SCC Court File No.: 36167

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-

ALBERTA ENERGY REGULATOR

Respondent
(Respondent)

REPLY TO RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL
Jessica Ernst – Applicant

(Pursuant to Rule 28 of the *Rules of the Supreme Court of Canada*)

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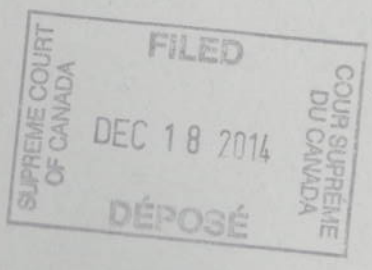

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MEMORANDUM OF ARGUMENT

Clarification regarding the key question on appeal

1. The Energy Resources Conservation Board ("**ERCB**" or the "**Respondent**")[1] misleadingly states throughout its Response that what the Applicant Jessica Ernst ("**Ms. Ernst**" or the "**Applicant**") has claimed is a "constitutionally guaranteed right to the *Charter* remedy of her choice" or other words of similar effect.[2] The Applicant has made no such claim.

2. Instead, the key question raised by the proposed appeal is whether the ERCB's immunity provision, which states simply that "no action or proceeding may be brought" against the ERCB,[3] can override the constitutionally guaranteed right under s. 24(1) of the *Canadian Charter of Rights and Freedoms* (the "***Charter***") to "apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just" for violations of *Charter* rights.[4]

The Respondent provides no good reason for why leave should not be granted

3. The ERCB spends much of its Response on the substance of the arguments that would be expected to be heard at the appeal itself. Many of these arguments are not supported by any established jurisprudence (other than the judgments appealed from), and require both leaps of logic and radical changes to fundamental constitutional principles. Examples include:

   a. An attempt to argue by way of a strained analogy that because limitation period provisions can define the time period in which claims for personal *Charter* remedies must be brought, that it is also constitutionally valid for an immunity provision to totally bar all possible claims for personal *Charter* remedies;[5]

   b. Use of the general concept of "good governance" to provide justification for an immunity provision that bars any and all actions and proceedings against the ERCB, including those made for claims for *Charter* remedies;[6]

   c. The general argument that because there happen to be examples of other, unrelated

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[1] The Energy Resources Conservation Board has since been succeeded by the Alberta Energy Regulator. For the purposes of this Reply, the Alberta Energy Regulator will be referred to as the "ERCB" or the "Respondent".
[2] Respondent's Memorandum of Argument, (the "**ERCB Response**") at paras 26 & 66 [Response to Application for Leave to Appeal, Tab 1].
[3] *Energy Resources Conservation Act*, RSA 2000, c E-10, s 43.
[4] *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, (the "***Charter***"), s 24(1).
[5] ERCB Response at paras 21-27.
[6] ERCB Response at paras 28-38.

limits to access to *Charter* remedies under s. 24 (1), that it is therefore permissible for a general immunity provision to eliminate any possibility of seeking a personal *Charter* remedy pursuant to s. 24(1).[7]

4. While the Applicant vigorously disagrees with the positions advanced above, the fact that the ERCB has responded to an application for leave by raising arguments that challenge established constitutional principles demonstrates precisely why leave to appeal should be granted. The Supreme Court's guidance on these core *Charter* principles is needed.

***This proposed appeal provides a welcome opportunity to consider the core legal question of whether an immunity provision can completely bar claims for personal* Charter remedies**

5. The Respondent argues that this action does not provide "a fulsome platform" to decide the question in issue because a) the claim was "struck at a pleadings stage and there is no evidence on the record", and b) there is, as yet, no record of submissions from interested parties regarding the constitutional point at issue.[8]

6. Both of these concerns are misplaced. With regard to the first concern, the key question is whether the Court has sufficient material before it in order to determine the issue fairly. Because this particular proposed appeal raises a purely legal question (namely, can a general immunity provision contained within legislation bar a *Charter* claim for a personal remedy made pursuant to s. 24(1)?), a well-developed evidentiary record is neither needed nor desirable. Indeed, this Honourable Court regularly hears matters that raise purely legal questions in the absence of evidentiary records. For example, in *Ravndahl v. Saskatchewan*, this Honourable Court considered the purely legal question of whether a claim for a personal *Charter* remedy was subject to a limitation period provision without reference to any evidence whatsoever.[9]

7. With regard to the second concern, rule 61(4) of the *Rules of the Supreme Court* provides the prima facie right for the attorneys general of Canada, the provinces and the

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[7] ERCB Response at paras 39-50.

[8] ERCB Response at paras 59, 61 & 62. The Respondent alleges that the Applicant improperly failed to give proper notice of a constitutional question at the court of first instance. The Applicant strongly disputes this. In any event, the Court of Appeal noted specifically that there was no appeal or cross-appeal on the issue of whether sufficient notice of the constitutional question was given, and further Alberta was given notice and had the opportunity to participate fully in the proceeding before the Court of Appeal. ABCA Reasons, at para 9 [Application, Tab 4].

[9] *Ravndahl v. Saskatchewan*, 2009 SCC 7, [2009] 1 SCR 181 (***"Ravndahl"***); see also examples of other cases heard on a point of law in the absence of any evidentiary record: *Operation Dismantle v. The Queen*, [1985] 1 SCR 441; *Nelles v Ontario*, [1989] 2 SCR 170; *Cooper v Hobart*, 2001 SCC 79, [2001] 3 SCR 537; and *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 SCR 83.

territories to intervene in any Supreme Court hearing on any constitutional question raised by the proceedings.[10] Should leave be granted, the Court will have the benefit of submissions from all interested parties on all *Charter* issues.

Nature of* Charter *damages, and other* Charter *relief

8. Throughout its response, the ERCB incorrectly implies that a claim for *Charter* damages is equivalent to a tort action for damages. In particular, the ERCB repeatedly and incorrectly suggests that what Ms. Ernst really seeks is a "private law remedy" that concerns only Ms. Ernst's private interests.[11]

9. This perspective misconstrues the nature of personal *Charter* remedies and ignores the fact that they include a public element. As explained by McLachlin C.J. in *Vancouver (City) v. Ward*, *Charter* damages are related to, but conceptually distinct from, other forms of damages, noting that "[t]he term "damages" conveniently describes the remedy sought in this case. **However, it should always be borne in mind that these are not private law damages, but the distinct remedy of constitutional damages**" [emphasis added].[12] In *Ward*, the court specifically describes *Charter* damages as "public law damages".[13]

10. Unlike private law damages, the purposes behind *Charter* damages are broader, and include restoring the constitutional order, as well as compensating the individual whose fundamental rights and freedoms have been violated. The Supreme Court has noted that a s. 24(1) remedy (including *Charter* damages) must (1) meaningfully vindicate the rights and freedoms of the claimants; (2) employ means that are legitimate within the framework of our constitutional democracy; (3) be a judicial remedy which vindicates the right while invoking the function and powers of a court; and (4) be fair to the party against whom the order is made.[14]

11. *Charter* damages will not be appropriate in every case, and indeed in some cases, another remedy may be more appropriate to vindicate the right. In all cases, however, where a *Charter* right has been breached there *must* be an effective remedy that vindicates the right and restores the constitutional order.[15] Further, in all cases, it is the court, not the legislature that retains the

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[10] *Rules of the Supreme Court of Canada*, SOR/2002-156, r. 61(4).
[11] ERCB Response at para 34.
[12] *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 SCR 28 ["***Ward***"] at para 22.
[13] *Ward*, *ibid.* at paras 22, 66 and 69.
[14] *Ward*, *ibid.* at paras 20-21.
[15] *R v Ferguson*, 2008 SCC 6, [2008] 1 SCR 96 at para 34.

discretion to determine the appropriate *Charter* remedy.[16]

Statutory immunity provisions are not analogous to limitation period provisions

12. The Respondent is unable to identify any case or other legal authority that holds that a legislature can pass an immunity provision that has the effect of barring any and all claims for personal *Charter* remedies made pursuant to s. 24(1). Instead, both the courts below and the ERCB have used a strained analogy to limitation period cases, arguing that since the Supreme Court has recognized that limitation periods can define the time within which a plaintiff must make a *Charter* claim for a personal remedy, so too can an immunity provision totally bar any and all *Charter* claims for personal remedies.[17] Notably, all key Supreme Court cases referenced by the Respondent (*Ravndahl, Manitoba Metis* and *Kingstreet Investments*) are limitation period cases, not complete immunity provision cases.[18]

13. With respect, the analogy between limitation period provisions and immunity provisions in the context of the *Charter* is a false analogy. Limitation periods are not adopted in order to bar claims outright; instead, limitation periods simply provide rules regarding how promptly claims must be made.[19] Immunity provisions, on the other hand, act as an absolute bar to bringing a claim. In other words, rather than merely controlling how the right to make a claim must be exercised, immunity provisions destroy that right entirely.

14. As acknowledged by the ERCB itself, the policy reasons underlying limitation period provisions are entirely different from those underlying immunity provisions.[20] According to this Honourable Court, the purposes of limitation periods (including those that apply to *Charter* claims) include (1) defining a time at which the potential defendant is free of ancient obligations; (2) preventing the bringing of claims based on stale evidence; and (3) providing an incentive for plaintiffs to bring claims in a timely fashion.[21] In contrast, and as explained by the ERCB, immunity provisions are designed to completely "immuniz[e] various government actors and

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[16] *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3 at paras 51-52.
[17] ABQB Reasons at paras 65-82 [Application, Tab 2]; ABCA Reasons, at para 26 [Application, Tab 4]; ERCB Response, para 21-27.
[18] *Ravndahl*, supra note 9; *Kingstreet Investments Ltd. v New Brunswick (Finance)* 2007 SCC 1, [2007] 1 SCR 3 ("***Kingstreet***") at paras 59-61; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 SCR 623.
[19] *Kingstreet, ibid* at para 60; see also *Ravndahl, supra* note 9 at para 17.
[20] ERCB at para 36.
[21] *Novak v Bond*, [1999] 1 SCR 808 at para. 67; *Ravndahl, supra* note 9 at para 17.

actions" based on the rationale that "a public decision-maker should be free to make the decisions it deems appropriate."[22] Given the major difference in policy considerations, the analogy between limitation and immunity provisions breaks down entirely.

15. Finally, the notion of immunizing governments from judicial scrutiny is particularly suspect when the claim in question is made pursuant to the *Charter*. Indeed, the very purpose of the *Charter* is to restrain government action and to provide citizens with access to a court to obtain a remedy when those rights have been breached.[23] Courts are given a special role as the guarantors of the *Charter* and the overseers of our constitutional system; this role cannot be usurped by an immunity provision purporting to completely shield government from judicial scrutiny for *Charter* breaches.

A* Charter *claim is separate and distinct from any possible judicial review

16. The Respondent argues that Ms. Ernst should have brought a judicial review rather than a claim for a personal remedy pursuant to the *Charter*.[24] With respect, this assertion fails to recognize that a claim for a *Charter* remedy is distinct from a judicial review, and aimed at different considerations. In particular, the ERCB's position conflicts with the Supreme Court's finding in *Manuge v. Canada* that so long as a plaintiff had pleaded a valid cause of action for *Charter* remedies (which in that case was a claim for *Charter* damages for alleged breaches of s. 15(1)), the plaintiff is entitled to pursue that action without having to resort to a judicial review.[25]

Conclusion

17. This proposed appeal raises a core unresolved constitutional issue: can a general immunity provision bar any and all claims brought pursuant to s. 24(1) of the *Charter*, thus completely eliminating the right of a citizen to seek personal *Charter* remedies for violations of their fundamental rights and freedoms? This question requires the guidance of the Supreme Court for the benefit of all Canadians.

All of which is respectfully submitted this 17th day of December, 2014.

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[22] ERCB Response at paras 29 & 35.
[23] *Charter*, s 24(1); see also, *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 SCR 157 at para 57; *Re Manitoba Language Rights*, [1985] 1 SCR 721 at 745; *Doucet- Boudreau* supra note 16 at paras 41, 43, 51 & 52.
[24] ERCB Response at para 1, 3, 54 & 66.
[25] *Manuge v. Canada*, 2010 SCC 67, [2010] 3 SCR 672 at paras 2, 10, 12, 17 & 21.

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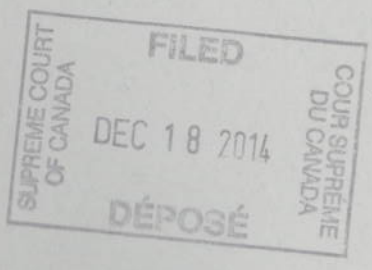

PART VI – TABLE OF AUTHORITIES

Authority	Paragraph(s)
Doucet-Boudreau v Nova Scotia (Minister of Education), 2003 SCC 62, [2003] 3 SCR 3 http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2096/index.do	11, 15
Canadian Egg Marketing Agency v. Richardson, [1998] 3 SCR 157 http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1661/index.do	15
Cooper v Hobart, 2001 SCC 79, [2001] 3 SCR 537 http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1920/index.do	6
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Manitoba Metis Federation Inc. v. Canada (Attorney General), 2013 SCC 14, [2013] 1 SCR 623 http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/12888/index.do	12
Manuge v. Canada, 2010 SCC 67, [2010] 3 SCR 672 http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7911/index.do	16
Nelles v Ontario, [1989] 2 SCR 170 http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/499/index.do	6
Novak v Bond, [1999] 1 SCR 808 http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1701/index.do	14
Operation Dismantle v. The Queen, [1985] 1 SCR 441 http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/48/index.do	6
R v Ferguson, 2008 SCC 6, [2008] 1 SCR 96 http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2406/index.do	11
Ravndahl v. Saskatchewan, 2009 SCC 7, [2009] 1 SCR 181 http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/6421/index.do	6, 12, 13, 14

PART VII – STATUES AND REGULATIONS RELIED UPON

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

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

Enforcement

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

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.**

Recours

Recours en cas d'atteinte aux droits et libertés	**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.

***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.