

PART I – OVERVIEW OF POSITION AND STATEMENT OF FACTS

A. Overview of Position

1. The Appellant, Jessica Ernst, applies under Rules 47 and 60 to state the following constitutional questions:

Does s. 43 of Alberta's *Energy Resources Conservation Act*, which contains a general "protection from action" clause, bar a *Charter* claim for a personal remedy made pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms*?

Does s. 43 of Alberta's *Energy Resources Conservation Act* define or constrain what remedies are available under s. 24(1) of the *Canadian Charter of Rights and Freedoms*?¹

2. The Appellant's motion should be dismissed. No constitutional question should be stated in the present matter. Contrary to the Appellant's submissions, the constitutional validity or applicability of s. 43 of the *Energy Resources Conservation Act*² was not raised in the Courts below. Rather, the issue addressed by the Courts below was whether s. 43 of the *ERCA*, on its face and as a matter of statutory interpretation, can bar a claim for damages on the grounds alleged by the Appellant. This Court should be reluctant to hear what amounts to a new argument that was not fully considered in the courts below.

3. In any event, the constitutional questions proposed by the Appellant are improper. They do not challenge the constitutional validity or applicability of s. 43 of the *ERCA*, or put at risk any other legislative provision. The proposed constitutional questions are, at best, indirect and generalized constitutional challenges to s. 43 of the *ERCA* based on s. 24(1) of the *Canadian Charter of Rights and Freedoms*,³ which relates to remedies and not rights.

B. Factual Background

4. The Appellant filed a Statement of Claim in respect of this matter on December 3, 2007. She filed an Amended Statement of Claim on April 21, 2011, and a Second Amended Statement of Claim on February 7, 2012. Finally, she filed a "Fresh" Statement of Claim on June 25, 2012.⁴ The Appellant claimed against EnCana Corporation, the Energy Resources Conservation Board

¹ Notice of Motion to State a Constitutional Question at p. 1 [Tab 1 of the Appellant's Motion Record ("AMR")]

² *Energy Resources Conservation Act*, RSA 2000, c E-10 [ERCA]

³ *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 [Charter].

⁴ *Ernst v EnCana Corporation*, 2013 ABQB 537 at para 4 [ABQB Reasons][Tab 3B of AMR]

(the "ERCB"),⁵ and the Government of Alberta, alleging, *inter alia*, that these defendants are responsible for the contamination of the groundwater near her residence near Rosebud, Alberta.⁶

5. Ms. Ernst claimed against the ERCB in negligence, alleging that the ERCB owed her a private duty to take reasonable steps to protect her well water from foreseeable contamination. The Appellant also alleged that the ERCB breached her *Charter* right to free expression by excluding her from its complaint process in retaliation for her criticism of the ERCB, or arbitrarily removing her from a public forum that had been established to accept complaints about the oil and gas industry.⁷ Ms. Ernst claimed \$50,000.00 in damages under section 24(1) of the *Charter* for this purported violation of her right to free expression. Ms. Ernst has not claimed any manner of declaratory relief in the Fresh Statement of Claim.⁸

6. The ERCB applied for an Order striking the Fresh Statement of Claim as disclosing no cause of action, or alternatively for summary judgment.⁹ Wittmann CJ allowed the ERCB's application, striking the Appellant's claims and awarding judgment in favour of the ERCB. In respect of the negligence claim, Wittmann CJ held 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.¹⁰ Wittmann CJ further held that, in any event, the negligence claims against the ERCB were barred by the statutory immunity provided by s. 43 of the *ERCA*:

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.¹¹

7. In respect of the Appellant's *Charter* claim, Wittmann CJ held that the evidence before him was insufficient to dismiss the claim on the basis that it did not disclose a reasonable cause of action, or on the basis that it was brought outside the relevant limitation period. However,

⁵ As noted by the Appellant, the ERCB has been succeeded by the Alberta Energy Regulator pursuant to the *Responsible Energy Development Act*, SA 2012, c R-17.3. However, the Respondent Alberta Energy Regulator will be referred to herein as the "ERCB".

⁶ ABQB Reasons at paras 1-3 [Tab 3B of AMR]

⁷ ABQB Reasons at para 2 [Tab 3B of AMR]

⁸ Fresh Statement of Claim at para 87 [Tab 3A of AMR]

⁹ ABQB Reasons at paras 46, 10, 90, 94-95 [Tab 3B of AMR]

¹⁰ ABQB Reasons at paras 27-28 [Tab 3B of AMR]

¹¹ ABQB Reasons at paras 27-30, 52-58 [Tab 3B of AMR]; *ERCA*, s. 43

Wittmann CJ dismissed the *Charter* claim on the basis of the statutory immunity contained in s. 43 of the *ERCA*.¹²

8. The Court of Appeal of Alberta dismissed Ms. Ernst's appeal, and held that the ERCB did not owe Ms. Ernst a private duty of care. The Court further held that the general "protection from action" provision in s. 43 of the *ERCA* barred Ms. Ernst's tort and *Charter* claims against the ERCB.¹³

PART II – THE QUESTION IN ISSUE

9. The question in issue is whether the constitutional questions proposed by the Appellant should be stated.

PART III – ARGUMENT

A. Generally, this Court will not state constitutional questions that were not raised below

10. In her memorandum in support of the within motion, the Appellant states that her proposed constitutional questions were "squarely considered and have been fully developed by the Alberta Court of Queen's Bench and the Court of Appeal of Alberta."¹⁴ What the Appellant neglects to state is that the constitutional validity or applicability of s. 43 of the *ERCA* was not raised before the Alberta Court of Queen's Bench or the Court of Appeal of Alberta.

11. The Appellant's allegation in the Fresh Statement of Claim is that the ERCB infringed her right to free expression under s. 2(b) the *Charter*. The Appellant's *Charter* claim relates to the conduct of the ERCB, and not to the validity or application of any particular legislative provision. The Application of the ERCB at the Court of Queen's Bench related to whether the Appellant's *Charter* claim disclosed a cause of action. The Appellant did not raise a constitutional question regarding the validity or applicability of s. 43 of the *ERCA* at Court of Queen's Bench, nor did she provide any Notice of Constitutional Question at that stage of the proceedings. Indeed, Wittmann CJ noted that the Appellant did not provide notice under s. 24 of the *Judicature Act*:¹⁵

As a final point on the constitutional issue, as was argued by counsel for the ERCB orally, if Ernst seeks as a remedy a declaration striking down section 43 of the *ERCA*, a Notice of Constitutional Question should be given to the Attorneys General of Alberta and Canada, pursuant to section 24 of the *Judicature Act*, RSA 2000, c J-2. The ensuing

¹² ABQB Reasons at paras 59-88 [Tab 3B of AMR]

¹³ *Ernst v EnCana Corporation*, 2013 ABCA 285 [ABCA Reasons][Tab 3C of AMR]

¹⁴ Memorandum of Argument at para 15 [Tab 2 of AMR]

¹⁵ *Judicature Act*, RSA 2000, c J-2, s. 24 [*Judicature Act*]

constitutional litigation could be pursued in a procedural matrix, which would consider the constitutional validity of the legislation, including whether a section 1 *Charter* defence might be available to the Legislature in the event a *Charter* breach is found. The procedural requirement to provide a Notice of Constitutional Question facilitates full argument of any constitutional issues and is a matter of procedural fairness necessary to ensure the Attorneys General of Alberta and Canada have an opportunity to be heard.¹⁶

12. As in the Court of Queen's Bench, the Appellant did not expressly raise the constitutional applicability or validity of s. 43 of the *ERCA* in her appeal of the Order of Wittmann CJ. In the Appellant's Notice of Appeal in the Court below, she stated that the issue on appeal was:

Did the Court err in finding that the statutory immunity clause contained within section 43 of the [*ERCA*] bars an otherwise valid claim for breach of the right to freedom of expression made pursuant to the [*Charter*]?¹⁷

The Appellant also provided the following answer to a question set out in the Notice of Appeal:

Q: Is the constitutional validity of an Act or Regulation being challenged as a result of this appeal?

A: No. The appeal, however, does relate to a claim made under s. 24 of the [*Charter*].¹⁸

13. Only at the Court of Appeal stage did the Appellant provide a Notice of Constitutional Question to the Minister of Justice and Solicitor General of Alberta (the "**Minister of Justice**") and the Attorney General of Canada. In this Notice, the Appellant stated that she was "not challenging the *constitutional validity* of any enactment (i.e. she is not seeking as a remedy a declaration striking down the section) but rather is challenging the *constitutional applicability* of s. 43 of the [*ERCA*]".¹⁹ The Appellant further stated that because she was not challenging the validity of the legislation, she was providing notice out of an abundance of caution, and not because notice was required under the *Judicature Act*. Ms. Ernst stated that it was her position that the "statutory immunity contained within s. 43 of the *ERCA* cannot apply to claims made pursuant to the *Charter*." She advised that in the alternative, she was "seeking a declaration

¹⁶ ABQB Reasons at para 89 [Tab 3B of AMR]

¹⁷ Civil Notice of Appeal, Filed December 2, 2013 at p. 2 [CA Notice of Appeal][**Tab 2A**]

¹⁸ CA Notice of Appeal at p. 3 [**Tab 2A**]

¹⁹ Factum of the Intervener, the Minister of Justice and Solicitor General of Alberta, filed April 17, 2014, at p. 1 of Tab A [AG CA Factum][emphasis in original][**Tab 2B**]

that to the extent that s. 43 of the *ERCA* is inconsistent with s. 24(1) of the *Charter*, it is of no force or effect.”²⁰

14. The Minister of Justice intervened at the Court of Appeal, arguing that proper notice of the constitutional challenge to s. 43 of the *ERCA* had not been given pursuant to s. 24 of the *Judicature Act*. The Minister of Justice argued that the Appellant was not entitled to raise a new constitutional argument on appeal because it deprived the parties of the opportunity to adduce relevant evidence, including evidence relating to s. 1 of the *Charter*.²¹ The Court of Appeal did not address the arguments raised by the Minister of Justice, apart from noting that there was no appeal or cross-appeal relating to whether sufficient notice of the constitutional attack on s. 43 was given under the *Judicature Act*.²²

15. The Court of Appeal did not address the constitutional validity or applicability of s. 43 (or any other legislative provision) because that issue was not before the Court. Rather, the Court characterized the issue before it as whether s. 43 of the *ERCA* can bar a *Charter* claim.²³ That is, the issue addressed by the Court of Appeal was one of statutory interpretation, and not constitutional applicability or validity. It was within the statutory interpretation context that the Court of Appeal held that s. 43 of the *ERCA* barred the Appellant’s claim for damages, including her *Charter* claim.

16. This Court generally, and save in exceptional circumstances, will not state a constitutional question where, as here, that issue has not been raised in the courts below. The Appellant did not challenge the constitutional validity or applicability of s. 43 of the *ERCA* in the Court of Queen’s Bench. At the Court of Appeal, the Appellant did not raise a proper constitutional question in respect of s. 43 of the *ERCA*. The Court did not address the constitutional applicability or validity of that section.

²⁰ AG CA Factum at p. 1 of Tab A [Tab 2B]

²¹ AG CA Factum at paras. 2, 9 [Tab 2B]

²² ABCA Reasons at para. 9 [Tab 3C of AMR]

The Court of Appeal determined that there was no appeal or cross-appeal on this issue, and that it was not necessary to address the issue in order to resolve the appeal. The Court also stated (at paragraph 9) that there was no appeal or cross-appeal regarding, *inter alia*, whether the pleadings disclosed a sustainable claim for a *Charter* breach. However, the Notice of Appeal in the Court below was in respect of all paragraphs of the Order of Wittmann CJ dismissing the claims against the ERCB: CA Notice of Appeal at pp. 5-6 [Tab 2A]. The Rules of the Court of Appeal of Alberta in force at the time did not require a cross-appeal to engage these issues in the Court below. The ERCB made submissions on the validity of the Appellant’s *Charter* claim before both of the Courts below. Ultimately, the whole appeal, which was on the whole decision Wittmann CJ in respect of the ERCB, was dismissed by the Court of Appeal (at paragraph 31).

²³ ABCA Reasons at para. 8 [Tab 3C of AMR]

17. The distinction between the issue raised by the Appellant in the Courts below and a proper constitutional question is not a mere technicality, of no import to the parties. It is a question of procedural fairness. If the Appellant seeks to challenge the constitutional applicability or validity of a legislative provision, she is required to do so expressly, properly and precisely. If the Appellant wishes to raise a constitutional question, the parties are entitled to know what that question is. Indeed, the ERCB should not be made the primary defender of the constitutionality of legislation. That is the primary function of the Attorney General.

18. There is an important purpose underlying the notice requirements set out in the *Judicature Act*. Evidence is required to make a determination of constitutional validity or applicability, including evidence related to s. 1 of the *Charter*. The Attorneys General must have the opportunity to be heard on issues relating to the constitutional validity or applicability of legislation. The most appropriate forum for this exercise is the court of first instance, in this case the Court of Queen's Bench.

19. The fact is that the Appellant has never clearly, properly or precisely set out the nature of the constitutional challenge she purports to make. Indeed, in the Notice of Constitutional Question in respect of the appeal below, the Appellant stated that she was challenging the constitutional applicability, but **not** the constitutional validity, of s. 43 of the *ERCA*. However, she also stated that she intended to seek a declaration that s. 43 of the *ERCA* was of no force or effect to the extent that it is inconsistent with s. 24(1) of the *Charter*.²⁴ Such declaratory relief was referred to in the Appellant's memorandum in respect of the within Motion and in her Application for Leave to Appeal to this Court.²⁵ As noted in the factum of the Minister of Justice in the Court below, "a declaration that a law is of no force or effect" is, in fact, "a challenge to the constitutional validity of that law."²⁶

20. The within Action does not seek to strike down s. 43 of the *ERCA* as contrary to the *Charter*. The Appellant has never properly challenged the constitutional validity or applicability of s. 43 of the *ERCA*. The Appellant has never posed the question of whether s. 43 of the *ERCA* is contrary to s. 2(b) of the *Charter* in that it constrains any potential for a personal remedy under s. 24(1). In this context, the constitutional validity or applicability of s. 43 of the *ERCA* is not in issue. The provision is presumed to be constitutional.

²⁴ AG CA Factum at p. 1 of Tab A [Tab 2B]

²⁵ As noted above, the declaratory relief referred to by the Appellant is not set out in the Fresh Statement of Claim, which is the Appellant's fourth attempt to draft a claim in respect of this matter.

²⁶ AG CA Factum at para. 6 [Tab 2B]

21. Contrary to the assertions of the Appellant, the relevant issue before this Court can be stated as follows: Assuming that s. 43 of the *ERCA* is constitutionally valid, its validity having not been challenged by the Appellant, does it on its face, as a matter of statutory interpretation, bar a claim for damages on the grounds alleged by the Appellant, notwithstanding that one of her claims was brought under the *Charter*? This is not a constitutional question. Indeed, there is no constitutional question to be stated in the present matter. The constitutional validity of s. 43 should be addressed in a case in which the issue is squarely raised.

22. The issue addressed by the Courts below was whether s. 43 of the *ERCA*, as a matter of statutory interpretation, can bar a *Charter* claim. Although the Court of Appeal addressed the essence of the constitutional argument in its decision, the constitutional validity or applicability of s. 43 of the *ERCA* was not before the Court, nor was it before Wittmann CJ in the Court of Queen's Bench. If a constitutional question is now stated in the present matter, this Court will be deprived of the benefit of the full consideration of the lower courts. Moreover, the Appellant's failure to raise a proper constitutional question below has deprived the parties of the ability to call evidence, particularly in relation to s. 1 of the *Charter*. This Court should be reluctant to hear what amounts to a new argument from the Appellant that was not considered in the Courts below.

B. The proposed constitutional questions are not proper

23. A constitutional question must "identify the law put at risk, and generally the reason for the alleged invalidity, inapplicability or inoperability." A legislative provision is "constitutionally invalid or inapplicable where [it is] *ultra vires* or where [it infringes] *Charter* rights".²⁷ This Court has "repeatedly declined to state as constitutional questions legal issues which, while arising in the appeal, do not identify a law at risk."²⁸ Moreover, this Court may refuse to state a constitutional question in circumstances where there is "no attack on the validity of the law, but where the Court [is] being asked to construe a law in light of a section of the *Charter*".²⁹

24. The constitutional questions proposed by the Appellant are not proper. The proposed questions do not challenge the constitutional validity of s. 43 of the *ERCA*, or any other legislative provision. Moreover, the proposed questions do not challenge the constitutional

²⁷ The Honourable Justice Henry S. Brown, *Supreme Court of Canada Practice 2015* (Scarborough: Carswell, 2015) at p. 443 [Brown]

²⁸ Brown at p. 442

²⁹ Brown at p. 445; *Tétreault-Gadoury v Canada (Employment & Immigration Commission)*, [1989] 2 SCR 1110 at para 1.

applicability of s. 43 of the *ERCA* in light of the Appellant's claims. Rather, the proposed constitutional questions ask this Court to construe s. 43 of the *ERCA* in light of s. 24(1) of the *Charter*, in a vacuum created by the Appellant.

25. Further, the proposed questions fail to specify the *Charter* right that s. 43 of the *ERCA* is purported to infringe. Section 24(1), the only section of the *Charter* referred to in the proposed constitutional questions, is a remedial provision that relates only to the enforcement of the rights and freedoms set out in the *Charter*.

26. The constitutional questions proposed by the Appellant should not be stated. The proposed questions are indirect and generalized constitutional challenges of s. 43 of the *ERCA*, and should not be permitted. This appeal is about the statutory interpretation of s. 43 of the *ERCA*, not its constitutionality.

PART IV – COSTS

27. The ERCB requests its costs of this motion, should the motion be dismissed.

PART V – ORDER REQUESTED

28. The ERCB requests an order dismissing the Motion to State a Constitutional Question with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of June, 2015.

Jensen Shawa Solomon Duguid Hawkes LLP


as agent for

Glenn Solomon, QC / Christy Elliott
Counsel for the Applicant, Alberta Energy Regulator

PART VI – TABLE OF AUTHORITIES

Cases

At para(s).

- A. *Tétreault-Gadoury v Canada (Employment & Immigration Commission)*, [1989] 2
SCR 1110 23
<http://www.canlii.org/en/ca/scc/doc/1989/1989canlii7/1989canlii7.html>

Books, Other

- B. The Honourable Justice Henry S. Brown, *Supreme Court of Canada Practice 2015*
(Scarborough: Carswell, 2015) 23

PART VII – STATUTORY PROVISIONS

	At para(s).
A. <i>Energy Resources Conservation Act</i> , RSA 2000, c E-10, s. 43	1-3, 6-8, 10-16 19- 22, 24-26
B. <i>Canadian Charter of Rights and Freedoms</i> , Part I of the <i>Constitution Act</i> , 1982, being Schedule B to the <i>Canada Act 1982</i> (UK), 1982, c 11, ss. 1, 2(b), 24(1)	1, 3, 5, 11-14, 18- 19, 20, 22, 24-25
C. <i>Judicature Act</i> , RSA 2000, c J-2, s. 24	11, 13, 14, 18