File No. 36167

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

BETWEEN:

JESSICA ERNST

Applicant
(Appellant)

- and -

ENERGY RESOURCES CONSERVATION BOARD

Respondent
(Respondent)

RESPONSE TO APPLICATION FOR LEAVE TO APPEAL
(ENERGY RESOURCES CONSERVATION BOARD, RESPONDENT)
(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

Glenn Solomon, QC/Laura Warner
Jensen Shawa Solomon Duguid Hawkes LLP
800, 304 8th Avenue SW
Calgary AB T2P 1C2
Phone: (403) 571-1507
Fax: (403) 571-1528
Email: gsolomon@jssbarristers.ca
warnerl@jssbarristers.ca
Counsel for the Respondent, Energy Resources Conservation Board

Jeffrey W. Beedell
Gowling Lafleur Henderson LLP
160 Elgin Street, Suite 2600
Ottawa ON K1P 1C3
Phone: (613) 786-1071
Fax: (613) 788-3587
Email: jeff.beedell@gowlings.com

Ottawa Agent for Counsel for the Respondent, Energy Resources Conservation Board

COPIES TO:

Murray Klippenstein/W. Cory Wanless
Klippensteins
300-160 John Street
Toronto ON M5V 2E5
Phone: (416) 598-0288
Fax: (416) 598-9520
Email: murray.klippenstein@klippensteins.ca
cory.wanless@klippensteins.ca
Counsel for the Applicant, Jessica Ernst

TABLE OF CONTENTS

PART I – OVERVIEW OF POSITION AND STATEMENT OF FACTS

A. Overview of Position on Public Importance

1. This matter does not raise an issue of general importance that requires any further guidance from this Court. The courts below applied clear and analogous decisions from this Court in concluding that section 43 of the *Energy Resources Conservation Act* (***ERCA***)[1] is a valid limit on Ms. Ernst's right to damages against the Energy Resources Conservation Board (**ERCB**). Ms. Ernst had access to a meaningful alternative remedy – judicial review - and chose to not pursue it. That was the avenue open to her as against the ERCB. She may have a valid claim for damages against the other defendants, Her Majesty the Queen in Right of Alberta and Encana Corporation, but she does not have one against the ERCB.

2. Ms. Ernst's application for leave, like her appeal in the Court below, is based on the incorrect axiomatic position that the right to a personal remedy under section 24(1) of the *Canadian Charter of Rights and Freedoms* (the ***Charter***)[2] is a constitutional prerogative that may not be limited by statute. That position is in direct conflict 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.

3. The immunity provision in s. 43 of the *ERCA* is a legitimate exercise of the Province's competence over the administration of justice and property and civil rights. The purpose of that section 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 with purely public duties from being called to account to any particular individual through a claim for private remedies. Section 43 ensures that the ERCB, which owes only public duties, is held to account only through the public law remedies available through judicial review and not through personal liability that would conflict with the ERCB's efficient operations.

4. The Applicant has not offered any principled reason why this validly enacted provision should not bar her claim for damages in the same way that a limitation provision would. The decision below is clear, well-reasoned, and relies on analogous caselaw from this Court. It does not raise a legal issue of general importance.

---

[1] RSA 2000, c. E-10 [Leave Application at p. 82].

[2] *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 [Leave Application at pp. 80-81].

B. Factual Background

5. While Ms. Ernst's leave application is limited to the *Charter* claim pleaded against the ERCB,[3] her related tort claim – and the relevant conclusions in the courts below – provide important context to the *Charter* claim.

(i) The ERCB Owes Only Public Duties

6. In her Fresh Claim, Ms. Ernst alleged that the ERCB owed her a private duty to take reasonable steps to protect her well water from foreseeable contamination.[4] Wittmann CJ rejected this allegation. He concluded that the statutory regime established the ERCB's **public** duties and nothing outside that regime created a private duty between the ERCB and Ms. Ernst.[5]

7. The Court of Appeal confirmed Wittmann CJ's conclusion, noting that regulatory duties are generally owed to the public, not to any individual. The Court noted, among other things, that:

> ...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.[6]

8. The Court concluded that "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".[7] Ms. Ernst's tort claim was struck on the basis that the ERCB did not owe her a duty of care.

---

[3] Leave Memorandum at para. 12 [Leave Application at p. 64].
[4] Court of Queen's Bench Judgment at para. 2 [Leave Application at Tab 2].
[5] Court of Queen's Bench Judgment at paras. 27-28 [Leave Application at Tab 2].
[6] Court of Appeal Judgment at paras. 16-17 (citations omitted) [Leave Application at Tab 4].
[7] Court of Appeal Judgment at para. 18 [Leave Application at Tab 4].

9. After the ERCB was successful in striking Ms. Ernst's claims against it, the other defendant, Alberta, brought a similar application seeking to strike Ms. Ernst's claims. In that subsequent decision, Wittmann CJ concluded that Alberta could be held to owe Ms. Ernst a private law duty of care:

> **The ERCB and Alberta had different roles with respect to Ernst**. Her allegations against the ERCB, which have been struck, related to the ERCB's administration of its regulatory regime and its communications with her. Ernst's allegations against Alberta include complaints about how it administered its regulatory regime, as well as allegations of a negligent investigation and inadequate response to her complaints about contamination of her well water. These allegations concern direct contact between Alberta and Ernst, and assert specific representations were made to Ernst. These facts, if proven at trial, could establish a sufficiently proximate relationship between Ernst and Alberta Environment.[8] [emphasis added]

10. This decision underscores the purely public nature of the ERCB's duties.

(ii) Section 43 of the ERCA *Expressly Bars the Applicant's Claim Against the ERCB*

11. Both courts below also confirmed that, in any event, the general "protection from action" provision in s. 43 of the *ERCA* barred Ms. Ernst's tort and *Charter* claims against the ERCB. Both courts below held that section 43 of the *ERCA* was a constitutionally valid limit on Ms. Ernst's ability to obtain damages against the ERCB. These conclusions were specific to the allegations against the ERCB and the provision at issue. Section 43 of the *ERCA* provides:

> **Protection from Action**
>
> 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.** [emphasis added]

12. In Alberta's subsequent application to strike, Wittmann CJ considered two different immunity provisions. He considered section 220 of the *Environmental Protection and Enhancement Act*[9] which provides that no action for damages may be commenced against various people "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 including, without

---

[8] *Ernst v EnCana Corporation*, 2014 ABQB 672 ("*Encana*") at para. 50.
[9] RSA 2000, c W-3.

limitation, any failure to do something when that person has discretionary authority to do something but does not do it". He also considered s. 157 of the *Water Act*,[10] which was similarly worded.[11]

13. Wittmann CJ concluded that the provisions that Alberta relied on did not expressly exclude Ms. Ernst's claims against Alberta because neither of the provisions specifically immunized the Province or the government as a whole. Rather, the provisions were directed at specific government employees.[12]

14. The wording and context of immunity provisions in different statutes in Alberta and elsewhere vary and each must be individually and purposively interpreted. This calls into question whether the interpretation of s. 43 of the *ERCA* raises an issue of general – as opposed to local – importance.

15. In summary, the ERCB owed only public duties and is covered by a clearly worded immunity provision which protects it from all private actions against it. Therefore, the courts below properly held that, in seeking to determine the validity of the ERCB's impugned conduct, Ms. Ernst was limited to public law remedies. By contrast, Ms. Ernst continues to have an arguable claim that Alberta and Encana breached private duties owed to her and may be liable to her for damages.

PART II – QUESTION IN ISSUE

16. The issue in this application is whether the decision below raises a question of public importance that ought to be decided by this Court. The ERCB respectfully submits that it does not.

PART III – STATEMENT OF ARGUMENT

A. The Well-Established Distinction Between General Remedies Which Restore Constitutional Order and Private Remedies Brought by the Individual *Qua* Individual

17. In her application for leave, Ms. Ernst surprisingly suggested that she is not seeking to determine whether a particular remedy is available but only whether she can bring a claim against the ERCB at all.[13] This attempt to re-frame the issue does not withstand scrutiny. The

---

[10] RSA 2000, c E-12.
[11] *Encana* at paras. 58 and 60.
[12] *Encana* at para. 65.
[13] Leave Memorandum at para. 22 [Leave Application at pp. 67-68].

outcome of Ms. Ernst's application hinges entirely on the nature of the remedy she sought, namely, damages in the amount of $50,000.00 for the purported violation of her right to free expression under section 2(b) of the *Charter*.[14]

18. Ms. Ernst's application is based on the position that s. 24(1) of the *Charter* enshrines a constitutional right to a personal remedy, which right cannot be limited by statute.[15] In advancing this position, the Applicant is effectively calling into question the correctness of this Court's decisions in *Kingstreet Investments Ltd. v New Brunswick (Department of Finance)*[16] and *Ravndahl v Saskatchewan*[17] (although she did not even cite those decisions in her application). Once it is understood that personal *Charter* remedies may be limited by statute, the foundation for Ms. Ernst's application falls apart.

19. 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. It is, however, completely silent regarding how those 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 amend or remove those heads of power and this Court has repeatedly confirmed that section 24(1) operates concurrently with, and does not replace, the general law.[18]

20. 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*. In other words, 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.

---

[14] With reference to paragraph 21 of the Applicant's leave memorandum, when the Applicant says the Court of Appeal did not disturb Wittman CJ's finding that "the *Charter* claim of Ernst against the ERCB is valid", all this means is that he declined to strike the s. 2(b) *Charter* claim as a novel pleading. He did, of course, strike the claim based on the s. 43 statutory bar, a conclusion that the Court of Appeal sustained.

[15] Leave Memorandum at para. 43 et seq [Leave Application at p. 75 et seq.].

[16] 2007 SCC 1, [2007] 1 S.C.R. 3 ("*Kingstreet*").

[17] 2009 SCC 7, [2009] 1 S.C.R. 181 ("*Ravndahl*").

[18] *Vancouver (City) v Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28 ("*Ward*") at para. 34 [Applicant's authorities; Leave Application at p. 79]; see also *Engler-Stringer c. Montréal (Ville)*, 2013 QCCA 707 at para. 50.

21. 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.**
>
> 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.[19] [emphasis added]

22. The task is to determine whether the Applicant seeks relief designed to address a constitutional deficiency for the benefit of everyone affected, thereby securing a global remedy, or whether the Applicant seeks a personal remedy that will accrue to her alone.

23. This Court recently affirmed the distinction between general and personal constitutional remedies in *Manitoba Metis Federation Inc. v Canada (Attorney General)*:[20]

> **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. [emphasis added]

24. 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*.

25. 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

---

[19] *Ravndahl* at paras. 16-17.
[20] 2013 SCC 14, [2013] 1 S.C.R. 623 ("*Manitoba Metis*") at paras. 134 and 143.

nature. The deprivation of a common law right to sue for damages does not offend the *Charter*, which does not protect purely economic interests.[21]

26. 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 for an alleged breach of her right to free expression.

27. There is no principled reason to distinguish between the limitation provision at issue in *Ravndahl* and the immunity provision at issue here. Both limitation and immunity provisions concern valid policy decisions to legislate limits on a litigant's access to personal remedies.

B. The Purpose of Immunity Provisions

28. The ERCB agrees that, at base, the Constitution is about good governance.[22] Of course, the immunity provision at issue here simply relates to a different side of the "good governance coin".

29. 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*,[23] 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...** [emphasis added]

---

[21] *Kingsway General Insurance Co v Alberta*, 2005 ABQB 662 at para. 90.
[22] Leave Memorandum at paras. 40-42 [Leave Application at p. 75].
[23] [1989] 2 S.C.R. 1228 ("*Just*") at 1239.

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

> ... becoming a vehicle for judicial interference with decision-making that is properly exercised by other branches of the government and [to protect] **"the Government from liability that would seriously handicap efficient government operations"**...[24] [emphasis added]

31. In *Welbridge Holdings Ltd v Greater Winnipeg*,[25] 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.** [emphasis added]

32. Justice Laskin 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.[26]

33. Drawing the boundaries of government immunity is a question of legislative prerogative. As this Court stated in *Swinamer v Nova Scotia (Attorney General)*,[27] 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".

34. 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.

35. 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

---

[24] *Just* at 1239, citing Becker J. of the United States District Court, in *Blessing v. United States*, 447 F.S. 1160.
[25] [1971] S.C.R. 957 ("*Welbridge*") at 968, citing *Dalehite v. United States* (1953), 346 U.S. 15.
[26] *Welbridge* at 969-970.
[27] [1994] 1 S.C.R. 445 at 461-62.

civil action. If a public decision-maker, balancing a myriad of different interests, could be civilly liable for its decisions, other incentives, irrelevant to the dispute before it, would be created. Immunity from suit is a crucial element of maintaining the integrity and impartiality of public decision-makers at all levels.

36. Immunity and limitation provisions serve different but equally important purposes. They are functionally analogous for purposes of this application. 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.

37. Section 43 of the *ERCA* ensures that, in exercising its public duties, the ERCB is held accountable only through public remedies. It serves the important purpose of protecting the ERCB and its members from liability that would handicap the efficient execution of statutory duties.

38. It is not designed to immunize unconstitutional measures from challenges. Rather, it falls legitimately within the jurisdiction of the Province to administer justice and regulate property and civil rights. Immunity provisions have long been part of the judicial landscape and the courts below properly recognized that their rationales are as relevant to claims for personal remedies brought under the *Charter* as to other sorts of claims.

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

39. To succeed in raising an issue of general importance, the Applicant must persuade this Court to adopt an overly literal reading of sections 24 and 52 of the *Charter*, which read:

> 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. . . .
>
> 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.

40. The Applicant's theory is that any limit on the right to a remedy in section 24(1) is unconstitutional and, under section 52(1), of no force or effect.[28] However, it is simply not the case that a personal claim for damages under the *Charter*, in and of itself, trumps the general

[28] Leave Memorandum at paras. 40-43 [Leave Application at pp. 74-75].

law. If a right to a remedy were a constitutional right, there could be no limits on personal *Charter* claims. However, as this Court noted in *Ward*, section 24(1) operates concurrently with, and does not replace, the general law. As such, there are numerous valid limits on the right to a personal remedy under section 24(1) of the *Charter*. The Court of Appeal noted many examples in the decision below.[29] We have already seen that limitation provisions apply to personal claims for constitutional relief brought by individuals as individuals. Notice requirements such as those found in s. 24 of the *Judicature Act*[30] are also legitimate limits on *Charter* remedies. Other limits on the right to a remedy under section 24(1) of the *Charter* include the following.

(i) Judicial and Quasi-Judicial Decisions

41. 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 this judicial immunity. The statutory regulator and decision-makers should be free to make independent and impartial decisions without being exposed to and distracted by the prospect of civil liability.[31] The prospect of civil liability creates a relationship that is inconsistent with impartial decision-making in the overall public interest.

42. 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 board and its members acting in their capacity as statutory decision-makers.

43. A judge's decision is subject to review through appeal; a tribunal's decision is subject to oversight through the mechanism of judicial review. Those affected by tribunal decisions do not enjoy an unlimited right to pursue the board or its members for a personal remedy in the nature of damages.

44. 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 the personal interests of the decision-maker, but rather to protect the public interest in an independent, impartial decision-making process.

---

[29] Court of Appeal Judgment at paras. 26-29 [Leave Application at Tab 4].
[30] RSA 2000, c. J-2; Court of Appeal Judgment at para. 27 [Leave Application at Tab 4].
[31] *Mackeigan v. Hickman* [1989] 2 S.C.R. 796 at 826-27.

Administrative decision-makers, no less than their judicial counterparts, must be able to act without fear of personal liability.[32]

(ii) Courts of Competent Jurisdiction

45. The *Charter* does not give jurisdiction to tribunals that do not already possess it. 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 section 24 of the *Charter*, Chief Justice McLachlin wrote:[33]

> 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.

(iii) Crown Immunity from Execution

46. 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 Crown is liable to pay all judgments entered against it,[34] 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*.[35] The potential disruption of public services militates strongly against public property being vulnerable to seizure and sale at the instance of a private party.[36] 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.

---

[32] 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.
[33] *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575 at para. 22 (citations omitted) [Applicant's authorities; Leave Application at p. 79].
[34] By enactment of Crown Liability and Proceedings Acts in most jurisdictions, directing the Treasurer to pay amounts ordered by courts.
[35] Ontario Law Reform Commission at p. 85.
[36] Ontario Law Reform Commission at pp. 85-86.

(iv) Traditional Limits on What is "Appropriate and Just"

47. Both courts below noted that, in determining whether a *Charter* remedy is "appropriate and just" in the circumstances, courts will have regard to traditional limits on personal remedies. In this context, the legislatures have a legitimate role to play in specifying the parameters of available remedies.[37]

48. In *Ward* this Court confirmed that entitlement to a personal remedy does not automatically flow from an unconstitutional law or act. Rather, an award of damages must be considered in light of countervailing policy considerations related to, among other things, the existence of alternative remedies and concern for good governance.[38] The policy considerations underlying limitation and immunity provisions should not be negated by recourse to s. 24(1) of the *Charter*.[39]

49. When a litigant seeks a personal remedy, the Court may decline to award it, even if a *Charter* breach is established.[40] As the Court of Appeal put it:

> **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.[41] [emphasis added]

50. In summary, the law recognizes a number of valid limits on the right to obtain certain types of remedies under the *Charter*. Ms. Ernst's understanding that she has a constitutionally guaranteed right to the remedy of her choice is incorrect.

D. There is No "Controversy" for this Court to Resolve

51. The Applicant has tried to create the notion of a controversy[42] by relying on this Court's 1989 decision in *Nelles v Ontario*[43] and the Ontario Court of Appeal's 1993 decision in *Prete v Ontario*.[44]

---

[37] Court of Appeal Judgment at para. 28 (citations omitted) [Leave Application at Tab 4].
[38] See discussion in Court of Queen's Bench Judgment at paras. 83-88 [Leave Application at Tab 2].
[39] *Ward* at para. 43, cited in the Court of Queen's Bench Judgment at para. 86 [Leave Application at Tab 2].
[40] *Ward* at paras. 33, 40, and 43.
[41] Court of Appeal Judgment at para. 29 [Leave Application at Tab 4].
[42] Leave Memorandum at para. 26 et seq. [Leave Application at pp. 69-70].
[43] [1989] 2 S.C.R. 170 ("*Nelles*") [Applicant's authorities; Leave Application at p. 79].

52. *Nelles* concerned whether the Attorney General and the Crown Attorneys enjoyed an absolute immunity from a suit for malicious prosecution. This Court held that, while the policy considerations in favour of absolute immunity had some merit, those considerations gave way to the right of a private citizen to seek a remedy when a prosecutor acted maliciously in fraud of her duties. A majority of this Court held that the "fundamental flaw with an absolute immunity for prosecutors is that the wrongdoer cannot be held accountable by the victim through the legal process".[45]

53. The animating principle in *Nelles* was that the Applicant could not be deprived of having access to **any** remedy. In *Nelles*, the Court was concerned with granting prosecutors a license to subvert individual rights. No such concern arises here.

54. Contrary to the Applicant's assertions,[46] she had access to a responsive and effective remedy. Ms. Ernst could have availed herself of the "time tested and conventional challenge to an administrative tribunal's decision", namely, judicial review.[47] Nothing in section 43 prevented Ms. Ernst from seeking an order to compel the Board to receive communications from her. Because there was a meaningful way to test the constitutional validity of the ERCB's impugned conduct, the decisions below do not conflict with the reasons for decision in *Nelles*.

55. In *Prete*, the Ontario Court of Appeal considered the application of a statutory immunity clause in respect of a personal *Charter* claim. The plaintiff brought an action for damages under section 24(1) of the *Charter* for malicious prosecution against, among others, the Attorney General of Ontario, who applied to dismiss the claim on a number of grounds, including limitations and Crown immunity. Relying on *Nelles*, the majority held that neither the six-month limitation period contemplated in section 11(1) of the *Public Authorities Protection Act*, nor the statutory immunity provision in section 5(6) of the *Proceedings Against the Crown Act*, could negate the plaintiff's ability to seek a personal remedy under the *Charter*. The Court concluded that "a statutory enactment cannot stand in the way of a constitutional entitlement".[48]

---

[44] (1993), 16 OR (3d) 161 (C.A.) ("*Prete*") [Applicant's authorities; Leave Application at p. 79].
[45] *Nelles* at 195.
[46] Leave Memorandum at paras. 44-48 [Leave Application at pp. 75-76].
[47] Court of Queen's Bench Judgment at para. 73 [Leave Application at Tab 2].
[48] *Prete* at para. 8.

56. As Wittmann CJ held, *Prete* is distinguishable from this matter on the basis that section 43 of the *ERCA* immunizes the ERCB from civil action generally, and its application is not targeted at any particular individual or group.[49]

57. Further, in *Prete*, the Court held that the reasons underlying the inapplicability of statutory immunity clauses to personal *Charter* claims were the same as those underlying the inapplicability of limitation periods. In other words, the Court held in *Prete* that neither immunity clauses nor limitation provisions could limit access to *Charter* remedies of any kind. In this sense, *Prete* has been overturned by this Court[50] so it does not create a conflict which requires any further clarification.

E. This Matter Does Not Afford this Court with a Fulsome Platform to Decide the Alleged Question in Issue

58. For all of the reasons summarized above, the ERCB submits that there is no pressing legal issue regarding whether section 43 of the *ERCA* validly limits access to claims for damages under the *Charter*. The Courts below applied analogous caselaw from this Court and provided well-reasoned decisions which confirm the established principle that personal *Charter* remedies may be limited by statute.

59. In any event, this matter does not provide the fulsome platform that would allow this Court to fully explore the alleged issue.

60. The scope of a valid immunity provision might be legitimately tested in a context where the relevant public body owes a private law duty to the Applicant. That issue cannot be meaningfully analyzed in this context, where the ERCB owes only public duties. It would be anomalous to subject the tribunal to liability for personal remedies when it owed Ms. Ernst no duty.

61. Further, as the courts below noted, Ms. Ernst's position is that section 43 of the *ERCA* is of no force and effect because it is inconsistent with s. 24(1) of the *Charter*. She has therefore impugned the validity of section 43 without going through the proper notice channels under s. 24 of the *Judicature Act*. The Minister of Justice and Solicitor General of Alberta intervened in the court below to complain about the lack of proper notice. Alberta has been denied the opportunity to call evidence on the topic.[51] When this Court decided *Ravndahl*, it did so with

[49] Court of Queen's Bench Judgment, at paras. 64 and 67 [Leave Application at Tab 2].
[50] *Prete* at para. 14; *Ravndahl* at paras. 16-17; *Kingstreet* at paras. 59-61; *Manitoba Metis* at para. 134.
[51] Court of Appeal Judgment at para. 7 [Leave Application at Tab 4].

the benefit of submissions from all interested parties. There is no such record in these proceedings.

62. Finally, Ms. Ernst's claim was struck at the pleadings stage and there is no evidence on the record. Ms. Ernst's *Charter* claim is novel, to say the least. Given that the ERCB's purported decision to cease communication with Ms. Ernst had no effect on her ability to express her views relating to oil and gas development in Alberta, either publicly or to the ERCB, it is unclear how Ms. Ernst's section 2(b) rights are engaged at all.

63. On the Applicant's own facts, she was free to, and did, continue to contact the ERCB after the purported decision to exclude her from the ERCB complaint process. Ms. Ernst also continued to express her views relating to the ERCB and oil and gas development publicly. The Applicant's own claim makes it clear that she was never restricted from expressing herself. It appears that the Applicant's claim, properly understood, is that the ERCB breached her right to free expression because it would not respond to her communications, or did not respond to her communications in a way that she found satisfactory.

64. Section 2(b) of the *Charter* does not guarantee an audience, and it certainly does not require a statutory regulator such as the ERCB to be that audience. Given that the Applicant's right to free expression does not guarantee an audience, it can hardly guarantee a right to effective, two-way communication with, or specific and satisfactory responses from, an audience. The Applicant's right to free expression cannot require the ERCB to communicate with her, or provide her with a specific or prescribed response. Such a requirement would effectively constitutionalize the form and content of ERCB responses to public complaints or requests.[52]

65. Taken to its logical conclusion, the Applicant 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. If any such right to a response exists, it must be enforced by judicial review - which allows the Court to determine the lawfulness of the Board's actions, and to grant the remedy due. Here, relief in the nature of *mandamus* to

[52] *Ontario (Attorney General) v Dieleman* (1994), 20 O.R. (3d) 229 (Gen Div) at paras. 637-8; *R v Breeden*, 2009 BCCA 463 at paras. 33-34; *R v Spratt*, 2008 BCCA 340 at para 82.

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. This matter offers nothing but a theoretical or hypothetical platform from which to address the issue of the proper balance between immunity provisions and access to remedies under s. 24(1) of the *Charter*.

F. Conclusion

66. Ms. Ernst's application hinges on the misguided notion that she has a constitutionally guaranteed right to the *Charter* remedy of her choice. Her application 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 does (or could) limit the Applicant's ability to seek an order to compel the ERCB to receive communications from her. She could have, but chose not to, pursue that remedy through judicial review. Instead, she pursued a personal monetary remedy against the ERCB.

67. Section 43 of the *ERCA* validly limits Ms. Ernst's claim for damages. This protection from action clause is a legitimate exercise of the Province's competence over the administration of justice and property and civil rights. Its purpose 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 with purely public duties from being called to account to any particular individual through a claim for private remedies.

68. Section 43 of the *ERCA* is one of many valid limits on the type of remedy Ms. Ernst sought. The right to such remedies is also limited by, among other things, limitation clauses of general application, judicial and quasi-judicial immunity, the Crown's right to immunize itself against execution, and traditional limits on "appropriate and just" remedies under section 24(1) of the *Charter*. In short, Ms. Ernst's application is based on a fundamentally flawed foundation.

69. The decisions below applied clear and analogous caselaw from this Court. The ERCB submits that there is no legal issue of general importance which requires further guidance from this Court nor any injustice to the Applicant to remedy.

PART IV – SUBMISSIONS ON COSTS

70. The ERCB requests its costs of this application for leave to appeal, should the application be dismissed.

PART V – ORDER REQUESTED

71. The ERCB requests an order dismissing the application for leave to appeal, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of December, 2014.

Jensen Shawa Solomon Duguid Hawkes LLP

as agent for

Glenn Solomon, QC/Laura Warner
Counsel for the Applicant, Energy Resources Conservation Board