File No. 36167

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

BETWEEN:

JESSICA ERNST

APPELLANT

- and -

ALBERTA ENERGY REGULATOR

RESPONDENT

- and -

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PART I – OVERVIEW OF POSITION AND STATEMENT OF FACTS

A. Overview of Appeal

1. The Appellant, Ms. Ernst, asserts the incorrect axiomatic position that a personal remedy under section 24(1) of the *Canadian Charter of Rights and Freedoms* (the ***Charter***)[1] is a constitutional prerogative that may not be limited by statute. That position conflicts with clear jurisprudence from this Court. The right to a **general** remedy which restores the constitutional order is inalienable; the right to a **personal** monetary remedy is not.

2. The immunity provision in s. 43 of the *Energy Resources Conservation Act* (***ERCA***)[2] is a legitimate exercise of the Province's competence over the administration of justice and property and civil rights, and is a valid limit on Ms. Ernst's claim to damages against the Alberta Energy Regulator (**AER**). Its purpose is not to immunize the government from scrutiny for unconstitutional laws or acts, but to promote good governance by shielding a statutory tribunal with purely public duties from being called to account to any particular individual in a claim for private remedies. It ensures that the AER, which owes only public duties, is held to account only through public law remedies, and not through personal liability that would conflict with the AER's efficient operations.

3. Ms. Ernst's personal *Charter* claim for damages suffers from a further fundamental flaw: it does not, in fact, engage s. 2(b). She was free to, and did, continue to contact the AER, and to publicly express herself in respect of oil and gas development and the AER, after the purported decision to exclude her from the AER complaint process. Her claim is that the AER violated her freedom of expression because it would not listen to her, or respond as she desired. Section 2(b) does not guarantee a right to be listened to, or to a response. Any duty the AER may have had to listen or respond was administrative in nature. There is no such constitutional entitlement.

4. The AER is a statutory body. Either it has, or does not have, a mandate to receive, and respond to, any and every communication. It if has that mandate, and failed to perform it, then the remedy lies within judicial review. If the AER does not have that mandate, then the *Charter*

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[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[2] RSA 2000, c E-10.

does not expand its mandate to include such a duty. If the *Charter* does so expand the AER's mandate, then the remedy is found in judicial review. That is, if the AER must receive and respond to Ms. Ernst's communications, whatever the source of that duty may be, the remedy is to compel it to do so through administrative law remedies.

B. Factual Background

5. Ms. Ernst brought a claim against EnCana Corporation (**EnCana**), the AER[3] and The Queen in Right of Alberta, claiming, *inter alia*, that the Defendants are responsible for the contamination of the groundwater near her residence near Rosebud, Alberta.[4]

6. The AER is a statutory agency responsible for regulating the development of Alberta's energy resources. Through its governing statutes, it has broad purposes that range from the conservation of energy resources in Alberta, to appraising energy resources in Alberta, and providing for the economic, orderly and efficient development of the oil and gas resources of Alberta in the public interest. The AER has public duties related to the development of Alberta's oil and gas reserves, the assessment of proposals for development and exploration, and the regulation and expansion of oil and gas development.[5] Pursuant to its governing statutes, the AER owes duties to the public as a whole, and does not owe private duties of care.[6]

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[3] The claim was brought against the Energy Resources Conservation Board ("ERCB"). On June 17, 2013, the *ERCA* was repealed and was replaced by the *Responsible Energy Development Act*, SA 2012, c R-17.3 ("*REDA*"), which created the ERCB's successor, the Alberta Energy Regulator.

[4] Ms. Ernst filed a Statement of Claim on December 3, 2007 [Respondent's Record ("RR"), Tab 1], an Amended Statement of Claim on April 21, 2011 [RR, Tab 2], a Second Amended Statement of Claim on February 7, 2012 [RR, Tab 3], and a "Fresh" Statement of Claim on June 25, 2012 ("Fresh Statement of Claim") [Appellant's Record ("AR"), Tab 5].

[5] *Oil and Gas Conservation Act*, RSA 2000, c O-6 ("*OGCA*") at s. 4 [Respondent's Book of Authorities ("BOA"), Tab 67]; *ERCA* at s. 2; *REDA* at s. 2 [BOA, Tab 73].

[6] *OGCA* at s. 4 [BOA, Tab 67]; *ERCA* at ss. 2, 3, 6; 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. 27-30 [AR, Tab 2 at 16]; Reasons for Judgment of the Court of Appeal of Alberta, dated September 15, 2014 ("ABCA Reasons") at para. 18 [AR, Tab 4 at 52]. The finding of the Court below that the AER owes only public duties has not been appealed to this Court.

7. Ms. Ernst alleged that the AER owed her a private duty to protect her well water from contamination.[7] She also sought damages under the *Charter* for the purported breach of her freedom of expression. She has not appealed the Order striking her claim in negligence.[8]

8. In the *Charter* claim,[9] which was struck and dismissed,[10] Ms. Ernst claims that the AER breached her freedom expression by excluding or removing her from its complaint process.[11] She asserts that the AER "has established a specific forum and process for communicating with the public and hearing public complaints and concerns regarding the oil and gas industry",[12] that, "as a public body", it "invited and encouraged public participation and communication in the regulatory process",[13] and represented "that it is responsible for responding to and addressing all public complaints, including by investigating all such complaints".[14]

9. Ms. Ernst claims that she frequently "voiced her concerns" through contact with the AER and through "other modes of public expression".[15] She claims that as a result of her public criticism, the AER "seized on an offhand reference to Weibo [sic] Ludwig made by Ms. Ernst and used it as an excuse to restrict her speech by prohibiting her from communicating with" the AER through the "usual channels".[16] She says that this "limited her ability to lodge complaints, register concerns and to participate" in the AER's compliance and enforcement process.[17]

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[7] ABQB Reasons at para. 2 [AR, Tab 2 at 4]; Order of Wittmann CJ, November 13, 2013, filed December 2, 2013 ("Order of Wittmann CJ"), para. 1 [AR, Tab 1 at 1], which struck paras. 24 through 41 of the Fresh Statement of Claim [AR, Tab 5 at 65-69].

[8] Appellant's Factum at para. 9.

[9] The *Charter* claim is pleaded in paras. 42 through 58, 81and 87 of the Fresh Statement of Claim.

[10] Order of Wittmann CJ at para. 2 [AR, Tab 1 at 2]. The Order of Wittmann CJ struck and dismissed the claims for a personal remedy for a *Charter* breach. The Appeal from that decision was dismissed: ABCA Reasons at paras. 30-31 [AR, Tab 4 at 55-56]. Rule 3.68 of the *Alberta Rules of Court*, AR 124/2010 ("*ARC*") allows a pleading to be struck, and judgment to be entered, where it discloses "no reasonable claim"; R. 7.3 allows summary judgment where there is "no merit to a claim": *ARC* at rr. 3.68, 7.3.

[11] Fresh Statement of Claim at para. 58 [AR, Tab 5 at 72]; ABQB Reasons at paras. 59-88 [AR, Tab 2 at 25-31].

[12] Fresh Statement of Claim at para. 42 [AR, Tab 5 at 69].

[13] Fresh Statement of Claim at para. 43 [AR, Tab 5 at 69-70].

[14] Fresh Statement of Claim at para. 44 [AR, Tab 5 at 70].

[15] Fresh Statement of Claim at para. 45 [AR, Tab 5 at 70].

[16] Fresh Statement of Claim at para. 47 [AR, Tab 5 at 70]. The "offhand" comment referred to in the Fresh Statement of Claim was set out in full in the Amended Statement of Claim, dated April 21, 2011 at para. 114 [RR, Tab 2 at 51-52], and the Second Amended Statement of Claim, dated February 7, 2012 at para. 114 [RR, Tab 3 at 120]. Specifically, the AER purportedly refused to communicate with Ms. Ernst when it learned of her comment that "the only way is the Wiebo way." Wiebo Ludwig, a notorious figure in Western Canada, was convicted of bombing oil and gas wells in 2000, and arrested under suspicion of blowing up six EnCana gas pipelines in 2010.

[17] Fresh Statement of Claim at para. 47 [AR, Tab 5 at 70].

10. She asserts that, by a letter, a manager at the AER informed Ms. Ernst "that he had instructed all staff at the Compliance Branch... to avoid any further contact with her".[18] She says that this restriction "was made arbitrarily, and without legal authority".[19] She says that a letter that she sent to the AER "was returned unopened",[20] a letter "did not receive a response",[21] and another letter was not responded to.[22] She says that in response to one of her letters the AER "failed to provide any further clarification or explanation regarding the restriction of communication", that she was re-directed to another person, and that he "continued to ignore, deflect and dismiss Ms. Ernst's request for an explanation".[23] She says that the AER confirmed its decision to discontinue discussion with her, and would not re-open communications until she agreed to raise her concerns only with the AER.[24] She was later informed that she was again free to communicate with AER staff.[25]

11. Despite Ms. Ernst's allegations that she was prohibited from communicating with the AER, the Fresh Statement of Claim is clear that she continued to contact the AER after it purportedly ceased communications with her. However, she claims that because the AER did not respond to her communications, she was excluded from "effective participation in the [AER] public complaints process".[26] She did not seek judicial review of the AER's purported decision to not respond to her communications. Rather, she made a claim under section 24(1) of the *Charter* for $50,000.00 in damages for the alleged breach of her freedom of expression.[27]

(i) The Court of Queen's Bench Struck and Dismissed the Claim

12. The AER applied to strike the "Fresh" Statement of Claim and for summary judgment,[28] or for particulars in the alternative.[29] Although this Appeal is limited to the *Charter* claim

[18] Fresh Statement of Claim at para. 48 [AR, Tab 5 at 70].
[19] Fresh Statement of Claim at para. 56 [AR, Tab 5 at 72].
[20] Fresh Statement of Claim at para. 49 [AR, Tab 5 at 71].
[21] Fresh Statement of Claim at para. 50 [AR, Tab 5 at 71].
[22] Fresh Statement of Claim at para. 53 [AR, Tab 5 at 71].
[23] Fresh Statement of Claim at para. 51 [AR, Tab 5 at 71].
[24] Fresh Statement of Claim at para. 52 [AR, Tab 5 at 71].
[25] Fresh Statement of Claim at para. 54 [AR, Tab 5 at 71].
[26] Fresh Statement of Claim at para. 51 [AR, Tab 5 at 71].
[27] Fresh Statement of Claim at para. 87(e) [AR, Tab 5 at 82].
[28] The AER had earlier sought to strike the Second Amended Claim, which resulted in the Fresh Statement of Claim being filed.
[29] ABQB Reasons at paras. 4, 10, 45-47, 90, 94-95 [AR, Tab 2 at 5, 6, 22-23, 32-33].

pleaded against the AER,[30] the negligence claim, and the findings in the Courts below, provide important context to the *Charter* claim.

13. The AER argued that Ms. Ernst's negligence claim should be struck or dismissed. A claim in negligence requires a duty of care, a breach of that duty, a causal link and resulting damage - each element was lacking in Ms. Ernst's claim. The AER argued that it owes only public duties, not private duties of care, and that the proximity required to ground a private duty of care was absent between Ms. Ernst and the AER.[31] The AER further argued that it was protected by a statutory immunity provision in s. 43 of the *ERCA,* which provides:

> 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.**[32] [emphasis added]

14. Wittmann CJ struck Ms. Ernst's negligence claims against the AER, holding that the statutory regime established the AER's public duties, nothing outside that regime created a private duty between the AER and Ms. Ernst, and the AER did not owe her a duty of care. Wittmann CJ further held that the negligence claims against the AER were barred by the statutory immunity clause in s. 43 of the *ERCA*.[33]

15. In respect of Ms. Ernst's *Charter* claim, the AER argued that (1) the claim failed to disclose a cause of action, because the freedom of expression guaranteed by s. 2(b) does not include a right to be listened to, or to a response, (2) Ms. Ernst was claiming a positive right but could not satisfy the criteria for its protection, and (3) s. 43 of the *ERCA* barred Ms. Ernst's personal claim for damages under the *Charter*.[34]

16. Wittmann CJ dismissed Ms. Ernst's *Charter* claim, and said:

> To a certain extent, 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 government agency. That is

[30] Appellant's Factum at para. 9.
[31] ABQB Reasons at para. 18 [AR, Tab 2 at 12].
[32] *ERCA* at s. 43.
[33] ABQB Reasons at paras. 27-30, 52-58 [AR, Tab 2 at 16-17, 23-25].
[34] ABQB Reasons at paras. 35-38, 51 [AR, Tab 2 at 20-21, 23].

> 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.[35]

On this point, the Court of Appeal stated:

> The Board argued that the Charter right of "freedom of expression" did not extend so far as to create a "right to an audience". It argued that the appellant's right to express her views was never impeded, and that it had no duty under the Charter to accommodate whatever form of expression the appellant chose. The chambers judge concluded, however, that the damages claim for breach of the Charter was not so unsustainable that it could be struck out summarily (reasons, paras. 31-43).[36] [emphasis added]

17. The finding that the *Charter* claim is not "doomed to fail" reflects the test for striking a claim, but not the test for summary judgment. A claim may be struck[37] if it is plain and obvious that the claim does not disclose a cause of action.[38] The test for summary judgment,[39] for which the AER also applied, is less stringent. In *Hryniak v Mauldin*, this Court recognized and encouraged a cultural shift to promote timely and affordable access to the civil justice system:

> To that end, I conclude that summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims.
>
> ...
>
> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.[40]

The Alberta Court of Appeal in *Windsor v Canadian Pacific Railway*, citing *Hryniak*, held that the modern test for summary judgment requires an examination of the record to see if a fair and just disposition can be determined on the existing record.[41]

18. In respect of Ms. Ernst's *Charter* claim, Wittmann CJ held that s. 43 of the *ERCA* barred her claim for damages under s. 24(1) of the *Charter*. Wittmann CJ held that although a statutory

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[35] ABQB Reasons at paras. 42 [AR, Tab 2 at 21].
[36] ABCA Reasons at para. 6 [AR, Tab 4 at 48].
[37] *ARC* at r. 3.68.
[38] ABQB Reasons at paras. 16 [AR, Tab 2 at 8].
[39] *ARC* at r. 7.3.
[40] *Hryniak v Mauldin*, [2014] 1 SCR 87, 2014 SCC 7 ("*Hryniak*") at paras. 2, 5 and 49 [BOA, Tab 14].
[41] *Windsor v Canadian Pacific Railway*, 572 AR 317, 2014 ABCA 108 ("*Windsor*") at para. 13 [BOA, Tab 43].

immunity clause will not bar a claim for a general constitutional remedy, it can bar a personal claim for damages under the *Charter*.[42]

(ii) The Court of Appeal of Alberta Dismissed the Appeal

19. Ms. Ernst appealed the findings of Wittmann CJ in respect of both her negligence claim and her *Charter* claim. The AER argued before the Court of Appeal that Ms. Ernst's *Charter* claim should be struck or dismissed because (1) the *Charter* does not guarantee an audience, or a response, (2) Ms. Ernst was asserting a positive right, but did not meet the criteria for the protection of a positive right, (3) the AER's purported decision to cease communication with her had no effect on her ability to express herself, and (4) Ms. Ernst's claim did not engage s. 2(b).[43]

20. The Court of Appeal dismissed Ms. Ernst's appeal. In respect of the negligence claim, the Court of Appeal noted that regulatory duties are generally "owed to the public, not any individual" and that there were "strong policy considerations against finding regulators essentially to be insurers of last resort for everything that happens in a regulated industry."[44] The Court of Appeal said:

> ...It is primarily the function of the Legislature to determine the scope of civil liability... To the extent that administrative tribunals perform judicial or quasi-judicial functions, it is contrary to long standing common law traditions to expose them, as decision-makers, to personal liability for their decisions... Exposing tribunal members to personal liability also undermines the testimonial immunity which they have traditionally enjoyed with respect to their decision-making process.[45]

The Court of Appeal concluded:

> Forcing the Board to consider the extent to which it must balance the interests of specific individuals while attempting to regulate in the overall public interest would be unworkable in fact and bad policy in law. Recognizing any such private duty would distract the Board from its general duty to protect the public, as well as its duty to deal fairly with participants in the regulated industry. Any such individualized duty of care would plainly involve indeterminate liability, and would undermine the Board's ability to effectively address the general public obligations placed on it under its controlling legislative scheme.[46]

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[42] ABQB Reasons at paras. 75, 82-83, 88 [AR, Tab 2 at 28, 30, 31].
[43] ABCA Reasons at para. 6 [AR, Tab 4 at 48].
[44] ABCA Reasons at para. 16 [AR, Tab 4 at 50-51].
[45] ABCA Reasons at para. 17 [AR, Tab 4 at 51] (citations omitted).
[46] ABCA Reasons at para. 18 [AR, Tab 4 at 52].

21. The Court of Appeal held that the general "protection from action" provision in s. 43 of the *ERCA* barred Ms. Ernst's claims against the AER, and was a constitutionally valid limit on her ability to obtain damages against the AER. It held that the law recognizes that an appropriate and just remedy "must be measured, limited and principled"[47] and noted that limitation laws of general application apply to claims for personal damages under s. 24(1). Moreover, "long-standing common law limitations on the availability of remedies against public officials, such as the immunity extended to those performing quasi-judicial functions" are not abolished in the context of such a claim.[48] Other limits include notice requirements and pre-conditions to common law actions.[49] The Court of Appeal held that legislatures have "a legitimate role in specifying the broad parameters" of available remedies.[50] The Court of Appeal held:

> **The law recognizes that moving from a *Charter* breach to a monetary damages remedy is not automatic or formalistic, but requires a careful analysis of whether that remedy is legitimate within the framework of a constitutional democracy,** as one which vindicates the *Charter* right through an appropriate invocation of the function and powers of a court... Protecting administrative tribunals and their members from liability for damages is constitutionally legitimate.[51] [emphasis added]

22. The Court of Appeal further held that, like time limitations, there was nothing constitutionally illegitimate about statutory immunity provisions such as s. 43. Such provisions are "general in nature, and not limited to *Charter* claims, nor impermissibly applied to select groups of litigants."[52] Further, "provisions immunizing decision makers from liability are not so uncommon or unusual in free and democratic societies as to render them constitutionally unreasonable."[53] Moreover, provided there remains some "effective avenues of redress," limits on remedies "do not offend the rule of law."[54] The Court noted that the "long standing remedy for improper administrative action has been judicial review" and that there was "nothing in s. 43

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[47] ABCA Reasons at para. 25 [AR, Tab 4 at 54].
[48] ABCA Reasons at para. 27 [AR, Tab 4 at 54].
[49] ABCA Reasons at para. 27 [AR, Tab 4 at 54].
[50] ABCA Reasons at para. 28 [AR, Tab 4 at 54].
[51] ABCA Reasons at para. 29 [AR, Tab 4 at 54-55].
[52] ABCA Reasons at para. 30 [AR, Tab 4 at 55].
[53] ABCA Reasons at para. 30 [AR, Tab 4 at 55].
[54] ABCA Reasons at para. 30 [AR, Tab 4 at 55].

that would have prevented the appellant from seeking an order in the nature of mandamus or certiorari to compel the Board to receive communications from her."[55]

(iii) The Court of Queen's Bench Declined to Strike the Claim Against Alberta Environment

23. The Queen in Right of Alberta[56] applied to strike Ms. Ernst's claim against Alberta Environment for negligence in its administration of its environmental regulatory regime, failing to monitor EnCana's activities, and conducting a negligent investigation into the contamination of Ms. Ernst's well water.[57]

24. Wittmann CJ, underscoring the purely public nature of the AER's duties, dismissed the Application of Alberta Environment and concluded that Alberta could be held to owe Ms. Ernst a private law duty of care because "The [AER] and Alberta had different roles with respect to Ernst".[58]

25. Wittmann CJ also considered two different immunity provisions which Alberta Environment argued limited its liability to Ms. Ernst. Section 220 of the *Environmental Protection and Enhancement Act* provides that no action for damages may be commenced against various persons "for anything done or not done by that person in good faith while carrying out that person's duties or exercising that person's powers under this Act …".[59] Section 157 of the *Water Act* is similarly worded.[60]

PART II – QUESTIONS IN ISSUE

26. This Court has stated a constitutional question as to whether s. 43 of the *ERCA* is constitutionally inapplicable or inoperable to the extent that it bars a claim against the regulator

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[55] ABCA Reasons at para. 30 [AR, Tab 4 at 55].
[56] As noted by Wittmann CJ at *Ernst v EnCana Corporation*, [2015] 1 WWR 719, 2014 ABQB 672 ("*Ernst #2*") at para. 4 [BOA, Tab 9], Ms. Ernst's claim against Her Majesty the Queen in Right of Alberta "is specifically against Alberta Environment and Sustainable Resource Development, which operated as Alberta Environment during the material time."
[57] *Ernst #2, supra,* at para. 4 [BOA, Tab 9].
[58] *Ernst #2, supra,* at para. 50 [BOA, Tab 9].
[59] *Environmental Protection and Enhancement Act*, RSA 2000, c W-3 at s. 220 [BOA, Tab 57].
[60] *Water Act*, RSA 2000, c E-12 at s. 157 [BOA, Tab 80]; *Ernst #2* at paras. 58 and 60 [BOA, Tab 9].

for a breach of s. 2(b) of the *Charter* and for a remedy under s. 24(1) of the *Charter*.[61] The Respondent will also address whether Ms. Ernst's claim engages s. 2(b) of the *Charter*.

PART III – STATEMENT OF ARGUMENT

27. The AER submits that the statutory immunity provision in s. 43 of the *ERCA* bars a claim against the regulator for a breach of s. 2(b) of the *Charter*, and is a constitutionally valid limit on the Appellant's **personal *Charter* claim for damages**. The AER further submits that Ms. Ernst's claim does not engage s. 2(b) of *Charter*, because the *Charter* does not guarantee a right to be listened to or to a response, and because the Appellant has claimed a positive right but cannot satisfy the criteria for its protection.

A. Section 43 of the *ERCA* can bar claims for personal damages under s. 24(1) of the *Charter*

28. Section 43 of the *ERCA* is a constitutionally valid limit on **personal claims for damages under the *Charter***. There is an important and well-established distinction between general claims for constitutional relief to challenge the constitutionality of legislation and restore the constitutional order, and personal claims for constitutional relief brought by an individual *qua* individual for a personal remedy. The first is inalienable, while the latter may be limited by statute.[62] Ms. Ernst seeks **only** damages - a personal remedy.

29. Section 24(1) operates concurrently with, and does not replace, the general law.[63] As such, an award of damages under s. 24(1) must be considered in the context of the traditional limits and liability principles associated with personal remedies. Section 43 of the *ERCA* is one of many constitutionally valid limits on access to personal remedies under s. 24(1), which include judicial and quasi-judicial immunity, the determination of what constitutes a court of competent jurisdiction, crown immunity from execution, various pre-conditions and procedural requirements, and limitation provisions.

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[61] Order of the Chief Justice Stating a Constitutional Question dated June 25, 2015 [Appendix].
[62] *Ravndahl v Saskatchewan*, [2009] 1 SCR 181, 2009 SCC 7 ("*Ravndahl*") at paras. 16-17 [BOA, Tab 35]; *Manitoba Métis Federation Inc. v Canada (Attorney General)*, [2013] 1 SCR 623, 2013 SCC 14 ("*Manitoba Métis*") at paras. 134-135 and 143 [BOA, Tab 21].
[63] *Vancouver (City) v Ward*, [2010] 2 SCR 28, 2010 SCC 27 ("*Ward*") at para. 43 [BOA, Tab 41].

30. The significant policy considerations underlying statutory immunity provisions should not be undermined by recourse to s. 24(1). Striking a balance between s. 43 of the *ERCA* and section 24(1) of the *Charter* requires a consideration of both public and private interests within the context of our constitutional democracy. Tribunals such as the AER, which owe only public duties, must not be inhibited by the fear of being held to account through private law remedies. Section 43 of the *ERCA* ensures that, in exercising its public duties, the AER is held accountable only through public law remedies.

31. Section 43 did not operate to deprive Ms. Ernst of every remedy. She had a meaningful method to challenge the constitutional validity of the AER's impugned conduct: judicial review.

(i) Section 24(1) of the Charter

32. Section 24(1) of the *Charter* provides that anyone whose rights and freedoms have been infringed may apply to a court of competent jurisdiction to obtain an appropriate and just remedy.[64] Section 24(1), "like all *Charter* provisions, commands a broad and purposive interpretation."[65] The "broad remedial mandate" for s. 24(1) should not be "frustrated by a 'narrow and formalist' reading."[66] However, any interpretation of s. 24(1) should not "intrude on legislative powers more than necessary to achieve the aims of the *Charter*."[67] Section 24(1) must be interpreted in a way that achieves a broad, purposive interpretation while "respecting the structure and practice of the existing court system and the exclusive role of Parliament and the legislatures in prescribing the jurisdiction of courts and tribunals."[68]

33. An appropriate *Charter* remedy requires a consideration of the measures which would "vindicate the values expressed in the *Charter*" and provide the form of remedy that "best achieves that objective."[69] However, "the court must be sensitive to its proper role in the

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[64] *Charter* at s. 24(1).
[65] *Ontario v 974649 Ontario Inc*, [2001] 3 SCR 575, 2001 SCC 81 ("*974649 Ontario Inc*") at para. 18 [BOA, Tab 28].
[66] *974649 Ontario Inc, supra,* at para. 18 [BOA, Tab 28].
[67] *974649 Ontario Inc, supra,* at para. 23 [BOA, Tab 28].
[68] *974649 Ontario Inc, supra,* at para. 24 [BOA, Tab 28].
[69] *Osborne v Canada (Treasury Board)*, 82 DLR (4th) 321, [1991] 2 SCR 69 ("*Osborne*") at 104 [BOA, Tab 29].

constitutional framework, and refrain from intruding into the legislative sphere beyond what is necessary to give full effect to the provisions of the *Charter*."[70]

34. To be appropriate and just, a remedy must meaningfully vindicate the rights and freedoms of a claimant, but must also:

> employ means that are legitimate within the framework of our constitutional democracy. [...] [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. This is not to say that there is a bright line separating these functions in all cases. A remedy may be appropriate and just notwithstanding that it might touch on functions that are principally assigned to the executive. The essential point is that the courts must not, in making orders under s. 24(1), depart unduly or unnecessarily from their role of adjudicating disputes and granting remedies that address the matter of those disputes.[71]

(ii) There is a Distinction Between General Remedies Which Restore Constitutional Order and Private Remedies Brought by the Individual Qua Individual

35. There is an important distinction between systemic remedies required to restore the constitutional order, and personal remedies intended to provide monetary relief to individual litigants. The Constitution is supreme in the sense that it guarantees the right to have the courts test the constitutional validity of government laws and actions. The right to a general remedy which globally corrects a constitutional deficiency may not be limited. However, the Constitution does not guarantee the right to obtain a personal remedy as a result of a breach of rights guaranteed by the *Charter*.

36. In this Court's unanimous decision in *Ravndahl*, the Chief Justice drew a clear distinction between personal and general constitutional relief:

> **Personal claims for constitutional relief are claims brought as an individual *qua* individual for a personal remedy... [P]ersonal claims in this sense must be distinguished from claims which may enure to affected persons generally under an action for a declaration that a law is unconstitutional.**[72] [emphasis added]

37. This Court recently affirmed the distinction between general and personal constitutional remedies in *Manitoba Métis Federation Inc v Canada (Attorney General)*:

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[70] *Osborne, supra,* at 104 [BOA, Tab 29].
[71] *Doucet-Boudreau v Nova Scotia (Minister of Education)*, [2003] 3 SCR 3, 2003 SCC 62 at para. 56 [BOA, Tab 7].
[72] *Ravndahl, supra,* at paras. 16-17 [BOA, Tab 35].

> **This Court has held that although claims for personal remedies flowing from the striking down of an unconstitutional statute are barred by the running of a limitation period, courts retain the power to rule on the constitutionality of the underlying statute...**
>
> **A declaration is a narrow remedy.** It is available without a cause of action, and courts make declarations whether or not any consequential relief is available... **it is not awarded against the defendant in the same sense as coercive relief...** Were the Métis in this action seeking personal remedies, the reasoning set out here would not be available.[73] [emphasis added]

38. A statutory bar cannot immunize a government actor from a constitutional challenge of a general nature.[74] However, the state is entitled to balance public and private interests in respect of personal claims for damages under the *Charter*. The task is to determine whether Ms. Ernst seeks relief to address a constitutional deficiency for the benefit of everyone affected, thereby securing a global remedy, or a personal remedy that will accrue to her alone. If Ms. Ernst was seeking general constitutional relief, the statutory immunity in s. 43 of the *ERCA* would not apply to that relief.

39. Ms. Ernst has **only** claimed for $50,000.00 in damages in respect of the alleged *Charter* breach.[75] She seeks **only** a personal remedy, not any general remedy. Ms. Ernst claims in her Factum that she seeks declaratory relief in respect of her *Charter* claim.[76] No such declaratory relief is sought in the Fresh Statement of Claim.

40. The courts below correctly concluded that the distinction between general and personal constitutional relief was fatal to Ms. Ernst's claim. She does not have an inalienable constitutional right to damages as a remedy.

(iii) Section 24(1) Does Not Replace the General Law

41. Although s. 24(1) contemplates claims for personal remedies, it is silent regarding how such remedies may be sought. The *Constitution Act, 1867* spells out legislative competence over the administration of justice and property and civil rights. The *Constitution Act, 1982* does not

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[73] *Manitoba Métis, supra,* at paras. 134 and 143 [BOA, Tab 21].
[74] *Amax Potash Ltd v Saskatchewan,* [1977] 2 SCR 576 at 590 [BOA, Tab 2].
[75] Fresh Statement of Claim at para. 87(e) [AR, Tab 5 at 82].
[76] Appellant's Factum at para. 23.

amend or remove those heads of power and this Court has repeatedly confirmed that section 24(1) does not replace the general law.[77]

42. Entitlement to a personal remedy does not automatically flow from an unconstitutional law or act. Even if a *Charter* breach is established, a Court may decline to award personal damages where damages would not achieve one of the remedial purposes set out by this Court in *Ward*: compensation, vindication and deterrence.[78] Moreover, even where one or more of those purposes would be achieved by an award of damages, damages are not appropriate if less drastic remedies would achieve the relevant purpose.[79]

43. Since s. 24(1) operates concurrently with the general law,[80] an award of damages must be considered in light of traditional limits on personal remedies. Such limits include countervailing policy considerations related to, among other things, the existence of alternative remedies and concern for good governance.[81]

44. That s. 24(1) operates concurrently with the general law is demonstrated by the fact that, generally, the same liability principles apply to both tort and *Charter* claims, because the policy reasons underlying these principles "apply regardless of how the claim is pleaded."[82] For instance, the public policy reasons underlying immunity from liability for policy decisions, including indeterminate liability, proximity, fault, and quantification of damages, are relevant regardless of whether a claimant has brought an action in negligence, or for damages arising out of a breach of the *Charter*.[83] That a damages claim arises out of an alleged rights violation:

> ... does not oust those fundamental rules which serve to safeguard the free and effective discharge of legislative function. ... by analogy, in the law of Crown liability, if upon

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[77] *Ward, supra,* at para. 43 [BOA, Tab 41].
[78] *Ward, supra,* at paras. 25 & 32 [BOA, Tab 41].
[79] *Ward, supra,* at para. 34 [BOA, Tab 41]; Kent Roach, *Constitutional Remedies in Canada*, 2nd ed (Toronto, Ontario: Canada Law Book, 2013), ss. 3.990-3.1000 [BOA, Tab 50].
[80] *Ward, supra,* at para. 43 [BOA, Tab 41].
[81] *Ward, supra,* at paras. 34, 38 & 43 [BOA, Tab 41]. See also: ABQB Reasons at paras. 83-88 [AR, Tab 2 at 30-31].
[82] Robert E. Charney & Josh Hunter, "Tort Lite? – *Vancouver (City) v. Ward* and the Availability of Damages for Charter Infringements" (2011) 54 SCLR (2d) 393 ("Tort Lite?") at 408-409 [BOA at Tab 46].
[83] Tort Lite?, *supra,* at 407-409 [BOA at Tab 46].

judicial review an administrative decision is found to be unlawful, it does not necessarily follow that there is a fault giving rise to recourse in civil liability.[84]

45. Even where a personal *Charter* claim for damages is available, the "underlying policy considerations that are engaged when awarding private law damages" are relevant.[85] For instance, while a private duty of care may arise out of a direct relationship between an individual and a statutory regulator, a mediated relationship does not give rise to a private duty of care. [86]

46. The AER is a statutory regulator that owes only public duties. The statutory immunity in s. 43 of the *ERCA* only serves to confirm the public nature of the AER's duties.[87] That the AER only has public duties is equally relevant to Ms. Ernst's *Charter* claim. Ms. Ernst claims that a public body, with whom she has no relationship and which has no regulatory authority over her, breached her freedom of expression because it would not communicate with her.[88] If she was, in fact, entitled to communications from the AER, she could have sought an order in the nature of mandamus or certiorari. She did not do so. Rather, she seeks $50,000.00 in damages. The remedy for a failure by the AER to perform its statutory functions is one that requires it to perform those functions.

47. Under Ms. Ernst's construction, a claim brought under the *Charter* is sacrosanct, and none of the foundational principles in respect of liability have any application. In her view, once a claim is brought under the *Charter*, any limits in respect of that claim would "effectively [neuter] s. 24(1) and [reduce] it from the supreme law of the land to meaningless words on a page."[89]

48. Such a position contradicts the comments of this Court in *Ward*:

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[84] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 1 SCR 789, 2004 SCC 30 at para. 23 [BOA at Tab 30]. In this quote, this Court was discussing Quebec's *Charter of Human Rights and Freedoms*, RSQ, c C-12. However, the underlying proposition is relevant to the within discussion of the *Charter*.

[85] *Ward, supra,* at para. 22 [BOA, Tab 41].

[86] See: *Heaslip Estate v Mansfield Ski Club Inc*, 2009 ONCA 594, 96 OR (3d) 401 at paras 17-20 [BOA at Tab 12]. Mediated relationships were also present in this Court's decisions in *Cooper v Hobart*, 2001 SCC 79, [2001] 3 SCR 537 [BOA at Tab 5] and *Edwards v Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 SCR 562 ("*Edwards*") [BOA at Tab 8], in which no private duty of care was found to exist between the plaintiffs and the Law Society of Upper Canada, and the Registrar of Mortgage Brokers, respectively.

[87] *Edwards, supra,* at paras. 13-17 [BOA at Tab 8].

[88] The validity of the Appellant's *Charter* claim is discussed in detail below.

[89] Appellant's Factum at para. 66.

> While the threshold for liability under the *Charter* must be distinct and autonomous from that developed under private law, **the existing causes of action against state actors embody a certain amount of "practical wisdom" concerning the type of situation in which it is or is not appropriate to make an award of damages against the state.** Similarly, it may be necessary for the court to consider the procedural requirements of alternative remedies. **Procedural requirements associated with existing remedies are crafted to achieve a proper balance between public and private interests, and the underlying policy considerations of these requirements should not be negated by recourse to s. 24(1) of the *Charter*. As stated earlier, s. 24(1) operates concurrently with, and does not replace, the general law.**[90] [emphasis added]

(iv) Section 43 is One of Many Constitutionally Valid Limits on Access to Remedies Under Section 24(1) of the Charter

49. Ms. Ernst does not have a constitutionally guaranteed right to the remedy of her choice, free from any and all limitations. The law recognizes a number of constitutionally valid limits on the right to obtain certain types of remedies under the *Charter*, and the legislatures have a legitimate role to play in specifying the parameters of available remedies.[91] For instance, state actions taken in good faith under statutes subsequently declared invalid are immune from personal claims for damages under s. 24(1).[92] Section 43 of the *ERCA* is another such limit, as are the examples set out below.

I. Judicial and Quasi-Judicial Decisions

50. Litigants are limited in their right to claim personal remedies against judicial and quasi-judicial decision-makers. The policy reasons for immunizing statutory regulators are much the same as the principles underlying judicial and quasi-judicial immunity. Decision-makers should be free to make independent and impartial decisions without being exposed to, and distracted by, the prospect of civil liability.[93]

51. The prospect of civil liability creates a relationship that is inconsistent with impartial decision-making in the overall public interest:

> [T]he most serious consequence of permitting judges to be sued for their decisions is that judicial independence would be severely compromised. If judges recognized that they

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[90] *Ward, supra,* at para. 43 [BOA, Tab 41].
[91] See: ABCA Reasons at paras. 26-29 [AR, Tab 4 at 54-55].
[92] *Mackin v New Brunswick (Minister of Justice)*, [2002] 1 SCR 405, 2002 SCC 13 at paras. 78-79 [BOA at Tab 20]; *Ward, supra,* at para. 39 [BOA, Tab 41].
[93] *Mackeigan v Hickman*, 114 NR 381, [1989] 2 SCR 796 at 830-831 [BOA at Tab 19].

> could be brought to account for their decisions, their decisions might not be based on a dispassionate appreciation of the facts and law related to the dispute. Rather, they might be tempered by thoughts of which party would be more likely to bring an action if they were disappointed by the result, or by thoughts of whether a ground-breaking but just approach to a difficult legal problem might be later impugned in an action for damages against that judge, all of which would be raised by the mere threat of litigation. In Lord Denning's words, a judge would turn the pages of his books with trembling fingers, asking himself: "If I do this, shall I be liable in damages?"[94]

52. Judicial immunity applies to the actions of judges as judges. Similarly, the immunity afforded by section 43 of the *ERCA*, by its very wording, applies to actions of the AER acting as the AER.

53. Incorrect judicial decisions may result in an infringement of the *Charter,* particularly in criminal proceedings. However, the "remedy for such an error has been a successful appeal, not the elimination of the doctrine of judicial immunity or an entitlement to sue a judge for damages under s. 24(1) of the *Charter.*"[95] A judge's decision is subject to review through appeal; a tribunal's decision is subject to oversight through judicial review. There is no unlimited right to pursue the AER for a personal remedy in damages.

54. The common law immunity enjoyed by superior court judges is not enjoyed by many judicial decision-makers, including provincial court judges and masters. These judicial decision-makers, like statutory decision-makers, are immune from civil action by virtue of statutory immunity provisions, similar to s. 43 of the *ERCA*. For instance, s. 9.51(1) of Alberta's *Provincial Court Act* immunizes provincial court judges in Alberta from civil action.[96]

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[94] *Taylor v Canada (Attorney General)*, 184 DLR (4th) 706, [2000] 3 FC 298 at para. 28 (FCA), leave to appeal refused [2000] SCCA No 213 (SCC) 79 [BOA at Tab 38]. See also: Tort Lite?, *supra*, at 412 [BOA, Tab 46].

[95] Tort Lite?, *supra*, at 413 [BOA, Tab 46].

[96] *Provincial Court Act*, RSA 2000, c P-31 at s. 9.51 [BOA at Tab 68]. See also: *Courts of Justice Act*, RSO 1990, c C43, ss. 49(27), 82, 86.2(19) (immunity for all Judges, Masters, Case Management Masters, and Judicial Council) [BOA at Tab 56]; *Provincial Court Act*, RSA 2000, c P-31 at s. 68 (immunity for Mediators) [BOA at Tab 68]; *Court of Queen's Bench Act*, RSA 2000, c C-31 at s. 14 (immunity for Masters) [BOA at Tab 55]; *Provincial Court Act*, RSBC 1996, c 379 at ss. 27.3 & 42 (immunity for tribunals and Provincial Court Judges) [BOA at Tab 69]; *Provincial Court Act*, SS 1998, c P-30.11 at s. 63 (immunity for Provincial Court Judges, Judicial Council) [BOA at Tab 72]; *The Provincial Court Act*, CCSM c 275 at s. 71 (immunity for all Judges and Justices of the Peace) [BOA at Tab 78]; Provincial Court Act, RSNS 1989, c 238 at s. 4A (immunity for Provincial Court Judges) [BOA at Tab 70]; *Small Claims Act*, SNB 2012, c 15 at s. 19 (immunity for Small Claims Adjudicators) [BOA at Tab 75]; *Provincial Court Act*, RSPEI 1988, c P-25 at s. 11 (immunity for Provincial Court Judges and Justices of the Peace) [BOA at Tab 71]; *Federal Courts Act*, RSC 1985, c F-7 at s. 12(6) (immunity for Prothonotaries) [BOA at Tab 58].

55. On Ms. Ernst's construction, to immunize these judicial decision-makers from claims for personal *Charter* damages would "gut the remedial power of 24(1)" and "cannot be countenanced."[97] However, the policy reasons underlying judicial immunity are equally relevant to a provincial court judge as they are to a superior court judge. Moreover, in its report on Crown immunity reform, the Ontario Law Reform Commission, chaired by Justice Abella, saw no principled reason why quasi-judicial statutory decision-makers should enjoy a more limited immunity than judges. The rationale for the protection of administrative actors and judges is not to protect their personal interests, but to protect the public interest in an independent, impartial decision-making process. Administrative decision-makers, no less than their judicial counterparts, must be able to act without fear of personal liability.[98]

56. Ms. Ernst argues that her claim does not relate to the AER *qua* quasi-judicial decision-maker, but rather to the AER *qua* government agency.[99] In her Fresh Statement of Claim she actually pleads that the AER "limited her ability to lodge complaints, register concerns and to participate" in the AER's compliance and enforcement process.[100] That is the claim that has been struck and dismissed. That aside, an artificial distinction among the AER's functions cannot be maintained. Given the highly complex, polycentric, intertwined operations of a statutory regulator such as the AER, the quasi-judicial decision-making functions of the AER cannot be isolated from the AER's administrative functions. The AER, as a statutory regulator and decision-maker, must be free to fulfill its functions without being exposed to liability for personal *Charter* claims for damages.

II. Courts of Competent Jurisdiction

57. While not applicable by analogy to the immunity in this case, another limitation on remedies under s. 24(1) arises from the fact that the *Charter* does not give jurisdiction to tribunals that do not already possess it. Rather, "for a tribunal to grant a Charter remedy under s. 24(1), it must have the power to decide questions of law and the remedy must be one that the

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[97] Appellant's Factum at para. 67.
[98] Ontario Law Reform Commission, *Report on the Liability of the Crown* (Toronto: Ontario Law Reform Commission, 1989) at p. 29, Commissioners J.R.S. Prichard and Margaret Ross dissenting ("Ontario Law Reform Commission") [BOA at Tab 49].
[99] Appellant's Factum at para. 105.
[100] Fresh Statement of Claim at para. 47 [AR, Tab 5 at 70].

tribunal is authorized to grant."[101] That is, the court of competent jurisdiction has to be found in the text of the legislation. Regarding the role of legislatures in defining the judicial structure and the interplay with s. 24 of the *Charter*, Chief Justice McLachlin wrote:

> The final proposition is that s. 24 should not be read so broadly that it endows courts and tribunals with powers that they were never intended to exercise. The jurisdictions of Canada's various courts and tribunals are fixed by Parliament and the legislatures, not by judges... It is Parliament or the legislature that determines if a court or tribunal is a "court of competent jurisdiction"... Legislative intention is the guiding light in identifying courts of competent jurisdiction.[102]

58. Generally, administrative tribunals empowered to apply the law also have the jurisdiction to apply the *Charter* "to the issues that arise in the proper exercise of their statutory functions."[103] In *R v Conway*, this Court held that the question of whether a tribunal is a court of competent jurisdiction is institutional, and flows from whether the tribunal has the power to decide questions of law.[104]

59. If, based on this threshold question, the tribunal has been found to be a court of competent jurisdiction "the remaining question is whether the tribunal can grant the particular remedy sought, given the relevant statutory scheme. Answering this question is necessarily an exercise in discerning legislative intent."[105] If the legislature did not intend for a tribunal to be able to award damages for a *Charter* violation, it may not do so, despite the fact that it is a court of competent jurisdiction.[106] Indeed, in *Ward,* this Court held that Provincial criminal courts do not have the power to award damages under s. 24(1).[107]

III. Crown Immunity from Execution

60. At common law the Crown was immune from execution. The extent of Crown liability on a judgment of the court remains subject to the ultimate control of the legislature. Although the

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[101] *Ward, supra,* at para. 58 [BOA, Tab 41]. See also: *R v Conway*, [2010] 1 SCR 765, 2010 SCC 22 ("*Conway*") at paras. 20-22 [BOA at Tab 32].
[102] *974649 Ontario Inc, supra,* at para. 22 (citations omitted) [BOA, Tab 28].
[103] *Conway, supra,* at para. 20 [BOA at Tab 32].
[104] *Conway, supra,* at para. 22 [BOA at Tab 32].
[105] *Conway, supra,* at para. 82 [BOA at Tab 32].
[106] *Conway, supra,* at para. 82 [BOA at Tab 32]; Christopher D. Bredt and Ewa Krajewska, "*R. v. Conway*: UnChartered Territory for Administrative Tribunals" (2011) 54 SCLR (2d) 451 at 457 [BOA, Tab 45].
[107] *Ward, supra,* at para. 58 [BOA, Tab 41]. See also: Tort Lite?, *supra,* at 423 [BOA, Tab 46].

Crown is liable to pay all judgments entered against it,[108] the legislature may at any time limit or abrogate the Crown's liability by legislation. This may be done before the fact, by denying or capping the Crown's liability for a particular kind of damage, or after the fact, by retroactively modifying a judgment awarded against the Crown. Such limits do not offend the *Charter*.[109] The potential disruption of public services militates strongly against public property being vulnerable to seizure and sale at the instance of a private party.[110] This provides further support for this Court's consistent distinction between constitutional remedies of general application which restore the constitutional order and coercive personal remedies which are purely financial in nature. The latter can be limited by validly enacted statutes.

IV. Pre-conditions and Procedural Requirements

61. Other constitutionally valid limits on personal claims under s. 24(1) are the various pre-conditions associated with such claims. In *Henry v British Columbia (Attorney General)*,[111] this Court held that s. 24(1) authorized a court to award damages against the Crown for wrongful non-disclosure in the absence of proof of malice. However, a majority of this Court held that while malice is not required, a claimant must still meet the threshold of demonstrating proof of intent to violate the *Charter*. Negligence – even gross negligence – will not suffice.[112]

62. The "heightened *per se* liability threshold" of malice is relevant to claims of malicious prosecution, regardless of whether the claim is brought in tort or as a personal *Charter* claim.[113] If the same liability threshold was not relevant to both types of claims, "the high thresholds for success in a malicious prosecution action could be avoided by framing it as a *Charter* claim."[114] This echoes the concern raised by Wittmann CJ in the instant case, regarding claimants coming "to the litigation process dressed in their *Charter* clothes whenever possible."[115]

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[108] By enactment of Crown Liability and Proceedings Acts in most jurisdictions, directing the Treasurer to pay amounts ordered by courts.
[109] Ontario Law Reform Commission, *supra*, at 85 [BOA at Tab 49].
[110] Ontario Law Reform Commission, *supra*, at 85-86 [BOA at Tab 49].
[111] [2015] 2 SCR 214, 2015 SCC 24 ("*Henry*") [BOA, Tab 13].
[112] *Henry*, *supra*, at paras. 82, 84-85, 92 [BOA, Tab 13].
[113] *Henry*, *supra*, at paras. 42-43 [BOA, Tab 13]; *Ward, supra,* at para. 43 [BOA, Tab 41].
[114] Tort Lite?, *supra*, at 409-411 [BOA, Tab 46].
[115] ABQB Reasons at para. 81 [AR, Tab 2 at 30].

63. Many procedural requirements also act as valid limits on personal *Charter* claims. Notice requirements such as those found in s. 24 of the *Judicature Act*[116] are legitimate limits on personal *Charter* remedies, as are requirements for leave to appeal. Rules of civil procedure do not become irrelevant in the context of a *Charter* claim.[117] As this Court held in *Ward*, such procedural requirements serve an important purpose of balancing public and private interests. These considerations "should not be negated by recourse to s. 24(1) of the *Charter*."[118]

V. Limitations

64. In its unanimous decision in *Ravndahl*, this Court held that limitation periods apply to personal *Charter* claims:

> The argument that *The Limitation of Actions Act* does not apply to personal claims was abandoned before us, counsel for the appellant conceding that *The Limitations of Actions Act* applies to such claims. This is consistent with this Court's decision in [*Kingstreet*], which held that limitation periods apply to claims for personal remedies that flow from the striking down of an unconstitutional statute.[119]

This finding was recently confirmed by this Court in *Manitoba Métis*.[120]

65. Limitation provisions serve important purposes. Limitation provisions provide certainty and finality to potential defendants, encourage plaintiffs to bring claims in a timely manner, and assist in assuring the cogency and reliability of evidence.[121] Statutory immunity provisions, as discussed below, serve different, but equally important purposes. However, both are constitutionally valid limits on a litigant's access to personal remedies and both function as statutory bars to claims that may otherwise have merit.

66. That limitation periods apply to *Charter* claims for personal damages is an indication that the state is entitled to balance public and private interests in respect of **personal** claims for damages under the *Charter*.

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[116] RSA 2000, c J-2 at s. 24 [BOA, Tab 60]; ABCA Reasons at para. 27 [AR, Tab 4 at 54].
[117] Tort Lite?, *supra*, at 422-23 [BOA, Tab 46].
[118] *Ward, supra,* at para. 43 [BOA, Tab 41].
[119] *Ravndahl, supra,* at paras. 16-17 [BOA, Tab 35]. See also: *Kingstreet Investments Ltd v New Brunswick (Department of Finance)*, 2007 SCC 1, [2007] 1 SCR 3 [BOA, Tab 17].
[120] *Manitoba Métis, supra,* at para. 134 [BOA, Tab 21].
[121] *Novak v Bond*, 172 DLR (4th) 385, [1999] 1 SCR 808 at para. 67 [BOA, Tab 26].

67. There is no provision in the *Charter* regarding civil rights and obligations. The right to bring a civil action is a species of personal property which is economic and proprietary in nature. The deprivation of a common law right to sue for damages does not offend the *Charter*, which does not protect purely economic interests. Limitations, like statutory immunity provisions, fall legitimately within the jurisdiction of the Province to administer justice and regulate property and civil rights.

(v) Immunity Provisions Serve an Important Purpose

68. The Courts below held that statutory immunity provisions are one of the many valid limits on the right to obtain personal damages under the *Charter*. Indeed, there are significant policy considerations underlying statutory immunity provisions that should not be negated by recourse to s. 24(1).[122] This Court has consistently recognized the validity and purpose of immunizing various government actors and actions from liability in damages. As Justice Cory observed in *Just v British Columbia*, in the context of the immunity afforded to policy decisions:

> The functions of government and government agencies have multiplied enormously in this century. **Often government agencies were and continue to be the best suited entities and indeed the only organizations which could protect the public in the diverse and difficult situations arising in so many fields.** They may encompass such matters as the manufacture and distribution of food and drug products, energy production, environmental protection, transportation and tourism, fire prevention and building developments. **The increasing complexities of life involve agencies of government in almost every aspect of daily living.** Over the passage of time the increased government activities gave rise to incidents that would have led to tortious liability if they had occurred between private citizens. The early governmental immunity from tortious liability became intolerable. This led to the enactment of legislation which in general imposed liability on the Crown for its acts as though it were a person. However, **the Crown is not a person and must be free to govern and make true policy decisions without becoming subject to tort liability as a result of those decisions**...[123] [emphasis added]

69. The purpose of immunity provisions is to prevent private actions from:

> ... becoming a vehicle for judicial interference with decisionmaking [*sic*] that is properly exercised by other branches of the government and [to protect] **"the Government from liability that would seriously handicap efficient government operations"**...[124] [emphasis added]

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[122] *Ward, supra,* at para. 43 [BOA, Tab 41], cited in ABQB Reasons at para. 86 [AR, Tab 2 at 31].
[123] 64 DLR (4th) 689, [1989] 2 SCR 1228 ("*Just*") at 1239 [BOA, Tab 16].
[124] *Just, supra,* at 1240, citing Becker J of the United States District Court, in *Blessing v United States*, 447 F Supp 1160 (1978) [BOA, Tab 16].

70. In *Welbridge Holdings Ltd v Greater Winnipeg*, this Court discussed these concepts in relation to a municipality's immunity from civil suit in the context of an invalid by-law. Laskin J (as he was then) noted that statutory bodies act in ways which no private person could:

> Such [statutory] activities do and are designed to affect, often deleteriously, the affairs of individuals, but **courts have long recognized the public policy that such [statutory bodies] shall be controlled solely by the statutory or administrative mandate and not by the added threat of private damage suits.**[125] [emphasis added]

Laskin J (as he was then) emphasized that defects in a decision may render the decision itself vulnerable to review, but a right to damages does not necessarily flow to any adversely affected person.[126]

71. Drawing the boundaries of government immunity is a question of legislative prerogative. As this Court stated in *Swinamer v Nova Scotia (Attorney General)*, the Crown is entitled to exempt itself from private liability by legislating to that effect, and the "propriety of that legislative action" should be left for "the voters' consideration".[127]

72. Assessing the interplay between section 43 of the *ERCA* and section 24(1) of the *Charter* is about balancing public and private interests within the context of our constitutional democracy. Considerations of good governance mandate that tribunals which owe public duties must not be inhibited in the efficient execution of their duties by the fear of being held to account through private law remedies that are inconsistent with the public nature of those duties.

73. The AER is tasked with regulating oil and gas development in Alberta, and a myriad of other duties.[128] It must balance all of the duties imposed on it by its governing statutes. Regulation of the industry would be impossible if it was subject to the whimsical override of every single citizen's different policy goals. This is a delicate balance, which the Courts below held precludes finding a private duty of care owed to a specific individual, a principle equally applicable to a personal claim for damages under the *Charter*. The AER is a single regulatory

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[125] 22 DLR (3d) 470, [1971] SCR 957 ("*Welbridge*") at 967-968 [BOA, Tab 42], citing *Dalehite v United States* (1953), 346 US 15.
[126] *Welbridge, supra,* at 969-970 [BOA, Tab 42].
[127] 112 DLR (4th) 18, [1994] 1 SCR 445 at 461 [BOA, Tab 37].
[128] *OGCA* at s. 4 [BOA, Tab 67]; *ERCA* at s. 2; *REDA* at s. 2 [BOA, Tab 73].

body that exercises only public duties, including important quasi-judicial functions which are central to its operation.

74. The Appellant correctly notes that immunity provisions are common in Canada.[129] Each is intended to serve an important public policy purpose, which should not be negated by recourse to s. 24(1). As noted above, provincial court judges, justices of the peace, and masters are immune from civil action by virtue of statutory immunity provisions.[130]

75. Statutory immunity provisions, including s. 43 of the *ERCA*, are valid limits on a claim for personal damages under the *Charter*. The purpose of such provisions is not to immunize the government from scrutiny for unconstitutional laws or acts. Rather, the purpose is to promote good governance by shielding a statutory tribunal or decision-maker with purely public duties from being called to account to any particular individual through a claim for private remedies.

76. This important purpose would be undermined if immunity did not extend to personal *Charter* claims, because the mere assertion of a personal damages claim under the *Charter* would render impotent any statutory immunity clause, including section 43 of the *ERCA*.[131] A finding that a statutory immunity clause cannot bar a personal *Charter* claim would thwart the well-established legislative prerogative to limit liability in respect of government actors.

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[129] Appellant's Factum at para. 67. See, for example *Alberta Human Rights Act,* RSA 2000, c A-25.5, s. 41 (no action lies against, *inter alia*, a member of the Commission while purporting to act under the legislation) [BOA, Tab 52]; *Administrative Tribunals Act*, SBC 2004, c-45, s. 56 (immunity for, *inter alia,* tribunal members and adjudicators) [BOA, Tab 51]; *Human Rights Code*, SS 1979, c S-24.1, s. 34 (immunity for, *inter alia*, the commission and its members) [BOA, Tab 59]; *The Human Rights Code*, CCSM c H175, s. 62 (immunity for, *inter alia*, the commission and its members or adjudicators) [BOA, Tab 76]; *Corrections and Conditional Release Act*, S. 1992, c 20 at s. 154 (no proceedings lie against a member of the Parole Board of Canada for anything done in the exercise of his or her duties) [BOA, Tab 54]; *Legal Professions Act*, RSA 2000, c L-8, s. 115 (no action lies against, *inter alia*, the Law Society of Alberta for anything done in good faith pursuant to the Act) [BOA, Tab 66]; *Law Society Act*, RSO 1990, c L.8 ss. 9 & 57.2 (immunity for, *inter alia*, benchers or officials) [BOA, Tab 61]; *Legal Profession Act*, SBC 1998, c 9 s. 86 (immunity for persons acting on behalf of the Law Society) [BOA, Tab 64]; *The Legal Profession Act, 1990*, SS 1990-91, c L-10.1 at s. 86 (no action lies against, *inter alia*, the Law Society for anything done in good faith under the Act) [BOA, Tab 77]; *Legal Profession Act*, CCSM c L107 at ss. 60, 86, 102 (no action lies against persons for anything done in good faith under the Act) [BOA, Tab 63]; *Legal Profession Act*, SNS 2004, c 28 at s. 81 (no action lies against, *inter alia*, the Law Society for anything done in good faith under the Act) [BOA, Tab 65]; *Law Society Act*, SNB 1996, c 89 at s. 110 (no action lies against, *inter alia*, the Law Society for anything done in good faith under the Act) [BOA, Tab 62].

[130] See footnote 96, *supra.*

[131] ABQB Reasons at para. 81 [AR, Tab 2 at 30].

77. A public decision-maker should be free to make the decisions it deems appropriate, having regard to all the various interests involved. It must be able to remain impartial in this important sense. It should not make decisions based on which result is least likely to lead to a civil action. If a public decision-maker, balancing a myriad of different interests, could be liable in damages for its decisions, irrelevant incentives would be created. Immunity from suit is a crucial element of maintaining the integrity and impartiality of public decision-makers at all levels. A party unhappy with a decision of a regulatory body has a remedy: judicial review. Section 43 of the *ERCA* validly limits Ms. Ernst's claim for damages.

78. Ms. Ernst argues that immunity provisions are distinguishable from limitations provisions because immunity provisions constitute a complete bar to a claim, whereas a limitation provision is a procedural bar which determines how a claim may be brought.[132] Limitations are, in fact, substantive law, not procedural.[133]

79. The governing distinction is not whether a statutory bar is procedural or not, but is between general, public law constitutional remedies and individual, private law remedies. This was the distinction drawn by this Court in *Ravndahl*: the distinction between the ability to challenge the constitutionality of legislation (which is inalienable) and the ability to seek a personal remedy as part of challenging the constitutionality of legislation or government action. The former cannot be impinged by statute; the latter can. That is, while Ms. Ernst could not be prevented from challenging the constitutionality of the AER's actions, her avenue for such a constitutional challenge was through judicial review or by seeking declaratory relief. Her ability to seek a personal remedy flowing from that constitutional challenge can be limited by statute.

80. *In personam Charter* relief is subject to, and must be brought within, the governing legal framework. To suggest that limitation periods are a valid limitation on personal constitutional remedies, but immunity provisions are not, would require this Court to draw an arbitrary distinction between the two types of restrictions. Both limitation and immunity provisions concern valid policy decisions to legislate limits on a litigant's access to personal remedies. As the courts below recognized, whatever their underlying differences, both are valid restrictions on

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[132] Appellant's Factum at para. 71.
[133] *Tolofson v Jensen*, 120 DLR (4th) 289, [1994] 3 SCR 1022 at 1071-1073 [BOA, Tab 39].

what might otherwise be well-founded claims. The policy considerations underlying limitation and immunity provisions should not be negated by recourse to s. 24(1) of the *Charter*.[134]

(vi) The Appellant is not deprived of a remedy

81. Ms. Ernst argues that by barring her claim for personal damages, s. 43 deprived her of a remedy, and immunized the AER from constitutional challenges, leaving the AER "free to infringe the fundamental rights and freedoms of Albertans without any risk of sanction, or even the possibility of judicial oversight."[135]

82. Ms. Ernst had access to a responsive and effective remedy. She could have availed herself of the "time tested and conventional challenge to an administrative tribunal's decision", namely, judicial review.[136] Nothing in s. 43 prevented her from seeking to compel the AER to receive, and respond to, communications from her. There was a meaningful way to test the constitutional validity of the AER's impugned conduct. That she chose not to pursue that avenue does not entitle the Appellant to relief that is not available to her.

83. Ms. Ernst argues in her Factum, without an evidentiary foundation, that her purpose in bringing this Action is "to defend water, and to protect the free speech of all Canadians."[137] It is unclear how awarding her personal damages achieves these goals.

(vii) Summary - s. 43 of the ERCA

84. Section 43 of the *ERCA* is a constitutionally valid limit on personal claims for damages under the *Charter*. There is a distinction between general claims for constitutional relief and personal claims for constitutional relief. The first is inalienable, while the latter may be limited by statute.[138] The Appellant's *Charter* claim seeks only damages - a personal remedy.

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[134] *Ward, supra,* at para. 43 [BOA, Tab 41], cited in ABQB Reasons at para. 86 [AR, Tab 2 at 31].
[135] Appellant's Factum at para. 64.
[136] ABQB Reasons at para. 73 [AR, Tab 2 at 28].
[137] Appellant's Factum at para. 8.
[138] *Ravndahl, supra,* at paras. 16-17 [BOA, Tab 35]; *Manitoba Métis, supra,* at paras. 134-135 and 143 [BOA, Tab 21].

85. Section 24(1) operates concurrent with, and does not replace, the general law.[139] An award of damages under s. 24(1) must be considered in the context of the traditional limits and liability principles associated with personal remedies generally. Section 43 of the *ERCA* is one of many constitutionally valid limits on access to personal remedies under s. 24(1).

86. The significant policy considerations underlying statutory immunity provisions should not be undermined by recourse to s. 24(1). Tribunals such as the AER, which owe only public duties, must not be inhibited by the fear of being held to account through private law remedies.

87. Section 43 does not operate to deprive Ms. Ernst of a remedy. Ms. Ernst had access to a meaningful method to challenge the AER's impugned conduct: judicial review.

B. The Appellant's Claim does not engage s. 2(b) of the *Charter*

88. The Order of the Court below should be upheld on the basis that Ms. Ernst's claim does not engage s. 2(b) of the *Charter*. Section 2(b) does not guarantee an audience, nor does it guarantee a response from an audience. Ms. Ernst claims a positive right but cannot satisfy the criteria for its protection.

89. Ms. Ernst argues that the validity of her *Charter* claim was not appealed by the Respondent, and thus has no relevance to the case at bar.[140] The AER sought to strike or summarily dismiss the *Charter* claim based on the facts as Ms. Ernst has pleaded them. The s. 2(b) issues raised by the AER have been argued at every level of Court. Wittmann CJ struck and dismissed the claims for a personal remedy for a *Charter* breach.[141] The Court of Appeal dismissed Ms. Ernst's appeal.[142] The AER is entitled to defend the Orders of the Courts below on any basis.[143]

90. Her *Charter* claim can be summarized as follows:

(a) Ms. Ernst wrote to the AER and her letters were returned to her, not responded to at all, or as desired, and the AER "continued to ignore, deflect and dismiss" her

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[139] *Ward, supra,* at para. 43 [BOA, Tab 41].
[140] Appellant's Factum at para. 62.
[141] Order of Wittmann CJ, November 13, 2013, filed December 2, 2013, para. 2 [AR, Tab 1 at 2].
[142] ABCA Reasons at paras. 30-31 [AR, Tab 4 at 55-56].
[143] *Rules of the Supreme Court of Canada*, SOR/2002-156, r. 29(3) [BOA, Tab 74].

communications. That is, the AER either did not listen to her ("ignore") or it did not respond to her in a way she found to be satisfactory ("deflect and dismiss").

(b) AER staff were instructed to avoid any further communication with her.

(c) Ms. Ernst does not plead any facts to suggest that the AER prevented her from expressing herself publicly or through other channels, nor does she plead any facts to suggest she did not continue to express herself in this way. Rather, she only alleges that the AER would not communicate with her.[144]

91. On her own facts, Ms. Ernst was free to, and did, continue to contact the AER after the purported decision to exclude her from the AER complaint process. She was free to, and did, continue to publicly express her views relating to the AER and oil and gas development. Her own facts make it clear that she was never restricted from expressing herself. Rather, her claim is that the AER violated her freedom of expression because it would not listen to her, or would not respond to her in a way that she found satisfactory.

(i) The Appellant does not have a right to be listened to or a right to a response

92. The freedom of expression contained in s. 2(b) of the *Charter* ensures that "everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream."[145] The first step in assessing whether a violation of s. 2(b) has occurred is to determine whether the activity in question is a protected form or method of expression. If so, it must be determined whether the purpose or effect of the government activity infringes on the claimant's freedom of expression.[146]

93. The freedom of expression contained in s. 2(b) of the *Charter* has never been held to include a corresponding right to be listened to, or to a response. As McLachlin J (as she then was) held, dissenting, in *R v Keegstra*, "[f]reedom of expression guarantees the right to loose one's ideas on the world; it does not guarantee the right to be listened to or to be believed."[147]

94. Freedom of expression is generally conceptualized in negative, rather than positive, terms. As this Court held in *Haig v Canada*, "the traditional view, in colloquial terms, is that the

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[144] The Appellant's *Charter* claim is at paras. 42-58 of the Fresh Statement of Claim [AR, Tab 5 at 69-72].
[145] *Irwin Toy Ltd v Quebec (Attorney General)*, 58 DLR (4th) 577, [1989] 1 SCR 927 ("*Irwin Toy*") at 968 [BOA, Tab 15].
[146] *Irwin Toy Ltd, supra,* at 968, 971-972 [BOA, Tab 15].
[147] *R v Keegstra*, 114 AR 81, [1990] 3 SCR 697 at 831-832 (McLachlin J (as she then was), dissenting) [BOA, Tab 33].

freedom of expression contained in s. 2(b) prohibits gags, but does not compel the distribution of megaphones." Freedom of expression is a right to be free from state interference, and not a right to state intervention to facilitate a particular means of expression.[148]

95. It follows that not every form of expression is captured within the sphere of s. 2(b). For instance, expression on government owned property only falls within the sphere of s. 2(b) if expression in that location does not conflict with the purposes underlying the protection of freedom of expression (democratic discourse, truth seeking, and self-fulfilment).[149] This determination requires a consideration of the "historical or actual function of the place", and "whether other aspects of the place suggest that expression within it would" undermine the purposes underlying s. 2(b).[150]

96. In *Committee for the Commonwealth of Canada v Canada*, Lamer CJC held that the function of a public place was an important element in the s. 2(b) analysis because freedom of expression:

> cannot be interpreted so as to consider only the interests of the person wishing to communicate. As the Attorney General for Ontario properly points out, s. 2(b) of the Charter does not protect "expression" itself, but freedom of expression. In my opinion, the "freedom" which an individual may have to communicate in a place owned by the government must necessarily be circumscribed by the interests of the latter and of the citizens as a whole [...]
>
> The fact that one's freedom of expression is intrinsically limited by the function of a public place is an application of the general rule that one's rights are always circumscribed by the rights of others. In the context of expressing oneself in places owned by the state, it can be said that, under s. 2(b), the freedom of expression is circumscribed at least by the very function of the place.[151]

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[148] *Haig v R*, 156 NR 81, [1993] 2 SCR 995 ("*Haig*") at 1034-1036 [BOA, Tab 11].
[149] *Montréal (Ville) v 2952-1366 Québec inc*, [2005] 3 SCR 141, 2005 SCC 62 ("*Montréal (Ville)*") at para. 74 [BOA, Tab 24].
[150] *Montréal (Ville), supra,* at para. 74 [BOA, Tab 24].
[151] *Committee for the Commonwealth of Canada v Canada*, 120 NR 241, [1991] 1 SCR 139 ("*Committee for the Commonwealth*") at 156-157 [BOA, Tab 4] (Lamer CJC). In *Committee for the Commonwealth*, 6 of the 7 Justices on the panel agreed with the general outcome of the case, being that expression on government owned property did not automatically fall within the sphere of s. 2(b). Lamer CJC (writing for two others on this point) proposed an approach which considered the interests of the individual and the interests of government in operating the place in question. The approach of Lamer CJC required a claimant to demonstrate that the expression in question was compatible with the intended function of the place in question. McLachlin J (as she then was, and also writing for two others on this point) proposed an approach whereby a claimant was required to demonstrate that the expression in question promotes one of the purposes underlying the protection in s. 2(b). This Court clarified the relevant test in *Montréal (Ville)*. In setting out the test, as described in para. 95 above, the majority combined elements from the

97. The scope of free expression is not unlimited. It necessarily includes "a preliminary screening process" in an effort to avoid uncertainty and to avoid forcing governments to continually justify "restrictions which, viewed from the perspective of history and common sense, are entirely appropriate."[152] One such restriction is expression in a government-owned place that does not meet the test set out by this Court in *Montréal (Ville)*. Another is that freedom of expression is circumscribed by the corresponding interests of the listener.[153] That is, one's freedom of expression is limited by the rights of others to not listen.

98. This principle is explored directly in the captive audience cases, which consider freedom of expression in the context of compelled listening.[154] In *Committee for the Commonwealth of Canada v. Canada,* L'Heureux-Dubé J addressed the potential of a captive audience issue in the balancing of the interests at stake in a free expression claim:

> *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) involved a challenge by a candidate for political office against an ordinance prohibiting political placards on all buses and streetcars. The Court upheld the regulation. As Douglas J., concurring, expressed at pp. 306-7:
>
> > ... if we are to turn a bus or streetcar into either a newspaper or a park, we take great liberties with people who because of necessity become commuters and at the same time captive viewers or listeners.
> >
> > In asking us to force the system to accept his message as a vindication of his constitutional rights, the petitioner overlooks the constitutional rights of the commuters. While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it. In my view the right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience.[155]

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approaches set out by both Lamer CJC and McLachlin J (as she then was) in *Committee for the Commonwealth*. The comments of Lamer CJC set out above continue to be relevant under the test set out in *Montréal (Ville)*.

[152] *Montréal (Ville), supra,* at para. 79 [BOA, Tab 24].

[153] *Committee for the Commonwealth, supra,* at 156-157 [BOA, Tab 4].

[154] See: *Ontario (Attorney General) v Dieleman* (1994), 117 DLR (4th) 449, 20 OR (3d) 229 (Gen Div) ("*Dieleman*") [BOA, Tab 27]; *R v Breeden*, 198 CRR (2d) 258, 2009 BCCA 463 ("*Breeden*") [BOA, Tab 31]; *R v Spratt*, 298 DLR (4th) 317, 2008 BCCA 340 [BOA, Tab 34].

[155] *Committee for the Commonwealth, supra*, at 204-205 (per L'Heureux-Dubé J, concurring) [BOA, Tab 4].

99. Freedom of expression "assumes an ability in the listener not to listen but to turn away if that is her wish."[156] To force an audience to listen to a particular message or form of expression undermines one of the very purposes underlying the protection of freedom of expression, the "unfettered interplay and competition among ideas which is the assumed ambient of the communication freedoms."[157] There is no right "to have one's message listened to."[158] Freedom of expression necessarily includes a "correlative right *not* to listen."[159] Simply put, the *Charter* does not guarantee an audience.

100. The captive audience cases articulate the notion that freedom of expression does not guarantee an audience. However, the captive audience cases do not involve, as here, an individual claiming a **constitutional** entitlement to an audience with, and satisfactory response from, a public body. There appears to be no Canadian authority on point. No such constitutional entitlement can, or does, exist.

101. The United States Bill of Rights includes a constitutional right to petition the government. The First Amendment to the Bill of Rights provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, **and to petition the Government for a redress of grievances.**[160] [emphasis added]

102. In colonial America, the right to petition the government was "an affirmative, remedial right which required governmental hearing and response."[161] At the time the First Amendment was ratified, the right to petition obliged Congress to "receive and consider, although not to be bound, by citizens' communications."[162]

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[156] *Dieleman, supra,* at 307 [BOA, Tab 27].
[157] Charles L. Black Jr., "He Cannot Choose but Hear: The Plight of the Captive Auditor" (1953) 53 Columbia L. Rev. 960 at 967 [BOA, Tab 44]. See also: *Breeden*, at paras. 33-34 [BOA, Tab 31].
[158] *Dieleman, supra,* at 308 [BOA, Tab 27].
[159] *Dieleman, supra,* at 307 [BOA, Tab 27].
[160] US Const amend I [BOA, Tab 79].
[161] Marie McTeague, "Neither Rain, nor Sleet...nor the United States Congress...Will Prevent the U.S. Postal Service from Delivering Hustler Magazine" (1988) 8 Loy LA Ent L Rev. 159 ("Neither Rain, nor Sleet") at 163 [BOA, Tab 48].
[162] Stephen A. Higginson, "A Short History of the Right To Petition Government for the Redress of Grievances" (1986) 96 Yale LJ 142 at 156. [BOA, Tab 47].

103. Over time, the right to petition the government became an exclusively presentative right: "a right of access to government in order to voice grievances and express opinions." That is, the right to petition no longer includes "a corresponding duty to listen to or respond to petitioners' grievances."[163] As the United States Supreme Court held in *Minnesota State Bd v Knight*:

> Appellees thus have no constitutional right as members of the public to a government audience for their policy views. As public employees, of course, they have a special interest in public policies relating to their employment. Minnesota's statutory scheme for public employment labor relations recognizes as much. Appellees' status as public employees, however, gives them no special constitutional right to a voice in the making of policy by their government employer.
>
> In *Smith v. Arkansas State Highway Employees, supra*, a public employees' union argued that its First Amendment rights were abridged because the public employer required employees' grievances to be filed directly with the employer and refused to recognize the union's communications concerning its members' grievances. The Court rejected the argument.
>
> "The public employee surely can associate, and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so. ... But the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it." ....
>
> The Court acknowledged that "[t]he First Amendment protects the right of an individual to speak freely, to advocate ideas, to associate with others, and to petition his government for redress of grievances." Id., at 464. The government had not infringed any of those rights, the Court concluded. "[A]ll that the [government] has done in its challenged conduct is simply to ignore the union. That it is free to do." Id., at 466.[164]

104. In *Apple v Glenn,* the plaintiff brought a claim against Senator John Glenn, United States Chief Justice William Rehnquist, and other senior government officials on the basis that the defendants violated his right to petition the government because they did not respond to his letters or take the action requested in his letters.[165] The plaintiff's claim was dismissed on the basis that it was not arguably plausible. The United States Court of Appeals, Sixth Circuit, held that while the First Amendment guaranteed the plaintiff's right to petition the government:

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[163] Neither Rain, nor Sleet, *supra*, at 163 [BOA, Tab 48].
[164] *Minnesota State Bd v Knight*, 465 US 271 (1984) at 286 [BOA, Tab 23]. See also: *Smith v Arkansas State Hwy Employees Local*, 441 US 463 (1979) [BOA, Tab 36]; *Lance v Davidson*, 379 F Supp 2d 1117 ("*Lance*") (Dist. Court, D. Colorado 2005) [BOA, Tab 18]; *United States Postal Service v Hustler Magazine*, 630 F Supp 867 (DDC 1986) [BOA, Tab 40].
[165] *Apple v Glenn*, 183 F 3d 477, 479 (6th Cir. 1999) ("*Apple*") [BOA, Tab 1].

> his suit is founded completely on a mistaken reading of that Amendment. A citizen's right to petition the government does not guarantee a response to the petition or the right to compel government officials to act on or adopt a citizen's views.[166]

105. In *Mullen v Thompson*, the plaintiffs claimed against various representatives of the Pittsburgh Board of Education, on the basis that the Board's decision to close a number of schools violated, *inter alia*, their First Amendment right to petition the government. The U.S. District Court for the Western District of Pennsylvania dismissed the claim, and held:

> Plaintiffs' theory appears to be that because the procedure Pennsylvania adopted to govern local school districts in closing schools (section 7-780) allowed for public participation in the decision-making process, when the Board failed to fully comply with that procedure, it effectively denied them their First Amendment right to petition the government for grievances. This claim is without merit.
>
> The First Amendment protects the right of an individual to speak freely, to advocate ideas, to associate with others, and to petition the government for redress of grievances. The government is prohibited from infringing upon these guarantees either by a general prohibition against certain forms of advocacy or by imposing sanctions for the expression of particular views it opposes. ... Restated, under First Amendment jurisprudence, a citizen can speak freely and petition the government openly while being protected by the First Amendment in doing so. The right to petition the government for redress of grievances, however, does not impose a correlative obligation on government officials to listen to those grievances. ... Indeed, the First Amendment does not require a school board to hold public meetings for the purpose of gaining input from the public. *Minnesota State Board For Community Colleges v. Knight*, 465 U.S. 271, 283, 104 S. Ct. 1058, 79 L. Ed. 2d 299 ("[T]he Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy."). Nor does the First Amendment right to petition the government require state officials to adopt or follow any specific procedure to allow or weigh public opinion in forming policy. *Knight*, 465 U.S. at 285, 104 S. Ct. 1058 ("However wise or practicable various levels of public participation in various kinds of policy decisions may be, [the Supreme Court] has never held, and nothing in the Constitution suggests it should hold, that government must provide for such participation.").[167]

106. In the United States, even with its constitutionally guaranteed right to petition the government, there is no obligation on a government actor to listen or to respond. It is unclear how such an obligation could arise out of the *Charter*, which contains no right to petition the government.

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[166] *Apple, supra,* at 479 [BOA, Tab 1].
[167] *Mullen v Thompson,* 155 F Supp 2d 448 (Dist Court, WD Pennsylvania 2001) at 453 [BOA, Tab 25].

107. The Quebec *Charter of Human Rights and Freedoms* includes a "right of petition to the National Assembly for the redress of grievances."[168] No authority suggests that the right guarantees a petitioner the right to be listened to or the right to a response. Further, the right only applies to petitions in respect of the National Assembly, and the exercise of the right is subject to the privileges of the National Assembly.[169]

108. The Courts below, in finding that Ms. Ernst's *Charter* claim is not "doomed to fail," applied only the test for striking a claim.[170] The test for summary judgment, relief also sought by the AER, was never applied. The test for summary judgment is less stringent, and only requires a determination of whether a fair and just determination on the existing record, considered in the context of the timely, just and affordable adjudication of claims, can be achieved.[171]

109. On Ms. Ernst's own facts, she was free to, and did, continue to contact the AER after the purported decision to exclude her from the AER complaint process, and to publicly express her views relating to the AER and oil and gas development generally. The AER's purported decision to cease communication with her had no effect on her ability to express herself, either publically or to the AER.

110. Ms. Ernst's claim, properly understood, is that the AER violated her freedom of expression because it would not listen to her, or respond to her communications in a way that she found satisfactory. Section 2(b) does not guarantee an audience, and it certainly does not require a statutory regulator such as the AER to be that audience. Section 2(b) does not grant a constitutional entitlement to effective, two-way communication with, or specific and satisfactory responses from, an audience. Section 2(b) is simply not engaged by the refusal of a statutory regulator to listen or respond.

111. If the AER had any duty to respond to Ms. Ernst's communications, it was administrative in nature, not constitutional. That duty may be enforced by judicial review, which allows the Court to determine the lawfulness of the AER's actions, and to grant the remedy due. Relief in

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[168] *Charter of Human Rights and Freedoms*, CQLR, c C-12, s 21 [BOA, Tab 53].
[169] *Michaud c Bissonnette*, [2006] RJQ 1552, 2006 QCCA 775 at paras. 57-62 [BOA, Tab 22].
[170] ABQB Reasons at paras. 42 [AR, Tab 2 at 21]; ABCA Reasons at para. 6 [AR, Tab 4 at 48]; *ARC* at r. 3.68.
[171] *Hryniak, supra,* at paras. 2, 5 and 49 [BOA, Tab 14]; *Windsor, supra,* at para. 13 [BOA, Tab 43].

the nature of *mandamus* to compel a response, prohibition to stop a course of conduct, or *certiorari* to quash a decision, would have been the available and appropriate course to pursue.

112. Ms. Ernst is asserting that everyone has an unlimited constitutional right to be listened to by, and to have a response from, all statutory bodies - without regard to content or processes - failing which they may sue for damages. They may abuse or threaten, they are not bound by limitations, prescribed forms, or procedures, they may not be cut short, and they are constitutionally entitled to a response - in fact, each individual may be entitled to only her preferred response. Such a conception of freedom of expression would inevitably create "liability in an indeterminate amount for an indeterminate time to an indeterminate class."[172]

113. Ms. Ernst's conception of free expression would render the operation of government institutions unworkable. A statutory body that received any manner of communication from an individual would be constitutionally obligated to respond in a manner that the individual considered satisfactory. The practical and logical hurdles to this approach are infinite. An example noted by Circuit Judge Ebel in the 2005 Colorado case of *Lance v Davidson* in the context of the right to petition elucidates this point:

> For instance, imagine a hypothetical citizen writing to his state senator, lobbying for the passage of a law which would deny state employment to persons of color. The state senator responds by including a copy of the Fourteenth Amendment. The state, he says, is simply powerless to discriminate against minorities in its hiring practices. According to Plaintiffs, the inability of the state to grant relief would make the citizen's initial petition moot and therefore violate the Petition Clause. We simply cannot agree with Plaintiffs' contention that there is "no meaningful distinction between prohibiting the object of redress . . . [and] prohibiting the petitioning activity in the first place." Under Plaintiffs' view, the Petition Clause would permit the expanse of governmental authority to be bounded only by desires and wishes of any single member of the citizenry.[173]

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[172] *Design Services Ltd v R*, [2008] 1 SCR 737, 2008 SCC 22 at para. 60 [BOA, Tab 6], citing *Ultramares Corp v Touche*, 174 NE 441 (US NY Ct App 1931) at p. 444.

[173] *Lance, supra,* at 17 [BOA, Tab 18]. The decision of the District Court in *Lance* was vacated by the United States Supreme Court in *Lance v Dennis*, 546 US 459. However, the decision was vacated on the basis of the District Court's finding respecting the "Rooker-Feldman doctrine," which relates to the jurisdiction of the lower federal courts. The United States Supreme Court explicitly did not pass on the District Court's decision in respect of the merits of plaintiffs' Petition Clause claim. The complaint was subsequently dismissed again at *Lance v Dennis*, 444 F Supp 2d 1149, and the District Court held that because it had dismissed the petition claim on grounds other than Rooker-Feldman, its prior decision on that claim had not been overturned. The United States Supreme Court subsequently affirmed the District Court's dismissal of the petition clause claim, in *Lance v Coffman*, 549 US 437.

114. Ms. Ernst's freedom of expression cannot require the AER to communicate with her, or provide her with a specific or prescribed response. Such a requirement would effectively constitutionalize the form and content of AER responses to public complaints or requests. It was open to Ms. Ernst to pursue judicial review in respect of the AER's purported decision to cease communications with her. She chose not to do so. She has no constitutional entitlement to an audience with, or response from, the AER. Her claim does not engage s. 2(b).

(ii) Ms. Ernst claims a positive right but does not satisfy the criteria for its protection

115. Ms. Ernst is claiming a positive right but cannot satisfy the criteria for its protection. Free expression is generally characterized as a negative right to be free from state interference, rather than a positive right to state intervention to facilitate a particular means of expression.[174] As this Court held in *Greater Vancouver Transportation Authority v Canadian Federation of Students*, s. 2(b) protects against "undue government interference with expression" but does not generally "go so far as to place the government under an obligation to facilitate expression by providing individuals with a particular *means* of expression."[175] That is, s. 2(b) does not guarantee any particular means or platform of expression, including statutory platforms. Restricting access to such a platform, absent exceptional circumstances, does not engage s. 2(b).[176]

116. Where a positive right is claimed, the court must first:

> consider whether the activity for which the claimant seeks s. 2(b) protection is a form of expression. If so, then second, the court must determine if the claimant claims a positive entitlement to government action, or simply the right to be free from government interference. If it is a positive rights claim, then third, the three *Dunmore* factors must be considered. As indicated above, these three factors are (1) that the claim is grounded in a fundamental freedom of expression rather than in access to a particular statutory regime; (2) that the claimant has demonstrated that exclusion from a statutory regime has the effect of a substantial interference with s. 2(b) freedom of expression, or has the purpose of infringing freedom of expression under s. 2(b); and (3) that the government is responsible for the inability to exercise the fundamental freedom. If the claimant cannot satisfy these criteria then the s. 2(b) claim will fail. If the three factors are satisfied then s. 2(b) has been infringed and the analysis will shift to s. 1.[177]

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[174] *Haig, supra,* at 1034-1036 [BOA, Tab 11].
[175] *Greater Vancouver Transportation Authority v Canadian Federation of Students*, [2009] 2 SCR 295, 2009 SCC 31 ("*Greater Vancouver Transportation Authority*") at para 29 (emphasis in original) [BOA, Tab 10].
[176] *Baier v Alberta*, [2007] 2 SCR 673, 2007 SCC 31 ("*Baier*") at para. 55 [BOA, Tab 3].
[177] *Baier, supra,* at para. 30 [BOA, Tab 3].

117. To determine whether a positive right is claimed, "the question is whether the appellants claim the government must legislate or otherwise act to support or enable an expressive activity."[178] This is distinct from a negative rights claim, in which a party would seek "freedom from government legislation or action suppressing an expressive activity in which people would otherwise be free to engage, without any need for any government support or enablement."[179] Section 2(b) provides protection from "undue government interference with expression," but does not oblige government to facilitate expression by providing a particular means of expression.[180] Where the government creates a means of expression:

> it is generally entitled to determine which speakers are allowed to participate. A speaker who is excluded from such means does not have a s. 2(b) right to participate unless she or he meets the criteria set out in *Baier*.[181]

118. Where a claimant is excluded from a statutory platform of expression that he or she previously had access to, the right claimed is still a positive one. As this Court held in *Baier*, to find otherwise "would mean that once a government had created a statutory platform, it could never change or repeal it without infringing s. 2(b) and justifying such changes under s. 1," effectively constitutionalizing any prior regime.[182] Such a result could not accord in circumstances where (as here) the statutory platform and regulatory body at issue are creatures of a provincial government, whose existence is not constitutionally protected. A regime cannot be constitutionalized in the context of an institution which has no "constitutional status or independent autonomy" and over which "the province has absolute and unfettered legal power to do with [it] as it wills."[183]

119. Moreover, as this Court held in *Baier,* "just as there is no s. 2(b) right of access to statutory platforms, there is no s. 2(b) right to receive expression through a particular statutory platform."[184]

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[178] *Baier, supra,* at para. 35 [BOA, Tab 3].
[179] *Baier, supra,* at para. 35 [BOA, Tab 3].
[180] *Greater Vancouver Transportation Authority, supra,* at para. 29 [BOA, Tab 10].
[181] *Greater Vancouver Transportation Authority, supra,* at para. 29 [BOA, Tab 10].
[182] *Baier, supra,* at paras. 36-38 [BOA, Tab 3].
[183] *Baier, supra,* at para. 38 [BOA, Tab 3], citing *Ontario English Catholic Teachers' Assn v Ontario (Attorney General)*, [2001] 1 SCR 470, 2001 SCC 15, at paras. 57-58.
[184] *Baier, supra,* at para. 40 [BOA, Tab 3].

120. Ms. Ernst's claim relates exclusively to a statutory platform for expression, or, as she describes it, "the [AER] has established a specific forum and process for communicating with the public and hearing public complaints and concerns regarding the oil and gas industry."[185] The AER is a creature of statute, with no constitutional status, and over which the province of Alberta has unfettered legal power. It follows that any expressive platform the AER may provide is necessarily a statutory platform for expression, and any expressive activity therein must be supported or enabled by the AER. Ms. Ernst's claim does not relate to expressive activity in which she would otherwise be free to engage, without any need for any government support or enablement.

121. Ms. Ernst does not plead, and cannot satisfy, the three *Dunmore* criteria set out in *Baier*. First, her claim is grounded in access to a particular statutory regime – the "specific forum" for expression she alleges was created by the AER - and not in the fundamental freedom of expression itself. Second, she has pleaded no facts capable of supporting the assertion that the purported exclusion from the AER's complaints process interfered with her freedom of expression substantially, or at all. The relevant question on this point is not whether the purported exclusion interfered with her lodging complaints with the AER, but rather whether the exclusion interfered with her ability to express herself in respect of the subject matter of those complaints.[186] Ms. Ernst continued to express herself both publicly and, in fact, to the AER. Third, Ms. Ernst cannot demonstrate that the AER is responsible for her inability to exercise her freedom to express herself, because she never lost the ability to exercise this freedom. On her own facts, she continued to express herself after the purported exclusion by the AER.[187]

122. Finally, Ms. Ernst is claiming a right to be listened to by, and to have a response from, the AER. Pursuant to this Court's finding in *Baier*, the Appellant does not have a s. 2(b) right to receive expression through any particular statutory platform, including any expressive forum established by the AER.[188] There is no genuine issue for trial in respect of Ms. Ernst's *Charter* claim, and her claim should be dismissed.

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[185] Fresh Statement of Claim at para. 42 [AR, Tab 5 at 69].
[186] *Baier, supra,* at paras. 44-45 [BOA, Tab 3].
[187] See: *Baier, supra,* at paras. 30, 44-55 [BOA, Tab 3].
[188] *Baier, supra,* at para. 40 [BOA, Tab 3].

C. Conclusion

123. Ms. Ernst's argument hinges on the misguided notion that she has a constitutionally guaranteed right to the *Charter* remedy of her choice. However, her claim ignores the distinction this Court has repeatedly drawn between general remedies which restore the constitutional order and personal remedies brought by an individual *qua* individual. Nothing limited her from seeking an order to compel the AER to receive communications from, or respond to, her through judicial review. Instead, she pursued a personal monetary remedy against the AER.

124. Section 43 of the *ERCA* is one of many constitutionally valid limits on access to personal remedies under s. 24(1). Such remedies are also limited by, *inter alia*, limitation clauses of general application, judicial and quasi-judicial immunity, the Crown's right to immunize itself against execution, and the determination of what constitutes a court of competent jurisdiction.

125. The purpose of the statutory immunity in s. 43 of the *ERCA* is not to immunize the government from scrutiny for unconstitutional laws or acts, but to promote good governance by shielding the AER, a statutory tribunal with purely public duties, from being called to account to any particular individual through a claim for private remedies.

126. Ms. Ernst's claim does not engage s. 2(b). She was free to, and did, continue to contact the AER, and publicly express her views, after the purported decision to exclude her from the AER complaint process. She was never restricted from expressing herself. Her claim is that the AER violated her freedom of expression because it would not listen to her, or would not provide her with a response that she found to be satisfactory.

127. Section 2(b) does not guarantee an audience, or guarantee a particular or satisfactory response from an audience. Even if the AER had a duty to listen to the Appellant's communications, or provide her with some manner of response, any such duty is administrative in nature. It is not a constitutional entitlement. To find otherwise would effectively constitutionalize the content of responses by statutory regulators to members of the public.

128. Section 2(b) is not engaged because Ms. Ernst asserts a positive right, but does not (and cannot) satisfy the criteria for its protection. Her claim relates exclusively to access to a particular statutory platform for expression.

129. Ms. Ernst could, and should, have sought judicial review in respect of the AER's purported decision to cease communication with her. She did not do so. That does not change the fact that judicial review is the only remedy available to her.

PART IV – SUBMISSIONS ON COSTS

130. The AER requests its costs should the appeal be dismissed, and in any event no variation to the costs below given that substantial success to the AER was and remains achieved.

PART V – ORDER REQUESTED

131. The AER requests an order dismissing the appeal, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of November, 2015.

Jensen Shawa Solomon Duguid Hawkes LLP

Glenn Solomon, QC / Christy Elliott
Counsel for the Respondent, Alberta Energy Regulator

PART VI – TABLE OF AUTHORITIES

Cases

Tab **At para(s).**

Tab **At para(s).**

Tab **At para(s).**

Books, Other

Tab **At para(s).**

Other Statutes

Tab **At para(s).**

Tab **At para(s).**

Tab **At para(s).**

PART VII – STATUTORY PROVISIONS

At para(s).

ALBERTA
RULES OF COURT

Effective November 1, 2010

AR 124/2010
Includes changes from AR 128/2015

VOLUME ONE

Published August, 2015

(a) a reply is filed and served by a plaintiff, plaintiff-by-counterclaim or third party plaintiff, as the case may be, or

(b) the time for filing and serving a reply expires,

whichever is earlier.

(3) The close of pleadings against one party represents the close of pleadings against all parties to that pleading.

Information note

The time for filing and service of a reply is covered in earlier rules in this Part. For example, rule 3.33 *[Reply to a defence]* requires the plaintiff's reply to be filed and served on the defendant within 10 days after service of the statement of defence on the plaintiff. See also rule 3.54(2) *[Plaintiff's reply to third party defence]*.

Division 5
Significant Deficiencies in Claims

Court options to deal with significant deficiencies

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).

(4) The Court may

(a) strike out all or part of an affidavit that contains frivolous, irrelevant or improper information;

(b) strike out all or any pleadings if a party without sufficient cause does not

(i) serve an affidavit of records in accordance with rule 5.5 *[When an affidavit of records must be served]*,

(ii) comply with rule 5.10 *[Subsequent disclosure of records]*, or

(iii) comply with an order under rule 5.11 *[Order for a record to be produced]*.

Division 6
Refining Claims and Changing Parties

Subdivision 1
Joining and Separating Claims and Parties

Joining claims

3.69(1) A party may join 2 or more claims in an action unless the Court otherwise orders.

(2) A party may sue or be sued in different capacities in the same action.

(3) If there is more than one defendant or respondent, it is not necessary for each to have an interest

(a) in all the remedies claimed or sought, or

(b) in each claim included in the action.

Information note

This rule and the following rules of this Division apply to all actions, whether started by statement of claim or by originating application.

Parties joining to bring action

3.70(1) Two or more parties may join to bring an action, and a plaintiff or originating applicant may make a claim against 2 or more persons as defendants or respondents in an action, if

(a) the claim arises out of the same transaction or occurrence or series of transactions or occurrences,

(b) a question of law or fact common to the parties is likely to arise, or

(c) the Court permits.

(2) This rule applies irrespective of the remedy claimed by the plaintiff or originating applicant and whether or not 2 or more plaintiffs or originating applicants seek the same remedy.

Information note

Rule 8.1 *[Trial without a jury]* requires the mode of trial of an action to be by judge alone unless otherwise ordered.

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.

Information note

A respondent to an application under rule 7.3 may file a response to the application under rule 6.6 *[Response and reply to applications]*.

If the amount of an award is referred for determination by a referee, rules 6.44 to 6.46 *[Referees]* apply.

CANADA

A Consolidation of

THE CONSTITUTION ACTS 1867 to 1982

DEPARTMENT OF JUSTICE
CANADA

Consolidated as of January 1, 2013

CONSTITUTION ACT, 1982 [80]

PART I

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

GUARANTEE OF RIGHTS AND FREEDOMS

Rights and freedoms in Canada

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.

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[80] **Enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.), which came into force on April 17, 1982. The *Canada Act 1982*, other than Schedules A and B thereto, reads as follows:**

An Act to give effect to a request by the Senate and House of Commons of Canada

Whereas Canada has requested and consented to the enactment of an Act of the Parliament of the United Kingdom to give effect to the provisions hereinafter set forth and the Senate and the House of Commons of Canada in Parliament assembled have submitted an address to Her Majesty requesting that Her Majesty may graciously be pleased to cause a Bill to be laid before the Parliament of the United Kingdom for that purpose.

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The *Constitution Act, 1982* set out in Schedule B to this Act is hereby enacted for and shall have the force of law in Canada and shall come into force as provided in that Act.

2. No Act of the Parliament of the United Kingdom passed after the *Constitution Act, 1982* comes into force shall extend to Canada as part of its law.

3. So far as it is not contained in Schedule B, the French version of this Act is set out in Schedule A to this Act and has the same authority in Canada as the English version thereof.

4. This Act may be cited as the *Canada Act 1982*.

all their children receive primary and secondary school instruction in the same language.

Application where numbers warrant

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(*a*) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(*b*) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

ENFORCEMENT

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Exclusion of evidence bringing administration of justice into disrepute

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

PART VI

AMENDMENT TO THE CONSTITUTION ACT, 1867

50. [103]

51. [104]

PART VII

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.

Constitution of Canada

(2) The Constitution of Canada includes

(*a*) the *Canada Act 1982*, including this Act;

(*b*) the Acts and orders referred to in the schedule; and

(*c*) any amendment to any Act or order referred to in paragraph (*a*) or (*b*).

Amendments to Constitution of Canada

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

Repeals and new names

53. (1) The enactments referred to in Column I of the schedule are hereby repealed or amended to the extent indicated in Column II thereof and, unless repealed, shall continue as law in Canada under the names set out in Column III thereof.

Consequential amendments

(2) Every enactment, except the *Canada Act 1982*, that refers to an enactment referred to in the schedule by the name in Column I thereof is hereby amended by substituting for that name the corresponding name in Column III thereof, and any British North America Act not referred to in the schedule may be cited as the *Constitution Act* followed by the year and number, if any, of its enactment.

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[103] **The text of this amendment is set out in the *Constitution Act, 1867*, as section 92A.**

[104] **The text of this amendment is set out in the *Constitution Act, 1867*, as the Sixth Schedule.**

CANADA

Codification administrative des

LOIS CONSTITUTIONNELLES DE 1867 à 1982

MINISTÈRE DE LA JUSTICE
CANADA

Lois codifiées au 1er janvier 2013

LOI CONSTITUTIONNELLE DE 1982 [80]

PARTIE I

CHARTE CANADIENNE DES DROITS ET LIBERTÉS

Attendu que le Canada est fondé sur des principes qui reconnaissent la suprématie de Dieu et la primauté du droit :

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;

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[80] **Édictée comme l'annexe B de la *Loi de 1982 sur le Canada*, 1982, ch. 11 (R.-U.), entrée en vigueur le 17 avril 1982. Texte de la *Loi de 1982 sur le Canada*, à l'exception de l'annexe B :**

ANNEXE A — SCHEDULE A

Loi donnant suite à une demande du Sénat et de la Chambre des communes du Canada

Sa Très Excellente Majesté la Reine, considérant :

qu'à la demande et avec le consentement du Canada, le Parlement du Royaume-Uni est invité à adopter une loi visant à donner effet aux dispositions énoncées ci-après et que le Sénat et la Chambre des communes du Canada réunis en Parlement ont présenté une adresse demandant à Sa Très Gracieuse Majesté de bien vouloir faire déposer devant le Parlement du Royaume-Uni un projet de loi à cette fin,

sur l'avis et du consentement des Lords spirituels et temporels et des Communes réunis en Parlement, et par l'autorité de celui-ci, édicte :

1. La *Loi constitutionnelle de 1982*, énoncée à l'annexe B, est édictée pour le Canada et y a force de loi. Elle entre en vigueur conformément à ses dispositions.

2. Les lois adoptées par le Parlement du Royaume-Uni après l'entrée en vigueur de la *Loi constitutionnelle de 1982* ne font pas partie du droit du Canada.

3. La partie de la version française de la présente loi qui figure à l'annexe A a force de loi au Canada au même titre que la version anglaise correspondante.

4. Titre abrégé de la présente loi : *Loi de 1982 sur le Canada.*

c) liberté de réunion pacifique;

d) liberté d'association.

DROITS DÉMOCRATIQUES

Droits démocratiques des citoyens

3. Tout citoyen canadien a le droit de vote et est éligible aux élections législatives fédérales ou provinciales.

Mandat maximal des assemblées

4. (1) Le mandat maximal de la Chambre des communes et des assemblées législatives est de cinq ans à compter de la date fixée pour le retour des brefs relatifs aux élections générales correspondantes. [81]

Prolongations spéciales

(2) Le mandat de la Chambre des communes ou celui d'une assemblée législative peut être prolongé respectivement par le Parlement ou par la législature en question au-delà de cinq ans en cas de guerre, d'invasion ou d'insurrection, réelles ou appréhendées, pourvu que cette prolongation ne fasse pas l'objet d'une opposition exprimée par les voix de plus du tiers des députés de la Chambre des communes ou de l'assemblée législative. [82]

Séance annuelle

5. Le Parlement et les législatures tiennent une séance au moins une fois tous les douze mois. [83]

LIBERTÉ DE CIRCULATION ET D'ÉTABLISSEMENT

Liberté de circulation

6. (1) Tout citoyen canadien a le droit de demeurer au Canada, d'y entrer ou d'en sortir.

Liberté d'établissement

(2) Tout citoyen canadien et toute personne ayant le statut de résident permanent au Canada ont le droit :

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[81] Voir l'article 50 de la *Loi constitutionnelle de 1867* et les notes en bas de page (40) et (42) relatives aux articles 85 et 88 de cette loi.

[82] Remplace en partie la catégorie 1 de l'article 91 de la *Loi constitutionnelle de 1867*, qui a été abrogée comme l'indique le paragraphe 1(3) de l'annexe de la *Loi constitutionnelle de 1982*.

[83] Voir les notes en bas de page (10), (41) et (42) relatives aux articles 20, 86 et 88 de la *Loi constitutionnelle de 1867*.

cette instruction est celle de la minorité francophone ou anglophone de la province,

ont, dans l'un ou l'autre cas, le droit d'y faire instruire leurs enfants, aux niveaux primaire et secondaire, dans cette langue. [93]

Continuité d'emploi de la langue d'instruction

(2) Les citoyens canadiens dont un enfant a reçu ou reçoit son instruction, au niveau primaire ou secondaire, en français ou en anglais au Canada ont le droit de faire instruire tous leurs enfants, aux niveaux primaire et secondaire, dans la langue de cette instruction.

Justification par le nombre

(3) Le droit reconnu aux citoyens canadiens par les paragraphes (1) et (2) de faire instruire leurs enfants, aux niveaux primaire et secondaire, dans la langue de la minorité francophone ou anglophone d'une province :

a) s'exerce partout dans la province où le nombre des enfants des citoyens qui ont ce droit est suffisant pour justifier à leur endroit la prestation, sur les fonds publics, de l'instruction dans la langue de la minorité;

b) comprend, lorsque le nombre de ces enfants le justifie, le droit de les faire instruire dans des établissements d'enseignement de la minorité linguistique financés sur les fonds publics.

RECOURS

Recours en cas d'atteinte aux droits et libertés

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

Irrecevabilité d'éléments de preuve qui risqueraient de déconsidérer l'administration de la justice

(2) Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des éléments de preuve ont été obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente charte, ces éléments de preuve sont écartés s'il est établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice.

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[93] **L'alinéa 23(1)*a*) n'est pas en vigueur pour le Québec. Voir l'article 59, ci-dessous.**

PARTIE VII

DISPOSITIONS 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.

Constitution du Canada

(2) La Constitution du Canada comprend :

a) la *Loi de 1982 sur le Canada*, y compris la présente loi;

b) les textes législatifs et les décrets figurant à l'annexe;

c) les modifications des textes législatifs et des décrets mentionnés aux alinéas *a*) ou *b*).

Modification

(3) La Constitution du Canada ne peut être modifiée que conformément aux pouvoirs conférés par elle.

Abrogation et nouveaux titres

53. (1) Les textes législatifs et les décrets énumérés à la colonne I de l'annexe sont abrogés ou modifiés dans la mesure indiquée à la colonne II. Sauf abrogation, ils restent en vigueur en tant que lois du Canada sous les titres mentionnés à la colonne III.

Modifications corrélatives

(2) Tout texte législatif ou réglementaire, sauf la *Loi de 1982 sur le Canada*, qui fait mention d'un texte législatif ou décret figurant à l'annexe par le titre indiqué à la colonne I est modifié par substitution à ce titre du titre correspondant mentionné à la colonne III; tout Acte de l'Amérique du Nord britannique non mentionné à l'annexe peut être cité sous le titre de *Loi constitutionnelle* suivi de l'indication de l'année de son adoption et éventuellement de son numéro.

Abrogation et modifications qui en découlent

54. La partie IV est abrogée un an après l'entrée en vigueur de la présente partie et le gouverneur général peut, par proclamation sous le grand sceau du Canada, abroger le présent article et apporter en conséquence de cette double abrogation les aménagements qui s'imposent à la présente loi. [105]

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[105] **La partie VII est entrée en vigueur le 17 avril 1982 (*voir* TR/82-97).**

Province of Alberta

ENERGY RESOURCES CONSERVATION ACT

Revised Statutes of Alberta 2000
Chapter E-10

Current as of December 2, 2010

Office Consolidation

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(c) "energy resource" means any natural resource within Alberta that can be used as a source of any form of energy;

(d) "environment" means the components of the earth and includes

(i) air, land and water,

(ii) all layers of the atmosphere,

(iii) all organic and inorganic matter and living organisms, and

(iv) the interacting natural systems that include components referred to in subclauses (i) to (iii).

RSA 2000 cE-10 s1;2010 c14 s1

Purposes of Act

2 The purposes of this Act are

(a) to provide for the appraisal of the reserves and productive capacity of energy resources and energy in Alberta;

(b) to provide for the appraisal of the requirements for energy resources and energy in Alberta and of markets outside Alberta for Alberta energy resources or energy;

(c) to effect the conservation of, and to prevent the waste of, the energy resources of Alberta;

(d) to control pollution and ensure environment conservation in the exploration for, processing, development and transportation of energy resources and energy;

(e) to secure the observance of safe and efficient practices in the exploration for, processing, development and transportation of the energy resources of Alberta;

(e.1) to secure the observance of safe and efficient practices in the exploration for and use of underground formations for the injection of substances;

(f) to provide for the recording and timely and useful dissemination of information regarding the energy resources of Alberta;

(g) to provide agencies from which the Lieutenant Governor in Council may receive information, advice and recommendations regarding energy resources and energy.

RSA 2000 cE-10 s2;2010 c14 s1

Consideration of public interest

3 Where by any other enactment the Board is charged with the conduct of a hearing, inquiry or other investigation in respect of a proposed energy resource project or carbon capture and storage project, it shall, in addition to any other matters it may or must consider in conducting the hearing, inquiry or investigation, give consideration to whether the project is in the public interest, having regard to the social and economic effects of the project and the effects of the project on the environment.

RSA 2000 cE-10 s3;2010 c14 s1

ALSA regional plans

3.1 In carrying out its mandate under this Act and other enactments, the Board must act in accordance with any applicable ALSA regional plan.

2009 cA-26.8 s75

Continuation of Board

4(1) The Energy Resources Conservation Board is continued as a corporation.

(2) The head office of the Board is to be at the City of Calgary.

RSA 1980 cE-11 s3

Membership of Board

5(1) The Board shall consist of not more than 9 members appointed by the Lieutenant Governor in Council, one of whom shall be designated as chair, not more than 2 of whom may be designated as vice-chairs and the remainder of whom shall be designated as Board members.

(2) In the event of any vacancy occurring in the membership of the Board, the Lieutenant Governor in Council may appoint a member and, in case the office of chair or a vice-chair becomes vacant, the Lieutenant Governor in Council may designate any member to fill the vacancy.

(3) Each of the members of the Board holds office during good behaviour for a term of 5 years from the date of that member's appointment and afterwards during the pleasure of the Lieutenant Governor in Council.

(4) Notwithstanding anything in this section, any member of the Board may be removed from office by the Lieutenant Governor in Council at any time during the 5-year term referred to in subsection (3) on the address of the Legislative Assembly.

(5) The Lieutenant Governor in Council shall determine the remuneration of the members of the Board, which is to be paid by the Board.

(6) The Lieutenant Governor in Council may delegate to the Minister all or any of the Lieutenant Governor in Council's powers to determine the remuneration of all or any of the members.

RSA 2000 cE-10 s5;2007 cA-37.2 s82(5)

Chief Executive

5.1(1) The Board shall appoint a Chief Executive and shall determine the Chief Executive's powers, duties and functions.

(2) The Board shall set the remuneration to be paid to the Chief Executive.

2007 cA-37.2 s82(5)

Duty of care

6(1) Every member, in exercising powers and in discharging functions and duties,

(a) shall act honestly, in good faith and in the public interest,

(b) shall avoid conflicts of interest, and

(c) shall exercise the care, diligence and skill that a reasonable and prudent person would exercise under comparable circumstances.

(2) The Board shall establish and maintain policies and procedures addressing the identification, disclosure and resolution of matters involving conflict of interest of members of the Board and senior officers and employees of the Board.

RSA 2000 cE-10 s6;2007 cA-37.2 s82(5)

Acting Board member

7(1) The Lieutenant Governor in Council may from time to time nominate one or more persons from among whom acting members of the Board may be selected.

(2) When in the chair's opinion it is necessary or desirable for the proper and expeditious performance of the Board's duties, the chair may name a person nominated under subsection (1) as an acting member for a period of time, during any circumstance or for the purpose of any matter before the Board.

(3) An acting member has, during the period, under the circumstances or for the purpose for which the acting member is

(9) Neither the Board nor any member of the Board is in any case liable to costs by reason or in respect of an appeal or application.

(10) If the order or direction is set aside or a variation is directed, the matter shall be reconsidered and redetermined by the Board, and the Board shall vary or rescind its order in accordance with the judgment of the Court of Appeal or the Supreme Court of Canada.

RSA 2000 cE-10 s41;2007 c3 s4

Exclusion of prerogative writs

42 Subject to section 41, no proceedings of or before the Board may be restrained by injunction, prohibition or other process or proceedings in any court nor are they removable by certiorari or otherwise into any court.

RSA 1980 cE-11 s45

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.

RSA 2000 cE-10 s43;2007 cA-37.2 s82(5)

44 Repealed 2007 cA-37.2 s82(5).

Disposition of taxes and penalties

45 Any sum of money collected by the Board

(a) pursuant to an Act that the Board administers, or

(b) on account of fees, taxes or penalties,

and any fine imposed pursuant to an Act that the Board administers are the property of the Board.

RSA 1980 cE-11 s48;1982 c27 s8

Action for recovery

46 The Board may recover any money payable to it pursuant to this or any other Act by an action in debt.

RSA 1980 cE-11 s49

Supreme Court of Canada Cour suprême du Canada

June 25, 2015 le 25 juin 2015

ORDER **ORDONNANCE**
MOTION **REQUÊTE**

JESSICA ERNST v. ALBERTA ENERGY REGULATOR
(Alta.) (36167)

THE CHIEF JUSTICE:

UPON APPLICATION by the appellant for an order stating constitutional questions in the above appeal;

AND THE MATERIAL FILED having been read;

IT IS HEREBY ORDERED THAT THE CONSTITUTIONAL QUESTION BE STATED AS FOLLOWS:

1. 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*?

Any attorney general who intervenes pursuant to par. 61(4) of the *Rules of the Supreme Court of Canada* shall pay the appellant and respondent the costs of any additional disbursements they incur as a result of the intervention.

IT IS HEREBY FURTHER ORDERED THAT:

1. Any attorney general wishing to intervene pursuant to par. 61(4) of the *Rules of the Supreme Court of Canada* shall serve and file their factum and book of authorities on or before December 23, 2015.

2. Any interveners granted leave to intervene under Rule 59 of the *Rules of the Supreme Court of Canada* shall file and serve their factums and books of authorities on or before December 23, 2015.

À LA SUITE DE LA DEMANDE de l'appelante visant à obtenir la formulation de questions constitutionnelles dans l'appel susmentionné;

ET APRÈS AVOIR LU la documentation déposée,

LA QUESTION CONSTITUTIONNELLE SUIVANTE EST FORMULÉE :

1. L'article 43 de la loi intitulée *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, est-il inapplicable ou inopérant du point de vue constitutionnel en ce qu'il fait obstacle à la présentation d'une action contre l'organisme de réglementation pour violation de l'al. 2*b*) de la *Charte*

canadienne des droits et libertés, ainsi qu'à la présentation d'une demande de réparation fondée sur le par. 24(1) de la *Charte canadienne des droits et libertés*?

Tout procureur général qui interviendra en vertu du par. 61(4) des *Règles de la Cour suprême du Canada* sera tenu de payer à l'appelante et à l'intimé les dépens supplémentaires résultant de son intervention.

IL EST EN OUTRE ORDONNÉ CE QUI SUIT :

1. Tout procureur général qui interviendra en vertu du par. 61(4) des *Règles de la Cour suprême du Canada* devra signifier et déposer son mémoire et son recueil de sources au plus tard le 23 décembre 2015.

2. Les intervenants qui seront autorisés à intervenir en application de l'art. 59 des *Règles de la Cour suprême du Canada* devront signifier et déposer leurs mémoires et recueils de sources au plus tard le 23 décembre 2015.

C.J.C.
J.C.C.