

SCC Court File No.:

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

B E T W E E N:

JESSICA ERNST

Applicant
(Appellant)

-and-

ENERGY RESOURCES CONSERVATION BOARD

Respondent
(Respondent)

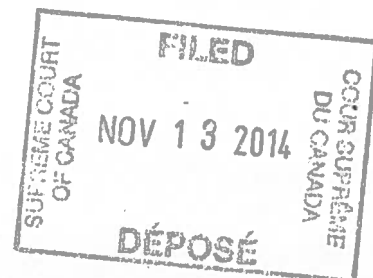
**APPLICATION FOR LEAVE TO APPEAL
Jessica Ernst – Applicant**

(Pursuant to Section 40 of the *Supreme Court Act*, RSC 1985, c S-26 and
Rule 25 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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TAB 1

SCC Court File No.:

IN THE SUPREME COURT OF CANADA
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B E T W E E N:

JESSICA ERNST

Applicant
(Appellant)

-and-

ENERGY RESOURCES CONSERVATION BOARD

Respondent
(Respondent)

NOTICE OF APPLICATION FOR LEAVE TO APPEAL

TAKE NOTICE that the Applicant, Jessica Ernst, applies for leave to appeal to the Court, under Section 40 of the *Supreme Court Act*, RSC 1985, c S-26 and Rule 25 of the *Rules of the Supreme Court of Canada*, SOR/2002-156, from the judgment of the Court of Appeal of Alberta in Court File No. 1301-0346AC (the “**Judgment**”) made September 15, 2014, for an order granting leave to appeal from the Judgment, along with costs of this application, or any further or other order that the Court may deem appropriate;

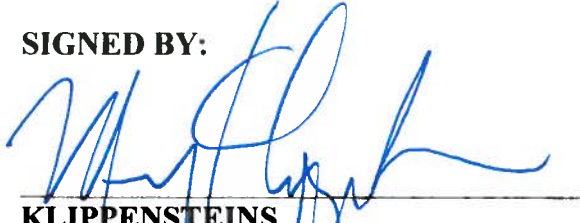
AND FURTHER TAKE NOTICE that this application for leave is made on the following grounds:

1. This case raises one of the most fundamental constitutional questions a court can consider: can legislation block an individual from seeking a remedy for a breach of her *Charter* rights pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”)? In this case, the Court of Appeal of Alberta has held that it can.

2. The fundamental questions of whether a legislature can bar or otherwise restrict *Charter* claims for personal remedies made pursuant to s. 24(1) of the *Charter* through a general “protection from action” clause has not been squarely considered by the Supreme Court. Where the Supreme Court has considered this issue indirectly, it has come to the opposite conclusion to that of the Court of Appeal of Alberta.
3. The decision of the Court of Appeal of Alberta in this case puts the law in Alberta in conflict with appellate law in Ontario, creating significant uncertainty in the law across Canada.
4. The issues raised by this appeal impact all Canadians. General “protection from action” clauses similar to s. 43 of the *Energy Resources Conservation Act* are found in dozens of statutes across Canada, and in each and every province in Canada. The Supreme Court’s guidance on whether such statutes can bar actions brought pursuant s. 24(1) of the *Charter* will benefit all Canadians.
5. There are very good reasons to doubt the correctness of the decisions below. The Court of Appeal of Alberta’s conclusion that a general “protection from action” clause can limit or eliminate the right of a citizen to pursue a remedy for a *Charter* breach pursuant to s. 24(1) of the *Charter* is contrary to constitutional principles laid down by the Supreme Court in other cases, and creates significant uncertainty and confusion within the law. This appeal provides a very good opportunity to correct the law on a fundamental constitutional question.
6. Review by this Court is therefore of national importance and will have value far beyond the interests of the parties and this particular dispute.
7. Sections 40 and 43 of the *Supreme Court Act*, and Rule 25 of the *Rules of the Supreme Court of Canada*.
8. Such further and other grounds as this Honourable Court may permit.

Dated at Toronto, Ontario this 12th day of November, 2014.

SIGNED BY:



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NOTICE TO THE RESPONDENT OR INTERVENER: A respondent or intervener may serve and file a memorandum in response to this application for leave to appeal within 30 days after the day on which a file is opened by the Court following the filing of this application for leave to appeal or, if a file has already been opened, within 30 days after the service of this application for leave to appeal. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration under section 43 of the *Supreme Court Act*.

TAB 6

MEMORANDUM OF ARGUMENT

PART I – OVERVIEW OF POSITION AND STATEMENT OF FACTS

Overview

1. This case raises one of the most fundamental constitutional questions a court can consider: can legislation block an individual from seeking a remedy for a breach of her *Charter* rights pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”)? In this case, the Court of Appeal of Alberta has held that it can.

2. The Applicant, Jessica Ernst (“**Ms. Ernst**” or the “**Applicant**”) brought a *Charter* claim against the Energy Resources Conservation Board (the “**ERCB**”),¹ Alberta’s energy regulator, seeking a remedy under s. 24(1) of the *Charter* for violation of her freedom of expression as protected by s. 2(b) of the *Charter*. Section 24(1) of the *Charter* provides:

Enforcement of guaranteed rights and freedoms

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 a remedy as the court considers appropriate and just in the circumstances.²

3. Both the Alberta Court of Queen’s Bench³ and the Court of Appeal of Alberta⁴ held that the general “protection from action” clause contained in section 43 of the *Energy Resources Conservation Act* completely bars Ms. Ernst’s *Charter* claim. Section 43 of the *Energy Resources Conservation Act* provides:

Protection from action

43 No action or proceeding may be brought against the Board or a member of the Board or a person referred to in section 10 or 17(1) in respect of any act or

¹ The ERCB has since been succeeded by the Alberta Energy Regulator through the *Responsible Energy Development Act*, SA 2012, c R-17.3. Under s. 83(3)(c) of the *Act*, “an existing cause of action, claim or liability to prosecution of, by or against the former Board is unaffected by the coming into force of this section and may be continued by or against the Regulator”. For the purposes of this Memorandum of Argument the energy regulator will be referred to as the ERCB.

² *Canadian Charter of Rights and Freedoms*, s 24(1), Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (“*Canadian Charter of Rights and Freedoms*”).

³ Reasons for Judgment of the Honourable Chief Justice Neil Wittmann of the Court of Queen’s Bench of Alberta, dated September 16, 2014 (“*ABQB Reasons*”) at paras 82 & 88 [Tab 2 at 32-33].

⁴ Reasons for Judgment of the Court of Appeal of Alberta, dated September 15, 2014 (“*ABCA Reasons*”) at para 30 [Tab 4 at 56].

thing done purportedly in pursuance of this Act, or any Act that the Board administers, the regulations under any of those Acts or a decision, order or direction of the Board.⁵

4. The findings of the courts below serve to impoverish s. 24(1) of the *Charter*, and are directly contrary to the principle of constitutional supremacy. The Applicant seeks leave to appeal in this case so that the Supreme Court of Canada (the “**Supreme Court**”) may consider the boundaries between the rights of Canadians to seek remedies for breaches of their *Charter* rights pursuant to s. 24(1), and the ability of both provincial and federal legislatures to eliminate those rights. The Applicant respectfully submits that the critical questions raised by this appeal are deserving of the Supreme Court’s attention for four reasons.

5. First, while the *Charter* has been extensively litigated over the past 32 years, the fundamental question of whether a legislature can bar *Charter* claims for personal remedies made pursuant to s. 24(1) of the *Charter* has not been squarely considered by the Supreme Court. The closest this Honourable Court has come to adjudicating this issue directly is the case of *Nelles v Ontario* where, in *obiter dicta*, the Court appears to come to the opposite conclusion to that of the Court of Appeal of Alberta.⁶ The present case provides an excellent opportunity to directly address this fundamental constitutional question.

6. Second, this case raises an important “separation of powers” question – namely whether it is the legislatures or the courts that may determine what is a “just and appropriate” remedy under s. 24(1) of the *Charter*. In the case at bar, the Court of Appeal of Alberta found that there are strong policy reasons to allow legislatures the power to define the available constitutional remedies available under s. 24(1) of the *Charter*.⁷ While this issue has not been squarely considered by the Supreme Court, the Court of Appeal of Alberta’s reasoning appears to contradict principles regarding the general nature of s. 24(1) set by the Supreme Court in cases such as *Doucet-Boudreau v Nova Scotia (Minister of Education)*.⁸

⁵ *Energy Resources Conservation Act*, RSA 2000, c E-10, s 43. The *Energy Resources Conservation Act* was repealed on June 17, 2013, and replaced with the *Responsible Energy Development Act*, SA 2012. Section 27 of the *Responsible Energy Development Act* contains a substantially similar protection from action clause.

⁶ *Nelles v Ontario*, [1989] 2 SCR 170 (“*Nelles*”) at 196.

⁷ ABCA Reasons at para 28 [Tab 4 at 55].

⁸ *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3 (“*Doucet-Boudreau*”) at paras 41-51.

7. Third, the decision of the Court of Appeal of Alberta in this case puts the law in Alberta at odds with the law in Ontario. The Court of Appeal for Ontario has specifically held that “a statutory enactment cannot stand in the way of a constitutional entitlement”.⁹ As things stand now, the uneasy reality is that the rights of Ontarians to seek *Charter* remedies are significantly more robust than the rights of Albertans.

8. Fourth, general “protection from action” clauses similar to s. 43 of the *Energy Resources Conservation Act* are found in dozens of statutes across Canada. There are nearly identical “protection from action” clauses in the statute books of each and every province in Canada.¹⁰ The Supreme Court’s guidance on whether legislation can limit the remedies available under s. 24(1) of the *Charter* will benefit all Canadians.

The Action

9. The Applicant, Jessica Ernst is a landowner who resides on an acreage near Rosebud, Alberta. Her rural property is supplied with fresh water by a private well that draws from the Rosebud Aquifer.¹¹

10. Between 2001 and 2006, the defendant EnCana Corporation (“**EnCana**”) engaged in a new and untested program of drilling for methane gas from shallow coal beds at over 190 gas wells located adjacent to Ms. Ernst’s property. This program included a technique known as “hydraulic fracturing” or “fracking” at shallow depths underground. Shortly thereafter, Ms. Ernst’s well water became severely contaminated with hazardous and flammable levels of methane and other toxic chemicals.¹²

11. Ms. Ernst has brought claims against the defendants EnCana, the ERCB and Her Majesty the Queen in Right of Alberta regarding the severe contamination of her well water and other harms. The portion of the Action against the ERCB includes claims for breaches of Ms. Ernst’s fundamental freedoms under the *Charter* and for the negligent failure to implement the ERCB’s inspection scheme.¹³

⁹ *Prete v Ontario*, 16 OR (3d) 161 (CA) (“*Prete*” cited to QL) at paras 7-8 [Tab 8 at 114-115].

¹⁰ See examples from each of the ten provinces at paragraph 31 of this factum.

¹¹ Fresh Statement of Claim, dated June 25, 2012 (“*Statement of Claim*”) at paras 1 & 5 [Tab 7 at 86-87].

¹² *Statement of Claim* at paras 6-14 [Tab 7 at 87-88].

¹³ *Statement of Claim* at paras 24-58 [Tab 7 at 92-99].

12. The present application for leave to appeal is concerned solely with the *Charter* claim pleaded against the ERCB as set out in paragraphs 42-58 of the Fresh Statement of Claim.¹⁴ The Court of Appeal of Alberta's reasons regarding Ms. Ernst's *Charter* claim are found at paragraphs 23-30 of the Reasons for Judgment of the Court of Appeal of Alberta.¹⁵ The Court of Queen's Bench reasons regarding the *Charter* claim are found at paragraphs 31-43 and 59-88 of the Reasons for Judgment of the Honourable Chief Justice Neil Wittmann of the Court of Queen's Bench of Alberta.¹⁶

Jessica Ernst's Charter claim against the ERCB

13. Ms. Ernst's *Charter* claim is made in the context of severe adverse impacts caused by the oil and gas industry near Ms. Ernst's home in Rosebud Alberta, including water that is so contaminated with methane that it can be lit on fire. Ms. Ernst was a vocal and effective critic of the ERCB's failure to adequately respond to these negative impacts. The pleadings state that the ERCB responded to Ms. Ernst's vocal and effective criticism by taking punitive action against her, and arbitrarily preventing her from communicating with key offices within the ERCB.

14. Ms. Ernst's *Charter* claim states that the ERCB breached her right to freedom of expression as guaranteed by the *Charter* by (i) punishing Ms. Ernst for publicly criticizing the ERCB and by (ii) arbitrarily preventing Ms. Ernst from speaking to key offices within the ERCB.¹⁷

15. The relevant particulars of the Statement of Claim are as follows:

- a. Between 2001 and 2006, EnCana conducted shallow fracking operations at dozens of gas wells in close proximity to Ms. Ernst's private property. It is alleged that EnCana's operations near Ms. Ernst's homes caused significant adverse impacts, including severe contamination of Ms. Ernst's well water with hazardous and flammable levels of methane and other toxic chemicals.¹⁸

¹⁴ Statement of Claim at paras 42-58 [Tab 7 at 96-99].

¹⁵ ABCA Reasons at paras 23-30 [Tab 4 at 54-56].

¹⁶ ABQB Reasons at paras 31-43 and 59-88 [Tab 2 at 18-20 & 26-33].

¹⁷ Statement of Claim at para 58 [Tab 7 at 99].

¹⁸ Statement of Claim at paras 6 & 13-15 [Tab 7 at 87-89].

- b. The ERCB is the government agency responsible for overseeing and regulating the oil and gas industry. Importantly, the ERCB is tasked with protecting groundwater from contamination due to oil and gas development.¹⁹ This Action deals solely with the ERCB's operational and administrative functions as carried out by the Operations Division of the ERCB, and specifically does not deal with any action taken by the ERCB in its role as an adjudicative tribunal.
- c. Throughout 2004 and 2005, Ms. Ernst frequently voiced her concerns regarding negative impacts caused by EnCana's oil and gas developments near her home through contact with the ERCB's Operations Division.²⁰
- d. At the same time, Ms. Ernst frequently spoke publicly about her concerns regarding oil and gas development, and the failure of the ERCB to adequately address these concerns. Ms. Ernst was a vocal and effective critic of the ERCB; her public criticism brought unwanted public attention to the ERCB and caused embarrassment within the organization.²¹
- e. The ERCB responded to this unwanted public criticism by severely restricting Ms. Ernst's communication with the ERCB and vindictively and arbitrarily prohibiting Ms. Ernst from communicating with the ERCB's compliance, investigation and enforcement offices in an attempt to control what issues Ms. Ernst raised publicly.²² Richard McKee, a senior lawyer with the ERCB, confirmed that the ERCB had decided to stop communication with Ms. Ernst and would not re-open communication until Ms. Ernst agreed to stop voicing her concerns publicly and agreed to raise her concerns only to the ERCB.²³
- f. The decision to stop communication with Ms. Ernst was taken specifically as a means to punish Ms. Ernst for her past public criticism of the ERCB, to marginalize her concerns, and to deny her access to the ERCB complaints mechanism. Ms. Ernst was

¹⁹ Statement of Claim at paras 24-26 [Tab 7 at 92].

²⁰ Statement of Claim at para 45 [Tab 7 at 97].

²¹ Statement of Claim at paras 45-46 [Tab 7 at 97].

²² Statement of Claim at para 47 [Tab 7 at 97].

²³ Statement of Claim at para 52 [Tab 7 at 98].

prevented from raising legitimate and credible concerns regarding water contamination with the very regulator mandated by the government to investigate and remediate such contamination and at the very time that the regulator was most needed.²⁴

16. Ms. Ernst has claimed for a remedy for the breach of her constitutional rights under s. 24(1) of the *Charter*; this claim includes both a claim for *Charter* damages, as well as a general claim for “further and other relief as seems just to this Honourable Court”.²⁵ At trial, Ms. Ernst will seek both a judicial finding that her *Charter* rights have been breached, as well as an appropriate *Charter* remedy for this breach, which may include monetary and/or declaratory relief.

The judgments below

17. The Defendant ERCB brought an application to the Court of Queen’s Bench of Alberta seeking to strike out the Statement of Claim on the ground that it disclosed no reasonable claim (under r. 3.68 of the *Alberta Rules of Court*), or, in the alternative, seeking summary judgment in favour of the ERCB (under r. 7.3 of the *Alberta Rules of Court*). The grounds asserted by the ERCB in support of both remedies were the same: first, that there was no legal basis for the claims against the ERCB, and second, that the ERCB is immune from suit because of the statutory immunity provided by section 43 of the *Energy Resources Conservation Act*.²⁶ Again, section 43 of the *Energy Resources Conservation Act* provides:

Protection from action

43. No action or proceeding may be brought against the Board or a member of the Board or a person referred to in section 10 or 17(1) in respect of any act or thing done purportedly in pursuance of this Act, or any Act that the board administers, the regulations under any of those Acts or a decision, order or direction of the Board.

18. On September 16, 2013, Wittmann CJ rendered his judgment in the above application, striking the Applicant’s *Charter* claim against the ERCB.

²⁴ Statement of Claim at para 55-57 [Tab 7 at 99].

²⁵ Statement of Claim at para 87 [Tab 7 at 109].

²⁶ ABQB Reasons at paras 6 & 12 [Tab 2 at 7-8].

19. Wittmann CJ made two key findings. First, Wittmann CJ found that “the *Charter* claim of Ernst against the ERCB is valid”. Second, Wittmann CJ found that the general “protection from action” clause contained within section 43 of the *Energy Resources Conservation Act* barred the *Charter* claim, stating:²⁷

I conclude that statutory immunity clauses apply to claims for personal remedies pursuant to the *Charter*. I reach this conclusion for two reasons. Firstly, it is my view that the reasons why limitation periods apply to claims for personal remedies under the *Charter* also apply to statutory immunity clauses because statutory immunity clauses and limitation periods are both legislated bars to what may otherwise be a meritorious claim.

Secondly, there are strong policy reasons for the application of immunity clauses for claims for personal remedies under the *Charter*. Policy considerations are given effect when the merits of a claim for a *Charter* breach are examined. In my view, these policy considerations also apply when determining whether a statutory immunity clause applies.²⁸ [Emphasis added]

20. Ms. Ernst appealed to the Court of Appeal of Alberta, asserting among other things, that the Court below had erred in holding that section 43 of the *Energy Resources Conservation Act* bars *Charter* claims for a remedy under s. 24(1) of the *Charter*. On September 15, 2014, the Court of Appeal of Alberta dismissed the appeal, holding:

Protecting administrative tribunals and their members from liability for damages is constitutionally legitimate. Just as there is nothing illegitimate about time limits to seek constitutional remedies, so too is there nothing constitutionally illegitimate about provisions like s. 43. . . . **the conclusion of the case management judge that s. 43 bars the appellant’s *Charter* claim discloses no reviewable error.**²⁹ [Emphasis Added]

21. The Court of Appeal did not, however, disturb Wittmann CJ’s finding that “the *Charter* claim of Ernst against the ERCB is valid”. The Court of Appeal specifically noted that the question of whether the pleadings disclosed a sustainable claim for a breach of the *Charter* was not appealed and was not before it.³⁰

22. In coming to its conclusion, the Court of Appeal appears to conflate two issues: first, the issue of whether s. 43 of the *Energy Resources Conservation Act* is a complete bar to a

²⁷ ABQB Reasons at paras 88 & 130 [Tab 2 at 33 & 42]; Order of the Honourable Chief Justice Neil Wittmann, pronounced November 13, 2013 at para 2 [Tab 3 at 46].

²⁸ ABQB Reasons at paras 82-83 [Tab 2 at 32].

²⁹ ABCA Reasons at paras 29-30 [Tab 4 at 56].

³⁰ ABCA Reasons at para 9 [Tab 4 at 49-50].

Charter claim brought pursuant to s. 24(1) of the *Charter*, and second, the related but distinct issue of whether legislatures have the power to define what remedies are available under s. 24(1) of the *Charter*, for example, by legislatively removing *Charter* damages as an available remedy. It is important to point out that while the second issue appears to play a significant role in the Court of Appeal’s reasoning,³¹ the question of whether legislatures have the power to define available *Charter* remedies was not specifically at issue in this case. Instead, the issue was limited to whether s. 43 of the *Energy Resources Conservation Act*, which reads “no action or proceeding may be brought against the board”, prevents Ms. Ernst from bringing an action for *any* remedy under s. 24(1) of the *Charter*. With respect to their operative findings, both the Court of Queen’s Bench of Alberta and the Court of Appeal of Alberta found that s. 43 of the *Energy Resources Conservation Act* acts as an absolute bar to *Charter* claims for personal remedies brought by individual citizens.

23. The present Application deals solely with the Ms. Ernst’s *Charter* claim; the Applicant is not seeking leave to appeal other aspects of the Court of Appeal of Alberta’s decision.

PART II – QUESTIONS IN ISSUE

24. The Applicant submits that the following issues warrant review by the Supreme Court of Canada under s. 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26:

Issue #1: Can a general “protection from action” clause contained within legislation bar a *Charter* claim for a personal remedy made pursuant s. 24(1) of the *Canadian Charter of Rights and Freedoms*?

Issue #2: Can legislation constrain what is considered to be a “just and appropriate” remedy under s. 24(1) of the *Charter*?

PART III – STATEMENT OF ARGUMENT

This case raises key issues of national and public importance

25. The Applicant respectfully submits that the constitutional issues raised by this case are of fundamental importance, and are deserving of the Supreme Court’s attention. The Applicant

³¹ ABCA Reasons at paras 28-29 [Tab 4 at 55-56].

seeks leave to appeal in this case so that the Court may consider the boundaries between the rights of Canadians to seek remedies for breaches of their *Charter* rights, and the ability of both federal and provincial legislatures to eliminate those rights.

The Court of Appeal decision in this case is in conflict with the jurisprudence of other Courts of Appeal

26. There is a clear conflict between the Court of Appeal of Alberta and the Court of Appeal for Ontario on the question of whether a general “protection from action” clause contained within a statute passed by a provincial legislature can bar an otherwise valid *Charter* claim for a personal remedy made pursuant s. 24(1) of the *Charter*. In particular, the Ontario decision of *Prete v Ontario* stands in direct conflict with the Court of Appeal of Alberta in the case at bar.

27. In *Prete v Ontario*, a case regarding malicious prosecution, the plaintiff brought a *Charter* claim against the Attorney General of Ontario for infringement of his s. 7 rights, and sought damages as a remedy under s. 24(1) of the *Charter*. The Ontario Court of Appeal was asked to determine whether the “protection from action” clause contained within s. 5(6) of the *Proceedings Against the Crown Act* could provide statutory immunity from *Charter* claims to Crown prosecutors.³² The Court found that it could not:

The reasons of [the Supreme Court] standing alone are strongly persuasive that a statutory enactment cannot stand in the way of a constitutional entitlement. Section 32(1)(b) of the *Charter* provides that the *Charter* applies to the legislature and government of each province. The remedy section of the *Charter* would be emasculated if the provincial government, as one of the very powers the *Charter* seeks to control, could declare itself immune.

Therefore, s 5(6) of the *Proceedings Against the Crown Act*. . . cannot infringe upon a s. 24(1) *Charter* remedy.³³

28. In contrast to *Prete*, the Alberta Court of Appeal held in the case at bar that the “protection from action” clause contained within s. 43 of the *Energy Resources Conservation Act* can and does bar a *Charter* claim, noting that “[p]rotecting administrative tribunals and their members from [*Charter*] damages is constitutionally legitimate”.³⁴

³² *Prete*, *supra* note 9 at paras 1 & 5 [Tab 8 at 112-113].

³³ *Prete*, *supra* note 9 at paras 7-8 [Tab 8 at 114-115].

³⁴ ABCA Reasons at paras 29-30 [Tab 4 at 56].

29. The Applicant respectfully submits that the Supreme Court’s guidance is required to resolve the conflict between the Courts of Appeal of Alberta and Ontario.

This case raises issues of interpretation of “protection from action” clauses in every province in Canada

30. General “protection from action” clauses similar to s. 43 of the *Energy Resources Conservation Act* are found in dozens of statutes across Canada. A non-exhaustive survey reveals examples of nearly identical general “protection from action” clauses in the statute books of Canada, British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, Nova Scotia, Newfoundland and Labrador, and Prince Edward Island.³⁵ The question directly raised by this case is whether each of these dozens of statutes provide immunity to their respective government agencies for remedies under s. 24(1) of the *Charter*.

31. Examples from every Canadian jurisdiction are provided below and were selected to cover both wide geographical scope and to demonstrate that the general “protection from action” clauses at issue cover a wide range of government actors and government actions. These are only examples of the dozens of statutes found in a brief survey of each jurisdiction’s statute books.

ALBERTA

Alberta Health Act, SA 2010, c A-19.5

Liability

11. No action lies against the Minister, the Crown in right of Alberta, the Health Advocate or any employee or agent of any of them for anything done or omitted to be done by that person in good faith while carrying out that person’s duties or exercising that person’s powers under this Act or the regulations.

SASKATCHEWAN

The Oil and Gas Conservation Act, RSS 1978, c O-2

Non-liability of board

7.9 No action lies or shall be instituted against the board, a member of the board or an officer, employee or agent of the board for any loss or damage suffered by a person by reason of anything in good faith done, caused, permitted or authorized to be done, attempted to be done or omitted to be done, by any of them, pursuant to or in the exercise of or supposed exercise of any power conferred by this Act or the regulations or in the carrying out or supposed carrying out of any order made pursuant to this Act or any duty imposed by this Act or the regulations.

³⁵ A non-exhaustive list of examples of similar “protection from action” clauses are provided below.

MANITOBA

The Correctional Services Act, CCSM c C230

No liability

58(1) No action lies against the government, the minister or the commissioner, or any staff member, contractor, volunteer or other person acting under the direction of the commissioner, for anything done or omitted to be done in good faith in the administration of this Act or in the discharge of any powers or duties that under this Act are intended or authorized to be executed or performed.

ONTARIO

Civil Remedies Act, 2001, SO 2001, c 28

Protection from liability

20(1) No action or other proceeding may be commenced against the Attorney General, the Crown in right of Ontario or any person acting on behalf of, assisting or providing information to the Attorney General or the Crown in right of Ontario in respect of the commencement or conduct in good faith of a proceeding under this Act or in respect of the enforcement in good faith of an order made under this Act.

QUEBEC

Securities Act, CQLR c V-1.1

283. No proceeding may be brought against the Authority, a member of its personnel, its appointed agent or any person exercising a delegated power, for official acts done in good faith in the exercise of their functions.

BRITISH COLUMBIA

Nisga'a Final Agreement Act, RSBC 1999, c 2, Chapter 20

24. No action lies or may be instituted against the Enrolment Appeal Board, or any member of the Enrolment Appeal Board, for anything said or done, or omitted to be said or done, in good faith in the performance, or intended performance, of a duty or in the exercise or intended exercise of a power under this Chapter.

NEW BRUNSWICK

Pension Benefits Act, SNB 1987, c P-5.1

100.1(5) No action for damages or other proceedings shall be taken against the Province, the Minister, or a person designated to act on behalf of the Minister with respect to anything done or purported to be done, or with respect to anything omitted in respect of a regulation with retroactive effect, either before or after the coming into force of this section.

NOVA SCOTIA

Building Code Act, RSNS 1989, c 46

No action

27. No action or proceeding lies against the Crown, a municipality or a servant or agent thereof for any matter or thing done or omitted to be done by them in good faith and with reasonable care in exercising their powers or carrying out their duties under this Act or the regulations. R.S., c. 46, s. 27.

PRINCE EDWARD ISLAND

Community Care Facilities and Nursing Homes Act, RSPEI 1988, c C-13

Liability

6. (2) No action lies against the Board or its members for anything done in good faith in exercise of its functions.

NEWFOUNDLAND AND LABRADOR

Public Utilities Act, RSNL 1990, c P-47

6. (13) An action or other proceeding does not lie against the board or a member, officer or employee of the board for anything done or omitted to be done in good faith in the course of carrying out its or his or her duties under this Act.

CANADA

Bank of Canada Act, RSC 1985, c B-2

No liability if in good faith

30.1 No action lies against Her Majesty, the Minister, any officer, employee or director of the Bank or any person acting under the direction of the Governor for anything done or omitted to be done in good faith in the administration or discharge of any powers or duties that under this Act are intended or authorized to be executed or performed.

32. The Applicant submits that the Supreme Court's guidance is needed to clarify what limits, if any, these dozens of general "protection from action" clauses place on the right of Canadians to seek a remedy for a *Charter* breach under s. 24(1).

The key constitutional questions raised by this case have not been directly considered by the Supreme Court

33. While the *Charter* has been extensively litigated over the past 32 years, the fundamental question of whether legislation can bar *Charter* claims for personal remedies made pursuant to s. 24(1) of the *Charter* (Question in Issue #1), has not been squarely considered by the Supreme Court. This case provides an excellent opportunity to directly address this key constitutional issue.

34. The Supreme Court addressed but did not decide this issue in the case of *Nelles v Ontario*, where Lamer J. provided general comments on constitutional principles in *obiter dicta*. Lamer J. however, specifically left this key issue open for future consideration, stating "[w]hether or not a common law or statutory rule can constitutionally have the effect of excluding the courts

from granting the just and appropriate remedy, their most meaningful function under the Charter, does not have to be decided in this appeal.”³⁶

35. Similarly, the Supreme Court has only indirectly considered the question of whether a legislature can determine what is a “just and appropriate” remedy under s. 24(1) of the *Charter* (Question in Issue #2). The case of *Doucet-Boudreau v Nova Scotia (Minister of Education)* involved the nature of remedies available under s. 24(1) of the *Charter* for the realization of minority language rights protected by s. 23 of the *Charter*, and specifically the question of whether the particular remedy ordered by the court (which in that case involved the court assuming an ongoing supervisory role) was “appropriate and just” in accordance with s. 24(1).³⁷ The Supreme Court was not required to and did not specifically consider whether a legislature can pass legislation which restricts the remedies available under s. 24(1). Instead, the focus was on describing the powers of the courts to grant appropriate and just remedies. These principles include the following:

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 the common law 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”.

What, then, is meant in s 24(1) by the words “appropriate and just in the circumstances”? Clearly, the task of giving these words meaning in particular cases will fall to the courts ordering the remedies since s. 24(1) specifies that the remedy should be such as the court considers appropriate and just.³⁸
[Emphasis in the original]

36. The Supreme Court’s discussion of the general principles governing s. 24(1) of the *Charter* appear to contradict the reasoning of the Court of Appeal of Alberta in the present case. In contrast, the Court of Appeal of Alberta found that there are strong policy reasons that suggest that legislatures should and in fact do have the power to define the remedies available under s. 24(1) of the *Charter*:

³⁶ *Nelles*, *supra* note 6 at 196.

³⁷ *Doucet-Boudreau*, *supra* note 8 at paras 1 & 52.

³⁸ *Doucet-Boudreau*, *supra* note 8 at paras 51-52.

The legislatures have a legitimate role in specifying the broad parameters of remedies that are available. **Having well established statutory rules about the availability of remedies is much more desirable than leaving the decision to the discretion of individual judges. Any such *ad hoc* regime would be so fraught with unpredictability as to be constitutionally undesirable.**³⁹ [Emphasis added]

Protecting administrative tribunals and their members from liability for damages is constitutionally legitimate. Just as there is nothing illegitimate about time limits to seek constitutional remedies, so too there is nothing constitutionally illegitimate about provisions like s. 43. . . . The conclusion of the case management judge that s. 43 bars the appellant's *Charter* claim discloses no reviewable error.⁴⁰

37. The Appellant seeks the Supreme Court's guidance in resolving the question of whether it is the legislature or the courts that have the power to determine what is considered a "just and appropriate remedy" under s. 24(1) of the *Charter*.

There is very good reason to doubt the correctness of the Court of Appeal's decision

38. Finally, leave to appeal should be granted because there is very good reason to doubt the correctness of the Court of Appeal of Alberta's decision. With respect, the finding by the Court of Appeal of Alberta that a "protection from action" clause contained within a provincial statute can provide immunity for valid *Charter* claims is not in keeping with the legal principle of constitutional supremacy, and is in urgent need of correction. The *Charter* guarantees not only fundamental freedoms, but also guarantees the right of Canadians to seek a remedy when these fundamental *Charter* rights and freedoms are violated. These constitutional rights cannot be taken away by legislation purporting to grant general immunity to the ERCB from any and all legal action.

39. It is difficult to overstate the importance of the *Canadian Charter of Rights and Freedoms* in the Canadian legal system. The *Charter* enshrines the fundamental freedoms of all Canadians, and, along with other parts of our Constitution, forms the supreme law of Canada.⁴¹

40. The *Charter* serves as a vital bulwark protecting the individual against the state. As repeatedly emphasized by the Supreme Court, the "primary purpose" of the *Charter* is to restrain

³⁹ ABCA Reasons at para 28 [Tab 4 at 55].

⁴⁰ ABCA Reasons at paras 29-30 [Tab 4 at 56].

⁴¹ *Canadian Charter of Rights and Freedoms*, *supra* note 2, s. 52(1).

government action and to protect individuals, like Ms. Ernst, from unconstitutional actions taken by government agencies, such as the ERCB. As noted by this Court, “the *Charter* is essentially an instrument for checking the powers of government over the individual”.⁴²

41. Crucially, the *Charter* itself not only guarantees the fundamental freedoms of Canadians, but also guarantees a right to a remedy for breaches of those fundamental freedoms.⁴³ Section 24(1) of the *Charter* specifically provides remedies for *unconstitutional government acts*.⁴⁴ In other words, the *right to a remedy is itself a constitutional right*. In the words of Iacobucci and Arbour JJ, “[s]ection 24(1) entrenches in the Constitution a remedial jurisdiction for infringements or denials of *Charter* rights and freedoms.”⁴⁵

42. Importantly for the present case, McLachlin CJ notes that section 24(1) “provides a *personal remedy* against unconstitutional government action” [emphasis added].⁴⁶ In other words, the entire purpose of s. 24(1) of the *Charter* is to provide individuals like Ms. Ernst an avenue to seek a *personal remedy* against government agencies when that individual’s fundamental *Charter* freedoms have been violated.

43. Because s. 24(1) is part of the supreme law of Canada, the power of a superior court to grant a remedy under s. 24(1) cannot be limited by statute:

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.⁴⁷

... superior courts’ powers to craft *Charter* remedies **may not be constrained by statutory or common law limits**.⁴⁸ [Emphasis added]

44. Specifically, this means that a statutory immunity clause cannot act to bar a claimant from seeking a *Charter* remedy; to the extent that it purports to do so, the immunity clause is of no force and effect.⁴⁹

⁴² *McKinney v University of Guelph*, [1990] 3 SCR 229 at 261-262.

⁴³ *R v 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 SCR 575 at para 14 (“*R v 974649 Ontario*”).

⁴⁴ *R v Ferguson*, 2008 SCC 6, [2008] 1 SCR 96 at paras 59-61 (“*Ferguson*”).

⁴⁵ *Doucet-Boudreau*, *supra* note 8 at para 41.

⁴⁶ *Ferguson*, *supra* note 44 at para 61.

⁴⁷ *Doucet-Boudreau*, *supra* note 8 at para 51.

⁴⁸ *Doucet-Boudreau*, *supra* note 8 at para 105.

⁴⁹ *Canadian Charter of Rights and Freedoms*, *supra* note 2, s. 52(1).

45. The Supreme Court has repeatedly and forcefully emphasized the supreme importance of providing full, effective and meaningful personal remedies under s. 24(1). Breaches of the *Charter* “cannot be countenanced”, and therefore “[a] court which has found a violation of a *Charter* right has a duty to provide an effective remedy” [emphasis added].⁵⁰ According to Lamer J, “access to a court of competent jurisdiction to seek a remedy is essential for the vindication of a constitutional wrong. To create a right without a remedy is antithetical to one of the purposes of the *Charter* which surely is to allow courts to fashion remedies when constitutional infringements occur”.⁵¹

46. McLachlin CJ, echoing the words of previous Supreme Court judgments, put it in the following terms:

S. 24(1) “establishes the right to a remedy as the foundation stone for the effective enforcement of *Charter* rights”. Through the provision of an enforcement mechanism, s. 24(1) “above all else ensures that the *Charter* will be a vibrant and vigorous instrument for the protection of the rights and freedoms of Canadians”. Section 24(1)’s interpretation necessarily resonates across all *Charter* rights, since a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach.⁵²

47. The authority of the Court to craft an appropriate *Charter* remedy under s. 24(1) is expansive. As emphasized by the Supreme Court, “it is difficult to imagine language which could give the court a wider and less fettered discretion”.⁵³ The Court’s discretion to grant an “appropriate and just” remedy includes the ability to award damages for a breach of a claimant’s *Charter* rights under s. 24(1) in appropriate circumstances.⁵⁴

48. Ms. Ernst is seeking a remedy under s. 24(1) of the *Charter* for a violation of her fundamental *Charter* right to freedom of expression. As noted above, because the remedial provision that provides access to a *Charter* remedy is itself a protected constitutional right, Ms. Ernst’s claim for a *Charter* remedy pursuant to s. 24(1) cannot be blocked by a general “protection from action” clause contained within provincial legislation such as the *Energy Resources Conservation Act*. In other words, Ms. Ernst is constitutionally guaranteed the right

⁵⁰ *Ferguson*, *supra* note 44 at para 34.

⁵¹ *Nelles*, *supra* note 6 at 196.

⁵² *R v 974649 Ontario*, *supra* 43 at paras 19-20.

⁵³ *Doucet-Boudreau*, *supra* note 8 at para 52.

⁵⁴ *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 SCR 28 at paras 16-22.

to apply to a court to seek a remedy for the ERCB's breaches of her *Charter* right to freedom of expression.

Summary

49. The Applicant respectfully submits that this case raises key issues of such national and public importance that leave to appeal to the Supreme Court should be granted. In particular, leave to appeal should be granted because:

- a. The decision of the Court of Appeal of Alberta in this case puts the law in Alberta in conflict with appellate law in Ontario.
- b. General "protection from action" clauses similar to s. 43 of the *Energy Resources Conservation Act* are found in dozens of statutes across Canada. The Supreme Court's guidance on whether such statutes can bar actions brought pursuant s. 24(1) of the *Charter* will benefit all Canadians.
- c. The fundamental questions of whether a legislature can bar or otherwise restrict *Charter* claims for personal remedies made pursuant to s. 24(1) of the *Charter* through a general "protection from action" clause has not been squarely considered by the Supreme Court.
- d. There are very good reasons to doubt the correctness of the decisions below. This appeal provides a very good opportunity to correct the law on a fundamental constitutional question.


PART IV – COSTS SUBMISSIONS

50. Ms. Ernst seeks costs of this application, and ultimately of the appeal here and throughout the courts below.


PART V – ORDER SOUGHT

51. Ms. Ernst respectfully seeks an Order granting her leave to Appeal to the Supreme Court of Canada from the decision of the Court of Appeal dated September 15, 2014, with costs.

All of which is respectfully submitted this 12th day of November, 2014.



Murray Klippenstein



W. Cory Wanless

Lawyers for the Applicant, Jessica Ernst

PART VI – TABLE OF AUTHORITIES

Authority	Paragraph(s)
<i>Doucet-Boudreau v Nova Scotia (Minister of Education)</i> , 2003 SCC 62, [2003] 3 SCR 3 http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2096/index.do	6, 35, 41, 43, 47
<i>McKinney v University of Guelph</i> , [1990] 3 SCR 229 http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/687/index.do	40
<i>Nelles v Ontario</i> , [1989] 2 SCR 170 http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/499/index.do	5, 34, 45
<i>Prete v. Ontario (Attorney-General)</i> , 1993 CanLII 3386 (ON CA), 16 OR (3d) 161 [Tab 8]	7, 27
<i>R v 974649 Ontario Inc</i> , 2001 SCC 81, [2001] 3 SCR 575 http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1922/index.do	41, 46
<i>R v Ferguson</i> , 2008 SCC 6, [2008] 1 SCR 96 http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1841/index.do	41, 42, 45
<i>Vancouver (City) v. Ward</i> , 2010 SCC 27, [2010] 2 SCR 28 http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7868/index.do	47

PART VII – STATUTES AND REGULATIONS RELIED UPON

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982.

Rights and freedoms in Canada

Guarantee of Rights and Freedoms 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

Fundamental freedoms 2. Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

....

Enforcement

Enforcement of guaranteed 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or

LA CHARTE CANADIENNE DES DROIT ET LIBERTÉS

Loi constitutionnelle de 1982 (R-U), constituant l'annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 11.

Garantie des droits et libertés

Droits et libertés au Canada 1. La Charte canadienne des droits et libertés garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

Libertés fondamentales

Libertés fondamentales 2. Chacun a les libertés fondamentales suivantes :

- (a) liberté de conscience et de religion;
- (b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;
- (c) liberté de réunion pacifique;
- (d) liberté d'association.

....

Recours

Recours en cas d'atteinte 24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la

rights and freedoms

denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

....

Application of Charter**Application of Charter**

- 32. (1)** This Charter applies
- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
 - (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

General**Primacy of Constitution of Canada**

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.

aux droits et libertés

présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

....

Application de la charte**Application de la charte**

- 32. (1)** La présente charte s'applique:
- (a) au Parlement et au gouvernement du Canada, pour tous les domaines relevant du Parlement, y compris ceux qui concernent le territoire du Yukon et les territoires du Nord-Ouest;
 - (b) à la législature et au gouvernement de chaque province, pour tous les domaines relevant de cette législature.

Disposition Générales**Primauté de la Constitution du Canada**

52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

ENERGY RESOURCES CONSERVATION ACT, RSA 2000, C E-10.**Protection from action**

43 No action or proceeding may be brought against the Board or a member of the Board or a person referred to in section 10 or 17(1) in respect of any act or thing done purportedly in pursuance of this Act, or any Act that the Board administers, the regulations under any of those Acts or a decision, order or direction of the Board.

ALBERTA RULES OF COURT, ALTA REG 124/2010.

3.68(1) If the circumstances warrant and a condition under subrule (2) applies, the Court may order one or more of the following:

- (a) that all or any part of a claim or defence be struck out;
- (b) that a commencement document or pleading be amended or set aside;
- (c) that judgment or an order be entered;
- (d) that an action, an application or a proceeding be stayed.

(2) The conditions for the order are one or more of the following:

- (a) the Court has no jurisdiction;
- (b) a commencement document or pleading discloses no reasonable claim or defence to a claim;
- (c) a commencement document or pleading is frivolous, irrelevant or improper;
- (d) a commencement document or pleading constitutes an abuse of process;
- (e) an irregularity in a commencement document or pleading is so prejudicial to the claim that it is sufficient to defeat the claim.

(3) No evidence may be submitted on an application made on the basis of the condition set out in subrule (2)(b).

....

7.3(1) A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds:

- (a) there is no defence to a claim or part of it;
- (b) there is no merit to a claim or part of it;
- (c) the only real issue is the amount to be awarded.

(2) The application must be supported by an affidavit swearing positively that one or more of the grounds described in subrule (1) have been met or by other evidence to the effect that the grounds have been met.

(3) If the application is successful the Court may, with respect to all or part of a claim, and whether or not the claim is for a single and undivided debt, do one or more of the following:

- (a) dismiss one or more claims in the action or give judgment for or in respect of all or part of the claim or for a lesser amount;
- (b) if the only real issue to be tried is the amount of the award, determine the amount or refer the amount for determination by a referee;
- (c) if judgment is given for part of a claim, refer the balance of the claim to trial or for determination by a referee, as the circumstances require.

RESPONSIBLE ENERGY DEVELOPMENT ACT, SA 2012, C R-17.3.**Protection from action**

27 No action or proceeding may be brought against the Regulator, a director, a hearing commissioner, an officer or an employee of the Regulator, or a person engaged by the Regulator, in respect of any act or thing done or omitted to be done in good faith under this Act or any other enactment.

Transitional provisions

83(1) In this section,

- (a) “former Act” means the *Energy Resources Conservation Act*, RSA 2000 cE-10;
- (b) “former Board” means the Energy Resources Conservation Board.

(2) On the coming into force of this section, any approval issued or any order, direction or declaration made or issued by the former Board before the coming into force of this section continues to have effect according to its terms until it expires or is amended or terminated by the Regulator under this Act or any other enactment.

(3) On the coming into force of this section, the following applies:

- (a) the property, assets, rights and benefits of the former Board become the property, assets, rights and benefits of the Regulator;
- (b) the Regulator is liable for the obligations and liabilities of the former Board;
- (c) an existing cause of action, claim or liability to prosecution of, by or against the former Board is unaffected by the coming into force of this section and may be continued by or against the Regulator;
- (d) a civil, criminal or administrative action or proceeding pending by or against the former Board may be continued by or against the Regulator;
- (e) a ruling, order or judgment in favour of or against the former Board may be enforced by or against the Regulator.