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

Appellant

-and-

ALBERTA ENERGY REGULATOR

Respondent

-and-

ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL FOR SASKATCHEWAN, and ATTORNEY GENERAL OF QUEBEC

Interveners

FACTUM OF THE APPELLANT, JESSICA ERNST

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada,* SOR/2002-156)

KLIPPENSTEINS
Barristers & Solicitors
160 John Street, Suite 300
Toronto, ON M5V 2E5
Tel: (416) 598-0288
Fax: (416) 598-9520

Murray Klippenstein
murray.klippenstein@klippensteins.ca
W. Cory Wanless
cory.wanless@klippensteins.ca

Lawyers for the Appellant Jessica Ernst

NELLIGAN O'BRIEN PAYNE LLP
50 O'Connor Street, Suite 1500
Ottawa, ON K1P 6L2
Tel: (613) 231-8311
Fax: (613) 788-3667

Christopher Rootham
Christopher.Rootham@nelligan.ca

Ottawa agent for the Appellant Jessica Ernst

ORIGINAL TO:

THE REGISTRAR
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

COPIES TO:

JENSEN SHAWA SOLOMON DUGUID HAWKES LLP
800, 304 –8 Avenue SW
Calgary, AB T2P 1C2
Tel: (403) 571-1520
Fax: (403) 571-1528

Glenn Solomon QC
gsolomon@jssbarristers.ca
Laura Warner
warnerl@jssbarristers.ca

Lawyers for the Respondent Alberta Energy Regulator

GOWLING LAFLEUR HENDERSON LLP
160 Elgin St., Suite 2600
Ottawa, ON K1P 1C3
Tel: (613) 786-0171
Fax: (613) 563-9869

Jeffrey W. Beedell
jeff.beedell@gowlings.com

Ottawa agent for the Respondent Alberta Energy Regulator

MINISTRY OF THE ATTORNEY GENERAL OF BRITISH COLUMBIA
6th-1001 Douglas Street
Victoria, British Columbia V8W 9J7
Tel: (205) 952-0122
Fax: (205) 356-9154

Jonathan Penner
jonathan.penner@gov.bc.ca

Lawyer for the Intervener, the Attorney General of British Columbia

BURKE-ROBERTSON LLP
441 MacLaren Street, Suite 200
Ottawa, ON K2P 2H3
Tel: (613) 236-9665
Fax: (613) 235-4430

Robert E. Houston, Q.C.
rhouston@burkerobertson.com

Ottawa agent for the Intervener, the Attorney General of British Columbia

DEPARTMENT OF JUSTICE CANADA
130 King Street West, Suite 3400, Box 36
Toronto, ON M5X 1K6
Tel: (416) 973-9704
Fax: (416) 973-0809

Michael H. Morris
michael.morris@justice.gc.ca

DEPARTMENT OF JUSTICE CANADA
William F. Penteny, Q.C.
Deputy Attorney General of Canada
50 O'Connor Street
Ottawa, ON K1A 0H8
Tel: (613) 670-6290
Fax: (613) 954-1920

Lawyer for the Intervener, the Attorney General of Canada

Christopher Rupar
crupar@justice.gc.ca

Ottawa agent for the Intervener, the Attorney General of Canada

SASKATCHEWAN MINISTRY OF JUSTICE
Constitutional Law Branch
820 – 1874 Scarth Street
Regina, SK S4P 3V7
Tel: (306) 787-8385
Fax: (306) 787-9111

Graeme G. Mitchell, Q.C.
graeme.mitchell@gov.sk.ca

Lawyer for the Intervener, Attorney General for Saskatchewan

GOWLING LAFLEUR HENDERSON LLP
Barristers & Solicitors
160 Elgin Street, 26th Floor
Ottawa, ON K1P 1C3
Tel: (613) 786-8695
Fax: (613) 788-3509

D. Lynn Watt
lynne.watt@gowlings.com

Ottawa agent for the Intervener, the Attorney General for Saskatchewan

PROCUREURE GÉNÉRALE QUÉBEC
Direction du droit public
1200, route de l'Église, 2e étage
Québec, QC G1V 4M1
Tél: (418) 643-1477
Téléc.: (418) 644-7030

Robert Desroches
robert.desroches@justice.gouv.qc.ca
Carole Soucy
carole.soucy@justice.gouv.qc.ca

Procureurs de la Procureure générale Québec

NOËL & ASSOCIÉS s.e.n.c.r.l.
111, rue Champlain
Gatineau, QC J8X 3R1
Tél: (819) 771-7393
Téléc: (819) 771-5397

Pierre Landry
p.landry@noelassocies.com

Correspondants pour les procureurs de la procureure générale du Québec

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PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

1. This appeal raises one of the most fundamental constitutional questions a court can consider: can a government, through legislation, block an individual from applying to a superior court 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 appellant, Jessica Ernst ("**Ms. Ernst**" or the "**Appellant**") brought a *Charter* claim against the Alberta Energy Regulator (the "**AER**"),[1] the regulator of Alberta's oil and gas industry, 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 Court of Queen's Bench of Alberta[3] and the Court of Appeal of Alberta[4] held that the general "protection from action" or "statutory immunity" clause contained in s. 43 of Alberta's *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10 (the "***ERCA***") completely bars Ms. Ernst's *Charter* claim. Section 43 of the *ERCA* 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

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[1] The ERCB has since been succeeded by the Alberta Energy Regulator through the *Responsible Energy Development Act,* S.A. 2012, c. R.-17.3. Under s. 83(3)(c) of the *Responsible Energy Development 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 factum, the energy regulator will be referred to as the "**Alberta Energy Regulator**" or the "**AER**".
[2] *Canadian Charter of Rights and Freedoms*, s. 24(1).
[3] Reasons for Judgment of the Honourable Chief Justice Neil Wittmann, Court of Queen's Bench of Alberta, dated September 16, 2013 ("**ABQB Reasons**") at paras. 82 & 88 [Appellant's Record, Tab 2 at 30-31].
[4] Reasons for Judgment of the Court of Appeal of Alberta, dated September 15, 2014 ("**ABCA Reasons**") at para 30 [Appellant's Record, Tab 4 at 55].

> administers, the regulations under any of those Acts or a decision, order or direction of the Board.[5]

4. With respect, the above findings upset the Canadian constitutional order, are directly contrary to the principle of constitutional supremacy, and must be reversed. Section 24(1) of the *Charter* guarantees the right of an individual to apply to a court of competent jurisdiction to seek personal remedies for breaches of that individual's fundamental *Charter* rights and freedoms. Because of the supremacy of the *Charter* in our constitutional system, the power granted by the *Charter* to the courts to provide access to remedies to individuals whose *Charter* rights have been breached cannot be removed by statute. The remedy section of the *Charter* would be gutted if a provincial government, as one of the very institutions that the *Charter* seeks to control, could declare itself or its agencies immune.

The Action

5. The Appellant, Jessica Ernst, is a landowner who resides on a rural property near the hamlet of Rosebud, Alberta. Her home is supplied with fresh water by a private well on her property that draws from the underground Rosebud Aquifer.[6]

6. 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 and other formations at over 190 gas wells located adjacent or near to Ms. Ernst's property. This program included use of a technique known as "hydraulic fracturing" or "fraccing" 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.[7]

7. Ms. Ernst has brought claims against the defendants EnCana, the AER and Her Majesty the Queen in Right of Alberta ("**Alberta Environment**") regarding the severe contamination of her well water and other harms. Specifically, Ms. Ernst has sued EnCana for negligence,

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[5] *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, s. 43. The *ERCA* was repealed on June 17, 2013, and replaced with the *Responsible Energy Development Act*. Section 27 of the *Responsible Energy Development Act* contains a statutory immunity clause that is substantially similar to the statutory immunity clause found at s. 43 of the *ERCA*.

[6] Fresh Statement of Claim, dated June 25, 2012 ("**Statement of Claim**") at paras. 1 & 5 [Appellant's Record, Tab 5 at 59-60].

[7] Statement of Claim at paras. 6-15 [Appellant's Record, Tab 5 at 60-62].

nuisance, and other torts;[8] Alberta Environment for conducting a negligent investigation into the contamination of her water;[9] and the AER for breaching her *Charter* right to free speech and for the negligent failure to implement the AER's inspection scheme.[10]

8. Ms. Ernst's primary purpose in bringing this action is to defend water, and to protect the right to free speech for all Canadians, including those who speak out in defence of water. In Ms. Ernst's view, water is life and nothing is more in need of respect and protection.

9. The present appeal is concerned solely with the *Charter* claim pleaded against the AER as set out in paragraphs 42-58 of the Fresh Statement of Claim (the "**Statement of Claim**").[11] The Court of Queen's Bench's 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.[12] 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.[13]

10. Ms. Ernst's other claims against EnCana for contaminating her water and against Alberta Environment for conducting a negligent investigation presently continue before the Court of Queen's Bench of Alberta.[14]

Jessica Ernst's Charter claim against the AER regarding freedom of expression

11. Ms. Ernst's freedom of expression *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 household water that is so contaminated with methane that the water coming from her kitchen faucet can be lit on fire. Ms. Ernst's water is too dangerous and too explosive to be used for any household needs including flushing toilets and thus has been disconnected from her home. Ms. Ernst was a vocal and effective critic of the AER's failure to adequately respond to these negative

[8] Statement of Claim at paras. 5-23 [Appellant's Record, Tab 5 at 59-64].
[9] Statement of Claim at paras. 59-80 [Appellant's Record, Tab 5 at 73-79].
[10] Statement of Claim at paras. 24-58 [Appellant's Record, Tab 5 at 65-72].
[11] Statement of Claim at paras. 42-58 [Appellant's Record, Tab 5 at 69-72].
[12] ABQB Reasons at paras. 31-43 & 59-88 [Appellant's Record, Tab 2 at 17-22 & 25-31].
[13] ABCA Reasons at paras. 23-30 [Appellant's Record, Tab 4 at 53-55].
[14] Alberta Environment subsequently brought a motion to strike out the claims against it on the grounds that it does not owe a duty of care to Ms. Ernst. This motion was dismissed, and Ms. Ernst continues to pursue her claims against Alberta Environment.

impacts. The pleadings state that the AER 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 AER.[15]

12. Ms. Ernst's *Charter* claim states that the AER breached her right to freedom of expression as guaranteed by s. 2(b) the *Charter* by (i) punishing her for publicly criticizing the AER and by (ii) arbitrarily preventing her from speaking to key offices within the AER.[16] Section 2(b) reads as follows:

> **Fundamental freedoms**
> 2. Everyone has the following fundamental freedoms: …
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.[17]

13. The relevant particulars of the Statement of Claim are as follows: Between 2001 and 2006, and with the blessing of the AER, EnCana conducted shallow fraccing operations at dozens of gas wells in close proximity to Ms. Ernst's rural residence. As part of these operations, EnCana engaged in new and untested fraccing and other related oil and gas activities at shallow depths underground, located at the exact same depths as freshwater aquifers that were used for drinking water. In particular, EnCana targeted and fractured directly into the Rosebud Aquifer – the freshwater aquifer that previously provided Ms. Ernst's home with safe, clean drinking water.[18]

14. EnCana's operations near Ms. Ernst's home caused serious negative impacts, including by severely contaminating Ms. Ernst's well water with hazardous and flammable levels of methane and other toxic chemicals.[19]

15. The AER is the government agency responsible for overseeing and regulating the oil and gas industry in Alberta. Importantly, the AER is tasked with protecting groundwater from interference or contamination due to oil and gas development.[20] The AER carries out its day-to-day operational and administrative work through its "Operations Division" and its numerous on-

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[15] Statement of Claim at paras. 42-58 [Appellant's Record, Tab 5 at 69-72].
[16] Statement of Claim at para. 58 [Appellant's Record, Tab 5 at 72].
[17] *Canadian Charter of Rights and Freedoms* at s. 2(b).
[18] Statement of Claim at paras. 6-12 & 30 [Appellant's Record, Tab 5 at 60-61 & 66].
[19] Statement of Claim at paras. 13-15 [Appellant's Record, Tab 5 at 61-62].
[20] Statement of Claim at paras. 24-25 [Appellant's Record, Tab 5 at 65].

the-ground "Field Offices" located throughout Alberta.[21] The AER's Field Offices of the Operations Division are responsible for investigating and responding to public complaints regarding the oil and gas industry and for ensuring that oil and gas operations comply with applicable regulations.[22] This appeal deals solely with the AER's operational and administrative functions as carried out by the Operations Division, and does not deal with any action or decision taken by the AER as a quasi-judicial tribunal.

16. The AER was kept well apprised of problems with EnCana's operations. 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 AER's Operations Division.[23] Similarly, by early 2005, the AER knew that a number of Ms. Ernst's neighbours had made several complaints regarding possible contamination of their water wells which were also fed by the Rosebud Aquifer.[24] Further, the AER specifically knew that EnCana had fractured directly into the Rosebud Aquifer.[25]

17. Despite clear knowledge of potentially serious industry-related water contamination and knowledge of potential breaches of AER requirements, the AER failed to respond in accordance with its own investigation and enforcement process. Instead, the AER either completely ignored Ms. Ernst and her concerns, or directed the AER's legal counsel to deal with her, which he did by refusing to consider or address her complaints.[26]

18. At the same time as she raised concerns with the AER, Ms. Ernst also frequently spoke publicly about her concerns regarding oil and gas development, and the failure of the AER to adequately address these concerns. Ms. Ernst was a vocal and effective critic of the AER, and her public criticism brought unwanted public attention to the AER and caused embarrassment within the organization.[27]

19. The AER responded to this unwanted public criticism by severely restricting Ms. Ernst's

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[21] Statement of Claim at para. 26 [Appellant's Record, Tab 5 at 65].
[22] Statement of Claim at para. 27 [Appellant's Record, Tab 5 at 65-66].
[23] Statement of Claim at para. 45 [Appellant's Record, Tab 5 at 70].
[24] Statement of Claim at para. 31 [Appellant's Record, Tab 5 at 67].
[25] Statement of Claim at para. 34 [Appellant's Record, Tab 5 at 67].
[26] Statement of Claim at para. 36 [Appellant's Record, Tab 5 at 68].
[27] Statement of Claim at paras. 45-46 [Appellant's Record, Tab 5 at 70].

communication with the AER and vindictively and arbitrarily prohibiting her from communicating with the AER's compliance, investigation and enforcement offices in an attempt to control what issues she raised publicly.[28]

20. In particular, in a letter dated November 24, 2005, Jim Reid, the Manager of the Compliance Branch of the AER, informed Ms. Ernst that he had instructed all staff at the Compliance Branch of the AER to avoid any further contact with her. On December 6, 2005, Ms. Ernst wrote to the AER to seek clarification of what was meant by Mr. Reid's prohibition, and what restrictions she faced when attempting to communicate with the AER. This letter was returned unopened. Richard McKee, a senior lawyer with the AER, later confirmed that the AER had decided to stop communication with Ms. Ernst and would not re-open communication until Ms. Ernst agreed to raise her concerns regarding the AER only with the AER, and not publicly through the media or through communications with other citizens.[29]

21. The Statement of Claim pleads that the decision to stop communication with Ms. Ernst was taken specifically as a means to punish her for her past public criticism of the AER, to marginalize her concerns, and to deny her access to the AER complaints mechanism. As a result, Ms. Ernst was prevented from raising legitimate and credible concerns regarding the severe contamination of her water with the very regulator mandated by the government to investigate and remediate such contamination, at the very time that the regulator was most needed.[30]

22. Again, Ms. Ernst's *Charter* claim states that the AER breached her right to freedom of expression as guaranteed by s. 2(b) of the *Charter* by (i) punishing Ms. Ernst for publicly criticizing the AER and by (ii) arbitrarily preventing Ms. Ernst from speaking to key offices within the AER.[31]

23. Ms. Ernst has applied to the Court of Queen's Bench of Alberta seeking a remedy for the breach of her constitutional rights under s. 24(1) of the *Charter*. Ms. Ernst's *Charter* claim includes both a claim for *Charter* damages, as well as a general claim for "further and other relief

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[28] Statement of Claim at para. 47 [Appellant's Record, Tab 5 at 70].
[29] Statement of Claim at paras. 48-52 [Appellant's Record, Tab 5 at 70-71].
[30] Statement of Claim at para. 55-57 [Appellant's Record, Tab 5 at 72].
[31] Statement of Claim at para. 58 [Appellant's Record, Tab 5 at 72].

as seems just to this Honourable Court."[32] At trial, Ms. Ernst will seek both a judicial finding that her *Charter* rights to free expression were breached, as well as an appropriate *Charter* remedy for this breach, which may include monetary damages and/or declaratory relief.

Court of Queen's Bench of Alberta Judgment

24. On January 18, 2013, the Court of Queen's Bench of Alberta heard an application brought by the AER which sought to strike out both the negligence claim and the *Charter* claim against it on the ground that the Statement of Claim 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 AER (under r. 7.3 of the *Alberta Rules of Court*). The key grounds asserted by the AER in support of both remedies were the same: first, the AER argued that there was no legal basis for the claims against it, and second, that the AER is simply immune from legal actions because of the statutory immunity provided by s. 43 of the *ERCA*.[33]

25. As part of its application before the Court of Queen's Bench, and despite a complete lack of evidence, the AER maliciously attempted to brand Ms. Ernst as an "eco-terrorist" by taking the prejudicial, extreme and unsupported position in its written brief that the "expression" that Ms. Ernst sought to protect under s. 2(b) was a "threat of violence" and that the AER ceased communication with Ms. Ernst "in order to protect its staff, the Alberta public and the Alberta oil and gas industry from further acts of eco-terrorism."[34] The Appellant rejects these baseless accusations in the strongest possible terms.

26. The Alberta Court of Queen's Bench judgment in the above matter was filled on September 19, 2013.[35] Wittmann C.J. struck both the Applicant's *Charter* claim and negligence claim against the AER. Wittmann C.J. made several key findings.

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[32] Statement of Claim at para. 87 [Appellant's Record, Tab 5 at 81-82].
[33] ABQB Reasons at paras. 6 & 12 [Appellant's Record, Tab 2 at 6-7].
[34] Brief of Argument of the Defendant Energy Resources Conservation Board submitted to the Court of Queen's Bench of Alberta on December 5, 2012 at para. 133.
[35] At the first preliminary hearing in this matter held on April 26, 2012, Veldhuis J. indicated that she was prepared to act as case management judge in this matter, and was subsequently appointed as such. The original application to strike out the claim against the AER was heard by Veldhuis J. on January 18, 2013. On February 8, 2013, Veldhuis J. was appointed as a justice of the Court of Appeal of Alberta. Wittmann C.J. volunteered to replace Veldhuis J. as Case Management Judge. Wittmann C.J. decided the applications based on written briefs and other materials filed and on the transcript of oral argument made before Veldhuis J. ABQB Reasons at paras. 5 & 8 [Appellant's Record, Tab 2 at 5-6].

27. First, Wittmann C.J. rejected the AER's baseless attempt to label Ms. Ernst as an "eco-terrorist", agreeing with Ms. Ernst that the AER "cannot rely on its argument on the Weibo eco-terrorism claim, in the total absence of evidence. There is none."[36]

28. Second, with regard to the negligence claim, Wittmann C.J. concluded that a) it is plain and obvious that the AER does not owe a private duty of care to Ms. Ernst, and b) the negligence claim is barred by the statutory immunity clause contained within s. 43 of the *ERCA*, and therefore struck the claim in negligence.[37] As noted above, the negligence claim is not subject to this appeal.

29. Third, and importantly, with regard to the *Charter* claim Wittmann C.J. agreed that the Statement of Claim properly pleads a cause of action regarding a breach of Ms. Ernst's freedom of expression rights as guaranteed by s. 2(b) of the *Charter*. Having analyzed the *Charter* claim and the general test on an application to strike, Wittmann C.J. held that:

> [A] claim for a *Charter* breach is based upon the establishment of a right and an infringement of it by the action of a government or a government agency. That is what is alleged here and, however novel the claim might be, I cannot say that it is doomed to fail or that the claim does not disclose a cause of action.[38]

Wittmann C.J. therefore concluded that the "*Charter* claim of Ernst against the [AER] is valid."[39]

30. Fourth, despite having made the important finding that the pleadings disclosed a valid *Charter* claim, Wittmann C.J. went on to find that the general "statutory immunity" clause contained within s. 43 of the *ERCA* barred Ms. Ernst's otherwise valid *Charter* claim, concluding that "statutory immunity clauses apply to claims for personal remedies pursuant to the *Charter.*"[40] Again, s. 43 of the *ERCA* 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

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[36] ABQB Reasons at para. 42 [Appellant's Record, Tab 2 at 21].
[37] ABQB Reasons at paras. 28, 58 & 130(a)&(c) [Appellant's Record, Tab 2 at 16, 25 & 42].
[38] ABQB Reasons at para. 42 [Appellant's Record, Tab 2 at 22].
[39] ABQB Reasons at para. 130(b) [Appellant's Record, Tab 2 at 42].
[40] ABQB Reasons at paras. 88 & 130(c) [Appellant's Record, Tab 2 at 32 & 41].

direction of the Board.

31. Wittmann C.J. held that the above statutory immunity clause applied to Ms. Ernst's *Charter* claim for two reasons, both of which are strongly contested by the Appellant in the present appeal. First, Wittmann C.J. compared statutory immunity clauses to lawsuits with time-based limitation periods and found 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."[41] Because limitation periods (which bar claims only if too much time has passed before litigation is initiated) have been held by this Court to be valid limits on *Charter* claims, Wittmann C.J. reasoned, so too are statutory immunity provisions (which act as a total and complete bar to any legal claim in all circumstances).

32. Second, Wittmann C.J. found that "there are strong policy reasons for the application of immunity clauses for claims for personal remedies under the *Charter*."[42] The specific policy reason identified by Wittmann C.J. is that of "good governance." In the words of Wittmann C.J.:

> In my view, if parties seeking damages could circumvent a statutory immunity clause by alleging a *Charter* breach, such a breach would be alleged in litigation against the government wherever possible. This would lessen considerably the effectiveness of such statutory immunity clauses, and would undermine the ability of the Legislature or Parliament to balance public and private interests.[43]

33. In sum, based both on the alleged similarities between limitation periods and statutory immunity clauses, and the purported concerns over "good governance", Wittmann C.J. held that the statutory immunity clause contained within s. 43 of the *ERCA* was constitutionally valid, and therefore was an "absolute bar" to Ms. Ernst's claim for a *Charter* remedy pursuant to s. 24(1).[44]

Court of Appeal of Alberta Judgment

34. Ms. Ernst appealed to the Court of Appeal of Alberta asserting, among other things, that the court below had erred in holding that s. 43 of the *ERCA* completely and totally bars her *Charter* claim for a personal remedy under s. 24(1) of the *Charter*. On September 15, 2014, the

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[41] ABQB Reasons at para. 82 [Appellant's Record, Tab 2 at 30].
[42] ABQB Reasons at para. 83 [Appellant's Record, Tab 2 at 30].
[43] ABQB Reasons at para. 87 [Appellant's Record, Tab 2 at 31].
[44] ABQB Reasons at para. 88 [Appellant's Record, Tab 2 at 31].

Court of Appeal of Alberta dismissed the appeal, holding that "the conclusion of the case management judge that s. 43 bars the appellant's *Charter* claim discloses no reviewable error".[45] In coming to this conclusion, the Court of Appeal made the following findings, all of which are strongly contested by the Appellant.

35. First, the Court of Appeal agreed with Wittmann C.J. that statutory immunity clauses are like limitation periods and are thus constitutionally legitimate: "[p]rotecting 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 [of the *ERCA*]."[46]

36. Second, the Court of Appeal noted that there are a number of other long-standing common law limitations on the availability of constitutional remedies against public officials including immunity extended to those performing quasi-judicial functions and notice requirements. According to the Court of Appeal, these examples show that there is nothing constitutionally suspect about other statutory limits to the availability of *Charter* remedies, such as statutory immunity clauses.[47]

37. Third, the Court of Appeal held that there are good policy reasons for granting legislatures the ability to impose limits on what remedies are available for breaches of *Charter* rights (including, as in this case, limits that function as total bars to all legal claims):

> 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 [citations omitted].[48]

38. Importantly, the Court of Appeal did not disturb Wittmann C.J.'s finding that Ms. Ernst's Statement of Claim disclosed a valid and sustainable cause of action for a breach of the *Charter*, noting specifically that the question of whether the pleadings disclosed a sustainable claim for a

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[45] ABCA Reasons at para. 30 [Appellant's Record, Tab 4 at 55].
[46] ABCA Reasons at paras. 26 & 29-30 [Appellant's Record, Tab 4 at 54-55].
[47] ABCA Reasons at paras. 26-27 [Appellant's Record, Tab 4 at 54].
[48] ABCA Reasons at para. 28 [Appellant's Record, Tab 4 at 54].

breach of the *Charter* was not appealed and was not before it.[49]

39. In sum, both the Court of Queen's Bench of Alberta and the Court of Appeal of Alberta found that s. 43 of the *ERCA* is an absolute bar to claims brought for personal *Charter* remedies pursuant to s. 24(1).

40. The present Appeal deals solely with Ms. Ernst's *Charter* claim; the Appellant has not appealed other aspects of the Court of Appeal of Alberta's decision.

PART II – QUESTIONS IN ISSUE

41. The only question in issue in this appeal is the constitutional question as stated by McLachlin C.J.C.:[50]

> Is s. 43 of the *Energy Resources Conservation Act*, R.S.A. 2000. c. E-10, constitutionally inapplicable or inoperable to the extent that it bars a claim against the regulator for a breach of s. 2(b) of the *Canadian Charter of Rights and Freedoms* and an application for a remedy under s. 24(1) of the *Canadian Charter of Rights and Freedoms*?

42. Put in more general terms, the question to be resolved is: can a statutory immunity clause bar any and all *Charter* claims for a personal remedy made pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms*?

PART III – ARGUMENT

43. For the reasons that follow, a statutory immunity clause like s. 43 of the *ERCA* cannot bar *Charter* claims for a personal remedy made pursuant to s. 24(1) of the *Charter*. To the extent that s. 43 of the *ERCA* bars a claim against the regulator for a breach of s. 2(b) of the *Charter* and an application for a remedy under s. 24(1) of the *Charter*, it is constitutionally inapplicable or inoperable.

44. The finding by the Court of Appeal of Alberta that s. 43 of the *ERCA* prevents the Appellant from pursuing an otherwise valid *Charter* claim violates the core legal principle of constitutional supremacy, impoverishes the *Charter*, and is thus in urgent need of correction.

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[49] ABCA Reasons at para. 9 [Appellant's Record, Tab 4 at 48].
[50] Order on motion to state a constitutional question issued by Chief Justice McLachlin dated June 25, 2015 [Appellant's Record, Tab 7 at 85-86].

The *Charter* not only guarantees fundamental rights and freedoms of Canadians, but also provides a constitutionally guaranteed avenue for Canadians to seek a remedy through the courts when these fundamental *Charter* rights and freedoms are violated by governments. The foundational constitutional right to seek a remedy for *Charter* breaches cannot be taken away by legislation purporting to grant general immunity to the AER from any and all legal action.

45. This factum will address the question in issue in this appeal by 1) reviewing the remedial provisions of the *Charter*, with specific emphasis on the remedial powers granted to courts under s. 24(1), 2) applying these general *Charter* principles to the case at bar, before 3) turning to various counter arguments and issues raised both by the courts below and by the AER previously in this proceeding.

46. Throughout, all arguments support the foundational legal principle that a general statutory immunity clause such as the one found in s. 43 of the *ERCA* cannot legitimately bar a claim for a personal *Charter* remedy made to a superior court pursuant to s. 24(1) of the *Charter*.

1. The remedial provisions of the Canadian Charter of Rights and Freedoms

47. 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 rights and freedoms of all Canadians, and, along with other parts of our Constitution, forms the supreme law of Canada.[51] As the "supreme law" of the nation, the Constitution is "unalterable by the normal legislative process, and unsuffering of laws inconsistent with it."[52]

48. The *Charter* serves as a vital bulwark protecting the individual against the state. As repeatedly emphasized by this Court, the "primary purpose" of the *Charter* is to constrain government action and to protect individuals like Ms. Ernst from unconstitutional actions taken by government agencies such as the AER.[53] As noted by this Court, "the *Charter* is essentially

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[51] *The Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, s. 52(1).
[52] *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at 745 [Appellant's Book of Authorities ("**Appellant's BOA**") Tab 13].
[53] The "primary purpose of the *Charter* is to constrain government action in conformity with certain individual rights and freedoms, the preservation of which are essential to the continuation of a democratic, functioning society in which the basic dignity of all is recognized." *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157 ("***Canadian Egg Marketing Agency***") at para. 57 [Appellant's BOA, Tab 1].

an instrument for checking the powers of government over the individual".[54]

49. Crucially, the Constitution itself not only guarantees the fundamental rights and freedoms of Canadians, but also contains two explicit enforcement provisions to ensure that any breaches of the *Charter* are remedied: s. 52(1), which provides the remedy for laws that violate a *Charter* right; and s. 24(1), which provides the remedy for government acts that violate an individual's *Charter* right.[55]

50. The case at bar is solely concerned with government action taken by the AER which is alleged to have infringed Ms. Ernst's right to freedom of expression as guaranteed by s. 2(b) of the *Charter*; accordingly, Ms. Ernst seeks a remedy pursuant to s. 24(1) of the *Charter*.

Section 24 of the Charter *and the courts' role in enforcement of guaranteed rights and freedoms*

51. As noted by this Court, "[s]ection 24(1) entrenches in the Constitution a remedial jurisdiction for infringements or denials of *Charter* rights and freedoms."[56] In particular, section 24(1) "provides a personal remedy against unconstitutional government action" [emphasis added].[57] In other words, the entire purpose of s. 24(1) of the *Charter* is to provide individuals like Ms. Ernst a legal avenue to seek a personal remedy against government agencies when that individual's fundamental *Charter* freedoms have been violated. Again, section 24(1) of the *Charter* states:

> **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.

52. This Court has repeatedly and forcefully emphasized the supreme importance of providing Canadians with access to courts in order to seek remedies for *Charter* violations pursuant to s. 24(1). According to Lamer J., "access to a court of competent jurisdiction to seek a

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[54] *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 ("***McKinney***") at 261 [Appellant's BOA, Tab 6].
[55] *R. v. Ferguson*, 2001 SCC 6, [2001] 1 S.C.R. 281, ("***Ferguson***") at para. 61 [Appellant's BOA, Tab 11]; see also *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28 ("***Ward***") at para. 1 [Appellant's BOA, Tab 14]; see also Peter Hogg, *Constitutional Law of Canada*, loose-leaf (consulted on 28 August 2015), 5th ed. (Toronto, Ont: Carswell, 2006), s. 40.2 ("**Hogg, Constitutional Law of Canada**") at 40-28 [Appellant's BOA, Tab 15].
[56] *Doucet - Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3 ("***Doucet-Boudreau***") at para. 41 [Appellant's BOA, Tab 2].
[57] *Ferguson* at para. 61 [Appellant's BOA, Tab 11].

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" [emphasis added].[58]

53. McLachlin C.J.C., echoing the words of previous judgments of this Court, explained the point 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 [emphasis in the original].[59]

54. 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 effectively abolished 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 [emphasis added].[60]

55. Crucially, the Constitution itself imposes a duty on the courts to enforce the Constitution, including the *Charter*.[61] As noted by this Court, "the courts are to uphold the Constitution and have been expressly invited to perform that role by the Constitution itself," [62] and thus must be careful not to "abdicate their responsibility."[63] Allowing a legislature to prevent a superior court from enforcing the Constitution impermissibly deprives courts of their "most meaningful function under the *Charter*,"[64] and in the process, upends the division of powers that is at the core of our constitutional system as set out in the Constitution itself.

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[58] *Nelles v. Ontario*, [1989] 2 S.C.R. 170 ("***Nelles***") at 196 [Appellant's BOA, Tab 7].
[59] *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575 ("***Dunedin***") at paras. 19-20 [Appellant's BOA, Tab 10].
[60] *Doucet-Boudreau* at para. 51 [Appellant's BOA, Tab 2].
[61] *Doucet-Boudreau* at para. 36 [Appellant's BOA, Tab 2].
[62] *Doucet-Boudreau* at para. 35 [Appellant's BOA, Tab 2], quoting *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 136.
[63] *Doucet-Boudreau* at para. 36 [Appellant's BOA, Tab 2].
[64] *Nelles* at 196 [Appellant's BOA, Tab 7].

Remedies available under s. 24(1)

56. 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].[65] In *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, Iacobucci and Arbour J.J. stressed the importance of a purposive approach to remedies under s. 24(1):

> A purposive approach to remedies in a *Charter* context gives modern vitality to the ancient maxim *ubi jus, ibi remedium*: where there is a right, there must be a remedy. More specifically, a purposive approach to remedies requires at least two things. First, the purpose of the right being protected must be promoted: courts must craft responsive remedies. Second, the purpose of the remedies provision must be promoted: courts must craft effective remedies [emphasis in the original].[66]

57. An appropriate remedy under s. 24(1) is one that "meaningfully vindicates the rights and freedoms of the claimants."[67] As noted by Professor Roach:

> There are a variety of legitimate purposes for *Charter* remedies including compensating *Charter* applicants for past violations and ensuring that the government respects the Charter right in the future by vindicating the right and even deterring future *Charter* violations. Remedies should be meaningful for the *Charter* applicant and effective in securing compliance with the *Charter*.[68]

58. The authority of a court to craft an appropriate *Charter* remedy under s. 24(1) is expansive. As emphasized by this Court, the language of s. 24(1) itself "appears to confer the widest possible discretion on a court to craft remedies for violations of *Charter* rights" and further "it is difficult to imagine language which could give the court a wider and less fettered discretion."[69] As observed by Professor Hogg, "[s]ubject to the important qualification that a remedy must be appropriate and just in all the circumstances of the case, there is no limit to the remedies that may be ordered under s. 24(1) [emphasis added]."[70] To date, courts have exercised their discretion under s. 24(1) to provide a wide range of possible constitutional remedies[71]

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[65] *Ferguson* at para. 34 [Appellant's BOA, Tab 11].
[66] *Doucet-Boudreau* at para. 25 [Appellant's BOA, Tab 2].
[67] *Doucet-Boudreau* at para. 55 [Appellant's BOA, Tab 2].
[68] Kent Roach, "Enforcement of the Charter – Subsections 24(1) and 52(1)" (2013) 62 S.C.L.R. (2d) 473 ("**Roach, Enforcement of the Charter**") at 485 [Appellant's BOA, Tab 17].
[69] *Dunedin* at para. 18 [Appellant's BOA, Tab 10]; quoted with approval in *Doucet-Boudreau* at para. 24 [Appellant's BOA, Tab 2].
[70] Hogg, Constitutional Law of Canada at 40-36 [Appellant's BOA, Tab 15].
[71] Roach, Enforcement of the Charter at 474 [Appellant's BOA, Tab 17].

including declarations, injunctions and other mandatory remedies, costs, and, as recognized in *Ward*,[72] *Charter* damages.

Summary of constitutional principles

59. In sum, the Constitution is the supreme law of the land. To ensure that the *Charter* is respected and followed, s. 24(1) of the *Charter* grants Canadians the right to "apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances" when an individual's *Charter* rights have been infringed.[73] The power of courts to provide an "appropriate and just" remedy under s. 24(1) is expansive, and includes the ability to award *Charter* damages in appropriate cases. Because of the supremacy of the *Charter* in our constitutional system, the constitutional power granted by the *Charter* specifically to the courts to provide remedies under s. 24(1) cannot be removed by statute. Simply put, a statutory immunity clause cannot bar a claimant from applying to a superior court for a *Charter* remedy pursuant to s. 24(1); to the extent that it purports to do so, the immunity clause is inconsistent with the Constitution and thus is constitutionally inapplicable or inoperable and of no force or effect.[74]

2. Application of Charter *principles to the case at bar*

60. The Court of Appeal of Alberta has found that the statutory immunity clause contained within s. 43 of the *ERCA* prevents Ms. Ernst from seeking a remedy under s. 24(1) of the *Charter* for a violation of her fundamental freedom of expression guaranteed by s. 2(b) of the *Charter*. This finding violates the fundamental and constitutional right of Ms. Ernst to "apply to a court of competent jurisdiction" to obtain a remedy for *Charter* breaches pursuant to s. 24(1).[75] For the reasons that follow, s. 43 of the *ERCA* is constitutionally inapplicable or inoperable to the extent that it bars Ms. Ernst's claim against AER for a breach of s. 2(b) of the *Charter* and an application for a remedy under s. 24(1) of the *Charter*.

61. As noted above, Ms. Ernst has brought a claim to the Court of Queen's Bench of Alberta, (Alberta's superior court) seeking a remedy under s. 24(1) of the *Charter* for a violation of her fundamental *Charter* right to freedom of expression. Again, as noted above, there is no doubt

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[72] *Ward* at paras. 21-22 [Appellant's BOA, Tab 14].
[73] *Canadian Charter of Rights and Freedoms*, s. 24(1).
[74] *The Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, s. 52(1).
[75] *Canadian Charter of Rights and Freedoms*, s. 24(1).

that Ms. Ernst's Statement of Claim properly pleads a cause of action regarding a breach of s. 2(b) of the *Charter*. Having analyzed the *Charter* claim and the general test on an application to strike, the Court of Queen's Bench of Alberta held that the "*Charter* claim of Ernst against the [AER] is valid."[76] The Court of Appeal did not interfere with the Court of Queen's Bench finding that the pleadings disclosed a sustainable cause of action for a breach of the *Charter*, noting specifically 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.[77]

62. Because the issue of whether the pleadings disclose a viable cause of action for a breach of a *Charter* right was not appealed to the Court of Appeal and is not under appeal before this Court, the only way that the *Charter* claim against the AER can be struck out is if the statutory immunity clause contained in the *ERCA* can override or otherwise limit Ms. Ernst's ability to seek a s. 24(1) *Charter* remedy against the AER pursuant to. It cannot. Again, s. 43 of the *ERCA* reads:

> **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.[78]

63. Section 43 is a statutory immunity clause of general application – on its face, s. 43 of the *ERCA* does not simply limit or circumscribe the right to bring an action or provide limits on what remedies are available in such an action. Rather, s. 43 completely eliminates the right to bring an action against the AER in all circumstances: "No action or proceeding may be brought against the Board . . . in respect or any act or thing done".[79] On its face, s. 43 is a total bar to <u>any</u> "action or proceeding" whatsoever brought against the AER by anyone in all circumstances. Section 43 destroys <u>all</u> rights of actions, and entirely eliminates the ability of any and all persons to even start a lawsuit against the AER, regardless of the nature of the claim.

64. As noted above, the courts below in this case have applied this statutory immunity clause

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[76] ABQB Reasons at paras. 42 & 130(b) [Appellant's Record, Tab 2 at 21 & 41].
[77] ABCA Reasons at para. 9 [Appellant's Record, Tab 4 at 48].
[78] *Energy Resources Conservation Act* at s. 43.
[79] *Energy Resources Conservation Act* at s. 43.

not only to "regular" causes of action (such as those based in tort), but also to *Charter* claims for personal remedies brought pursuant to s. 24(1) of the *Charter*. In particular, s. 43 of the *ERCA* was held to be an "absolute bar" to Ms. Ernst's claim for a *Charter* remedy brought before the Alberta Court of Queen's Bench.[80] The Court of Appeal of Alberta's ruling means that by virtue of s. 43 of the *ERCA*, the AER is immune from claims for *Charter* rights; accordingly the AER is free to infringe the fundamental rights and freedoms of Albertans without any risk of sanction, or even the possibility of judicial oversight. This conclusion is a clear error of law.

65. As discussed extensively above, the *Charter* guarantees not only fundamental rights and freedoms, but crucially, also guarantees the right of Canadians to apply to a court to seek a remedy when these fundamental *Charter* rights and freedoms are violated. It would defeat the very purpose of the *Charter* (and in particular its remedial provisions) if the very government in question could simply legislate itself out of the enforcement provisions of the *Charter*.

66. The unsupportable logical conclusion of the Court of Appeal's ruling in this matter is that all governments in Canada have the ability to legislatively immunize themselves and all of their government agencies against any claim for a personal remedy brought pursuant to s. 24(1) of the *Charter*. As noted by McLachlin C.J.C., the purpose of section 24(1) is to provide "personal remedy against unconstitutional government action."[81] Allowing governments the ability to immunize themselves from such claims effectively neuters s. 24(1) and reduces it from the supreme law of the land to meaningless words on a page. Moreover, since "a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach,"[82] giving governments the ability to immunize themselves from *Charter* claims brought pursuant to s. 24(1) in practice could render all other fundamental *Charter* rights and freedoms meaningless. Governments would be free to infringe on the fundamental rights and freedoms of individual Canadians at will and Canadians would be left with no recourse.

67. Moreover, the effect of upholding the Court of Appeal's ruling would be immediate and, in the Appellant's view, disastrous. General statutory immunity clauses are very common across

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[80] ABQB Reasons at para. 88 [Appellant's Record, Tab 2 at 31], affirmed by ABCA Reasons at para. 30 [Appellant's Record, Tab 4 at 55].
[81] *Ferguson* at para. 61 [Appellant's BOA, Tab 11].
[82] *Dunedin* at para. 20 [Appellant's BOA, Tab 10]; quoted with approval in *Doucet-Boudreau* at para. 25 [Appellant's BOA, Tab 2].

Canada; there are currently nearly identical statutory immunity clauses in the statute books of every jurisdiction in Canada.[83] A ruling that s. 43 of the *ERCA* is constitutionally applicable to claims for personal remedies pursuant to s. 24(1) of the *Charter* would mean that dozens of other general statutory immunity clauses also block any and all attempts by Canadians to challenge the constitutionality of the actions taken by hundreds of governments and government agencies across Canada. Such a finding would gut the remedial power of 24(1), and render functionally useless this Court's previous jurisprudence on s. 24(1). Such a result cannot be countenanced.

68. The Court of Appeal of Alberta's ruling in this action is contrary to foundational constitutional principles and must be overturned. Accordingly, the Appellant urges this Court to grant the appeal and to find that s. 43 of the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10 is constitutionally inapplicable or inoperable to the extent that it bars a claim against the regulator for a breach of s. 2(b) of the *Charter* and an application for a remedy under s. 24(1) of the *Charter*.

3. Responses to arguments and concerns raised by the courts below

69. Both the courts below and the AER have raised a number of counter arguments and concerns in support of the proposition that s. 43 of the *ERCA* is and should be a complete bar to Ms. Ernst's s. 24(1) *Charter* claim. Each will be addressed in turn.

Are statutory immunity provisions analogous to limitation period provisions?

70. Both the courts below and the AER have relied on a strained analogy to "limitation period" cases to argue that since this Court has recognized that limitation periods can define the time within which a plaintiff must make a *Charter* claim for a personal remedy,[84] so too can an

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[83] See Examples of General Statutory Immunity Clauses in Canadian Jurisdictions [Appellants' BOA at Tab 18]. A non-exhaustive survey reveals examples of nearly identical general "statutory immunity" clauses in the statute books of every Canadian jurisdiction. The examples provided 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.

[84] *Ravndahl v. Saskatchewan*, 2009 SCC 7, [2009] 1 S.C.R. 181 at para. 17 [Appellant's BOA, Tab 12]; *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3 at paras. 59-60 [Appellant's BOA, Tab 3]; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623 at para 134 [Appellant's BOA, Tab 4].

immunity provision totally bar any and all *Charter* claims for personal remedies.[85]

71. With respect, the analogy between limitation period provisions and general immunity provisions in the context of the *Charter* is a false analogy, in particular because limitation period provisions and statutory immunity provisions have entirely different functions. Limitation periods do not bar claims outright; instead, limitation periods simply provide rules regarding how promptly claims must be made. 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 eliminate that right entirely.

72. Crucially, the policy reasons underlying limitation period provisions are entirely different from those underlying immunity provisions. According to this Honourable Court, the purposes of limitation periods include bringing finality to disputes, preventing the bringing of claims based on stale evidence, and providing an incentive for plaintiffs to bring claims in a timely fashion.[86] As noted by Professor Hogg, the basic policy reasons underlying limitation periods do not disappear when the Constitution is invoked by a claimant,[87] and therefore it is appropriate that limitation periods would also apply to *Charter* claims.

73. Statutory immunity clauses, on the other hand, do not share any of the policy considerations that underpin statutes of limitation. Instead, general statutory immunity clauses are exercised by governments to shield certain government action from legal challenge in the courts, often on the grounds that judicial interference with government decision-making impedes efficient governance. In essence, governments pass statutory immunity clauses to give government decision-makers freedom to make decisions without worrying about being sued by individual citizens.

74. Unlike limitation periods, the policy reasons underlying statutory immunity clauses do not transfer well to the constitutional sphere. While shielding government decision makers from judicial scrutiny may sometimes be a valid consideration in the passing of general statutory immunity clauses including those, for example, that protect against tort claims, these

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[85] ABQB Reasons at paras. 65-82 [Appellant's Record, Tab 2 at 26-30]; ABCA Reasons at paras. 26 & 30 [Appellant's Record, Tab 4 at 54-55].
[86] *Novak v Bond,* [1999] 1 S.C.R. 808 at para. 67 [Appellant's BOA, Tab 8].
[87] Hogg, Constitutional Law of Canada at 40-48 [Appellant's BOA, Tab 15].

considerations have no place when the claim in question is made pursuant to the *Charter*. Indeed, as discussed above, the very purpose of the *Charter* is to constrain government action, to protect the fundamental rights and freedoms of individuals, and to provide citizens with access to a court of competent jurisdiction to obtain a remedy when those rights have been breached.[88] The whole point of the *Charter* is to grant the power to the courts to supervise government acts in circumstances where those government acts have infringed upon *Charter* rights and freedoms. Courts are given a special role as the guarantors of the *Charter* and the overseers of our constitutional system;[89] this important role cannot be usurped by a statutory immunity clause purporting to free government from judicial scrutiny.

Interference with good governance?

75. Both the Court of Appeal and the Court of Queen's Bench relied on concerns regarding "good governance" to hold that it is constitutionally legitimate for governments to pass general statutory immunity clauses that protect government agencies from claims for personal *Charter* remedies pursuant to s. 24(1). In particular, the courts below reasoned that allowing *Charter* claims for personal remedies could impede the effectiveness and efficiency of government action, and could open the floodgates to potentially harmful claims against the public purse, and accordingly it is legitimate for governments to use general statutory immunity clauses to bar *Charter* claims.

76. For example, the Court of Appeal found that statutory immunity clauses which bar claims for *Charter* remedies are justified because of concerns that legal claims would "chill the exercise of policy-making discretion." According to the Court of Appeal, there is valid reason to protect administrative tribunals from the "distraction of litigation over their actions." As such, the Court found that "protecting administrative tribunals and their members from liability for *Charter* damages is constitutionally legitimate."[90]

77. Similarly, the Court of Queen's Bench of Alberta held:

> In my view, if parties seeking damages could circumvent a statutory immunity clause by alleging a *Charter* breach, such a breach would be alleged in

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[88] *Charter of Rights and Freedoms*, s. 24(1); see also *Canadian Egg Marketing Agency* at paras. 55-57 [Appellant's BOA, Tab 1]; *McKinney* at 261-262 [Appellant's BOA, Tab 6].
[89] *Re Manitoba Language Rights* at 745 [Appellant's BOA, Tab 13].
[90] ABCA Reasons at paras. 28-29 [Appellant's Record, Tab 4 at 54-55].

> litigation against the government wherever possible. This would lessen considerably the effectiveness of such statutory immunity clauses, and would undermine the ability of the Legislature or Parliament to balance public and private interests.[91]

78. With respect, these concerns are misplaced. Such arguments have also been considered and specifically rejected by this Court in *Ward*:

> Another consideration that may negate the appropriateness of s. 24(1) damages is concern for effective governance. Good governance concerns may take different forms. At one extreme, it may be argued that any award of s. 24(1) damages will always have a chilling effect on government conduct, and hence will impact negatively on good governance. The logical conclusion of this argument is that s. 24(1) damages would never be appropriate. Clearly, this is not what the Constitution intends.[92]

79. In this case, the Court of Appeal has taken the "extreme" view that any availability of s. 24(1) damages will have a chilling effect on government, and thus Alberta should be able to pass a statutory immunity provision which completely immunizes the AER from all claims, including *Charter* claims. This approach must be rejected.

80. In *Ward,* this Court went on to reject extensive arguments by governments that *Charter* damage awards in that case would chill the exercise of government discretion and open the floodgates to potentially harmful claims against the public purse, finding that the state had not "established that an award of s. 24(1) damages is negated by good governance considerations."[93] If concerns about chilling law enforcement discretion and draining the public purse were not sufficient to negate the award of damages in the specific case of *Ward*, it is difficult to see how such concerns could be used to justify a blanket statutory immunity clause that bars all individuals from seeking personal *Charter* remedies (including damages) against a government agency pursuant to s. 24(1) no matter what the context. Such an approach uses an axe to manage a problem when this Court has already held that a scalpel is available and appropriate for the job.

81. As pointed out by Professor Roach, it is not that good governance factors have no role to play when considering a claim brought pursuant to s. 24(1). Rather, *Ward* establishes that good

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[91] ABQB Reasons at para. 87 [Appellant's Record, Tab 2 at 31].
[92] *Ward* at para. 38 [Appellant's BOA, Tab 14].
[93] *Ward* at para. 68 [Appellant's BOA, Tab 14]; see also Kent Roach, "A Promising Late Spring for Charter Damages: Ward v. Vancouver" 29 N.J.C.L 145 ("**Roach on *Ward v. Vancouver***") at 160 [Appellant's BOA, Tab 16].

governance factors are to be "considered on a case-by-case basis with the government bearing the burden of establishing that functional good governance concerns should preclude the award of damages when they are sought under s. 24(1)."[94] In other words, concepts of "good governance" are relevant to determining on a case-by-case basis which remedy is appropriate under s. 24(1) (an analysis which occurs at trial), but such concerns cannot be used to justify a blanket and all-encompassing statutory immunity clause which prevents all Albertans from ever bringing any kind of s. 24(1) *Charter* claim against the AER.

82. Moreover, and crucially, when "good governance" factors are considered in a particular case, courts must also give adequate weight to the fact that s. 24(1) remedies promote good governance by helping to ensure that governments and government agencies comply with the *Charter*, and by deterring future breaches of the *Charter* by those governments. As noted by McLachlin C.J.C., "insofar as s. 24(1) damages deter *Charter* breaches, they promote good governance. Compliance with *Charter* standards is a foundational principle of good governance."[95]

Opening the floodgates to meritless claims?

83. The Court of Queen's Bench of Alberta also raised the additional but related concern that a flood of meritless claims for *Charter* damages might result if the general statutory immunity clause were not employed in this instance:

> I cannot accede to the proposition that statutory immunity clauses in favour of government officials or tribunals have no application when a personal claim for damages for a *Charter* remedy is asserted. The mischief that arises circumventing an otherwise valid immunity provision is obvious. Parties would come to the litigation process dressed in their *Charter* clothes whenever possible.[96]

84. The argument is, in effect, that because some litigants might bring *Charter* claims that are, in fact, meritless, all *Charter* claims, including meritorious *Charter* claims (such as Ms. Ernst's), should be absolutely barred. The danger in this approach is obvious – it sacrifices the fundamental constitutional rights of Canadians in order to address nebulous and hypothetical

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[94] Roach on *Ward v. Vancouver* at 150 [Appellant's BOA, Tab 16].
[95] *Ward* at para. 38 [Appellant's BOA, Tab 14].
[96] ABQB Reasons at para. 81 [Appellant's Record, Tab 2 at 30].

considerations of judicial economy and the protection of governments from unmeritorious lawsuits.

85. A better solution already exists within our legal system. The *Alberta Rules of Court* have extensive mechanisms for dealing with situations where a litigant has brought a claim that is meritless, or is improperly "dressed up" as a *Charter* claim. For example, a defendant can seek to strike out the claim under r. 3.68 on the grounds that the pleading discloses no reasonable claim. Similarly, if there is no merit to a claim, a defendant can seek summary judgment under Rule 7.2. Rules 7.1 ("trial of particular questions") and 7.5 ("summary trials") also provide a means to deal with meritless claims at a summary stage.[97] These rules are far better for weeding out unmeritorious *Charter* claims than a blanket and overbroad rule barring all litigants from making any claim for a personal remedy under the *Charter* whether the claim is valid or not.[98]

The public nature of Charter *damages*

86. In previous submissions to this court, the AER incorrectly implies that a claim for *Charter* damages is equivalent to a tort action for damages. In particular, the AER incorrectly suggests that what Ms. Ernst really seeks is a "private law remedy" that concerns only Ms. Ernst's private interests.[99] Because of the private nature of the claim, the argument goes, the Crown is entitled to exempt itself from private liability by legislating to that effect.[100]

87. This perspective badly misconstrues the nature of personal *Charter* remedies and ignores the fact that such claims include a distinctly public element. As explained by McLachlin C.J.C. in *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].[101] In *Ward*, the court specifically

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[97] *Alberta Rules of Court*, Alta. Reg. 124/2010, rr. 3.68, 7.1, 7.2, 7.3 & 7.5.
[98] *Nelles* at 197 [Appellant's BOA, Tab 7].
[99] Response to Application for Leave to Appeal to the Supreme Court of Canada, Energy Resources Conservation Board, dated December 5, 2014 ("**AER Response to Application for Leave to Appeal**") at para. 34.
[100] AER Response to Application for Leave to Appeal at paras. 15, 33-34 & 67.
[101] *Ward* at para. 22 [Appellant's BOA, Tab 14].

describes *Charter* damages as "public law damages," that are "a unique public law remedy" [emphasis added].[102]

88. Unlike the case of private law damages, the purposes behind *Charter* damages are broad, and include upholding and restoring the constitutional order, as well as compensating the individual whose fundamental rights and freedoms have been violated. Indeed, the purpose of *Charter* damages is threefold: not only (1) to compensate the plaintiff for the harm suffered, but also (2) to vindicate *Charter* rights and (3) to deter future *Charter* breaches.[103]

89. As pointed out by this Court, the goals of vindication and deterrence are societal goals, not individual ones. While compensation focuses on the particular individual whose *Charter* rights have been violated, "vindication as an object of constitutional damages focuses on the harm the *Charter* breach causes to the state and to society" [emphasis added].[104] Similarly, "[d]eterence, like vindication, has a societal purpose" which "seeks to regulate government behavior, generally, in order to achieve compliance with the Constitution."[105]

90. As *Ward* teaches, *Charter* damages will not be appropriate in every case, and indeed in some cases, another *Charter* remedy may be more appropriate. 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.[106] This means that even in a case where a court concludes that there has been a *Charter* breach but nonetheless *Charter* damages are not appropriate in the circumstances, that court still must provide another alternate remedy that vindicates the *Charter* right. For example, in *Ward*, when considering an appropriate remedy for the government's unconstitutional seizure of Mr. Ward's car, this Court held that *Charter* damages were not necessary. This Court, however, still provided a s. 24(1) remedy, substituting for the nominal damages awarded by the lower court a declaration that the vehicle seizure violated Mr. Ward's right to be free from unreasonable search and seizure under s. 8 of the *Charter*.[107]

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[102] *Ward* at paras. 22, 27, 29, 31, 56, 66 and 69 [Appellant's BOA, Tab 14].
[103] *Ward* at para. 25 [Appellant's BOA, Tab 14].
[104] *Ward* at para. 28 [Appellant's BOA, Tab 14].
[105] *Ward* at para. 29 [Appellant's BOA, Tab 14].
[106] *Ferguson* at para. 34 [Appellant's BOA, Tab 11].
[107] *Ward* at paras. 74-79 [Appellant's BOA, Tab 14].

The courts alone have constitutional authority to determine appropriate Charter *remedies*

91. The reasoning of the Court of Appeal of Alberta in the case at bar depends to a certain extent on the flawed premise that the legislature has a legitimate role to play in constraining the range of *Charter* remedies available under s. 24(1), including by sometimes completely eliminating the right of Albertans to seek personal *Charter* remedies at all (which is the case with s. 43 of the *ERCA*). In particular, the Court of Appeal held:[108]

> The legislatures have a legitimate role in specifying the broad parameters of remedies that are available*: Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at paras. 26-31, [2013] 3 SCR 3; *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para. 56, [2003] 3 SCR 3. 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. If the availability of a remedy were only known at the conclusion of a trial, it would defeat the whole point of protecting administrative tribunals from the distraction of litigation over their actions. . .

92. With respect, the Court of Appeal appears to conflate two issues in its judgment: first, the issue of whether s. 43 of the *ERCA* is a complete bar to a *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,[109] 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 *ERCA*, which states that "no action or proceeding may be brought against the board," prevents Ms. Ernst from bringing an action for *any kind* of remedy under s. 24(1) of the *Charter*.

93. In any event, legislatures do not have the power to define or limit which *Charter* remedies are available under s. 24(1). With respect, the paragraphs cited by the Court of Appeal from the Supreme Court cases of *Doucet-Boudreau v. Nova Scotia* and *Ontario v. Criminal Lawyers' Association of Ontario* do not stand for the proposition that legislatures may limit or eliminate

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[108] ABCA Reasons at para. 28 [Appellant's Record, Tab 4 at 54]
[109] ABCA Reasons at paras. 28-29 [Appellant's Record, Tab 4 at 54-55].

access to *Charter* remedies under s. 24(1).[110] On the contrary, this Court noted in *Ontario v. Criminal Lawyers' Association of Ontario* that "the judiciary…protects the fundamental liberties and freedoms guaranteed under the *Charter.*"[111] In *Doucet-Boudreau*, this Court specifically held that it is the courts, not the legislatures, that have the discretion to determine what is an "appropriate and just" remedy pursuant to s. 24(1).[112] Iaccobucci and Arbour JJ, specifically note:[113]

> 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 common law rules 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."
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> …
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> 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 [emphasis in the original].

94. As noted by Professor Roach, the "remedial discretion of independent judges is an important part of Canada's constitutional structure."[114] The necessary corollary of the courts' power pursuant to s. 24(1) to craft constitutional remedies that are appropriate and just in the circumstances is that legislatures do not have the power to either constrain available remedies pursuant to s. 24(1), or to eliminate the right of an individual to apply to a court of competent jurisdiction when that individual believes her *Charter* rights have been violated. If applied in the context of s. 24(1), statutory immunity clauses impermissibly infringe on the constitutional duty

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[110] Paragraph 56 in *Doucet-Boudreau* simply makes the point that an "appropriate and just [s. 24(1)] remedy must employ means that are legitimate within the framework of our constitutional democracy." In particular, "a court ordering a Charter remedy must strive to respect the relationships with and separation of functions among the legislature, the executive and the judiciary." *Doucet-Boudreau* at para. 56 [Appellant's BOA, Tab 2]. Paragraphs 26-31 of *Ontario v. Criminal Lawyers' Association of Ontario* hold that separation of powers between the executive, legislative and judicial branches are important aspects of Canada's constitutional framework, and the limits of the inherent jurisdiction of superior courts must be responsive to the proper function of the separate branches of government. *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3 at paras. 26-31 [Appellant's BOA, Tab 9].

[111] *Ontario v. Criminal Lawyers' Association of Ontario* at para. 28 [Appellant's BOA, Tab 9].

[112] *Doucet-Boudreau* at para. 52 [Appellant's BOA, Tab 2].

[113] *Doucet-Boudreau* at paras. 51-52 [Appellant's BOA, Tab 2].

[114] Roach, Enforcement of the Charter at 477 [Appellant's BOA, Tab 17].

of the courts, thereby upsetting the division of power between the legislatures and the courts as set out in the Constitution.

95. Contrary to previous submissions of the AER, the Appellant is not arguing that there are no limits to the right to a remedy in s. 24(1).[115] Rather, the Appellant argues that any limits on the availability of remedies under s. 24(1) must come from judicial analysis of s. 24(1) itself,[116] and cannot come from statute. When considering appropriate remedies, courts can and should have regard to the general legal framework as contained within statutes and the common law, but ultimately the decision of whether and what remedy is available in a *Charter* context always lies with the courts.

96. Similarly, the Appellant is not arguing that legislation does not have a role to play in defining the procedure by which *Charter* claims may be pursued. As has been clear since the early days of *Charter* jurisprudence, general rules of practice and procedure of the court in which a claim is made still apply, despite the fact that failing to comply with these rules sometimes will defeat a *Charter* claim (as is the case with limitation periods, for example).[117] This is categorically different, however, than allowing statutes to act as total bars to *Charter* claims.

97. The distinction can be put this way: legislatures have a legitimate role in defining how s. 24(1) *Charter* remedies can be pursued (including, for example, by setting limitation periods, defining which tribunals and courts have jurisdiction to hear the claim, providing rights of appeal, and setting out any notice requirements etc.). Legislatures do not, however, have a role to play in either determining whether an individual can make a claim for a *Charter* remedy against a particular government or government agency at all, nor can a legislature define or set out the remedies that a superior court can provide to those whose *Charter* rights have been breached – these are powers that are reserved exclusively for the courts.[118]

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

98. Both the Court of Appeal of Alberta and the Court of Queen's Bench of Alberta appear to

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[115] AER Response to Application for Leave to Appeal at para. 40.
[116] *Doucet-Boudreau* at para. 50 [Appellant's BOA, Tab 2] "The nature and extent of remedies available under s. 24(1) remain limited by the words of the section itself and must be read in harmony with the rest of our Constitution."; see also Roach on Ward v. Vancouver at 152-153 [Appellant's BOA, Tab 16].
[117] Hogg, Constitutional Law of Canada at 40-48 [Appellant's BOA, Tab 15].
[118] *Doucet-Boudreau* at paras. 51-52 [Appellant's BOA, Tab 2].

have based their conclusion that a statutory immunity clause can bar a claim for a *Charter* remedy pursuant to s. 24(1) in part on their view that a judicial review was an alternative avenue of redress that should have been pursued before resorting to an action for a *Charter* remedy. The Court of Appeal of Alberta held that "the long standing remedy for improper administrative action has been judicial review," and implied that Ms. Ernst should have brought an application seeking *mandamus* or *certiorari* instead of bringing an action for a *Charter* remedy pursuant to s. 24(1).[119] Similarly, the Court of Queen's Bench of Alberta held that "the time-tested and conventional challenge to an administrative tribunal's decision is judicial review, not an action against the administrative tribunal."[120]

99. These findings conflict with this Court's explicit finding in *Ward* that it is not essential that the claimant exhaust other legal avenues before bringing a s. 24(1) claim.[121] While the availability of alternate remedies will be a factor in determining an appropriate remedy under s. 24(1), as this Court has explained, a *Charter* claim is distinct from other legal avenues such as tort, or in the Appellant's view, judicial review.[122] Just as the existence of a potential claim in tort does not bar a claimant from obtaining damages under the *Charter*, neither can a potential remedy through judicial review be used to justify barring a *Charter* claim brought pursuant to s. 24(1).

100. A claim for a *Charter* remedy pursuant to s. 24(1) is clearly distinct from a judicial review, and is aimed at remedying different wrongs. As held in *Manuge v. Canada*, so long as a plaintiff has 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 provincial superior court should not decline jurisdiction on the basis that the claim could be pursued by judicial review. In such circumstances, the plaintiff is generally entitled to pursue that action without having to resort to a judicial review.[123]

101. The case at bar is distinct from cases in which there is already ongoing related litigation in another forum. In such circumstances, owing to concerns regarding judicial efficiency and

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[119] ABCA Reasons at para. 30(c) [Appellant's Record, Tab 4 at 55].
[120] ABQB Reasons at para. 73 [Appellant's Record, Tab 2 at 28].
[121] *Ward* at paras. 35 & 59 [Appellant's BOA, Tab 14].
[122] *Ward* at para. 36 [Appellant's BOA, Tab 14].
[123] *Manuge v. Canada*, 2010 SCC 67, [2010] 3 S.C.R. 672 at paras. 2, 10, 12, 17 & 21 [Appellant's BOA, Tab 5].

convenience, it may be that a superior court should decline to hear a *Charter* claim if the constitutional remedy can be sought through existing proceedings.[124] In cases, however, where there is no pre-existing litigation, there is no principled reason that a litigant whose *Charter* rights have been infringed should be required to seek *Charter* remedies through judicial review rather than through an action in a superior court. Indeed, as noted by Professor Hogg, a superior court is always a court of competent jurisdiction to hear *Charter* claims, and therefore "an application for a remedy under s. 24(1) can always be made to a superior court."[125]

102. Moreover, it is noteworthy that in this case the AER is not seeking a stay of the action so that Ms. Ernst's *Charter* claim can be pursued elsewhere. Instead, the AER is seeking to rely on a statutory immunity clause that would end the litigation before the Court of Queen's Bench, with no possibility of pursuing the *Charter* claim in another forum.

AER was not acting as a quasi-judicial board

103. In concluding that the AER's statutory immunity clause was constitutionally valid, the Court of Appeal of Alberta appears to have placed some weight on the fact that the AER is an administrative tribunal and, as a general rule, administrative tribunals enjoy immunity from legal actions related to their judicial or quasi-judicial functions.[126]

104. With respect, this consideration fails to account for the nature and structure of the AER. The AER is a large, multifaceted government agency that is involved in all aspects of regulating the oil and gas industry in Alberta. While a part of the AER certainly has quasi-judicial functions, including a board that conducts hearings and makes quasi-judicial decisions, the AER also includes a number of branches and field offices that have nothing to do with the quasi-judicial adjudicative function of the AER. These operational and administrative functions include responding to public complaints and investigating possible breaches of applicable

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[124] Hogg, Constitutional Law of Canada at 40-32 [Appellant's BOA, Tab 15].
[125] Hogg, Constitutional Law of Canada at 40-32 [Appellant's BOA, Tab 15]; see also *Doucet-Boudreau* at para. 45 [Appellant's BOA, Tab 2]: "s. 24(1) guarantees that there must always be a court of competent jurisdiction to hear anyone whose rights or freedoms have been infringed or denied. The default court of competent jurisdiction is a superior court established under s. 96 of the *Constitution Act*, 1867" and at para. 49 "a superior court will always be a court of competent jurisdiction under s. 24(1) of the Charter, Superior courts retain 'constant, complete and concurrent jurisdiction" to issue remedies under s. 24(1)" [citations omitted].
[126] ABCA Reasons at paras. 17(g), 27, 30(b) [Appellant's Record, Tab 4 at 51-52 & 54-55].

regulations by oil and gas operators to ensure that the oil and gas operations comply with the law.[127] In these respects, the AER functions as a government agency, not a quasi-judicial tribunal.

105. This appeal deals solely with the AER's operational and administrative functions as carried out by the Operations Division of the AER, and does not deal with any action or decision taken by the AER in its role as a quasi-judicial adjudicative tribunal. As a result, any constitutional or policy considerations that might apply to a *Charter* claim brought pursuant to s. 24(1) against a quasi-judicial tribunal acting in its adjudicative capacity simply do not apply to this case.

Summary of argument

106. Ms. Ernst has applied to a superior court 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 the general "statutory immunity" clause contained within s. 43 of the *ERCA*. In other words, Ms. Ernst is constitutionally guaranteed the right to apply to a court to seek a remedy for the AER's breaches of her *Charter* right to freedom of expression. Accordingly, s. 43 of the *ERCA* is constitutionally inapplicable or inoperable to the extent that it bars a claim against the AER for a breach of s. 2(b) of the *Charter* and an application for a remedy under s. 24(1) of the *Charter*.

PART IV – COSTS SUBMISSIONS

107. Ms. Ernst seeks her costs in this Court and in the Courts below.

PART V – ORDER SOUGHT

108. Ms. Ernst respectfully seeks an Order allowing this Appeal with costs and declaring that s. 43 of the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10 is constitutionally inapplicable or inoperable to the extent that it bars a claim against the regulator for a breach of s.

[127] Statement of Claim at paras. 26-27 [Appellant's Record, Tab 5 at 65-66].

2(b) of the *Canadian Charter of Rights and Freedoms* and an application for a remedy under s. 24(1) of the *Canadian Charter of Rights and Freedoms*.

All of which is respectfully submitted this 11th day of September, 2015.

Murray Klippenstein

W. Cory Wanless

Lawyers for the Applicant, Jessica Ernst

PART VI – TABLE OF AUTHORITIES

SECONDARY SOURCES	**Paragraph(s)**
Peter Hogg, *Constitutional Law of Canada*, loose-leaf (consulted on 28 August 2015), 5th ed. (Toronto, Ont: Carswell, 2006), s. 40.2	49, 58, 72, 96, 101
Kent Roach, "A Promising Late Spring for Charter Damages: Ward v. Vancouver" 29 N.J.C.L 145	80, 81, 95
Kent Roach, "Enforcement of the Charter – Subsections 24(1) and 52(1)" (2013) 62 S.C.L.R. (2d) 473	57, 58, 94

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 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

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 aux droits	**24. (1)** Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la

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.

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*, R.S.A. 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).

….

Part 7
Resolving Claims Without Full Trial

Division 1
Trial of Particular Questions or Issues

Application to resolve particular questions or issues

7.1(1) On application, the Court may

(a) order a question or an issue to be heard or tried before, at or after a trial for the purpose of

(i) disposing of all or part of a claim,

(ii) substantially shortening a trial, or

(iii) saving expense,

(b) in the order or in a subsequent order

(i) define the question or issue, or

(ii) in the case of a question of law, approve or modify the issue agreed by the parties,

(c) stay any other application or proceeding until the question or issue has been decided, or

(d) direct that different questions of fact in an action be tried by different modes.

(2) If the question is a question of law, the parties may agree
(a) on the question of law for the Court to decide,
(b) on the remedy resulting from the Court's opinion on the question of law, or
(c) on the facts or that the facts are not in issue.

(3) If the Court is satisfied that its determination of a question or issue substantially disposes of a claim or makes the trial of the issue unnecessary, it may
(a) strike out a claim or order a commencement document or pleading to be amended,
(b) give judgment on all or part of a claim and make any order it considers necessary,
(c) make a determination on a question of law, or
(d) make a finding of fact.

(4) Part 5, Division 2 applies to an application under this rule unless the parties otherwise agree or the Court otherwise orders.

Division 2
Summary Judgment

Application for judgment

7.2 On application, the Court may at any time in an action give judgment or an order to which an applicant is entitled when
(a) admissions of fact are made in a pleading or otherwise, or
(b) the only evidence consists of records and an affidavit is sufficient to prove the authenticity of the records in which the evidence is contained.

Application and decision

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.

….

Division 3
Summary Trials

Application for judgment by way of summary trial

7.5(1) A party may apply to a judge for judgment by way of a summary trial on an issue, a question, or generally.

(2) The application must

(a) be in Form 36,

(b) specify the issue or question to be determined, or that the claim as a whole is to be determined,

(c) include reasons why the matter is suitable for determination by way of summary trial,

(d) be accompanied with an affidavit or any other evidence to be relied on, and

(e) specify a date for the hearing of the summary trial scheduled by the court clerk, which must be one month or longer after service of notice of the application on the respondent.

(3) The applicant may not file anything else for the purposes of the application except

(a) to adduce evidence that would, at trial, be admitted as rebuttal evidence, or

(b) with the judge's permission.

***RESPONSIBLE ENERGY DEVELOPMENT ACT*, S.A. 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.