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January 16, 2017

Die Another Day: The Supreme Court's Decision in *Ernst v Alberta Energy Regulator* and the Future of Statutory Immunity Clauses for *Charter* Damages

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Case Commented On: *Ernst v Alberta Energy Regulator*, 2017 SCC 1 (CanLII)

On January 13, 2017, the Supreme Court of Canada released its decision in *Ernst v Alberta Energy Regulator*, 2017 SCC 1 (CanLII), an appeal it heard in January 2016. As noted in a previous ABlawg post, the appeal arose from the decisions of Alberta courts to strike Jessica Ernst's claim for damages against the Energy Resources Conservation Board (now the Alberta Energy Regulator) for allegedly violating her freedom of expression under s 2(b) of the *Charter*. At issue before the Supreme Court was whether the decisions to strike her claim should be upheld, which turned on whether the statutory immunity clause in s 43 of the *Energy Resources Conservation Act*, RSA 2000, c E-10 (*ERCA*) could constitutionally bar a claim for damages under s 24(1) of the *Charter* against the Board. The length of time the Court took to deliver its decision might be explained by the Court's 4:4:1 split. Justice Abella serves as the swing judge by siding with Justice Cromwell (with Justices Karakatsanis, Wagner, and Gascon) in upholding the decision that Ernst's claim for *Charter* damages should be struck, basing her decision primarily on Ernst's failure to provide notice of the constitutional challenge in earlier proceedings. I had predicted that the Supreme Court would deny leave to appeal based on that lack of notice, yet had to eat my words when a three-member panel of the Court – including Justice Abella – granted leave despite the lack of notice. The other two judges who granted the leave application, Karakatsanis and Côté JJ, are split between the Cromwell faction and the dissent (written by Chief Justice McLachlin and Justices Moldaver and Brown, with Justice Côté concurring), which would have allowed the appeal and permitted Ernst's claim for *Charter* damages against the Board to proceed.

This post will parse the three judgments to determine what the Court actually decided on the viability of the *Charter* damages claim and for what reasons. There may be subsequent posts by my colleagues on other aspects of the decision. It is important to note that Ernst's underlying tort claims against Encana and the provincial government for contamination of her groundwater are ongoing; the Supreme Court only ruled on whether Ernst's claim for *Charter* damages against the Board for violating her freedom of expression could proceed.

Facts and Issues

In *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 (CanLII) at para 17, the Court held that "A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action" (cited by Justice Abella at para 68 and by Chief Justice McLachlin et al at para 148). The facts related to Ernst's *Charter* claim that must be accepted as true relate to the alleged violation of her freedom of expression by the Board and its staff. Ernst had concerns about Encana's hydraulic fracturing and drilling close to her property and was critical of the Board's role in monitoring Encana's operations and performing

its statutory duties as the regulator in this context. Ernst voiced her concerns to the Board, as well as publicly and to the media. This led the Board to refuse to communicate with her for a 16-month period from 2005 to 2007 unless she agreed to refrain from going public. Along with her principle actions in negligence (against Encana) and regulatory negligence (against both the Board and Alberta Environment), Ernst brought a *Charter* claim against the Board alleging that its actions were punitive and intended "to prevent her from making future public criticisms" of the Board (at para 144). She claimed $50,000 in *Charter* damages for this alleged breach of her freedom of expression.

The Board moved to strike the *Charter* claim on the ground that it was barred by s 43 of the *ERCA*, which provides that:

> **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.

The Supreme Court addressed three key issues, although not all of the justices agreed that these issues were worthy of consideration, nor did they agree on the order in which they should be considered:

> 1. Whether it was plain and obvious that s 43 of the *ERCA* barred Ernst's *Charter* claim;
>
> 2. Whether it was plain and obvious that *Charter* damages were not an appropriate and just remedy in Ernst's claim against the Board; and
>
> 3. Whether Ernst's failure to provide notice of a constitutional challenge to s 43 was fatal to her claim.

The Decisions

Justices Cromwell, Karakatsanis, Wagner, and Gascon found that the Alberta courts properly struck Ernst's claim for *Charter* damages. On the first issue, they held that s 43 of the *ERCA* did, on its face, bar Ernst's claim for damages against the Board. On the second issue, the headnote suggests that the basis for the Cromwell judgment was that damages "could never be an appropriate and just remedy for *Charter* breaches" by the Board. However, Justices Cromwell et al also based their decision on Ernst's failure to discharge her burden of proving that s 43 of the *ERCA* was unconstitutional (at paras 21-23). They did not deal with the third issue concerning notice.

Chief Justice McLachlin et al, dissenting, would have allowed the appeal and permitted Ernst's *Charter* claim for damages to proceed. They dealt with the second issue first, and disagreed with Justice Cromwell that it was plain and obvious that damages could never be an appropriate and just remedy for *Charter* breaches by the Board. They also disagreed with the Cromwell group on the first issue, finding it was not plain and obvious that s 43 of the *ERCA* barred Ernst's claim for *Charter* damages where the allegations were unrelated to the Board's adjudicative role. The McLachlin group thus left open the question of whether the immunity clause was constitutional, and did not address the lack of notice directly.

Justice Abella sided with the Cromwell group in holding that Ernst's claim for *Charter* damages should be struck, but, as noted, based her decision on the third issue – Ernst's failure to provide notice of the constitutional challenge to s 43 of the *ERCA*. She agreed with Justice Cromwell on the first issue, finding it was plain and obvious that s 43 barred Ernst's claim for damages against the Board. However, on the second issue, Justice Abella found that a ruling on the constitutionality of s 43 was required before looking at whether damages were an appropriate and just remedy under s 24 of the *Charter*. She also left open the possibility that s 43 could be constitutionally challenged, siding with the Chief Justice et al on that point (although she suggested in *obiter* that it was unlikely that *Charter* damages would be an appropriate and just remedy against this Board (at para 123)).

Overall then, the majority decision is that s 43 of the *ERCA* did, on its face, bar Ernst's claim for *Charter* damages against the Board (Justice Cromwell et al plus Justice Abella), with a differently constituted majority ruling that the constitutionality of that provision remains an open question (Chief Justice McLachlin et al plus Justice Abella). One might argue that to the extent the Cromwell group based their decision in part on Ernst's failure to prove the unconstitutionality of s 43, they leave that matter open as well (although Chief Justice McLachlin et al see Justice Cromwell et al as having ruled definitively – indeed too definitively – on the constitutionality of s 43). While the constitutionality of s 43 is an open question for at least five justices, Ernst will not be able to pursue this issue, because a majority of the Court struck her action against the Board.

Exploring the reasons for decision of the different factions of the Court in more depth sheds light on their disagreements and on whether and how the constitutionality of statutory immunity clauses such as s 43 might be challenged in the future. I reserve my commentary for the end of this post, but to foreshadow a bit, I argue that there are elements of each of the three decisions that are open to criticism.

Reasons for Decision

Justice Cromwell et al

Justices Cromwell, Karakatsanis, Wagner, and Gascon found that s 43 of the *ERCA* did, on its face, bar Ernst's claim for damages against the Board. They reached this conclusion largely because it was "common ground between the parties" that s 43 had this effect and there was no argument to the contrary (at paras 10, 11). Although they agreed with Chief Justice McLachlin et al that the Court was not bound by Ernst's position that s 43 barred her claim, they noted that there was no authority to the contrary, and that to hold otherwise would be unfair to the Board, which had not made submissions on this issue. Justice Cromwell et al were critical of the decision of the dissenting justices that it was not plain and obvious that s 43 acted as a bar to Ernst's action against Board, stating that their position on this issue cast doubt "on the scope of scores of other immunity provisions in many statutes across Canada" and was therefore "unnecessary, undesirable and unjustified" (at para 17).

On the second issue, whether it was plain and obvious that *Charter* damages were not an appropriate and just remedy in Ernst's claim against the Board, Justice Cromwell et al made two findings. First, Ernst "failed to discharge her burden of showing that the law is unconstitutional", such that her challenge to s 43 failed, the immunity clause applied, and her claim must be struck (at para 21). This finding was framed (at para 20) as a disagreement with the approach of Chief Justice McLachlin et al, who found that the record was inadequate to consider the *Charter* claim,

yet left open the possibility that s 43 was unconstitutional and could be challenged at a later date by Ernst. While this would have been a sufficient reason to strike the claim, Justice Cromwell et al went on to consider the merits of the constitutional challenge as a second basis for their decision on this issue.

On the merits, Justice Cromwell et al found that "*Charter* damages could never be an appropriate and just remedy for *Charter* breaches by the Board", such that s 43 did not bar a remedy that would otherwise be available, and was not therefore be unconstitutional (at para 24). In so holding, they considered the wording of s 24 of the *Charter*, which provides that "Anyone whose [*Charter*] rights or freedoms … 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" (emphasis added). They also applied the principles from the Court's leading decision on *Charter* damages, *Vancouver (City) v Ward*, 2010 SCC 27 (CanLII). *Ward* held that *Charter* damages should be reserved for cases where the purpose of those damages – compensation, vindication of rights, and deterrence – were met, and where countervailing factors did not weigh against damages as "an appropriate and just" remedy. The countervailing factors identified in *Ward* – which are not a closed list, as Justice Cromwell noted (at para 28) – include whether there is an effective alternative remedy to damages and whether damages would raise concerns about good governance.

Without explicitly considering whether any of the purposes of *Charter* damages would be served by Ernst's *Charter* claim against the Board, Justice Cromwell et al went directly to the countervailing factors. They found that an alternative remedy existed in Ernst's case, namely judicial review of the alleged *Charter* breaches (at para 32). This alternative – which could not be ousted by s 43 – was seen as potentially providing "substantial and effective relief against alleged *Charter* breaches by a quasi-judicial and regulatory board" (at para 35) and to "in all likelihood provide vindication in a much more timely manner than an action for damages" (at para 36). Judicial review would also make it unnecessary to consider whether the immunity in s 43 required reading down so as to permit claims in circumstances involving an "elevated liability threshold" such as the misconduct of government actors (at para 38) – a point raised by the dissenting justices.

Justice Cromwell et al also found that the "good governance" factor operated against *Charter* damages in this case. Here, they considered several policy rationales drawn from the "practical wisdom" of private law, including "(i) excessive demands on resources, (ii) the potential "chilling effect" on the behaviour of the state actor, and (iii) protection of quasi-judicial decision making" (at para 45). They also considered the rationales behind statutory and common law immunities for quasi-judicial decision makers, including their "freedom from interference" so as to protect their independence and impartiality, and their capacity "to fulfill their functions without the distraction of time-consuming litigation" (at para 51). Overall, consideration of the good governance factor led Cromwell et al to find that "Opening the Board to damages claims will distract it from its statutory duties, potentially have a chilling effect on its decision making, compromise its impartiality, and open up new and undesirable modes of collateral attack on its decisions" (at para 55). In response to Ernst's argument that *Charter* damages claims should be assessed on a case by case basis, Justice Cromwell stated that this approach would "largely undermine the purpose of conferring immunity in the first place" (at para 56).

Ernst thus failed in her constitutional challenge to s 43 and was bound by the immunity clause, which barred her claim on its face, leading Justice Cromwell et al to uphold the striking of her action for *Charter* damages.

Chief Justice McLachlin et al

The dissenting justices introduced their judgment by noting that this was “a difficult case raising novel and difficult issues” and one in which “counsel and judges at all levels have struggled to find the appropriate template through which to view Ms. Ernst’s claim” (at para 135). Their template reversed the consideration of issues undertaken by Justice Cromwell. On the issue of whether *Charter* damages were an appropriate and just remedy, Chief Justice McLachlin et al interpreted the Cromwell judgment to have ruled “not only that *Charter* damages are not appropriate and just in the circumstances of Ms. Ernst’s claim, but also that *Charter* damages could *never* be appropriate and just in the circumstances of *any* claim against the Board — or, indeed, against any quasi-judicial decision-maker like it” (at para 150). McLachlin CJ et al disagreed with this holding. They were the only justices to speak to s 2(b) of the *Charter* in any detail, noting Ernst had raised a novel yet viable claim that the Board had limited her freedom of expression by curtailing her ability to speak to the media and public and by prohibiting her from communicating with the Board (at paras 158-160). They also considered – unlike the Cromwell group– whether Ernst’s claim would fulfill one of the rationales of *Charter* damages, finding that the objectives of vindication and deterrence were engaged (at para 160). The dissent only then turned to *Ward*’s countervailing factors, noting that the burden was on the state to substantiate that these factors should override eligibility for *Charter* damages.

On the issue of other remedies, Chief Justice McLachlin et al disagreed with Justice Cromwell that judicial review was an effective alternative. The dissenting justices noted that judicial review would not necessarily achieve the same objectives as *Charter* damages “in this case, let alone in all cases, against the Board” (at para 167). This section of their decision is brief, but their finding seems to be based on the functions of damages as a remedy, rather than on the availability of judicial review for the *Charter* breach. The Chief Justice et al also rejected good governance concerns as a persuasive countervailing factor in this case, drawing a distinction between the adjudicative functions of statutory tribunals (where policy considerations may favour immunity) and non-adjudicative – indeed, allegedly punitive – actions such as those at issue in *Ernst* (where policy considerations do not favour immunity). Nor did the dissent find the private law’s “practical wisdom” to be persuasive in supporting an absolute immunity under s 43. Rather, they pointed to a number of claims for *Charter* damages against state actors where the Court qualified or read down immunities to permit damages claims in cases of bad faith, abuse of power, fraud and the like (at paras 174-6). Overall, Chief Justice McLachlin et al found that “whether the countervailing factors are examined individually or collectively, the record at this juncture does not support recognizing such a broad, sweeping immunity for the Board in this case, let alone in every case” (at para 177).

The dissenting justices then turned to the issue of whether it was plain and obvious that s 43 of the *ERCA* barred Ernst’s *Charter* claim, answering this question in the negative. They acknowledged that Ernst had argued otherwise throughout the proceedings, but noted the Court was not bound by this argument, and found that the “exceptional circumstances” of the case “compel[led] the Court to consider an issue not raised by the parties” (at para 183). The exceptional circumstances included the novelty and complexity of the interaction between s 43 of the *ERCA* and s 24 of the *Charter*, and the “significant public importance” of the issues raised by Ernst and their potential consequences for other cases (at para 184). Setting aside Ernst’s position on s 43, the dissent found that the sort of punitive conduct she alleged against the Board was not plainly and obviously within the scope of that section, particularly the wording “any act or thing done purportedly in pursuance of this Act.”

Having found that it was not plain and obvious that *Charter* damages were inappropriate, nor that s 43 barred the *Charter* claim, Chief Justice McLachlin et al found that the application to strike failed, and would have allowed the appeal and restored Ernst's *Charter* claim against the Board. They declined to answer the constitutional question, stating that this determination was "therefore unnecessary" (at para 186), and that even if it were necessary, "the record before us does not provide an adequate basis on which to do so" (at para 189). If the claim for *Charter* damages had proceeded against the Board, they noted that Ernst then could have provided notice of the constitutional challenge to s 43, allowing the provincial and federal governments to provide evidence and submissions on the constitutionality of that section (including the application of section 1 of the *Charter*, the reasonable limits clause) (at para 191).

Justice Abella

In her concurring judgment dismissing Ernst's appeal, Justice Abella focused on the third issue, finding that Ernst's failure to provide notice of a constitutional challenge to s 43 of the *ERCA* was fatal to her claim. It was fatal because s 43 did, on its face, bar Ernst's claim for *Charter* damages against the Board (at paras 70-72). Justice Abella thus agreed with Cromwell et al on the first issue, although her decision was based on the interpretation of s 43 more so than the position the parties had taken on this question.

On the issue of notice, Justice Abella noted the public interest purpose behind notice provisions such as s 24 of Alberta's *Judicature Act,* RSA 2000, c J-2, indicating that "strict adherence" to notice provisions is required to ensure that governments have a full opportunity to support the validity of their legislation with a full evidentiary record (at paras 99-100). She found that Ernst had not clearly given notice of an intent to challenge s 43 until her Supreme Court appeal – Ernst had earlier indicated that she was challenging the application of that section to her *Charter* claim rather than its constitutionality (at paras 65-66; see also paras 92-94). Justice Abella acknowledged that the Court can answer newly raised constitutional questions in exceptional circumstances, where "the state of the record, the fairness to all parties, the importance of having the issue resolved by this Court, the question's suitability for decision, and the broader interests of the administration of justice demand it" (at para 101). However, this threshold was "nowhere in sight in this case" (at para 102). Furthermore, Ernst's constitutional challenge, once recognized as such, raised "profound implications for judicial and quasi-judicial decision-makers across Canada" who are protected by immunity clauses similar to s 43 (at para 114). Echoing Justice Cromwell, Justice Abella noted that these immunity clauses are intended to protect judicial and quasi-judicial decision makers' independence and impartiality and the administration of justice. She disagreed with the dissent's distinction between immunity for adjudicative and other administrative decisions, noting that all such decisions were subject to judicial review (at para 119). She also noted that *Charter* damages had never been awarded or upheld by the Court against judicial or quasi-judicial decision makers, again supporting the need for notice and a full evidentiary record in this case.

In a brief consideration of the second issue, Justice Abella stated that *Ward* "likely leads to the conclusion that *Charter* damages are not an "appropriate and just" remedy in the circumstances." However, she believed that this question could only be answered following "a prior determination of the constitutionality of the immunity clause" (at para 123). Under this approach, "if the clause is constitutional, there is no need to embark on a *Ward* analysis. If, on the other hand, it is found to be unconstitutional, only then does a *Ward* analysis become relevant" (at para 123). Justice Abella's approach differs from that taken by Justice Cromwell et al, who looked at

whether *Charter* damages were "appropriate and just" under *Ward* without first considering the constitutionality of s 43. Her method also differs from that of Chief Justice McLachlin et al, who found that it was unnecessary to consider the constitutionality of s 43 before considering *Ward* and the availability of damages (although the dissent did discuss the alleged s 2(b) violation before *Ward*). Lastly, although this point was not made under *Ward*'s analysis of alternative remedies, Justice Abella agreed with Justice Cromwell et al that "judicial review was the appropriate means of addressing [Ernst's] concerns" (at para 127) and called Ernst's *Charter* claim an "end-run… around the required process" (at para 129).

Commentary

The *Ernst* decision is challenging to read. It comes across as largely technical and devoid of the substance of Ernst's *Charter* claim, except for the dissenting decision of Chief Justice McLachlin et al, which provides the most contextual assessment of the issues. It is also challenging to identify the precedential value of the case. A majority of the Court agreed that s 43 of the *ERCA* acts as a bar to claims for *Charter* damages, but for Justice Cromwell et al, that holding seems to be based on procedural considerations (who argued what and when) rather than the proper interpretation of the section, which Justice Abella and the dissenting justices disagree upon. In contrast, procedural fairness concerns are largely absent from the decision of the Chief Justice et al that s 43 should not be read as a bar to *Charter* damages.

The Court's rulings on the issue of whether s 43 is constitutional also appear largely procedural, which is perhaps appropriate given that the issue arose in the context of an application to strike. Chief Justice McLachlin et al did not believe it was necessary to decide the issue. Justice Abella found that the lack of notice was determinative, using language that is quite harsh towards Ernst (see e.g. her reference to Alice in Wonderland at para 66), which is uncharacteristic of Justice Abella's compassionate treatment of most *Charter* claimants. The judgment of Justice Cromwell et al on this issue can also be read as procedural in that they found the case lacked a sufficient evidentiary record to support the constitutional argument. However, the Cromwell faction provides a decision on the constitutional issue on the merits as well, with Chief Justice McLachlin et al opining that they went too far in doing so. But Justice Cromwell et al's ruling on the merits is arguably *obiter* and in any event, is not the majority position on whether damages "could never be an appropriate and just remedy for *Charter* breaches" against the Board (even though Justice Abella states the view that *Ward* "likely leads" to that conclusion at para 123). Justice Cromwell et al's judgment is also subject to the criticism that they misapplied *Ward* by going straight to the countervailing considerations rather than first looking at whether *Charter* damages would be appropriate and just based on the functions of those damages for the claimant. Because Cromwell et al did not consider the purpose of *Charter* damages against the Board first, their reliance on the availability of judicial review (at paras 33-41, with Justice Abella concurring at para 84) and their use of private law principles to refute the appropriateness of damages is open to critique as well.

I also take issue with Justice Cromwell's use of "chilling effect" language as applied to the state; in other freedom of expression cases, the chilling effect is considered in relation to the impact of state limits on the expression of other groups and individuals, rather than on the state's ability to act without constraints (see most recently *R v Khawaja*, 2012 SCC 69 (CanLII) and *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 (CanLII)). Should we not reserve terms like "chilling effect" for those who are vulnerable to the power of the state? I acknowledge that the Court has used this term previously to describe the impact that judicial actions may have on the other branches of government or state actors, but I would argue it was

inappropriately employed there as well (see e.g. *Henry v British Columbia (Attorney General)*, [2015 SCC 24 (CanLII)](#)).

So, what is the bottom line from *Ernst*? The constitutionality of s 43 (and similar immunity clauses) is still a live issue – the Court *did not* rule that the Board, the Alberta Energy Regulator, or any other Canadian regulator are immune from *Charter* damages claims; the majority only held that Ernst won't have the benefit of challenging the immunity in her own litigation. Given that immunity clauses such as s 43 will live (or die) another day, what guidance does the Court offer in terms of how this issue could be constitutionally challenged in the future?

First, notice of the constitutional challenge should be provided to the appropriate parties so that a proper evidentiary record can be amassed. Although the lack of notice was not fatal for eight justices in *Ernst*, they all remarked on the insufficiency of the evidentiary record, which flowed from the failure to provide notice.

Second, Justice Abella indicates that the constitutionality of the immunity clause should be considered before the question of whether *Charter* damages would be appropriate and just under *Ward*. She does not elaborate on what an assessment of the constitutionality of s 43 and other immunity clauses should look like, apart from noting that the government would have an opportunity to justify the immunity under section 1 of the *Charter* (at paras 111-112; see also McLachlin CJ et al at para 191, seemingly agreeing on this point). But what is the *Charter* breach that section 1 might "save"? Is the idea here that the violation of the underlying *Charter* right or freedom requires a remedy that cannot be immunized against without justification – i.e. a right to a remedy? This was the gist of Ernst's argument, but counsel framed the issue as the "inapplicability" or "inoperability" of s 43, which are remedies from the federalism rather than *Charter* context. If the right to a remedy is the proper focus, and s 43 were found to violate this right, would the usual justification test from *R v Oakes*, [1986] 1 SCR 103 (CanLII), apply under section 1, requiring consideration of the government's pressing and substantial objective, rational connection, minimal impairment, and balancing of salutary and deleterious effects? Unfortunately, the path forward for those seeking to bring constitutional challenges to statutory immunity clauses such as s 43 of the *ERCA* – or to defend such clauses – is not at all clear, in spite of the long wait and the hope that *Ernst* would clarify this area.

Thanks to Shaun Fluker and Martin Olszynski for their comments on an earlier version of this post.

This post may be cited as: Jennifer Koshan "Die Another Day: The Supreme Court's Decision in *Ernst v Alberta Energy Regulator* and the Future of Statutory Immunity Clauses for *Charter* Damages" (16 January, 2017), online: ABlawg, http://ablawg.ca/wp-content/uploads/2017/01/Blog_JK_Ernst.pdf

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