

May 1, 2015

## Leave to Appeal granted in *Ernst v Alberta Energy Regulator*

By: Jennifer Koshan

**Case Commented On:** *Ernst v Alberta Energy Regulator*, [2013 ABQB 537](#), aff'd [2014 ABCA 285](#), leave to appeal [granted](#) April 30, 2015 (SCC)

Today the Supreme Court (Justices Abella, Karakatsanis and Côté) [granted](#) leave to appeal with costs in the cause to Jessica Ernst. The Court's [description of the case](#) is as follows:

Charter of Rights – Constitutional law – Enforcement – Remedy – Freedom of expression – Statutory immunity clause held to preclude adjudication of individual's action in damages for alleged Charter breach by the regulator – Can a general “protection from action” clause contained within legislation bar a Charter claim for a personal remedy made pursuant to s. 24(1) of the Charter – Can legislation constrain what is considered to be a “just and appropriate” remedy under s. 24(1) of the Charter – Vancouver (City) v. Ward, 2010 SCC 27, [2010] 2 S.C.R. 28.

The applicant owns land near Rosebud, Alberta. She brought an action against: i) EnCana Corporation for damage to her water well and the Rosebud aquifer allegedly caused by its construction, drilling, hydraulic fracturing and other activities in the area; ii) Alberta Environment and Sustainable Resource Development, claiming it owes her a duty to protect her water supply and had failed to address her complaints about EnCana; and iii) the respondent regulator, for “negligent administration of a regulatory regime” related to her claims against EnCana. She brought a further claim for damages against the regulator under s. 24(1) of the Charter for alleged breaches of her s. 2(b) Charter rights. She alleges that from November, 2005 to March 2007, the Board's Compliance Branch refused to accept further communications from her through the usual channels for public communication until she agreed to raise her concerns only with the Board and not publicly through the media or through communications with other citizens. She submits the respondent infringed her s. 2(b) Charter rights both by restricting her communication with it and by using those restrictions to punish her for past public criticisms and prevent her making future public criticisms of the respondent.

The respondent brought an application to strike paragraphs from the Statement of Claim or grant summary judgment in its favour. The Court of Queen's Bench of Alberta granted the application and struck out the applicant's negligence and Charter claims. While the Court held that the Charter claims were not doomed to fail and did disclose a cause of action, it held that the courts were precluded from considering the claims by the statutory

immunity provision in the Energy Resources Conservation Act, R.S.A. 2000, c. E-10. The Alberta Court of Appeal dismissed the appeal.

There have been several ABlawg posts on the Alberta courts' earlier decisions in the *Ernst* litigation. The most relevant to the issue that is now going to the Supreme Court is my post [The Charter Issue\(s\) in Ernst: Awaiting Another Day](#).

This post notes that at the ABQB level, Chief Justice Wittman found that although Ernst's *Charter* claim against the ERCB (now AER) should not be struck on the merits, section 43 of the [Energy Resources Conservation Act, RSA 2000, c. E-10](#) (*ERCA*) barred Ernst's *Charter* claim ([2013 ABQB 537](#) at paras 42, 82-88). Ernst had not directly challenged the constitutionality of section 43; notice of constitutional question had not been given to the Attorneys General of Alberta and Canada under section 24 of the [Judicature Act, RSA 2000, c J-2](#). Nevertheless, the Alberta Court of Appeal weighed in on the constitutional legitimacy of section 43, stating that "It cannot be suggested that those sorts of limits on remedies are unconstitutional" ([2014 ABCA 285](#) at para 26). I concluded that because the constitutional issue was not squarely before the Court, its decision "should not be taken as a definitive assessment of the constitutionality of [section 43], 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."

It appears that I must now eat my words, since "that day" does seem to have come; the SCC will consider the constitutionality of section 43 and like sections in other legislation. [Ernst framed the issue on appeal](#) as whether legislation can "block an individual from seeking a remedy for a breach of her Charter rights" under s 24(1) of the Charter, which provides that "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such a remedy as the court considers appropriate and just in the circumstance." Focusing on the interaction between section 43 of the *ERCA* and section 24 of the *Charter* may negate the need for a direct constitutional challenge to section 43. And it should be noted that the Ontario Court of Appeal came to a conclusion contrary to that of the Alberta Court of Appeal about the constitutionality of such statutory bars in *Prete v Ontario* (1993), [1993 CanLII 3386 \(ON CA\)](#), 16 OR (3d) 161, application for leave to appeal to SCC dismissed with costs, [1994] 1 SCR x.

For other ABlawg posts on the Ernst litigation see:

Shaun Fluker, [Ernst v Alberta Environment: The Gatekeeper Refuses to Strike or Grant Summary Judgment](#)

Martin Olszynski, [Regulatory Negligence Redux: Alberta Environment's Motion to Strike in Fracking Litigation Denied](#)

Shaun Fluker, [Ernst v Alberta \(Energy Resources Conservation Board\): The gatekeeper is alive and well](#)

Martin Olszynski, [Revisiting Regulatory Negligence: The Ernst Fracking Litigation](#)

And for Jessica Ernst's blog, which contains copies of all of the relevant documents, see [here](#).

To subscribe to ABlawg by email or RSS feed, please go to <http://ablawg.ca>  
Follow us on Twitter [@ABlawg](#)

