File No. 36167

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

BETWEEN:

JESSICA ERNST

Appellant
(Appellant)

and

ALBERTA ENERGY REGULATOR

Respondent
(Respondent)

and

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Interveners

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(Rules 37 and 42 of the Rules of the Supreme Court of Canada)

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PART I: OVERVIEW OF POSITION AND RELEVANT FACTS

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." That is what the constitution says, in s. 24(1). The language is hardly abstruse. Its import is clear: it will *always* be the case that *anyone* whose rights have been infringed may seek an "appropriate and just" remedy from a "court of competent jurisdiction". And it will *always* be the case that such a remedy may be sought from a provincial superior court, because no matter what Parliament or the Legislatures might otherwise provide, such courts "retain their historic jurisdiction over the Constitution": *Canada (Attorney General) v. McArthur*, 2010 SCC 63, [2010] 3 S.C.R. 626, para. 14.

2. This case, in which an individual's *Charter* damages claim is pitted against a statutory provision purporting to confer upon a government actor absolute and blanket immunity for actions taken under statutory auspices, thus reduces to consideration of whether or to what extent the immunity stipulated by the Legislature may shape the court's assessment of what is "appropriate and just". The nature of the claim is important here, in two respects: the conduct of the Energy Resources Conservation Board (now the Alberta Energy Regulator; herein, the "regulator") that is in question is *purely operational*; and the plaintiff Ernst alleges that the regulator's conduct was *punitive* (Wittman C.J., paras. 17, 33; statement of claim, paras. 41, 58).

3. Sometimes, undoubtedly, the presence of legislation and the will of a legislature may bear upon the propriety and justice of the remedy sought. But not here. The total immunity set up for this regulator by Alberta's Legislature overshoots any legitimate policy concern warranting protection of the regulator from liability for *Charter* damages. It would be inappropriate and unjust to apply it to bar Ms. Ernst's claim.

PART II: STATEMENT OF POSITION

4. The interest of the British Columbia Civil Liberties Association ("BCCLA") in these proceedings is grounded in the BCCLA's basic commitment to the protection and advancement of the rights and freedoms enshrined in the *Charter*. In the view of the BCCLA, the remedies available for infringement of *Charter* rights should always be sufficiently robust to meaningfully

vindicate the right, and to deter similar government conduct in the future. In many instances, damages may be the most effective means of achieving those objectives; in other instances, they may be the only means of doing so. The BCCLA will therefore make four points in relation to the questions raised by the parties' submissions:[1]

A. Parliament and the Legislatures are incapable of denying access to a provincial superior court to obtain the remedy the court considers "appropriate and just".

B. Operational conduct of government bodies which is not compelled by, or otherwise attributable to, a legislative regime or a true policy decision is susceptible to an award of *Charter* damages.

C. Parliament and the Legislatures have only a limited ability to influence – but not control – the court's determination of what is "appropriate and just".

D. Ernst's pleading discloses a reasonable claim for *Charter* damages as an "appropriate and just" remedy.

PART III: STATEMENT OF ARGUMENT

A. *The Right to Seek* Charter *Remedies from a Provincial Superior Court*

5. The constitutional question stated by the Chief Justice requires consideration of three elements: the historic and inalienable function of the superior courts as guardians of the constitution; the extension of that function by the *Constitution Act, 1982* to encompass a new enforcement and remedial power; and finally, the means by which this Court has addressed legislative efforts to preclude or to limit the discharge of such functions.

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[1] It is important to note here the questions that are *not* before the Court in this case. First, there is no question about whether, as a matter of interpretation, s. 43 (or equivalent provisions) ought to be interpreted to apply to *Charter* claims in the first place. Second, this case does not involve *quasi*-judicial decision-making. Decision-making of that kind is obliged to be consistent with constitutional values, and can be judicially reviewed directly on that footing: *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395. A case of that kind may raise questions about the preclusive effect of adequate alternate remedies, given the decision-maker's duty to take up the constitution in its reasoning, and the deference to which it would be entitled in that regard: *cf. Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28, para. 35. Finally, there is no question about the liability of Alberta. Professor Roach, endorsing the Privy Council's decision in *Maharaj v. Attorney-General Trinidad and Tobago (No. 2)*, [1979] A.C. 385, would attribute direct liability to "the state" for constitutional violations by state actors: *Constitutional Remedies in Canada* (loose-leaf), s. 11.510. The regulator here (unlike, for instance, an individual employee) is part of the government "by its very nature": *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295, para. 15. The regulator is thus is a defendant from whom *Charter* damages may appropriately be sought, and it has made no argument to the contrary: *cf. Ward*, para. 22.

6. As a starting point, the provincial superior courts – that is, the courts comprising the judges appointed pursuant to s. 96 of the *Constitution Act, 1867* – have from the outset of Confederation possessed the power and the duty to ensure that the "Executive Power" and the "Legislative Power"[2] of Canada and the Provinces is exercised in a manner consistent with the constitution. And, that is a power and responsibility from which it is long-established that neither Parliament nor the Legislatures may subtract.

7. The Court most recently delved into this subject in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, describing at para. 32 "[t]he historic task of the superior courts […] to resolve disputes between individuals and decide questions of public and private law" as being "central to what the superior courts do" – "[i]ndeed, it is their very book of business". Naturally among these "central" institutional functions is the courts' role in interpreting and applying the constitution; that is, "as ultimate interpreters of the *British North America Act*, and s. 96 thereof": *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, p. 237.

8. Relying on s. 96 and the associated judicature provisions of the *Constitution Act, 1867*, this Court has developed the concept of a "core jurisdiction" of provincial superior courts, that "comprises those powers which are essential to the administration of justice and the maintenance of the rule of law": *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, para. 38. Such "'hallmarks of superior courts' cannot be removed from those courts": *MacMillan Bloedel*, para. 35, quoting *Crevier*.

9. This "core jurisdiction" extends absolutely to questions of constitutional compliance. In *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, the Court held that Parliament could not remove from the superior courts the power to consider the validity of federal statutes. Estey J. said:

> To do so would strip the basic constitutional concepts of judicature of this country, namely the superior courts of the provinces, of a judicial power fundamental to a federal system as described in the *Constitution Act*. [p. 328]

[2] Those terms appear as such in Parts IV and V of the *Constitution Act, 1867*.

The applicability of such logic in the administrative context was confirmed recently by this Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190:

> The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. [para. 31]

10. All of this is ancient: it has been true from the first moment of Confederation. More recently, however, among the innovations brought about with the advent of the *Charter* was the extension of the superior courts' power (along with that of such other "courts of competent jurisdiction" as might be created) to the granting of appropriate and just remedies where *Charter* rights have been infringed. This new power, described by the *Charter* itself as one of "Enforcement", entrusted to the courts the task of determining that which would be "appropriate and just" to enforce and to make redress for lost *Charter* rights, in order to thereby make meaningful the *Charter*'s guarantees.

11. The Court anticipated that this "remedial power cannot be strictly limited by statutes or rules of the common law", in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, para. 51. Then, in *McArthur*, *supra*, this Court confirmed that what is true of review of the validity of statutes, and of review for constitutional compliance by administrative actors, is also true of claims for *Charter* damages. Binnie J. said for the Court that "the provincial superior court clearly has jurisdiction to hear Mr. McArthur's claim for compensation under s. 24(1) of the *Charter*", and, relying on *Law Society of British Columbia*, *supra*, rejected the ability of legislation to "operate to prevent provincial superior court scrutiny of the constitutionality of the conduct of federal officials" (para. 14; emphasis added).[3]

12. Where legislation trenches upon this judicial function, the Court's response has varied depending on the nature of the legislative measure. Where the legislation specifically targets or substantially affects the "core jurisdiction", it will be declared invalid; as was the case with the partial removal of contempt jurisdiction in *MacMillan Bloedel*, or the hearing fees in *Trial*

[3] Whether a Legislature can deprive an *inferior* tribunal of the right to give *Charter* remedies is a different question. Arguably a legislated restriction of that kind would suffice to render the tribunal no longer a "court of competent jurisdiction" for purposes of granting a remedy of that kind: *cf. R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765, paras. 81-82; *Ward*, para. 58.

Lawyers Association. On the other hand, a more generally-framed provision that has only incidental impermissible effects will simply be treated as ineffective in preventing the discharge of the judicial function. That was the approach established in *Crevier*, in which Laskin C.J. held for the Court that privative clauses purporting to totally preclude judicial review, while generally valid, will be ineffective insofar as they would detract impermissibly from what s. 96 reserves for the courts – namely, jurisdictional and constitutional review (p. 237; see also *Dunsmuir*, paras. 29, 31).

13. Section 43 of the *Energy Resources Conservation Act* intuitively attracts the *Crevier* mode of analysis. The Legislature may legitimately extinguish tort and other common law or equitable claims against an administrative body, and in the vast majority of its applications, that is what s. 43 does. But the Legislature may not limit the right of anyone whose *Charter* rights have been infringed to seek resort to a provincial superior court for "appropriate and just" remedies, as to do so trespasses upon the "core jurisdiction" of the s. 96 court. In the face of such claims s. 43 is ineffective – or inapplicable, or inoperable; the nomenclature matters not – and the analysis necessarily then turns to whether the remedy sought is "appropriate and just".

B. Charter *Damages for Operational Conduct is Consistent with Good Governance*

14. Three relevant principles emerge from this Court's s. 24 jurisprudence. One is the importance of distinguishing on one hand between *Charter* breaches that are compelled by, or otherwise attributable to, a legislative or regulatory regime, and those that, on the other hand, flow only from the manner in which that regime has been implemented by a government actor. Sometimes the source of the breach will not be immediately apparent; but for remedial purposes, the distinction is essential. In the former category of case, the usual remedy will be a declaration of invalidity pursuant to s. 52 of the *Constitution Act, 1982*.[4] In the latter category, the appropriate remedy (if any) is granted under s. 24.[5] Where there is a s. 52 declaration of

[4] See *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, in which the proof was made that the anti-prostitution provisions of the *Criminal Code* were what was responsible for the s. 7 breaches suffered by sex workers (para. 73). For the general principle, see *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, para. 35.

[5] See *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120, in which the problem was not with the impugned legislation, but "at the administrative level in the implementation of the Customs legislation" (para. 125); and *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, in which the *Controlled Drugs and Substances Act* was found to be valid but the Minister of Health's decision-making thereunder was not (para. 116).

invalidity, s. 24 damages for conduct under the auspices of the invalid regime will not be awarded unless the conduct is "clearly wrong, in bad faith or an abuse of power": *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405, para. 78. This is the basic remedial landscape of the *Charter*, established prior to *Ward*.

15. Second, *Mackin* and *Ward* teach that:

> [T]he state must be afforded some immunity [*i.e.*, the immunity described in *Mackin*] from liability in damages resulting from the conduct of certain functions that only the state can perform. Legislative and policy-making functions are one such area of state activity. The immunity is justified because the law does not wish to chill the exercise of policy-making discretion. [*Ward*, para. 40]

Thus, even where the *Charter* infringement arises from implementation of legislation rather than the legislation itself, the protection of "good governance" requires immunity for "policy-making discretion".[6] As to the extent of such policy-making immunity, this Court's decision in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, provides definitional help. It casts "true" policy decisions narrowly: they are "discretionary legislative or administrative decisions and conduct that are grounded in social, economic, and political considerations", "made by legislators or officers whose official responsibility requires them to assess and balance public policy considerations", that "are neither irrational nor taken in bad faith" (paras. 87-90).

16. Third, private law principles may shed light upon the propriety of an award of damages. But at the same time, liability for *Charter* damages is not confined by private law concepts and may well exist where private liability otherwise would not. *Ward* lays this down quite clearly:

> [P]rivate law thresholds and defences may offer guidance in determining whether s. 24(1) damages would be "appropriate and just". While the threshold for liability under the *Charter* must be distinct and autonomous from that developed under private law, the existing causes of action against state actors embody a certain amount of "practical wisdom" concerning the type of situation in which it is or is not appropriate to make an award of damages against the state. [para. 43]

[6] For this reason, it is unlikely that the Minister of Health in *PHS*, whose decision-making was clearly policy-driven, could have been held accountable in damages for shutting down Insite, had he temporarily succeeded in that goal.

This relationship – one of influence and inspiration by the private law, while remaining distinct and autonomous – is why the traditional qualified immunity for select governmental functions was preserved by the traditional test set out in *Mackin*. It is also why the application of that immunity to "policy-making" ought to be no broader than the narrow definition of "true policy" developed for the tort of negligence in *Imperial Tobacco*. And, on the other hand, it is why, in a case like the present one, there can be liability for *Charter* damages even if there is not sufficient "proximity" to also give rise to a private law duty of care (Wittmann C.J., para. 27; Court of Appeal, para. 18). And it is also why, in *Henry v. British Columbia (Attorney General)*, 2015 SCC 24, [2015] 2 S.C.R. 214, the test for *Charter* damages for certain prosecutorial misconduct was influenced by, *but more lenient than*, the common law of malicious prosecution.

17. There is a space left by these principles: where the *Charter* infringement is not attributable to legislation; and where the *Charter* infringement does not flow from a true policy decision; and where there is no common law or other established legal principle conferring any further or special immunity applicable in the circumstances, then it follows that the "good governance" element of the *Ward* framework provides no impediment whatsoever to a *Charter* damages claim.[7] What will matter instead are the "objects of compensation, vindication of the right, or deterrence of future *Charter* breaches": *Ward*, para. 32.[8] Fulfilment of these objects rules out the Court of Appeal's suggestion, echoed in this Court by the regulator, that Ernst's remedy is to be found by way of judicial review (Court of Appeal, para. 30(c); respondent's factum, para. 129). Damages are not available on judicial review. Compensation and deterrence could not thereby be achieved.

18. The regulator argues nonetheless that good governance dictates that this damages claim be struck, essentially on the ground that s. 43 of the *ERCA* "promotes good governance by

[7] Wittmann C.J. placed particular emphasis on a floodgates concern – that "[p]arties would come to the litigation process dressed in their *Charter* clothes whenever possible" (para. 81; see also para. 87). The Supreme Court of the United States has regarded such concerns about constitutional damages claims as unfounded in light of existing qualified immunities, observing as well that "plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits": *Butz v. Economou*, 438 U.S. 478 (1978), p. 508 *per* White J. The superior courts of this country have no less power to weed out unmeritorious claims, through motions to strike and, where evidence is needed, motions for summary judgment.

[8] Professor Cooper-Stephenson reads *Ward* the same way; see the trichotomy suggested in *Constitutional Damages Worldwide* (2013), p. 196.

shielding the AER" (factum, para. 125). This submission necessitates consideration of the extent to which legislation may influence the court's determination of what is "appropriate and just".

C. *The Limited Influence of Legislation*

19. The Court has suggested that in choosing a remedy under s. 24(1), "statutes and common law rules may be helpful" insofar as they assist in "determining what is 'appropriate and just in the circumstances'": *Doucet-Boudreau*, para. 51. However, in the courts below, this Court's decision in *Ravndahl v. Saskatchewan*, 2009 SCC 7, [2009] 1 S.C.R. 181, was taken to support the proposition that statutes may be *decisive* (Wittmann C.J., para. 82; Court of Appeal, para. 26). *Ravndahl* is the only case in which this Court has arguably found that claims for so-called "personal remedies" under the *Charter* may be extinguished by legislation,[9] and correspondingly, it warrants close scrutiny.

20. In *Ravndahl*, the claimant's argument that Saskatchewan's *Limitation of Actions Act* could not apply to her personal claims was abandoned (para. 17). In the result, the Court was left without argument on this difficult and important point. The Chief Justice did not explicitly endorse the concession, but only noted that the concession was "consistent" with *Kingstreet Investments* – presumably to explain her acceptance of the concession for purposes of that case, in which the debate focussed instead upon how the limitation period *would properly be applied*.

21. Had the Court received full argument, it would have been made aware of *Prete v. Ontario* (1993), 110 D.L.R. (4th) 94 (Ont. C.A.), *Duplessis v. Canada*, 2004 FC 154, and *Pearson v. Canada*, 2006 FC 931, all of which are persuasive on this point. In *Prete*, the Court of Appeal rejected the application of both a shortened limitation period and special immunity designed for the benefit of public authorities. Carthy J.A. reasoned:

> The purpose of the *Charter*, in so far as it controls excesses by governments, is not at all served by permitting those same governments to decide when they would like to be free of those

[9] Two other cases were cited in this connection: *Kingstreet Investments Ltd. v. New Brunswick*, 2007 SCC 1, [2007] 1 S.C.R. 3, and *Manitoba Metis Federation v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623. *Kingstreet Investments* was a claim for *restitution*, of monies paid pursuant to an unconstitutional tax. *Manitoba Metis* did not involve a claim for a "personal remedy" of any kind. Neither decision has any application to the *Charter* damages context.

> controls and put their houses in order without further threat of complaint. [p. 101]

In *Duplessis*, Hugessen J. accepted the legitimacy of generally applicable limitation periods, while expressing "very serious doubt that the government can insulate itself from [*Charter*] claims by adopting legislation which is applicable only to its servants", giving as an example "short draconian prescriptive periods" (para. 12). Finally, in *Pearson*, de Montigny J. left it open to a *Charter* claimant to establish that application of a limitation period would not be "appropriate and just", reasoning that such an approach

> balances out the need to ensure that *Charter* rights will not be emptied through lack of proper means of enforcement with the acknowledgement that the absence of procedural provisions and rules governing prescriptions must be taken to signal that the civil remedies fashioned by the courts must ordinarily be fitted within the existing systems of civil law. [para. 54]

22. Such reasoning is entirely consistent with what was later said in *Ward*, as discussed above. In particular, limitation periods *can* help to define what is "appropriate and just": often they will advance the "good governance" objective by precluding stale claims, preventing dilatory behaviour, and allowing governmental conduct to be treated as settled after a reasonable period of time (see *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6, pp. 29-31). But no matter what the Legislature has said, whether it be about limitation periods, immunities, available remedies, procedure – anything – the ultimate question must in every case be, "what is appropriate and just?" The plain words of the *Charter* dictate that claimants must always be free to show that a legislative limit on a superior court's power to grant remedies under s. 24 would be inappropriate, or would be unjust, in all the circumstances.

23. In the present case, the total immunity set up by s. 43 of the *ERCA* vastly overshoots any plausible articulation of what good governance requires for this regulator. Recall that if the regulator acts pursuant to statutory dictates, it will not be liable absent conduct that is "clearly wrong, in bad faith or an abuse of power". The same is true if the regulator is engaged in any truly policy-based function. *Mackin* and *Ward* make those protections secure. Yet s. 43 would insulate from liability purely operational conduct, conduct that is clearly wrong, conduct that is an abuse of power, and conduct undertaken in bad faith. Such blanket extinguishment of

recourse to the *Charter* bears no relationship to propriety or to justice. It should be given no weight.

D. *Ernst's Claim is Therefore Arguable*

24. Ernst alleges that steps taken by the regulator were intended to *punish* her past *public* expression, and to *prevent* future *public* expression (see in particular Wittmann C.J., para. 33; statement of claim, para. 55). If nothing else, her claim alleges that a government actor has taken steps with the *purpose* of restricting freedom of expression: *cf. R. v. Khawaja*, 2012 SCC 69, [2012] 3 S.C.R. 555, para. 65.[10] This suffices to disclose an arguable claim for breach of s. 2(*b*). The ultimate merit of that claim, including all its other and varied facets, can be developed and resolved at trial.

25. There can be no suggestion, on the facts alleged, as to the application of the qualified immunity for policy decisions. Nor can there be any attribution of the alleged conduct to any legislative or regulatory regime. The conduct in question is the manner of the regulator's communication with Ernst over the years. This is a case about the day-in-and-day-out workings of bureaucrats said to have run amok to a degree harmful to freedom of expression.[11] Manifestly, there was no legislative compulsion at work, nor "social, economic, and political considerations" at play in the regulator's alleged decision-making. Once the regulator's resort to s. 43 of the *ERCA* is dispensed with, there is no basis under the *Ward* framework to reject Ernst's *Charter* damages claim at this stage.

PARTS IV AND V: COSTS AND REQUEST FOR ORAL ARGUMENT

26. The BCCLA does not seek costs and asks that costs not be awarded against it. The BCCLA requests the Court's permission to make 10 minutes of oral argument at the hearing of these appeals.

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[10] Similar reasoning has led to the conclusion it is contrary to s. 2(*b*) for the government to bring, or even to *threaten to bring*, defamation claims: *Dixon v. Powell River (City)*, 2009 BCSC 406, 310 D.L.R. (4th) 176; and see *Derbyshire County Council v. Times Newspapers Ltd.*, [1993] A.C. 534 (H.L.), *per* Lord Keith of Kinkel.

[11] Indeed, given Ernst's allegation of punitive conduct on the part of the regulator, arguably this claim would also meet the higher *Mackin* standard. The regulator has no business seeking to punish those with whom it communicates; doing so would thus amount to an "abuse of power".

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 16th day of December, 2015.

Ryan D. W. Dalziel	**Emily C. Lapper**

PART VI: TABLE OF AUTHORITIES

PART VII: LEGISLATION IN ISSUE

Canadian Charter of Rights and Freedoms / Charte Canadienne des Droits et Libertés

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.

24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

Constitution Act, 1867 / Loi Constitutionnelle de 1867

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

96. Le gouverneur-général nommera les juges des cours supérieures, de district et de comté dans chaque province, sauf ceux des cours de vérification dans la Nouvelle-Écosse et le Nouveau-Brunswick.

***Energy Resources Conservation Act,* R.S.A. 2000, c. E-10**

43 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.