHEDULE "B" - RELEVANT STATUTES**

None.



Appellant/Plaintiff

Respondent/Defendant

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Proceeding commenced at TORONTO

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