

Appeal Number: 1301-0346 AC  
Q.B. Number: 0702-00120

IN THE COURT OF APPEAL OF ALBERTA

BETWEEN:

JESSICA ERNST

Appellant  
(Plaintiff)

-and-

ENERGY RESOURCES CONSERVATION BOARD

Respondent  
(Defendant)

-and-

ENCANA CORPORATION  
AND HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA

Not Parties to the Appeal  
(Defendants)

-and-

THE MINISTER OF JUSTICE AND SOLICITOR GENERAL OF ALBERTA

Intervener

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APPEAL FROM THE WHOLE OF THE ORDER OF THE HONOURABLE MR.  
JUSTICE WITTMANN, CJQB, PRONOUNCED THE 13<sup>TH</sup> DAY OF NOVEMBER, 2013  
FILED THE 2<sup>ND</sup> DAY OF DECEMBER, 2013

**FACTUM OF THE INTERVENER,  
THE MINISTER OF JUSTICE AND SOLICITOR GENERAL OF ALBERTA**

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## TABLE OF CONTENTS

	<u>Page</u>
<b>PART I – STATEMENT OF FACTS</b>	1
<b>PART II – GROUNDS OF APPEAL</b>	1
<b>PART III – POINTS OF LAW</b>	1
A. Standard of Review	1
B. Analysis	1
<b>PART IV – NATURE OF RELIEF DESIRED.</b>	3
<b>LIST OF AUTHORITIES</b>	4

## **PART I – STATEMENT OF FACTS**

1. The Minister of Justice and Solicitor General of Alberta (“Alberta”) as an intervener, takes no issue with the Statement of Facts set forth by the Appellant and the Respondent.

## **PART II – GROUNDS OF APPEAL**

2. It is Alberta’s position that the Appellant should not be entitled to raise an issue as to the constitutional validity of legislation for the first time on appeal, hence depriving the parties of an opportunity to adduce any relevant evidence.

## **PART III – POINTS OF LAW**

### **A. Standard of Review**

3. The Appellant, in the court below, alleged that the Energy Resources Conservation Board violated her right to free expression contrary to s. 2(b) of the *Charter* and sought damages as a remedy under s. 24(1) of the *Charter*. A new constitutional argument is raised on this appeal. Absent a decision by the Trial Judge on the new issue, no standard of review arises with respect to it.

### **B. Analysis**

4. The Appellant provided a written notice of constitutional question to the Minister of Justice and Solicitor General of Alberta dated February 6, 2014 [Tab A] advising of the appeal in this matter and advising that it is her position that she is not challenging the *constitutional validity* of any enactment but rather is challenging the *constitutional applicability* of section 43 of the *Energy Resources Conservation Act* (“ERCA”) and therefore notice is not required under section 24(1) of the *Judicature Act* but she was serving the notice out of an abundance of caution.

5. The Notice states that it is the Appellant’s position “that the statutory immunity contained within s. 43 of the *ERCA* cannot apply to claims made pursuant to the *Charter*. In the alternative the Appellant is seeking a declaration that to the extent that s. 43 of the *ERCA* is inconsistent with s. 24(1) of the *Charter*, it is of no force and effect.” The Appellant argues in her Factum (pages 8-11) that her right to pursue a *Charter* remedy is guaranteed by s. 24(1) of the *Charter* and cannot be taken away by a provincial statute.

6. A declaration that a law is of no force or effect is a challenge to the constitutional validity of that law.

7. Alberta intervenes as a right pursuant to section 24(4) of the *Judicature Act*, RSA 2000 c. J-2, as amended, in response solely to the Appellant's challenge to the constitutional validity of s. 43 of the *ERCA*.

8. Alberta's position is that the Appellant is raising a new argument on appeal which she cannot do. There is no indication in her Fresh Statement of Claim [Appeal Record at P1] that she wishes to challenge the constitutional validity of s. 43 of the *ERCA*. Further, Wittmann, CJ, at para. 72 of his Reasons [Appeal Record at F27], notes that the Appellant is not seeking to strike down legislation. She seeks only the personal remedy of damages under s. 24(1) of the *Charter*.

9. It is submitted that the Appellant cannot now raise this constitutional issue. This Court has made it clear that generally constitutional arguments will not be entertained for the first time on appeal, particularly where the government is precluded from considering whether to call evidence of justification under s. 1.

*Aftergood v. Alberta (Minister of Municipal Affairs)*, 2006 ABCA 154 at para. 4 [Tab 1]

*Big Loop Cattle Co. Ltd. v Alberta (Energy Resources Conservation Board)*, 2010 ABCA 328 at paras. 35-36 [Tab 2]


See also: *Canadian Newspapers Co. v Canada (AG)*, [1988] 2 SCR 122 at p 134-135

**PART IV – NATURE OF RELIEF DESIRED**

10. Alberta requests that the issue as to the constitutional validity of section 43 of the *ERCA* be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of April, 2014.

Estimated time for argument – 10 minutes.

  
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Lillian H. Riczu  
Counsel for the Minister of Justice  
and Solicitor General of Alberta  
Intervener

## LIST OF AUTHORITIES

### Tab

1. *Aftergood v. Alberta (Minister of Municipal Affairs)*, 2006 ABCA 154
2. *Big Loop Cattle Co. Ltd v Alberta (Energy Resources Conservation Board)*, 2010 ABCA 328