Federal Court of Appeal | Cour d'appel fédérale

Date: 20250801

Docket: A-199-24

Citation: 2025 FCA 140

CORAM: **RENNIE J.A.**
LASKIN J.A.
GOYETTE J.A.

BETWEEN:

HIS MAJESTY THE KING

Appellant

and

KRISTEN MARIE WHALING
(FORMERLY KNOWN AS CHRISTOPHER JOHN WHALING)

Respondent

Heard at Vancouver, British Columbia, on April 10, 2025.

Judgment delivered at Ottawa, Ontario, on August 1, 2025.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: LASKIN J.A.
GOYETTE J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

Overview

[1] There are two questions of law before this Court:

(i) Can the estate of a deceased member of a class action claim damages for breach of a section 11(h) right under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (*Charter*); and

(ii) if the answer to this is yes, then do provincial estates statutes providing for an "alive as of" date prohibit or limit recovery of those *Charter* damages?

[2] The Federal Court (*Whaling v. Canada*, 2024 FC 712 [Reasons]) answered both questions in the affirmative, holding that an estate's standing to pursue *Charter* damages for section 11(h) claims could be determined by reference to provincial and territorial estates and survival legislation (hereinafter referred to as provincial survival legislation). Section 11(h) of the *Charter* provides that a person acquitted of an offence has the right not to be tried for it again, and that a person found guilty and punished for an offence has the right not to be tried or punished again for it.

[3] The Attorney General appeals, arguing that a section 11(h) *Charter* right may only be claimed by an individual whose right was breached. Before this Court, the Attorney General also advances an alternative argument, contending that, in any event, the claim would be barred by the doctrine of intergovernmental immunity. That is, as provincial laws cannot bind the federal Crown, provincial survival legislation cannot enlarge the liability of the federal Crown.

[4] This appeal does not raise new questions; indeed, this Court has the benefit of a well-travelled jurisprudential path. The Supreme Court of Canada's decision in *Canada (Attorney*

General) v. Hislop, 2007 SCC 10 [*Hislop*] is dispositive. As I would allow the appeal on the first ground, it is unnecessary to discuss the alternative ground of appeal.

The Context

[5] The two questions were framed as preliminary questions of law in a class proceeding. The proceeding arose from the retrospective abolition of accelerated parole review by subsection 10(1) of the *Abolition of Early Parole Act*, S.C. 2011, c. 11 (the Act), which came into force on March 28, 2011. Prior to its abolition, accelerated parole review operated as an exception to the normal parole eligibility procedures under the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, as repealed by the *Abolition of Early Parole Act* and in force until March 27, 2011.

[6] Accelerated parole review differed from the normal parole review process in three relevant aspects: automatic and simplified procedures, a lower and presumptive standard for release without discretion, and earlier day parole eligibility. While the accelerated parole review scheme did not impact the date that offenders became eligible for full parole, it advanced their eligibility date for day parole to one-sixth of their sentence rather than six months before one-third of their sentence (*Corrections and Conditional Release Act*, ss. 119(1)(c), 119.1, 126(1), (2), (4)).

[7] Under its transitional provision, subsection 10(1), the *Abolition of Early Parole Act* applied to all offenders held in federal institutions, including those previously sentenced. As a result, the respondent, a federal offender, became ineligible for accelerated parole review.

[8] In the British Columbia Supreme Court, the respondent sought, and was granted, a declaration under subsection 52(1) of the *Charter* that, in abolishing earlier day parole for those who had already been sentenced under the *Abolition of Early Parole Act*, subsection 10(1) of the Act infringed section 11(h) of the *Charter* (*Whaling v. Canada (Attorney General)*, 2012 BCSC 944). This decision was affirmed by the British Columbia Court of Appeal (*Whaling v. Canada (Attorney General)*, 2012 BCCA 435) and, subsequently, by the Supreme Court of Canada (*Canada (Attorney General) v. Whaling*, 2014 SCC *2*0).

[9] Following the Supreme Court of Canada's decision, the respondent commenced a class proceeding in the Federal Court seeking section 24(1) *Charter* damages on behalf of all federal inmates whose right to accelerated parole review was removed by the retrospective application of the Act.

[10] In certifying the action as a class proceeding (*Whaling v. Canada (AG)*, 2020 FC 1074 [Certification Order]), the Certification Order provided for certain questions to be addressed in a common issues trial. These questions included whether the *Abolition of Early Parole Act* breached the section 11(h) *Charter* rights of the class members and, if so, whether the breach was justified under section 1 of the *Charter*. If the breach was not justified, another common issue was set as to whether damages pursuant to section 24(1) of the *Charter* were a just and appropriate remedy.

[11] The Certification Order also ordered that two of the common issues be determined prior to trial as preliminary questions of law:

(1) Can the estate of a deceased class member in this action claim Charter damages for violation of a section 11(h) right?; and

(2) if the answer to (1) is yes, then do provincial estates statutes providing for an "alive as of" date prohibit or limit recovery of those *Charter* damages?

The Federal Court Decision

[12] The Federal Court answered both questions in the affirmative.

[13] The Federal Court framed the issue before it as:

> …whether the rule at common law that personal rights die with the individual, and the exceptions to that rule, as outlined by [*Hislop*], provide a complete analytical framework for estates to gain standing to pursue Charter claims, regardless of whether applicable provincial or territorial survival legislation may otherwise allow for it.
>
> [Reasons, at para. 53.]

[14] In reaching this conclusion, the judge reasoned that "*Hislop* did not create a general rule that Charter claims always end upon death," and did not "[create] a single path for estates to pursue Charter remedies." Noting that provincial and territorial legislation enables an estate to pursue personal injury litigation after death, the judge determined that whether an estate could or could not continue a *Charter* claim could be based on the law of the province (Reasons, at paras. 64-65, 70, 79).

[15] The Federal Court rejected the argument that the language of the *Charter* excluded the application of provincial survival legislation. However, the judge also noted that the respondent had not identified any authority that supported their "untested premise" that provincial survival legislation would, in fact, provide standing to an estate to advance such a claim nor had they established that the provinces or territories had jurisdiction to pass legislation that could inform standing in *Charter* litigation (Reasons, at paras. 79-80, 88).

[16] Ultimately, the Federal Court concluded that Question 1 of the preliminary questions of law:

> …must be answered in the affirmative provided that the situation of the estate falls within one of the exceptions set out by the Supreme Court in *Hislop*, or provided that it is established that validly enacted provincial or territorial survival legislation is available to supplant the common law rule that actions die with the individual.
>
> [Reasons, at para. 92.]

[17] For the reasons that follow, I would allow the appeal. The *Charter* itself sets the limits or boundaries with respect to who may claim remedies under section 24(1), and those limits or boundaries are unaffected by provincial survival legislation.

Standing and the *Charter*

[18] As a general principle, the provisions of the *Charter* may be invoked only by those who enjoy its protection. A party must have standing to commence or continue a *Charter* claim and to invoke a *Charter* remedy.

[19] A party seeking to invoke the *Charter* may be granted standing under one of four possible paths: as of right or private standing; under the exception created by *Big M Drug Mart* for those who have been charged under a law which may be unconstitutional; as a participant granted public interest standing; or by the residual discretion of the court (*Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, at paras. 1, 22; *Canadian Egg Marketing Agency v. Richardson*, 1997 CanLII 17020 (SCC), [1998] 3 S.C.R. 157, at para. 36; *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295 [*Big M Drug Mart*]).

[20] The class members' only basis for standing in this matter is private standing.

[21] The Federal Court judge stated that, if the *Charter* itself "contained a specific proscription on legal standing to pursue *Charter* claims," then provincial survival legislation "would have no bearing on the issue" and the question of law would have to be answered in the negative (Reasons, at para. 90). As the *Charter* did not expressly proscribe actions by estates, it could be that the question could be resolved by reference to provincial law which "supplant[s] the common law rule that actions die with the individual" (Reasons, at paras. 91-92).

[22] However, an express proscription against the standing of an estate to seek *Charter* remedies is not required. The text of section 24(1), the nature of *Charter* rights themselves and the guidance of the Supreme Court of Canada in *Hislop* foreclose, with limited exceptions, an estate's standing to invoke the remedy of *Charter* damages. Accordingly, provincial survival

legislation cannot provide standing to pursue a section 24(1) remedy; thus, the first question of law must be answered in the negative.

Section 24(1)

[23] *Charter* analysis and interpretation "must first and foremost have reference to, and be constrained by, [the text of the Constitution]" (*Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, at para. 9). Consequently, "[t]he starting point in determining whether a person has standing to apply for a remedy under s. 24(1) of the *Charter* is the text of this provision" (*R. v. Brunelle*, 2024 SCC 3, at para. 43), which reads as follows:

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.	**24 (1)** Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

[24] Section 24(1) itself addresses who may seek a remedy and, as such, is determinative of standing. A remedy under section 24(1) is a unique public law remedy that cannot be extrapolated from, or assimilated into, the private law context (*Canada (Attorney General) v. Power*, 2024 SCC 26, at para. 36). The estates' claims are barred because they do not fall within the scope of section 24(1) and, therefore, the estates have no standing to pursue a remedy of *Charter* damages.

[25] Since the early days of the *Charter* to as recent as 2024, and at many points in between, the Supreme Court of Canada has consistently held that section 24(1) is a personal remedy against unconstitutional state action "that can only be invoked by a claimant alleging a violation of their own constitutional rights" and not those of a third party (*R. v. Ferguson*, 2008 SCC 6, at para. 61; *R. v. Albashir*, 2021 SCC 48, at para. 33; *Big M Drug Mart*, at 313). That is, standing can only be found where an individual alleges infringement of their own *Charter* rights.

[26] The point is well-entrenched. Professor Kent Roach stated that "[a]lthough there are limits to a textual approach to constitutional remedies, there is a strong textual basis for concluding that a person does not have standing under s. 24(1) to obtain a remedy unless his or her own rights have been violated." Indeed, courts have found that estates do not have standing to seek remedy for the violation of deceased persons' rights, as "[i]t now appears to be settled law that a party cannot generally rely upon the violation of a third party's *Charter* rights" (Kent Roach, *Constitutional Remedies in Canada, 2nd Edition* (Toronto: Thomson Reuters, 2013) (loose-leaf updated 2023, release 2) at § 5:10).

[27] The test for standing under section 24(1) of the *Charter*, which provides personal remedies, differs from the test for standing under section 52(1), which provides relief that is declaratory in nature; the former test is also stricter. Again, according to Professor Roach, this narrower test "makes sense when it is recognized that s. 24(1) remedies will generally respond to the personal and particular circumstances of those whose rights have been violated" (Kent Roach, at § 5:10).

[28] Section 24(1) remedies are constitutionally limited, in type and scope, by the text of the section itself and a "judge ordering a remedy must respect this boundary" (*British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2019 BCCA 228, at para. 253; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, at para. 50).

Symmetry Between Rights and Remedies

[29] The limitations on standing to pursue section 24(1) remedies align with the nature of the right in question.

[30] An estate is not "anyone" for the purpose of section 24(1). An estate is a collection of assets and liabilities of a person who has died. Here, we are concerned with breach of section 11(h). As no estate could have experienced a section 11(h) breach, no estate has standing to seek a section 24(1) remedy for that breach.

[31] In academic commentary, Cromwell J. observed that "[o]nly those whose rights have been infringed or denied may apply under s. 24, and accordingly the definition of 'anyone' will be limited to the way in which the right in issue is defined" (Thomas Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: The Carswell Co. Ltd., 1986) at 98). Put otherwise, the definition of "anyone" in section 24(1) takes its colour and content from the nature of the substantive *Charter* right in question as well as the context in which the term is used. This understanding of "anyone" is informed by other language in the *Charter*: for example, "person" in section 11, "everyone" in section 12 and "individual" in section 15.

[32] The Federal Court rightly accepted that the *Charter* right at issue (s. 11(h)) was a personal one. Section 11 rights can be exercised by "any person charged with an offence," and an estate is not a "person" within the meaning of this section nor can it be "charged with an offence." Here, only those federal inmates whose entitlement to accelerated parole review was abolished by the *Abolition of Early Parole Act* could have experienced a violation of their section 11(h) rights.

Hislop

[33] *Hislop* was a class proceeding that raised the question whether estates could claim a section 15(1) *Charter* right on behalf of deceased class members.

[34] In *Hislop*, amendments to the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (*CPP*) opened the door for applications for survivor pensions by survivors in same-sex relationships, but limited eligibility retroactively, along with the arrears that could be claimed. Specifically, a provision in the *CPP* restricted an estate's ability to claim survivor benefits, which would otherwise have been available to a surviving spouse, unless the estate applied within 12 months of the death (s. 60(2)). As *CPP* benefits were not available to same-sex survivors until these amendments were made to the *CPP*, subsection 60(2) resulted in an effective bar to estates claiming benefits for same-sex survivors that had been deceased for over 12 months prior to the amendments' coming into force.

[35] The Supreme Court of Canada held that the estates of survivors who had died more than 12 months before the coming into force of the *CPP* amendments did not have standing to claim a section 15(1) *Charter* right on behalf of the deceased survivor. The Court stated that the use of the term "individual" in section 15(1) was intentional and indicated that section 15(1) applies to natural persons only. An estate is not an individual and has no dignity that may be infringed.

[36] *Hislop* was a class action, with many possible permutations within the class. Recognizing this, the Court gave broad guidance on estates' standing to pursue *Charter* claims and carved out two exceptions.

[37] Mr. Hislop had obtained judgment while still alive, but died between the time his notice of appeal was filed in the Supreme Court of Canada and the hearing of the appeal. The Court relied on the doctrine of merger (which provides that when a judgment is obtained, the cause of action upon which the judgment is based is merged in the judgment and the judgment survives even if the original cause of action would not) to find that the estate could continue the appeal. Therefore, where a party dies pending appeal, as did Mr. Hislop, an estate can continue the claim.

[38] The Court specified a second exception. Estates of any class member who was alive on the date that argument concluded in the trial court, and who otherwise met the requirements under the *CPP*, were also entitled to the benefit of the Court's decision (*Hislop*, at paras. 71-77).

[39] Therefore, it is not relevant to consider whether a deceased individual invoked a *Charter* right, or was even aware of a *Charter* breach, in their lifetime when determining if an estate has standing.

[40] I do not agree with the respondent's argument that *Hislop* is limited to circumstances where provincial survival legislation did not provide for standing for estates to pursue *Charter* claims. Nor do I agree that it should be distinguished on the basis that the remedy in that case was under section 52. *Hislop* does not turn on common law principles about estates' capacity in the absence of legislation; rather, it is a *Charter* case about the personal nature of *Charter* rights. Its guidance on estate standing was not limited to those estates that were disentitled to survivor benefits.

[41] Appellate courts are consistent on this reading of *Hislop* and the capacity of estates to seek *Charter* remedies. So too are trial courts.

[42] In *Grant*, the Manitoba Court of Appeal, said it is "well established" that an estate does not have private standing or sufficient personal interest to bring a claim for section 24(1) *Charter* damages for alleged unconstitutional actions (*Grant v. Winnipeg Regional Health Authority*, 2015 MBCA 44, at paras. 44-45 [*Grant*]). However, the Court carved out a third exception to the general rule that estates cannot seek section 24(1) *Charter* remedy and granted public interest standing to the estate to pursue its *Charter* claim because of the unique circumstances of the case; the *Charter* breach was alleged to have been the very cause of death.

[43] The Ontario Court of Appeal also held that an estate did not have standing to continue a claim seeking section 24(1) *Charter* damages where a living plaintiff commenced the proceeding, but was deceased before the claim was determined (*Giacomelli Estate v. Canada (Attorney General)*, 2008 ONCA 346, at paras. 16-20 [*Giacomelli*]). The facts of *Giacomelli* warrant description because of their similarity to the case at bar.

[44] Mr. Giacomelli claimed damages under section 24(1) of the *Charter* for alleged breaches of his sections 7 and 15 *Charter* rights arising from his internment during World War II as an Italian-Canadian. Mr. Giacomelli commenced the proceeding while he was alive, but was deceased before trial. The Ontario Court of Appeal, relying on *Hislop*, held that the estate did not have standing to pursue the section 7 and 15 claims. It found that although *Hislop* involved section 15, not section 7, it nonetheless applied equally to claims for breaches of section 7 *Charter* rights; as personal rights, section 7 rights similarly ceased at death (*Giacomelli*, at paras. 13, 15-16, 20).

[45] *Stinson (Estate of) v. British Columbia*, 1999 BCCA 761 [*Stinson Estate*] also bears certain similarities to the case before us. *Stinson Estate* involved a section 15 challenge to workers' compensation legislation limiting survivor benefits to which a deceased person would otherwise be statutorily entitled, had they not remarried. The British Columbia Court of Appeal dismissed the case for want of standing, holding that "[t]he rights guaranteed are personal, and the power to enforce the guarantee resides in the person whose rights have been infringed" (*Stinson Estate*, at paras. 11-12). Consequently, the estate did not have private interest standing to pursue a claim for breach of a deceased's section 15 *Charter* rights.

[46] The Nova Scotia Court of Appeal relied on *Hislop* in *Lawen Estate v. Nova Scotia (Attorney General)*, 2021 NSCA 39, a public interest standing case, in finding that individuals who had died lack capacity to benefit from *Charter* remedies and, thus, that estates lack standing to advance *Charter* claims (at paras. 72-75).

[47] Turning to trial court decisions, an estate commenced an action for damages under section 24(1) of the *Charter* in the British Columbia Supreme Court in *Wilson Estate v. Canada*, 1996 CanLII 2417 (BCSC), 25 B.C.L.R. (3d) 181 [*Wilson Estate*]. In this case, the estate's action alleged numerous *Charter* violations on behalf of the plaintiff, who had died while detained in police custody (*Wilson Estate*, at para. 23). The action was struck for disclosing no reasonable claim because section 24(1) remedies are restricted to the individual whose personal *Charter* rights were infringed; since the personal rights violated belonged to the deceased, there was no legal basis for the "estate to seek a remedy for the benefit of her estate" (*Wilson Estate*, at paras. 24-27).

[48] *Shanthakumar v. CBSA*, 2023 ONSC 3180 [*Shanthakumar*] involved a claim brought in the Ontario Superior Court for section 24(1) *Charter* damages for unlawful detention and arrest by law enforcement. One of the plaintiffs died prior to trial. Following *Hislop*, the Court rejected the estate's arguments that it should be granted standing to continue the deceased's claim on the basis that she had already started the proceeding and pleaded the breach of her *Charter* rights before she died. In denying the estate standing, the Court found it irrelevant whether the plaintiff had already commenced the proceeding as "unfortunately, now that she has died, her claim under

section 15(1) has also ‘died’” (*Shanthakumar*, at para. 46). The Court extrapolated this reasoning to deny the estate standing to continue the plaintiff’s section 7, 8, 9, and 10 claims.

[49] No court has looked to provincial survival legislation to determine an estate’s standing to pursue a *Charter* claim. Rather, all courts have considered *Hislop*, although a section 52 case, to speak equally to section 24(1), with the result that *Charter* claims die with the individual.

Conclusion

[50] The limits of the *Charter*’s reach are determined by the *Charter*. Section 24(1) provides inherent limits on standing, restricting claims for remedy under this section to only those persons whose rights were breached personally. The effect of the Federal Court’s ruling is to establish an alternate route to standing via provincial survival legislation, rather than relying on the limits set out in the *Charter* itself (Reasons, at paras. 62, 79, 82, 84).

[51] The content and reach of the *Charter* do not expand or contract according to the will of provincial legislatures; otherwise, this would lead to the inconsistent application of *Charter* rights across the country, a consequence inimical to the *Charter* itself.

[52] Accordingly, I would allow the appeal and answer Question 1 in the negative: the estate of a deceased member of a class action cannot claim damages for breach of a section 11(h) *Charter* right. It is, therefore, unnecessary to address Question 2, which asked whether provincial

estates statutes providing for an "alive as of" date prohibit or limit recovery of those *Charter* damages.

"Donald J. Rennie"
J.A.

"I agree.
J.B. Laskin J.A."

"I agree.
Nathalie Goyette J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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