

SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

ONTARIO PLACE PROTECTORS

Appellant
(Appellant)

and

HIS MAJESTY THE KING

Respondent
(Respondent)

and

**BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION; ATHABASCA
CHIPEWYAN FIRST NATION AND MIKISEW CREE FIRST NATION (JOINTLY);
VUNTUT GWITCHIN FIRST NATION, LITTLE SALMON/CARMACKS FIRST
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PART I - OVERVIEW

1. At the heart of this appeal is the constitutionality of the immunity clause in s. 17 of the *Rebuilding Ontario Place Act, 2023*, which purports to insulate the Ontario government from all liability in connection with a redevelopment project, including actions for misfeasance and bad faith by public officials. It asks this Court to evaluate the concept of absolute Crown immunity in light of the superior court’s core jurisdiction under s. 96 of the *Constitution Act, 1867* to supervise the exercise of public power and the rule of law.

2. This case is bound to become an important precedent on Crown liability, as absolute immunity clauses are becoming increasingly common in legislation across Canada. Many purport to absolve government from any accountability for wrongdoing, including dishonest, arbitrary, and bad faith misconduct.¹ Some legislation even targets specific proceedings—singling them out by their court file number and shielding the government from any liability.²

3. The CCLA submits that absolute immunity clauses interfere with the court’s s. 96 jurisdiction to hold government to account and violate the rule of law. It offers two submissions:

- (a) **Absolute immunity provisions are unconstitutional because they trench on the superior courts’ core jurisdiction to supervise the exercise of public power.** The rule of law requires that the law be “supreme over the acts of both government and private persons”. Just as privative clauses cannot effectively oust judicial review, absolute immunity clauses should be ineffective because they prevent superior courts from awarding private law remedies to Canadians injured by government misconduct. Supervising the exercise of public power in this way is core to the superior court’s inherent jurisdiction. While certain limited immunities may be constitutional, absolute, blanket immunities are not.
- (b) **The Court should hold *at minimum* that legislation cannot immunize the government from liability for deliberate wrongdoing, including misfeasance in public office, malicious prosecution, and other intentional torts.** Unlike limited

¹ See, e.g., [s. 7\(3\)](#) of the *Special Economic Zones Act, 2025*, S.O. 2025, c. 4, Sched. 9; [s. 6 \(2\)](#) of the *Ontario Free Trade and Mobility Act, 2025*, S.O. 2025, c. 4, Sched. 5.

² See, e.g., the legislation in *Minotar Holdings Inc. v. Ontario*, [2025 ONSC 1791](#) (appeal pending, file no. COA-25-CV-0425); *5185603 Manitoba Ltd. et al. v. Government of Manitoba et al.*, [2023 MBCA 47](#); and *Regional Municipality of York v. Ontario*, [2023 ONSC 5708](#).

immunities that this Court has recognized in certain contexts (like core policy decisions in negligence), there is no constitutional justification for Crown immunity from willful, deliberate misconduct. Legislatures should never be permitted to absolve the government from bad faith abuses of power, as the Constitution should always guarantee Canadians' ability to seek meaningful remedies for such wrongdoing. Immunity from intentional wrongdoing is contrary to *Roncarelli*.

PART II - STATEMENT OF ARGUMENT

A. Absolute Crown Immunity is Contrary to s. 96 and the Rule of Law

4. Section 96 of the *Constitution Act, 1867* guarantees the superior court's inherent jurisdiction to resolve disputes and decide issues of public and private law. Judges have a constitutional duty to supervise holders of public power, ensuring they act within their legal authority and protecting citizens from arbitrary or bad faith conduct. This supervisory role is "central to what the Superior Courts do".³

5. The core jurisdiction of s. 96 courts is intrinsically tied to the rule of law. In *B.C.G.E.U.*, Chief Justice Dickson explained that "there cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice". In *United Nurses*, Justice McLachlin (as she then was) held that "[t]he rule of law is at the heart of our society; without it, there can be neither peace nor good government".⁴

6. Aside from constitutional oversight, superior courts control the exercise of public power in two primary ways. First, they hear judicial review applications and determine whether administrative decisions should be set aside as unreasonable, unlawful, or procedurally unfair. Judicial review remedies include public law remedies such as *certiorari* and *mandamus*, but a reviewing court lacks jurisdiction to award damages.

7. Judicial review is part of the superior court's constitutionally-protected jurisdiction that cannot be completely ousted by a privative clause. In *Crevier*, Chief Justice Laskin explained

³ *Trial Lawyers Association of British Columbia v. British Columbia*, 2014 SCC 59, [paras. 29-35](#); *Tesla Motors Canada ULC v. Ontario*, 2018 ONSC 5062, [para. 42](#).

⁴ *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, [para. 25](#); *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, p. 931.

that privative clauses are ineffective in supplanting the court's reviewing authority because "it cannot be left to a provincial statutory tribunal, in the face of s. 96, to determine the limits of its own jurisdiction without appeal or review". While the scope and content of judicial review have been substantially developed and refined since *Crevier*, and the vocabulary of administrative law has been entirely transformed, the constitutional need to ensure that administrative decision-makers are held to a reasonable level of account remains. In *Dunsmuir*, Justices Bastarache and LeBel confirmed that "judicial review is constitutionally guaranteed in Canada", rooted in "the inherent power of the superior courts" under ss. 96-101 of the *Constitution Act, 1867*.⁵

8. The second way Canadian courts hold governmental actors accountable is by adjudicating civil actions against the Crown. Private law remedies for unlawful Crown conduct, including damages, are "separate and distinct" from public law remedies on judicial review, but are no less important in upholding the rule of law. In its *Report on the Liability of the Crown*, the Ontario Law Reform Commission—then chaired by Justice Abella—endorsed the "deeply held notion that the government and its officials ought to be subject to the same legal rules as private individuals, and in particular, should be accountable to injured citizens for unauthorized actions". This notion "lies at the heart of the 'rule of law' and of 'constitutionalism' as those concepts have been conventionally understood in the common law world". And because courts are independent of government, they are "capable of being relied upon to award an appropriate remedy to a person who has been injured by inappropriate government action".⁶

9. In *TeleZone*, Justice Binnie explained that individuals injured by government action may choose not to seek judicial review, "let the order stand, and instead [seek] compensation for alleged losses". In that case, the plaintiff was permitted to advance its \$250 million claim in contract, negligence and misfeasance against the federal government without having to first seek judicial review. Justice Binnie stated that "[a]ccess to justice requires that the claimant be permitted to pursue its chosen remedy directly", whether by judicial review or civil action.⁷

⁵ *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, pp. 237-238; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [para. 31](#).

⁶ Ontario Law Reform Commission, *Report on the Liability of the Crown* (1989), pp. 2-3.

⁷ *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [para. 19](#).

10. The Ontario Court of Appeal’s decision in *Aylmer* is also instructive. The plaintiff sued the Crown in tort for suspending its license and occupying its meat processing plant for 19 months. By the time the Crown returned control over the plant, “the business was destroyed”. While the exercise of regulatory responsibilities under the *Meat Inspection Act (Ontario)* could have been challenged on judicial review, this would have been pointless—the passage of time made *certiorari* or *mandamus* futile because the plaintiff’s business had already been destroyed. The Court of Appeal held the Crown liable for \$3.5 million in damages for what it described as “a litany of bureaucratic ineptitude”. This was the only meaningful remedy available.⁸

11. The core issue in this appeal is whether blanket immunity clauses that prevent courts from awarding damages and other private law remedies against the government engage the same constitutional protections that invalidate privative clauses precluding judicial review. Both kinds of statutory provisions interfere with the court’s s. 96 jurisdiction to uphold the rule of law. The key question is this: if the legislature cannot immunize unlawful Crown conduct from public law remedies, should it be permitted to immunize the same conduct from private law remedies?

12. The answer is no. As set out below, the superior court’s constitutionally-protected jurisdiction under s. 96 must include the ability to grant meaningful public *and* private law remedies for deliberate governmental misconduct. Where individuals suffer harm from intentional abuses of power, the court must be able to hold the state to account. This ensures the rule of law remains “supreme over officials of the government as well as private individuals”.⁹

13. There is ample support in the case law for limiting the legislature’s ability to extinguish Crown liability for wrongful conduct. In *Roncarelli*, this Court affirmed a trial judgment granting a restaurateur damages against Premier Duplessis for wrongfully cancelling his liquor license “with an improper intent and for a purpose alien to the very statute under which the act is purported to be done”. Premier Duplessis argued (among other things) that he was immune from suit under art. 88 of the *Code of Civil Procedure*, which provides that no public officer can be sued “by reason of any act done by him in the exercise of his functions” unless the plaintiff gives written notice one month before issuing its claim. Mr. Roncarelli did not provide such notice.¹⁰

⁸ *Aylmer Meat Packers Inc. v. Ontario*, 2022 ONCA 579, [paras. 1, 71](#).

⁹ *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721, [para. 59](#).

¹⁰ *Roncarelli v. Duplessis*, [1959] S.C.R. 121, [pp. 123, 144](#).

14. In his concurring opinion, Justice Rand held that the Premier's conduct was a "gross abuse of legal power expressly intended to punish [the plaintiff] for an act wholly irrelevant to the statute, a punishment which inflicted on him, as it was intended to do, the destruction of his economic life as a restaurant keeper within the province". Premier Duplessis enjoyed no immunity for his bad faith conduct because, as Justice Rand explained, "an administration according to law [cannot] be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty". To permit otherwise "would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure". A majority of this Court agreed with Justice Rand that Premier Duplessis's bad faith conduct fell outside the scope of immunity under article 88.¹¹

15. In *Nelles*, Chief Justice Lamer held that Crown attorneys are not immune from malicious prosecution despite s. 5(6) of the *Proceedings Against the Crown Act*, which exempts liability for "anything done ... while discharging or purporting to discharge responsibilities of a judicial nature".¹² He explained that "[t]he fundamental flaw with an absolute immunity for prosecutors is that the wrongdoer cannot be held accountable by the victim through the legal process" and is therefore "akin to granting a license to subvert individual rights". Absolute immunity "strikes at the very principle of equality under the law and is especially alarming when the wrong has been committed by a person who should be held to the highest standards of conduct in exercising a public trust". The plaintiff's malicious prosecution case was therefore allowed to proceed.¹³

16. It would be absurd and constitutionally dangerous if the outcomes in *Roncarelli* and *Nelles* could be avoided simply by having the legislature grant Premier Duplessis unfettered authority to target Mr. Roncarelli and arbitrarily revoke liquor licences, or give statutory authorization for Crown attorneys to engage in deliberate, bad faith prosecutorial misconduct without consequence. There must be a constitutional bulwark preventing the legislative branch from absolving the executive of responsibility for intentional misconduct with complete impunity.

17. Professor Patrick Monahan (now of the Ontario Court of Appeal) has argued that "the principle of the rule of law requires that governments be accountable in the ordinary courts for

¹¹ *Roncarelli*, pp. 141-142.

¹² *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27, s. 5(6).

¹³ *Nelles v. Ontario*, [1989] 2 S.C.R. 170, p. 195.

wrongful actions of governmental officials”. Legislation that “permits government to absolve itself from the consequences of its own wrongful acts” is contrary to the rule of law because it “purports to place governments above the law, thus contradicting the fundamental precept that governments should not be permitted to treat citizens in an arbitrary manner”.¹⁴

18. Parliamentary sovereignty is no answer to the constitutional problems created by absolute immunity clauses. The Court must interpret and apply this principle in light of Canada’s constitutional structure as a whole, giving effect to other equally important principles and protections. While legislatures undoubtedly have broad law-making powers, they remain subject to meaningful constraints:

- (a) In *Power*, this Court rejected the argument that the Crown enjoys absolute immunity for unconstitutional legislation based on parliamentary sovereignty and the separation of powers. The majority confirmed that “an award of damage against the state for exceeding its legal powers has long been recognized as an important requirement for the rule of law”. Balancing all applicable constitutional principles, the majority held that damages may lie only when the legislation at issue was “clearly wrong, in bad faith or an abuse of power”;¹⁵
- (b) While unwritten constitutional principles cannot invalidate statutory enactments on their own, they still meaningfully constrain the legislature’s law-making powers. In *OPSEU*, Justice Beetz held that “neither Parliament nor the provincial legislatures may enact legislation the effect of which would be to substantially interfere with the operation of [Canada’s] basic constitutional structure”. “[A]part from *Charter* considerations, the legislative bodies in this country must conform to these basic structural imperatives and can in no way override them”;¹⁶ and
- (c) In *City of Toronto*, Chief Justice Wagner and Justice Brown held that “it is inconceivable that legislation which is repugnant to our ‘basic constitutional

¹⁴ Patrick J. Monahan, “[Is the Pearson Airport Legislation Unconstitutional? The Rule of Law as a Limit on Contract Repudiation by Government](#)”, *Osgoode Hall Law Journal*, Vol. 33 (1995), No. 3, pp. 411, 416.

¹⁵ *Power v. Canada*, 2024 SCC 26, [paras. 41, 60-66 & 77](#).

¹⁶ *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at [paras. 151-152](#).

structure’ would not infringe the Constitution itself”.¹⁷ In this case, the constitutional infringement relates to s. 96, which safeguards the superior court’s jurisdiction to uphold the rule of law and ensure “there is some way of holding everyone to account”. Such jurisdiction cannot be ousted by statute—whether by full privative clause or absolute immunity provision—or else the rule of law becomes “an empty concept”.¹⁸

19. All of these authorities lead to the same conclusion: there is no constitutional justification for blanket immunity clauses purporting to exempt the government from any and all liability, including for deliberate wrongdoing. These clauses engage the same s. 96 concerns as privative clauses that preclude remedies on judicial review. Both place unacceptable limits on the superior court’s jurisdiction to uphold the rule of law. This appeal provides the Court with an opportunity to confirm that such limits are unacceptable in a free and democratic society.

B. The Rule of Law Ensures Meaningful Redress for Governmental Misfeasance

20. Certain Crown immunities are well-established at common law and rooted in constitutional principles. In *Just*, Justice Cory held the Crown enjoys limited immunity in negligence for core policy decisions. Crown liability in negligence thus extends only to operational decisions, while an absolute Crown liability in tort is “intolerable”.¹⁹

21. In *Marchi*, Justice Karakatsanis justified limited immunity for core policy decisions on constitutional grounds—specifically, the separation of powers, which allows the legislative and executive branches to make social, economic, and political decisions that may “adversely affect the interests of individuals”. This immunity prevents judges from having to “second-guess[] the decisions of democratically-elected government officials” and “simply substitut[e] their own opinions” if they disagree.²⁰ Immunity in negligence for core policy decisions respects the distinct roles played by each of the legislature, the executive, and the judiciary under Canada’s constitutional structure.

22. But there is no constitutional justification for Crown immunity from deliberate, willful misconduct. Whatever the Court decides about statutory immunity from causes of action in

¹⁷ *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, [para. 52](#).

¹⁸ *Jonsson v. Lymer*, 2020 ABCA 167, [para. 10](#).

¹⁹ *Just v. British Columbia*, [1989] 2 S.C.R. 1228, pp. 1239, 1244-1245.

²⁰ *Nelson (City) v. Marchi*, 2021 SCC 41, [paras. 44, 46](#).

negligence or breach of contract, the CCLA submits that s. 96 and the rule of law *at minimum* must safeguard the superior court's constitutional jurisdiction to hold government to account when its officials intentionally abuse public power in a way that injures members of the public.

23. The tort of misfeasance in public office exists for precisely this purpose. In *Freeman-Maloy*, the Ontario Court of Appeal explained that this intentional tort is “founded on the fundamental rule of law principle that those who hold public office and exercise public functions are subject to the law and must not abuse their powers to the detriment of the ordinary citizen”.²¹ In *Odhavji*, Justice Iacobucci recognized that the tort's “underlying purpose” is to “protect each citizen's reasonable expectation that a public officer will not intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of public functions”.²²

24. For this reason, the Ontario Court of Appeal recently confirmed in *Castrillo* that “as a general principle, the legislature cannot completely oust the jurisdiction of the Superior Court, most pertinently, an allegation of misfeasance in public office related to its use of statutory power for an improper purpose”. That case involved a proposed class action on behalf of injured workers who were denied full non-economic loss benefits based on what the plaintiff alleged was an illegal policy change by the Workplace Safety Insurance Board. The action pleaded misfeasance, bad faith, and negligence.²³

25. The Court of Appeal unanimously rejected the motion judge's conclusion that the proposed class action was barred by a “strongly worded” privative clause in the *Workplace Safety and Insurance Act*. Applying this Court's holding in *Crevier*, Justice Lauwers held that the privative clause cannot oust the superior court's authority to adjudicate the plaintiff's misfeasance claim. The proposed action was thus allowed to proceed on its merits.

26. The same is true for other intentional torts, like malicious prosecution. In *Nelles*, Chief Justice Lamer held that, unlike immunity for core policy decisions under *Just* and *Marchi*, “absolute immunity for the Attorney General and his agents, the Crown Attorneys, is not justified in the interests of public policy”. That is because “the existence of absolute immunity is

²¹ *Freeman-Maloy v. Marsden* (2006), 79 O.R. (3d) 401, 2006 CanLII 9693 (C.A.), [para. 10](#).

²² *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [para. 30](#).

²³ *Castrillo v. Workplace Safety and Insurance Board*, 2017 ONCA 121, [para. 66](#).

a threat to the individual rights of citizens who have been wrongly and maliciously prosecuted”, with the effect of “negating a private right” and possibly barring a *Charter* remedy as well.²⁴

27. Justice Côté echoed this in her dissent in *Clark*, stating that “*Roncarelli* is emblematic of a conception of the rule of law that is incompatible with absolute immunities”, and that an “overly broad immunity undermines the rule of law”. While the majority did not agree with her on expanding prosecutorial liability to claims brought by third parties, it confirmed that Crown attorneys enjoy no immunity for malicious prosecution and wrongful non-disclosure.²⁵

28. The CCLA submits that Canada’s constitutional order does not permit the legislature to immunize government actors for deliberate, bad faith misconduct. Doing so would impermissibly erode the superior court’s core jurisdiction under s. 96 and undermine the rule of law’s guarantee between state and citizen. This appeal provides an opportunity to confirm the judiciary’s constitutional authority to grant meaningful remedies to those injured by intentional abuses of public power, like misfeasance, malicious prosecution, and other intentional torts.

C. This Court’s Decisions in *Resler* and *Ernst* are Not Determinative

29. This Court recently considered a statutory immunity provision in *Resler* that immunizes the Chief Electoral Officer or his agents from “anything done, or omitted to be done, in good faith in exercise or performance or the intended exercise or performance of a power duty or function under [Alberta’s *Election Act*]”. The Court found this immunity clause was limited only to actions “carried out in good faith”, and therefore did not preclude the plaintiff from advancing his misfeasance claim against the Chief Electoral Officer.²⁶

30. At paragraph 61, the majority justified its conclusion on the basis that the Alberta legislature “could have provided for full and absolute immunity” in the *Election Act*, “but chose not to”.²⁷ It distinguished the “good faith” immunity clause in that case from the legislation in *Ernst*, where this Court struck a claim against the Alberta Energy Regulator for breach of the

²⁴ [Nelles](#), p. 199.

²⁵ *Ontario (Attorney General) v. Clark*, 2021 SCC 18, [paras. 35](#), [63](#), [156](#).

²⁶ *Resler v. Anglin*, 2026 SCC 23, [paras. 58](#), [61-62](#).

²⁷ *Resler*, [para. 61](#).

Charter right to freedom of speech because it was barred by an absolute immunity clause in the *Energy Resources Conservation Act*.²⁸

31. Neither *Resler* nor *Ernst* say anything about the constitutional issues in this case. Those precedents are not germane and do not bind this Court as to the outcome of the present appeal:

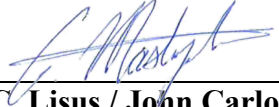
- (a) *Resler* is a statutory interpretation case, and the plaintiff did not challenge the immunity clause's constitutionality. The majority's reasons say its interpretation of the *Elections Act* may have differed had the legislature not included a "good faith" proviso, but not that alternative legislation would have been constitutional. Nor did it need to—that point was irrelevant to the appeal's disposition;²⁹ and
- (b) The plaintiff in *Ernst* challenged the constitutionality of the immunity clause in the *Energy Resources Conservation Act* on the basis that it prevented her from claiming a violation of her s. 2(b) rights. The plurality rejected that argument on the basis that, because damages "could never be an appropriate and just remedy for *Charter* breaches by the Board", the immunity clause is not what prevents her claim from succeeding and the provision is therefore not unconstitutional. The plurality did not consider s. 96 or rule of law principles, because neither was argued; it instead decided the appeal by applying the *Ward* criteria for *Charter* damages.³⁰

32. The CCLA submits that, in disposing of this appeal, focus must remain on the s. 96 and rule of law issues that did not arise in *Resler* or *Ernst*.

PART III - ORDER REQUESTED

33. The CCLA takes no position on the outcome of the appeal. The CCLA does not seek costs and asks that it not be liable for the costs of any party or intervener.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of July, 2026.



Jonathan C. Lisus / John Carlo Mastrangelo
Lax O'Sullivan Lisus Gottlieb LLP

²⁸ *Ernst v. Alberta Energy Regulator*, 2017 SCC 1, [paras. 1-4](#).

²⁹ *Resler*, [para. 58](#).

³⁰ *Ernst*, [paras. 24-31](#).

PART IV - TABLE OF AUTHORITIES

CASES		Cited in para(s).
1.	<i>5185603 Manitoba Ltd. et al. v. Government of Manitoba et al.</i> , 2023 MBCA 47	2
2.	<i>Aylmer Meat Packers Inc. v. Ontario</i> , 2022 ONCA 579	10
3.	<i>B.C.G.E.U. v. British Columbia (Attorney General)</i> , [1988] 2 S.C.R. 214	5
4.	<i>Canada (Attorney General) v. TeleZone Inc.</i> , 2010 SCC 62	9
5.	<i>Castrillo v. Workplace Safety and Insurance Board</i> , 2017 ONCA 121	24, 25
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7.	<i>Dunsmuir v. New Brunswick</i> , 2008 SCC 9	7
8.	<i>Ernst v. Alberta Energy Regulator</i> , 2017 SCC 1	30, 31(b), 32
9.	<i>Freeman-Maloy v. Marsden</i> (2006), 79 O.R. (3d) 401, 2006 CanLII 9693 (C.A.)	23
10.	<i>Jonsson v. Lymer</i> , 2020 ABCA 167	18(c)
11.	<i>Just v. British Columbia</i> , [1989] 2 S.C.R. 1228	20
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15.	<i>Odhayji Estate v. Woodhouse</i> , 2003 SCC 69	23
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17.	<i>OPSEU v. Ontario (Attorney General)</i> , [1987] 2 S.C.R. 2	18(b)
18.	<i>Power v. Canada</i> , 2024 SCC 26	18(a)
19.	<i>Re Manitoba Language Rights</i> , [1985] 1 S.C.R. 721	12
20.	<i>Regional Municipality of York v. Ontario (Minister of the Environment, Conservation and Parks)</i> , 2023 ONSC 5708	2

21.	<i>Resler v. Anglin</i> , 2026 SCC 23	29, 30, 31(a), 32
22.	<i>Roncarelli v. Duplessis</i> , [1959] S.C.R. 121	13, 14, 16, 27
23.	<i>Tesla Motors Canada ULC v. Ontario</i> , 2018 ONSC 5062	4
24.	<i>Toronto (City) v. Ontario (Attorney General)</i> , 2021 SCC 34	18(c)
25.	<i>Trial Lawyers Association of British Columbia v. British Columbia</i> , 2014 SCC 59	4
26.	<i>United Nurses of Alberta v. Alberta (Attorney General)</i> , [1992] 1 S.C.R. 901	5
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27.	Ontario Free Trade and Mobility Act , 2025, S.O. 2025, c. 4, Sched. 5	2
28.	Proceedings Against the Crown Act , R.S.O. 1990, c. P.27	15
29.	Rebuilding Ontario Place Act , 2023, S.O. 2023, c. 25, Sched. 2	1
30.	Special Economic Zones Act , 2025, S.O. 2025, c. 4, Sched. 9	2
SECONDARY SOURCES		Cited in para(s).
31.	Ontario Law Reform Commission, Report on the Liability of the Crown (1989)	8
32.	Patrick J. Monahan, “ Is the Pearson Airport Legislation Unconstitutional? The Rule of Law as a Limit on Contract Repudiation by Government ”, <i>Osgoode Hall Law Journal</i> , Vol. 33 (1995), No. 3	17