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The Charter Issue(s) in Ernst: Awaiting Another Day

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Case Commented On: *Ernst v Alberta (Energy Resources Conservation Board)*, 2014 ABCA 285

My colleagues Martin Olszynski and Shaun Fluker have posted comments on the Alberta Court of Appeal decision in *Ernst* here and here. In addition to the regulatory negligence claim against the Energy Resources Conservation Board (ERCB) and Alberta Environment they cover in their posts, Ernst brought a claim against the ERCB for breach of the *Charter*. More specifically, she alleged that the ERCB violated her freedom of expression under section 2(d) of the *Charter* by "punishing her for criticizing the ERCB in public and to the media, and … because she was prohibited and restrained in her communication with the ERCB" (2013 ABQB 537 at para 39). In response to the ERCB's application to strike the statement of claim, Chief Justice Wittman found that the *Charter* claim, although novel, was not doomed to fail and should not be struck. However, section 43 of the *Energy Resources Conservation Act*, RSA 2000, c. E-10 (*ERCA*) barred Ernst's *Charter* claim against the ERCB (2013 ABQB 537 at paras 42, 82-88). Although the ERCB did not appeal the finding that the pleadings disclosed an arguable claim for a breach of the *Charter,* the Court of Appeal upheld Wittman CJ's finding that section 43 of the *ERCA* barred any *Charter* claim by Ernst.

ABQB and ABCA Decisions

At both levels of court, Ernst argued that section 43 of the *ERCA* could not bar a *Charter* claim as a matter of constitutional law. Wittman CJ canvassed the case law, and found that while such statutory bars could not preclude declarations regarding the constitutionality of statutes or government action, they could bar actions for personal remedies. Because Ernst was seeking a personal remedy of $50,000 damages against the ERCB, section 43 barred her claim against it (2013 ABQB 537 at para 88). Of note was the fact that Ernst had not sought to challenge the constitutionality of section 43 of the *ERCA* itself; notice of constitutional question had not been given to the Attorneys General of Alberta and Canada, as required by section 24 of the *Judicature Act*, RSA 2000, c J-2 (2013 ABQB 537 at para 89).

The Court of Appeal noted that there was no appeal on the question of notice (at para 9), but the Minister of Justice and Solicitor General of Alberta intervened to reiterate the point that since Ernst had not filed notice of a constitutional challenge to section 43 of the *ERCA*, that issue should not be considered. Ernst framed her argument as follows: section 24 of the *Charter* entitles *Charter* claimants to a remedy that is "appropriate and just in the circumstances" upon

the finding of a *Charter* breach, and since section 52 of the *Constitution Act, 1982* provides that "any law that is inconsistent with the Constitution is of no force and effect", any limits on the remedies available under section 24 are of no force and effect (at para 24). The Minister of Justice contended that this was a new argument on appeal, on which it had not been given the opportunity to call evidence (at para 7).

The Court of Appeal did not deal explicitly with whether Ernst was entitled to raise the constitutionality of section 43, but cast its judgment in terms of the "constitutional legitimacy" of that provision. It rejected Ernst's argument as to the effect of section 43 on *Charter* remedies, finding that "The law has always recognized that to be "appropriate and just", remedies must be measured, limited, and principled" (at para 25). For example, case law has recognized that statutes of limitation can apply to constitutional claims, as can appeal periods, leave and notice requirements. According to the Court of Appeal, "It cannot be suggested that those sorts of limits on remedies are unconstitutional" (at para 26).

With respect to a claim for *Charter* damages more specifically, the Court referred (at para 29) to *Vancouver (City) v Ward*, 2010 SCC 27 (CanLII), [2010] 2 SCR 28 at para 20, for the proposition 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…" The Court also cited the *Mackin* principle, according to which "the state must be afforded some immunity from liability in damages resulting from the conduct of certain functions that only the state can perform" (*Mackin v New Brunswick (Minister of Finance)*, 2002 SCC 13 (CanLII), [2002] 1 SCR 405, cited in *Ward* at para 40). Although *Makin* referred to immunity in the context of legislative and policy-making functions, the Court of Appeal used the case to conclude that "Protecting administrative tribunals and their members from liability for damages is constitutionally legitimate" (at para 29).

The Court gave a number of other reasons why section 43 of the *ERCA* was not "constitutionally illegitimate" (at para 30):

- such provisions are general in nature, and not targeted at *Charter* claims or specific litigants (citing *Alexis v Toronto Police Service Board*, 2009 ONCA 847 (CanLII) at paras. 19-21);

- provisions which immunize decision makers from liability "are not so uncommon or unusual in free and democratic societies as to render them constitutionally unreasonable" (citing a number of cases immunizing administrative tribunal members from personal liability for their decisions);

- limits on remedies such as section 43 "do not offend the rule of law, so long as there remain some effective avenues of redress", such as judicial review;

- section 52 of the *Constitution Act, 1982* has not "swept away" well established common law remedial barriers (citing *Islamic Republic of Iran v Kazemi*, 2012 QCCA 1449 (CanLII) at paras 118 to 120, subsequently upheld by the Supreme Court in *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62).
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Overall, the Court found that Wittman, CJ had not erred in holding that section 43 barred Ernst's *Charter* claim, just as it had barred her claim in negligence.

Commentary

There are two ways to read the Court of Appeal decision in this case. It may be that the Court believed that Ernst's failure to meet the procedural requirement to give notice to government of a constitutional challenge to section 43 of the *ERCA* was fatal. However, the Court used the language of "constitutional legitimacy" throughout its reasons on section 43, suggesting that it might have been pronouncing on the constitutionality of the section in spite of the failure to give notice. I am inclined to read this case in the former sense, i.e. as not having actually decided the constitutionality of section 43. This would be in keeping with the usual consequence of the failure to give notice, which was not appealed here. Furthermore, the Court did not undertake the usual steps in a constitutional analysis, i.e. by reviewing whether section 43 breached any of Ernst's *Charter* rights, and if so, whether it could be upheld as a reasonable limit on those rights under section 1 of the *Charter*.

By way of contrast, in *Kazemi* the Supreme Court assessed whether the *State Immunity Act,* RSC 1985, c S-18 (*SIA*), which limited civil redress in Canada against foreign states, even for acts of torture, violated section 7 of the *Charter*. A majority of the Court found that the *SIA* might engage the right to security of the person under section 7 by "impeding the healing of Canadian victims of torture or their family members" (at para 143). However, the *SIA* did not violate the principles of fundamental justice under section 7, as there was no international consensus that article 14 of the *Convention Against Torture*, which requires state parties to provide means for redress, was fundamental to the operation of the international legal system (at para 147).

Assuming that I am correct in my reading of the case, the Court of Appeal's references to the "constitutional (il)legitimacy" of section 43 are unfortunate in producing a lack of clarity as to the Court's intent. The Court's decision should not be taken as a definitive assessment of the constitutionality of that section, nor that of its successor, section 27 of the *Responsible Energy Development Act*, SA 2012, c R-17.3. That issue awaits another day, and sadly for Ernst, that day will not come in her case, even though her *Charter* claim against the ERCB was arguable.