



**SUPREME COURT OF CANADA**

**CITATION:** Ernst v. Alberta Energy Regulator,  
2017 SCC 1

**APPEAL HEARD:** January 12, 2016  
**JUDGMENT RENDERED:** January 13, 2017  
**DOCKET:** 36167

**BETWEEN:**

**Jessica Ernst**  
Appellant

and

**Alberta Energy Regulator**  
Respondent

- and -

**Attorney General of Quebec, Canadian Civil Liberties Association,  
British Columbia Civil Liberties Association and  
David Asper Centre for Constitutional Rights**  
Interveners

**CORAM:** McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner,  
Gascon, Côté and Brown JJ.

**REASONS FOR JUDGMENT:** Cromwell J. (Karakatsanis, Wagner and Gascon JJ.  
(paras. 1 to 60) concurring)

**REASONS CONCURRING IN THE** Abella J.  
**RESULT:**  
(paras. 61 to 130)

**JOINT DISSENTING REASONS:** McLachlin C.J. and Moldaver and Brown JJ. (Côté J.  
(paras. 131 to 192) concurring)

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ERNST v. ALBERTA ENERGY REGULATOR

**Jessica Ernst**

*Appellant*

v.

**Alberta Energy Regulator**

*Respondent*

and

**Attorney General of Quebec,  
Canadian Civil Liberties Association,  
British Columbia Civil Liberties Association and  
David Asper Centre for Constitutional Rights**

*Interveners*

**Indexed as: Ernst v. Alberta Energy Regulator**

**2017 SCC 1**

File No.: 36167.

2016: January 12; 2017: January 13.

Present: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner,  
Gascon, Côté and Brown JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

*Constitutional law — Charter of Rights — Enforcement — Remedy — Damages — Claim brought against statutory board seeking Charter damages for breaching right to freedom of expression — Board applying to strike claim on basis of immunity clause — Whether claim for Charter damages should be struck out because it discloses no cause of action — Whether immunity clause is constitutionally inapplicable or inoperable to the extent that it bars claim against board for Charter damages — Whether constitutional question should be decided at this stage of proceedings — Canadian Charter of Rights and Freedoms, s. 24(1) — Energy Resources Conservation Act, R.S.A. 2000, c. E-10, s. 43.*

The Alberta Energy Regulator (the “Board”) is a statutory, independent, quasi-judicial body responsible for regulating Alberta’s energy resource and utility sectors. E claims that the Board breached her right to freedom of expression under s. 2(b) of the *Canadian Charter of Rights and Freedoms* by punishing her for publicly criticizing the Board and by preventing her, for a period of 16 months, from speaking to key offices within it. E brought a claim against the Board for damages as an “appropriate and just” remedy under s. 24(1) of the *Charter* for that alleged breach. The Board applied to strike this claim on the basis, among others, that it is protected by an immunity clause — i.e., s. 43 of the *Energy Resources Conservation Act* — which precludes all claims in relation to the Board’s actions purportedly done pursuant to the legislation which the Board administers. Both the Alberta Court of Queen’s Bench and the Court of Appeal found that the immunity clause on its face bars E’s claim for *Charter* damages and concluded therefore that it should be struck

out. On appeal to this Court, E reformulated her claim to add a challenge to the constitutional validity of s. 43.

*Held* (McLachlin C.J. and Moldaver, Côté and Brown JJ. dissenting): The appeal should be dismissed.

1. *Per* Cromwell J. (with Karakatsanis, Wagner and Gascon JJ.): The claim for *Charter* damages should be struck out and the appeal should be dismissed. It is plain and obvious that s. 43 on its face bars E's claim for *Charter* damages. However, because *Charter* damages could never be an appropriate and just remedy for *Charter* breaches by the Board, s. 43 does not limit the availability of such a remedy under the *Charter* and the provision cannot be unconstitutional.

2. *Per* Abella J.: E's claim for *Charter* damages should be struck and the appeal dismissed. E did not seek to challenge the constitutionality of s. 43 in the prior proceedings. In the absence of proper notice and a full evidentiary record, this Court should not entertain the constitutional argument. This leaves the constitutionality of s. 43 intact. It is therefore plain and obvious that s. 43, an unqualified immunity clause, bars E's claim. While it is likely that *Charter* damages would not be an appropriate and just remedy against this Board, a prior determination of the constitutionality of the immunity clause is required.

3. *Per* McLachlin C.J. and Moldaver and Brown JJ. (with Côté J.): The application to strike E's claim must fail and the appeal must be allowed. It is not plain

and obvious that *Charter* damages could not be an appropriate and just remedy in the circumstances of E's claim against the Board. Nor is it plain and obvious that, on its face, s. 43 bars E's claim for *Charter* damages. As a result, it is not necessary to consider s. 43's constitutionality at this stage of the proceedings.

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*Per Cromwell, Karakatsanis, Wagner and Gascon JJ.:* It is plain and obvious that s. 43 of the *Energy Resources Conservation Act* on its face bars E's claim for *Charter* damages. This conclusion is common ground between the parties. The only issue for decision then is whether E successfully challenged the constitutionality of s. 43. In this case, having had more than ample opportunity to do so, E has failed to discharge her burden of showing that the law is unconstitutional. It follows that the immunity clause must be applied, and E's claim for *Charter* damages struck out.

*Charter* damages may vindicate *Charter* rights, provide compensation and deter future violations. But awarding damages may also inhibit effective government, and remedies other than damages may provide substantial redress without having a broader adverse impact. Section 24(1) of the *Charter* confers on the courts a broad remedial authority. But this does not mean that *Charter* breaches should always, or even routinely, be remedied by damages. The leading case about when *Charter* damages are an appropriate and just remedy is *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28. If damages would further one or more of the

objectives of compensation, vindication and deterrence, it is open to the state to raise countervailing factors to establish that damages are not an appropriate and just remedy. In the present case, when such countervailing factors are considered collectively, they negate the appropriateness of an otherwise functionally justified award of *Charter* damages against the Board.

First, there is an alternative and more effective remedy for *Charter* breaches by the Board. Judicial review of the Board's decisions has the potential to provide prompt vindication of E's *Charter* rights, to provide effective relief in relation to the Board's conduct in the future, to reduce the extent of any damage flowing from the breach, and to provide legal clarity to help prevent any future breach of a similar nature. Further, the statutory immunity clause here cannot bar access to judicial review.

Second, good governance concerns are also engaged, as granting damages would undermine the effectiveness of the Board and inhibit effective governance. Private law thresholds and defences may offer guidance about when *Charter* damages may be an appropriate remedy. The policy reasons considered capable of negating a *prima facie* duty of care under the private law of negligence have included (i) excessive demands on resources, (ii) the potential chilling effect on the behaviour of the state actor, and (iii) protection of quasi-judicial decision making. The same policy considerations weigh heavily here. The Board has the public duty of balancing several potentially competing rights, interests and objectives, and balancing

public and private interests in the execution of its quasi-judicial duties. The jurisprudence cautions against attempting to segment the functions of a quasi-judicial regulatory board such as this one into adjudicative and regulatory activity for the purposes of considering whether its actions should give rise to liability. And the policy reasons that have led legislatures across Canada to enact many statutory immunity clauses, like the one in this case, may also inform the analysis of countervailing considerations relating to good governance. Overall, opening the Board to damages claims could deplete the Board's resources, distract it from its statutory duties, potentially have a chilling effect on its decision making, compromise its impartiality, and open up new and undesirable modes of collateral attack on its decisions.

Finally, to determine the appropriateness of *Charter* damages against this type of board on a case-by-case basis in a highly factual and contextual manner would largely undermine the purposes served by an immunity. Not every bare allegation claiming *Charter* damages must proceed to an individualized, case-by-case consideration on its particular merits. Immunity is easily frustrated where the mere pleading of an allegation of bad faith or punitive conduct in a statement of claim can call into question a decision-maker's conduct. Even qualified immunity undermines the decision-maker's ability to act impartially and independently, as the mere threat of litigation, achieved by artful pleadings, will require the decision-maker to engage with claims brought against him or her.

In view of these countervailing factors, *Charter* damages could never be an appropriate and just remedy for *Charter* breaches by the Board. Therefore, s. 43 of the *Energy Resources Conservation Act* does not limit the availability of such a remedy under the *Charter* and the provision cannot be unconstitutional.

*Per Abella J.:* E is asking this Court to pronounce on the constitutional applicability and operability of s. 43, an immunity clause in the *Energy Resources Conservation Act*. This is in essence a challenge to the constitutionality of s. 43. At no stage did E give the required formal notice of a constitutional challenge to s. 43. Until she came to this Court, E denied that she was even challenging the constitutionality of s. 43. E's approach represents an improper collateral attack on s. 43's constitutionality.

All the provinces have statutes that require notice to be given to the Attorney General of that province, and most require that notice be given to the Attorney General of Canada as well, in any proceeding where the constitutionality of a statute is in issue. Notice requirements serve a vital purpose. They ensure that courts have a full evidentiary record before invalidating legislation and that governments are given the fullest opportunity to support the validity of legislation. A new constitutional question ought not be answered unless the state of the record, the fairness to all parties, the importance of having the issue resolved, the question's suitability for decision, and the broader interests of the administration of justice demand it. The test for whether new issues should be considered is a stringent one,



and the discretion to hear new issues should only be exercised exceptionally and never unless there is no prejudice to the parties.

The threshold for the exceptional exercise of this discretion is nowhere in sight in this case. First, the public interest requires that the fullest and best evidence possible be put before the Court when it is asked to decide the constitutionality of a law. This requires the participation and input of the appropriate Attorneys General, especially from the jurisdiction of the legislation in question. In this case, there is no such evidentiary record.

The notion of “fairness to the parties” also weighs against this Court exercising its discretion to decide the constitutionality of s. 43. The Board asked this Court not to hear the constitutional question because it was not properly raised in the courts below, leaving it, rather than the Attorney General, unfairly as the sole defender of a provision in its enabling statute. At the Court of Appeal, the Attorney General of Alberta, for his part, also expressly raised concerns about the lack of notice and his inability to adduce evidence at the trial court and the appellate court. The failure to provide notice about the intention to challenge the constitutionality of s. 43 has resulted in no record and in the Attorney General of Alberta being unable to properly meet the case against it. This makes acceding to the request to determine the constitutionality of the statutory immunity clause inappropriate.

Immunity clauses protecting judicial and quasi-judicial bodies are found in a number of Canadian statutes. Judicial and quasi-judicial decision-makers are also

protected by common law immunities. Immunizing these adjudicators from personal damage claims is grounded in attempts to protect their independence, impartiality and to facilitate the proper and efficient administration of justice.

The immunity clause here is absolute and unqualified. The legislature clearly chose not to qualify the immunity in any way. Any argument that it should not apply to conduct alleged to be punitive, or that it applies to adjudicative but not to other kinds of Board decisions, is nowhere evident in the statutory language. Caution should be exercised before undermining the immunity clause in this case. There are profound and obvious implications for all judges and tribunals from such a decision, and it should not be undertaken without a full and tested evidentiary record. It may or may not be the case that governments will be able to justify immunity from *Charter* damages, but until the s. 1 justificatory evidence is explored, this Court should not replace the necessary evidence with its own inferences.

While an analysis pursuant to *Vancouver (City) v. Ward*, [2010] 2 S.C.R. 28, likely leads to the conclusion that *Charter* damages are not an appropriate and just remedy in the circumstances, the question of whether such damages are appropriate requires a prior determination of the constitutionality of the immunity clause. If the clause is constitutional, there is no need to embark on a *Ward* analysis. If it is found to be unconstitutional, only then does a *Ward* analysis become relevant. Here, since E did not seek to challenge the constitutionality of s. 43 in the prior proceedings, there is no record either to justify or impugn the provision. This means that, for the time

being, the provision's constitutionality is intact. It is therefore plain and obvious that E's claim is barred. E's *Charter* claim should therefore be dismissed.

Judicial review was the appropriate means of addressing E's concerns. The conventional challenge to an administrative tribunal's decision is judicial review, not an action against the administrative tribunal. When the Board made the decision to stop communicating with E, in essence finding her to be a vexatious litigant, it was exercising its discretionary authority under its enabling legislation. Issues about the legality, reasonableness, or fairness of this discretionary decision are issues for judicial review. E had the opportunity to seek timely judicial review of the Board's decision. She chose not to. Instead, she attempted to frame her grievance as a claim for *Charter* damages. That is precisely why s. 43 exists — to prevent an end-run by litigants around the required process, resulting in undue expense and delay for the Board and for the public.

*Per McLachlin C.J.* and *Moldaver*, Côté and *Brown JJ.* (dissenting): In deciding whether a claim for *Charter* damages should be struck out on the basis of a statutory immunity clause, the court must first determine whether it is plain and obvious that *Charter* damages could not be an appropriate and just remedy in the circumstances of the plaintiff's claim. If it is not plain and obvious that *Charter* damages could not be appropriate and just, then the court must determine whether it is plain and obvious that the immunity clause, on its face, applies to the plaintiff's claim. If it is plain and obvious that the immunity clause applies, then the court must

give effect to the immunity clause and strike the plaintiff's claim, unless the plaintiff successfully challenges the clause's constitutionality.

The framework set out in *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28, for assessing whether damages are an appropriate and just remedy in the circumstances can be applied at the application to strike stage. To survive an application to strike, the claimant must first plead facts which, if true, could prove a *Charter* breach; E has met this threshold here. E's pleadings establish the elements of an admittedly novel but arguable s. 2(b) claim. It cannot be said that it is plain and obvious that E cannot establish a breach of s. 2(b) of the *Charter*. The second step requires the claimant to demonstrate that damages could fulfill one or more of the functions of compensation, vindication, or deterrence. E has met this threshold, as well. Her allegations are sufficient to establish that the functions of vindication and deterrence could be supported by an award of *Charter* damages.

At the third step, the state may show that countervailing considerations make it plain and obvious that *Charter* damages could not be appropriate and just. Such considerations include the availability of alternative remedies that will meet the same objectives as an award of *Charter* damages, and good governance concerns — i.e., policy factors that will justify restricting the state's exposure to civil liability. Here, the Board has not shown that it is plain and obvious that judicial review will meet the same objectives as an award of *Charter* damages, namely, vindicating E's *Charter* right and deterring future breaches. With respect to good governance, two

interrelated principles must be kept in mind. First, *Charter* compliance is itself a foundational principle of good governance. Second, good governance concerns must be considered in a manner that remains protective of *Charter* rights, since the “appropriate and just” analysis under s. 24(1) is designed to redress the *Charter* breach. While the common law recognizes absolute immunity from personal liability for judges and other state actors in the exercise of their adjudicative function, there is nothing in the record which indicates that the Board was acting in an adjudicative capacity in this case. Nor is there a compelling policy reason for which to immunize state actors in all cases, including where, as here, the impugned conduct is said to have been punitive in nature. Further, considerations supporting private law immunity from liability for negligent conduct do not automatically support absolute immunity from *Charter* damages claims for more serious misconduct, including conduct amounting to bad faith or an abuse of power.

Thus, whether the countervailing factors are examined individually or collectively, the record at this juncture does not support recognizing a broad, sweeping immunity for the Board in this case, let alone in every case. In the final analysis, it is not plain and obvious that *Charter* damages could not be an appropriate and just remedy in the circumstances of E’s claim against the Board.

It is also not plain and obvious that E’s claim is barred by the statutory immunity clause. E seeks *Charter* damages as a remedy for actions by the Board that E says were intended to punish her. It is arguable that such punitive acts fall outside

the scope of the immunity that s. 43 of the *Energy Resources Conservation Act* confers. While E did not argue that the wording of s. 43 does not apply to her claim, this omission should not impede the just determination of a novel legal issue which has such broad ramifications for the public. E's assumption that s. 43 bars all actions or proceedings against the Board, regardless of the nature of the claim, is not binding on the Court. Her assumption may ultimately prove correct, but it is not plainly and obviously so at this stage. Since it is not plain and obvious that s. 43 bars E's claim, it is not necessary to consider s. 43's constitutionality at this stage of the proceedings. If it is subsequently determined that s. 43 does, indeed, bar E's claim for *Charter* damages, then she may challenge its constitutionality at that juncture.

Therefore, the appeal must be allowed. The test for striking out E's claim at the outset has not been satisfied, and the matter should be returned to the Alberta courts to decide the important issues of free speech and *Charter* remedies that her case raises.

### Cases Cited

By Cromwell J.

**Applied:** *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28;  
**referred to:** *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686; *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110; *MacKay v. Manitoba*, [1989] 2 S.C.R. 357; *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13,

[2002] 1 S.C.R. 405; *Henry v. British Columbia (Attorney General)*, 2015 SCC 24, [2015] 2 S.C.R. 214; *Mills v. The Queen*, [1986] 1 S.C.R. 863; *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220; *Nelles v. Ontario*, [1989] 2 S.C.R. 170; *Hinse v. Canada (Attorney General)*, 2015 SCC 35, [2015] 2 S.C.R. 621; *Manuge v. Canada*, 2010 SCC 67, [2010] 3 S.C.R. 672; *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585; *Canada (Attorney General) v. McArthur*, 2010 SCC 63, [2010] 3 S.C.R. 626; *Parrish & Heimbecker Ltd. v. Canada (Agriculture and Agri-Food)*, 2010 SCC 64, [2010] 3 S.C.R. 639; *Nu-Pharm Inc. v. Canada (Attorney General)*, 2010 SCC 65, [2010] 3 S.C.R. 648; *Canadian Food Inspection Agency v. Professional Institute of the Public Service of Canada*, 2010 SCC 66, [2010] 3 S.C.R. 657; *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129; *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562, aff'g (2000), 48 O.R. (3d) 329; *Morier v. Rivard*, [1985] 2 S.C.R. 716; *Crispin v. Registrar of the District Court*, [1986] 2 N.Z.L.R. 246; *Sirros v. Moore*, [1975] 1 Q.B. 118; *Hazel v. Ainsworth Engineered Corp.*, 2009 HRTO 2180, 69 C.H.R.R. D/155; *Agnew v. Ontario Assn. of Architects* (1987), 64 O.R. (2d) 8; *Ermina v. Canada (Minister of Citizenship and Immigration)* (1998), 167 D.L.R. (4th) 764; *Cartier v. Nairn*, 2009 HRTO 2208, 8 Admin. L.R. (5th) 150; *Gonzalez v. British Columbia (Ministry of Attorney General)*, 2009 BCSC 639, 95 B.C.L.R. (4th) 185; *Taylor v. Canada (Attorney General)*, [2000] 3 F.C. 298, leave to appeal refused, [2000] 2 S.C.R. xiv; *Garnett v. Ferrand* (1827), 6 B. & C. 611, 108 E.R. 576; *Fray v. Blackburn* (1863), 3 B. & S. 576, 122 E.R. 217; *Royer v. Mignault*, [1988] R.J.Q.

670; *Canada (Attorney General) v. Slansky*, 2013 FCA 199, [2015] 1 F.C.R. 81; *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 S.C.R. 147; *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796.

By Abella J.

**Applied:** *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3; **referred to:** *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45; *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537; *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562, aff'g (2000), 48 O.R. (3d) 329; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *R. v. Aberdeen*, 2006 ABCA 164, 384 A.R. 395; *TransCanada Pipelines Ltd. v. Beardmore (Township)* (2000), 186 D.L.R. (4th) 403; *R. v. Lilgert*, 2014 BCCA 493, 16 C.R. (7th) 346; *Broddy v. Alberta (Director of Vital Statistics)* (1982), 142 D.L.R. (3d) 151; *Seweryn v. Alberta (Appeals Commission for Alberta Workers' Compensation)*, 2016 ABCA 239; *R. v. Redhead*, 2006 ABCA 84, 384 A.R. 206; *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241; *Alkasabi v. Ontario*, 1994 CarswellOnt 3639 (WL Can.); *Morier v. Rivard*, [1985] 2 S.C.R. 716; *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796; *Taylor v. Canada (Attorney General)*, [2000] 3 F.C. 298; *Canada (Attorney General) v. Slansky*, 2013 FCA 199, [2015] 1 F.C.R. 81; *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28; *Henry v. British Columbia (Attorney General)*, 2015 SCC 24, [2015] 2 S.C.R. 214; *Dunsmuir*



*v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87.

By McLachlin C.J. and Moldaver and Brown JJ. (dissenting)

*R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45; *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263; *Henry v. British Columbia (Attorney General)*, 2015 SCC 24, [2015] 2 S.C.R. 214; *Sirros v. Moore*, [1975] 1 Q.B. 118; *Gonzalez v. British Columbia (Ministry of Attorney General)*, 2009 BCSC 639, 95 B.C.L.R. (4th) 185; *Taylor v. Canada (Attorney General)*, [2000] 3 F.C. 298, leave to appeal refused, [2000] 2 S.C.R. xiv; *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562; *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537; *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405; *Hinse v. Canada (Attorney General)*, 2015 SCC 35, [2015] 2 S.C.R. 621; *Nelles v. Ontario*, [1989] 2 S.C.R. 170.

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*Alberta Rules of Court*, Alta. Reg. 124/2010, rr. 3.24, 3.68.

*Canadian Charter of Rights and Freedoms*, ss. 1, 2(b), 24.

*Constitution Act, 1982*, s. 52.

*Court of Queen's Bench Act*, R.S.A. 2000, c. C-31, s. 14.

*Courts of Justice Act*, R.S.O. 1990, c. C.43, ss. 33.1(21), 49(27), 82, 86.2(19).

*Energy Resources Conservation Act*, R.S.A. 2000, c. E-10 [rep. 2012, c. R-17.3, s. 112], ss. 3, 16, 20, 43.

*Environmental Review Tribunal Act, 2000*, S.O. 2000, c. 26, Sch. F, s. 8.1(1).

*Federal Courts Act*, R.S.C. 1985, c. F-7, s. 12(6).

*Gas Resources Preservation Act*, R.S.A. 2000, c. G-4.

*Human Rights Code*, C.C.S.M., c. H175, s. 62.

*Judicature Act*, R.S.A. 2000, c. J-2, s. 24.

*Justices of the Peace Act*, R.S.N.W.T. 1988, c. J-3, s. 4(5).

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*Pipeline Act*, R.S.A. 2000, c. P-15, ss. 6, 12.

*Provincial Court Act*, R.S.A. 2000, c. P-31, s. 68.

*Provincial Court Act*, R.S.B.C. 1996, c. 379, ss. 27.3, 42.

*Public Inquiry Act*, S.B.C. 2007, c. 9, s. 32.

*Responsible Energy Development Act*, S.A. 2012, c. R-17.3, s. 27.

*Sex Offender Information Registration Act*, S.C. 2004, c. 10.

*Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Sch. A, s. 179(1).

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APPEAL from a judgment of the Alberta Court of Appeal (Côté, Watson and Slatter JJ.A.), 2014 ABCA 285, 580 A.R. 341, 2 Alta. L.R. (6th) 293, 75 Admin. L.R. (5th) 162, 12 C.C.L.T. (4th) 274, 85 C.E.L.R. (3d) 39, 319 C.R.R. (2d) 309, 620 W.A.C. 341, [2014] 11 W.W.R. 496, [2014] A.J. No. 975 (QL), 2014 CarswellAlta 1588 (WL Can.), affirming a decision of Wittmann C.J., 2013 ABQB 537, 570 A.R. 317, 85 Alta. L.R. (5th) 333, 5 C.C.L.T. (4th) 285, 78 C.E.L.R. (3d) 227, 292 C.R.R. (2d) 333, [2013] 12 W.W.R. 738, [2013] A.J. No. 1045 (QL), 2013 CarswellAlta 1836 (WL Can.). Appeal dismissed, McLachlin C.J. and Moldaver, Côté and Brown JJ. dissenting.

*W. Cory Wanless and Murray Klippenstein*, for the appellant.

*Glenn Solomon, Q.C.*, and *Christy Elliott*, for the respondent.

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Written submissions only by *Stuart Svonkin*, *Brendan Brammall* and *Michael Bookman*, for the intervener the Canadian Civil Liberties Association.

*Ryan D. W. Dalziel* and *Emily Lapper*, for the intervener the British Columbia Civil Liberties Association.

*Raj Anand* and *Cheryl Milne*, for the intervener the David Asper Centre for Constitutional Rights.

The reasons of Cromwell, Karakatsanis, Wagner and Gascon JJ. were delivered by

CROMWELL J. —

## I. Introduction

[1] The appellant, Ms. Ernst, claims that a quasi-judicial, regulatory board, the Alberta Energy Regulator (the “Board”), breached her right to freedom of expression under s. 2(b) of the *Canadian Charter of Rights and Freedoms*. She brought a claim against the Board for damages as an “appropriate and just” remedy under s. 24(1) of the *Charter* for that alleged breach. The Board applied to strike this

claim on the basis, among others, that it is protected by an immunity clause which precludes all claims in relation to the Board's actions purportedly done pursuant to the legislation which the Board administers.

[2] Ms. Ernst's position, in both her factum and oral argument, is that this immunity provision is unconstitutional because it purports to bar her claim for *Charter* damages. She submits that the *only* issue on this appeal is whether the immunity clause is constitutionally inapplicable or inoperable to the extent that it bars a claim against the Board for *Charter* damages. She accepts, as the Alberta courts found, that the immunity clause on its face bars her claim; the issue she brings to the Court is whether this immunity clause is unconstitutional to the extent that it does so.

[3] That the provision purports to bar her damages claim is the foundation on which her appeal was argued. It follows that the Court must give effect to the immunity clause and strike Ms. Ernst's claim unless she successfully challenges the clause's constitutionality. In my view, she has not done so.

[4] Like the Alberta courts in this case, although for somewhat different reasons, I conclude that the claim for *Charter* damages should be struck out. I would therefore dismiss the appeal.

## II. Background

[5] My reference to the relevant background will be very brief because my colleagues, the Chief Justice and Justices Moldaver and Brown, and Justice Abella, have detailed the claims and proceedings giving rise to the appeal.

[6] In a nutshell, Ms. Ernst claims that the Board breached her *Charter* right to freedom of expression by punishing her for publicly criticizing the Board and by preventing her, for a period of 16 months, from speaking to key offices within it. As she alleges in her claim, these restrictions limited her ability “to lodge complaints, register concerns and to participate in the [Board’s] compliance and enforcement process”: A.R., at p. 76. The Alberta Court of Queen’s Bench concluded that Ms. Ernst has pleaded a breach of her right to freedom of expression under the *Charter* and that this claim ought not to be struck out at this preliminary stage of the action: 2013 ABQB 537, 570 A.R. 317. Notwithstanding the Board’s submissions to the contrary, I accept that conclusion for the purposes of my analysis.

[7] The Board is a statutory, independent, quasi-judicial body responsible for regulating Alberta’s energy resource and utility sectors: Alberta Ministry of Energy, *2005-2006 Annual Report*, at p. 7.<sup>1</sup> It has regulatory and quasi-judicial duties under a number of Alberta statutes: *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, ss. 16 and 20, and see, e.g., *Gas Resources Preservation Act*, R.S.A. 2000, c. G-4; *Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6; *Pipeline Act*, R.S.A. 2000, c. P-15. The Board is responsible for granting and overseeing licenses and making orders

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<sup>1</sup> This document refers to the Energy and Utilities Board which was comprised, in part, of members of the Alberta Energy Regulator’s predecessor, the Energy Resources Conservation Board.

regarding energy related activities, such as pipeline construction and oil sand sites: *Oil Sands Conservation Act*, R.S.A. 2000, c. O-7, s. 7; *Pipeline Act*, ss. 6 and 12. The Board has the power to conduct inquiries, inspections, investigations and hearings, and to carry out remedial action where required. Additionally, the Board has procedures in place to receive public complaints and concerns and to perform its enforcement functions where its orders or regulatory rulings are not complied with.

[8] There is now no dispute that the Board does not owe Ms. Ernst a common law duty of care; her claim in negligence was struck out for that reason and the affirmation of that order by the Court of Appeal has not been appealed: 2014 ABCA 285, 2 Alta. L.R. (6th) 293.

[9] The Board is protected by a broadly worded immunity clause, namely, s. 43 of the *Energy Resources Conservation Act*:

**Protection from action**

**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.

[10] We have received virtually no argument concerning the interpretation of this clause because it is common ground between the parties that this provision, on its face, purports to bar Ms. Ernst's claim for *Charter* damages, to the extent that she has

such a claim against the Board. This point leads me to have some difficulty with the reasons of the Chief Justice and Justices Moldaver and Brown.

[11] The Chief Justice and Justices Moldaver and Brown would allow the appeal on the basis that, contrary to Ms. Ernst's position, it is not plain and obvious that the immunity provision on its face bars her claim for *Charter* damages. However, it is not open to the Court to dispose of the appeal on this basis, for several related reasons.

[12] First, not only did Ms. Ernst repeatedly submit, in writing and orally, that the immunity provision on its face bars her claim, this position was the foundation of her appeal.

[13] In her factum in this Court, Ms. Ernst submitted that the immunity provision on its face purports to bar her *Charter* damages claim. As she put it in her factum, the provision "completely eliminates the right to bring an action against [the Board] in all circumstances . . . . On its face, s. 43 is a total bar to any 'action or proceeding' whatsoever brought against [the Board] by anyone in all circumstances. Section 43 destroys all rights of action, and entirely eliminates the ability of any and all persons to even start a lawsuit against [the Board], regardless of the nature of the claim": A.F., at para. 63 (emphasis in original). Ms. Ernst's position is that the only issue on appeal is the constitutional question: whether the immunity clause is constitutionally inapplicable or inoperable to the extent that it bars a damages claim against the Board for a breach of the *Charter*: A.F., at para. 41.



[14] Ms. Ernst took the same position — repeatedly — in oral submissions. Her counsel said that a valid cause of action “is clearly defeated” by the immunity provision: Transcript, at pp. 3-4. He referred to the provision as barring any action in respect of “any act or thing done”: p. 12. He also referred to the provision as “an immunity clause of general application” which “simply on its face seems to apply to all claims against [the Board] no matter what they are about”: p. 12 (emphasis added). He further submitted that the immunity provision does not simply limit rights or restrict the remedies that are appropriate, but that “it blocks all rights”: p. 12. Ms. Ernst’s counsel further submitted that “the issue for today is section 43 [i.e. the immunity provision] which is a blanket statutory immunity clause. It says no proceeding or action no matter what we do”: pp. 19-20 (emphasis added).

[15] The Court of course is not bound by positions taken by parties on questions of law such as this one: see, e.g., *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686, at para. 62. But I see no reason to think that Ms. Ernst’s position on the interpretation of the immunity provision is wrong in law. No one has cited any authority — and I am aware of none — to suggest that it is wrong. I agree with Abella J. that we should hold that it is “plain and obvious” that the immunity clause on its face bars Ms. Ernst’s claim for *Charter* damages.

[16] To do otherwise is unfair to the Board. In light of Ms. Ernst’s position in her factum and during oral submissions, the Board had no reason to think that there was any doubt that the provision purports to bar her claim. The Board had no

indication that this issue was in question, let alone that it could become the basis on which the appeal might be decided against it. The holding proposed by the Chief Justice and Justices Moldaver and Brown would deprive the Board of any opportunity to make submissions on what has become, unbeknownst to the parties, the key point in the case. This is unfair.

[17] Finally, the reasons of the Chief Justice and Justices Moldaver and Brown, without citing authority in support and without the benefit of any argument on the point, cast doubt on the scope of this immunity clause where there has up until now been none. And in doing that, doubt is also cast on the scope of scores of other immunity provisions in many statutes across Canada. As I see it, this result is unnecessary, undesirable and unjustified.

[18] I will therefore approach the appeal on the basis that Ms. Ernst herself urged us to adopt — that the immunity provision (s. 43) purports to bar her *Charter* damages claim.

[19] That leaves only one issue for decision: Has Ms. Ernst successfully challenged the constitutionality of s. 43? If the provision on its face bars her claim and she has not successfully challenged the provision's constitutionality, the Court must give effect to the immunity clause and strike the claim.

### III. Analysis

[20] Ms. Ernst has not successfully challenged the constitutionality of s. 43. If, as my colleagues would hold, the record were not adequate to consider the constitutionality of s. 43, then it should follow that Ms. Ernst's constitutional challenge cannot succeed and the appeal should be dismissed, contrary to the result reached by the Chief Justice and Justices Moldaver and Brown. In my view, however, we should consider the constitutional challenge on its merits, and when we do so, the appeal should still be dismissed.

A. *If the Record Were Inadequate to Address the Constitutionality of the Provision, the Appeal Must Be Dismissed*

[21] When a court is faced with an immunity clause that bars a plaintiff's claim (as this one does), the court cannot refuse to rule on the law's constitutionality and yet also refuse to apply the clause. Having had more than ample opportunity to do so, Ms. Ernst has failed to discharge her burden of showing that the law is unconstitutional, a burden sometimes described as a presumption of constitutionality: *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, at pp. 124-25.

[22] Where a person challenging a law's constitutionality fails to provide an adequate factual basis to decide the challenge, the challenge fails. As Cory J. put it on behalf of the Court in *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, at p. 366, "the absence of a factual base is not just a technicality that could be overlooked, but rather it is a flaw that is fatal to the appellants' position" (emphasis added).

[23] It follows that if, as Ms. Ernst maintains, the immunity provision clearly purports to bar her damages claim, and if the record before the Court is not adequate to permit a decision on its constitutionality, then the immunity clause must be applied, Ms. Ernst's claim for *Charter* damages struck out and the appeal dismissed.

B. *Charter Damages Would Never Be an Appropriate Remedy Against This Board*

[24] If *Charter* damages could never be an appropriate and just remedy for *Charter* breaches by the Board, then s. 43 does not limit the availability of such a remedy under the *Charter* and the provision cannot be unconstitutional. In my view, *Charter* damages could not be an appropriate remedy.

[25] Underlying the question of whether *Charter* damages could be an appropriate remedy is a broader issue. It concerns how to strike an appropriate balance so as to best protect two important pillars of our democracy: constitutional rights and effective government; see, e.g., *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405, at para. 79. Granting *Charter* damages may vindicate *Charter* rights, provide compensation and deter future violations. But awarding damages may also inhibit effective government, and remedies other than damages may provide substantial redress for the claimant without having that sort of broader adverse impact. Thus there is a need for balance with respect to the choice of remedies. This concern for balance was emphasized recently in *Henry v. British Columbia (Attorney General)* in words that are especially apt in this case: "Courts should endeavour, as much as possible, to rectify *Charter* breaches with appropriate

and just remedies. Nevertheless, when it comes to awarding *Charter* damages, courts must be careful not to extend their availability too far” (2015 SCC 24, [2015] 2 S.C.R. 214, at para. 91).

[26] The leading case about when *Charter* damages are an appropriate and just remedy is *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28. Applying the principles set out in that case, damages are not an appropriate and just remedy for *Charter* violations by this Board. Not every bare allegation claiming *Charter* damages must proceed to an individualized, case-by-case consideration on its particular merits. *Ward* held that *Charter* damages will not be an appropriate and just remedy where there is an effective alternative remedy or where damages would be contrary to the demands of good governance. These considerations, taken together, support the conclusion that the proper balance would be struck by holding that damages are not an appropriate remedy.

[27] Section 24(1) of the *Charter* confers on the courts a broad remedial authority. As has been said, “[i]t is difficult to imagine . . . a wider and less fettered discretion”: *Mills v. The Queen*, [1986] 1 S.C.R. 863, at p. 965. This broad discretion should not be narrowed by “casting it in a straight-jacket of judicially prescribed conditions”: *Ward*, at para. 18. But this does not mean that *Charter* breaches should always, or even routinely, be remedied by awards of *Charter* damages. The remedy of damages is limited to situations in which it is “appropriate and just” because it serves one or more of the compensatory, vindicatory and deterrent purposes which support

that choice of remedy: *Ward*, at para. 32. Countervailing factors may establish that damages are not an appropriate and just remedy even though they would serve these ends: *Ward*, at para. 33.

[28] The list of countervailing factors is not closed. So far, two have been identified: the existence of alternative remedies and concerns for good governance: (*Ward*, at para. 33; see also para. 42). I conclude, therefore, that *Ward* does not preclude the immunity of the Board to *Charter* damages. Rather, *Ward* set out two countervailing factors that could negate the appropriateness of *Charter* damages and specifically left open the development of others.

[29] The jurisprudence does not require that every pleaded claim for *Charter* damages be assessed on an individualized, case-by-case basis. *Ward*, for example, specifically contemplates the development of new defences to *Charter* damages claims and these defences are not limited to enhanced liability thresholds. Countervailing factors against granting *Charter* damages may be of a more generalized nature, reflecting the availability of other remedies, the accumulated wisdom of the common law and strong indications of public policy.

[30] First, there is an alternative remedy — judicial review — that substantially addresses the alleged *Charter* breach. Judicial review is available to vindicate *Charter* rights and to clarify the law so as to prevent similar future breaches. Second, good governance concerns are also engaged as granting damages undermines the effectiveness of the Board and inhibits effective governance. Third, to

determine the appropriateness of *Charter* damages against this type of board on a case-by-case basis in a highly factual and contextual manner largely undermines the purposes served by an immunity.

[31] When these countervailing factors are considered collectively — that is, when one looks at their cumulative effect — they negate the appropriateness of an otherwise functionally justified award of *Charter* damages against this Board. In short, damages are not an appropriate and just remedy for the Board’s *Charter* breaches.

(1) Judicial Review Is an Available Alternative Remedy

[32] The first countervailing factor discussed in *Ward* was the availability of alternative remedies: para. 33. Once the claimant establishes that damages would further one or more of the objectives of compensation, vindication and deterrence, it is open to the state to show that other remedies are available that will sufficiently address the breach: para. 35. As stated in *Henry*, where another remedy is available to effectively address a *Charter* breach, damages may be precluded by virtue of this countervailing factor: para. 38. In my view, the availability of judicial review to address alleged *Charter* breaches by the Board is a strong countervailing factor.

[33] I have no doubt, as my colleague Justice Abella notes, that judicial review is available to address the Board’s alleged *Charter* breaches. Both the Alberta Court of Queen’s Bench and the Court of Appeal so found. Ms. Ernst does not deny this in

her factum and the brief oral submissions suggesting that judicial review was not available were not persuasive. Further, the statutory immunity clause cannot bar access to judicial review: *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220.

[34] The availability of judicial review is important for two reasons.

[35] First, judicial review can provide substantial and effective relief against alleged *Charter* breaches by a quasi-judicial and regulatory board like this one. The facts of this case strikingly illustrate the utility of the remedy of judicial review. The basis of Ms. Ernst's complaint is that the Board abused its discretion and breached the *Charter* by refusing to deal with her. If that claim were established in the context of judicial review, a superior court could set aside the directive which Ms. Ernst alleges was issued to stop interaction with her and could order corrective action. Such orders would go a long way towards vindicating Ms. Ernst's *Charter* rights.

[36] Moreover, judicial review would in all likelihood provide vindication in a much more timely manner than an action for damages. Again, the facts of this case provide a good example of how this could be so. Ms. Ernst did not start her action for damages until some two years after the alleged breach, and several months *after* the Board had rescinded the directive which she challenged. A prompt application for judicial review had the potential to achieve practical relief much sooner. While an application for judicial review would not have led to an award of damages, it might well have addressed the breach much sooner and thereby significantly reduced the extent of its impact as well as vindicated Ms. Ernst's *Charter* right to freedom of



expression. Finally, judicial review would have provided a convenient process to clarify what the *Charter* required of the Board. That sort of clarification plays an important role in preventing similar future rights infringements.

[37] Thus, judicial review of the Board's decisions and directives has the potential to provide prompt vindication of *Charter* rights, to provide effective relief in relation to the Board's conduct in the future, to reduce the extent of any damage flowing from the breach, and to provide legal clarity to help prevent any future breach of a similar nature. While the remedies available under judicial review do not include *Charter* damages, *Ward* directs us to consider the existence of alternative remedies, not identical ones: para. 33.

[38] The availability of judicial review is important for a second reason: it distinguishes this case from others in which the Court has crafted an elevated liability threshold in preference to a complete immunity. For example, the rationale for denying absolute immunity to prosecutors in *Nelles v. Ontario*, [1989] 2 S.C.R. 170, does not apply to claims against quasi-judicial regulatory boards. Lamer J. (as he then was) in *Nelles* found that none of the alternative remedies to a civil suit for malicious prosecution adequately redressed that wrong: p. 198. However, unlike in *Nelles*, a claimant who alleges the decision or action of a quasi-judicial regulatory body has infringed his or her *Charter* rights or freedoms is not without a remedy, given the availability of judicial review. Similarly, in *Henry*, which established an elevated liability threshold for *Charter* damages for failure of the prosecutor's duty to disclose,

the majority of the Court noted that such conduct is, for practical purposes, largely untouchable by way of judicial review: para. 49. In contrast to the claims arising out of alleged misconduct by prosecutors as in *Nelles* and *Henry*, there is a wide range of remedies available through judicial review for *Charter* breaches by quasi-judicial and regulatory boards such as this one. The availability and utility of the remedy of judicial review in this context supports a different remedial balance than was struck in *Nelles* and *Henry*.

[39] The Court's decision in *Hinse v. Canada (Attorney General)*, 2015 SCC 35, [2015] 2 S.C.R. 621, like the decision in *Henry*, underlines the importance of the entire context in establishing this remedial balance. And, of course, the availability of judicial review is only one of these considerations. The issue in *Hinse* was whether the general Quebec rules of extracontractual civil liability apply to the federal Crown in relation to the exercise of the royal prerogative of mercy: para. 45. In deciding on the proper scope of immunity, the Court considered the context: the nature of the Minister's functions in exercising the royal prerogative of mercy; the relevant law in relation to the liability threshold applying to Crown prosecutors; the availability of judicial review; and the general principles of civil law. As the Court noted, significant differences in the content of the duties under consideration mean that the duties must be analyzed from a different perspective: para. 44. Both *Hinse* and *Henry* demonstrate that the contours of liability must be considered in the context of, among other things, the particular state actor, having regard to the nature of the duties, the potential

availability of other remedies and general principles of liability. That is the analysis that I have conducted in this case.

[40] Ms. Ernst submits that the potential to be granted a remedy through judicial review cannot be used to bar a *Charter* claim under s. 24(1). Citing *Manuge v. Canada*, 2010 SCC 67, [2010] 3 S.C.R. 672, Ms. Ernst argues that if a plaintiff has pleaded a valid cause of action for *Charter* damages, the provincial superior court should not decline jurisdiction on the basis that the claim could be pursued by judicial review. This submission, however, overstates the holding in *Manuge* and the other *TeleZone* line of cases: *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585; *Canada (Attorney General) v. McArthur*, 2010 SCC 63, [2010] 3 S.C.R. 626; *Parrish & Heimbecker Ltd. v. Canada (Agriculture and Agri-Food)*, **2010 SCC 64**, [2010] 3 S.C.R. 639; *Nu-Pharm Inc. v. Canada (Attorney General)*, 2010 SCC 65, [2010] 3 S.C.R. 648; *Canadian Food Inspection Agency v. Professional Institute of the Public Service of Canada*, **2010 SCC 66**, [2010] 3 S.C.R. **657**. The issue in those cases was whether a successful application for judicial review was a prerequisite to seeking damages. The Court held it was not. The Court did not comment on the appropriateness of a *Charter* damages award against a quasi-judicial board.

[41] In sum, judicial review is an alternative, and more effective, remedy for *Charter* breaches by the Board. And, as I will discuss, the availability of judicial

review is only one of the countervailing factors that weigh heavily against the appropriateness of *Charter* damages awards against the Board.

(2) Good Governance Concerns

(a) *The “Practical Wisdom” of Private Law*

[42] “[C]oncern for effective governance” was the second category of factors identified in *Ward* as militating against damages being an appropriate and just remedy: para. 38. The Court in *Ward* noted that “the state must be afforded some immunity from liability in damages resulting from the conduct of certain functions that only the state can perform. . . . [I]mmunity is justified because the law does not wish to chill the exercise of policy-making discretion”: para. 40. Quintessentially, the Board is a state actor whose responsibilities are of a policy-making and adjudicative nature.

[43] *Charter* damages are, of course, a distinct and autonomous remedy. But that does not mean that the development of that remedy should ignore the accumulated insights of the general law. *Ward* noted that private law thresholds and defences may offer guidance about when *Charter* damages may be an appropriate remedy because “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. Considering private law is not, of course, simply transposing private law rules into the *Charter*

context. The majority of the Court in *Henry*, for example, considered the policy factors outlined in the malicious prosecution context in *Nelles* and found it appropriate to rely on them heavily in establishing the liability threshold for *Charter* damages: *Henry*, at paras. 66-74. It is therefore helpful to consider the law governing Ms. Ernst's private law claim in negligence against the Board.

[44] No one contests that the Board owes Ms. Ernst no duty of care under the private law of negligence. In negligence law, whether there is a duty of care depends on the existence of foreseeability and proximity, and the absence of countervailing policy considerations: *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, at para. 30; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129. In the case of public regulators, for reasons of insufficient proximity or countervailing policy considerations, or both, courts have generally held that these state actors do not owe claimants a duty of care: *Cooper*; *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562.

[45] The policy reasons considered capable of negating a *prima facie* duty of care have included (i) excessive demands on resources, (ii) the potential “chilling effect” on the behaviour of the state actor, and (iii) protection of quasi-judicial decision making: see, e.g., A. M. Linden and B. Feldthusen, *Canadian Tort Law* (10th ed. 2015), at s. 9.65, citing S. Sugarman, “A New Approach to Tort Doctrine: Taking the Best From the Civil Law and Common Law of Canada” (2002), 17 *S.C.L.R.* (2d) 375, at p. 388.

[46] The reasons of the Court of Appeal called on these sorts of policy considerations to uphold the Court of Queen's Bench's finding that the Board did not owe a duty of care to Ms. Ernst:

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. Recognizing any such private duty would distract the Board from its general duty to protect the public, as well as its duty to deal fairly with participants in the regulated industry. Any such individualized duty of care would plainly involve indeterminate liability, and would undermine the Board's ability to effectively address the general public obligations placed on it under its controlling legislative scheme. [para. 18]

[47] Brief reference to the Board's mandate underlines the wisdom of these comments. Section 3 of the *Energy Resources Conservation Act* required the Board to undertake its duties respecting proposed energy resource projects in light of the public interest and with regard to the social, economic, and environmental effects of the project. The Board had the public duty of balancing several potentially competing rights, interests and objectives. Allowing claimants to bring claims for damages against the Board has the potential to deplete the Board's resources, with respect to both funds and time. Allowing a claimant to bring a damages claim against the Board may also result in defensive actions by the Board, which would "chill" its ability to otherwise carry out its statutory duties effectively and in the public interest. Likewise, the Board is required to balance public and private interests in the execution of its quasi-judicial duties, and this responsibility is inconsistent with being liable to an individual claimant for damages.

[48] This jurisprudence also cautions against attempting to segment the functions of a quasi-judicial regulatory board such as this one into adjudicative and regulatory activity for the purposes of considering whether its actions should give rise to liability. For example in *Edwards*, this Court endorsed the Ontario Court of Appeal's refusal to distinguish between the Law Society's adjudicative and investigatory functions for the purpose of the duty of care analysis: see para. 11, citing (2000), 48 O.R. (3d) 329 (C.A.), at para. 30. The Board has a broad mandate to, among other things, conduct inquiries and investigations, make inspections and conduct hearings, making it impractical and artificial to try to distinguish among its various roles for the purposes of liability.

[49] While, as noted, *Charter* damages are an autonomous remedy, and every state actor has an obligation to be *Charter*-compliant, the same policy considerations as are present in the law of negligence nonetheless weigh heavily here, particularly in light of the availability of judicial review to uphold constitutional rights.

(b) *Statutory and Common Law Immunities*

[50] The strong common law immunity of judges from civil suits has been extended by common law and statute to many quasi-judicial bodies and agencies including administrative bodies such as the Board, as aptly articulated by my colleague Justice Abella in her reasons; and see also, e.g., *Morier v. Rivard*, [1985] 2 S.C.R. 716; *Crispin v. Registrar of the District Court*, [1986] 2 N.Z.L.R. 246 (H.C.), at p. 252; *Sirros v. Moore*, [1975] 1 Q.B. 118 (C.A.), at p. 136, cited by *Morier*, at pp.

739-40; *Hazel v. Ainsworth Engineered Corp.*, 2009 HRTO 2180, 69 C.H.R.R. D/155, at para. 84; *Agnew v. Ontario Assn. of Architects* (1987), 64 O.R. (2d) 8 (Div. Ct.); *Ermina v. Canada (Minister of Citizenship and Immigration)* (1998), 167 D.L.R. (4th) 764 (F.C.T.D.); *Cartier v. Nairn*, 2009 HRTO 2208, 8 Admin. L.R. (5th) 150; *Courts of Justice Act*, R.S.O. 1990, c. C.43; *Provincial Court Act*, R.S.A. 2000, c. P-31; *Court of Queen's Bench Act*, R.S.A. 2000, c. C-31; A. A. Olowofoyeku, *Suing Judges: A Study of Judicial Immunity* (1993), at pp. 1-32; P. W. Hogg, P. J. Monahan and W. K. Wright, *Liability of the Crown* (4th ed. 2011), at p. 289. This immunity is broad and has been applied even in the face of alleged human rights infringements: *Hazel*; *Cartier*; *Gonzalez v. British Columbia (Ministry of Attorney General)*, 2009 BCSC 639, 95 B.C.L.R. (4th) 185; *Taylor v. Canada (Attorney General)*, [2000] 3 F.C. 298 (C.A.), leave to appeal refused, [2000] 2 S.C.R. xiv. The common law is a source of “practical wisdom” about exposing quasi-judicial and regulatory decision-makers such as the Board to damages claims. And the policy reasons that have led legislatures across Canada to enact many statutory immunity clauses, like the one that protects this Board, may also inform the analysis of countervailing considerations relating to good governance. Of course, these sorts of statutory provisions cannot override constitutional rights, but the policy reasons on which they are based can and should be taken into account by a reviewing court.

[51] The rationales underlying the common law and statutory immunity for quasi-judicial and regulatory decision-makers fall into two main interrelated categories. First, immunity from civil claims permits decision-makers to fairly and



effectively make decisions by ensuring freedom from interference, which is necessary for their independence and impartiality: *Morier*, at pp. 737-38, citing *Garnett v. Ferrand* (1827), 6 B. & C. 611, 108 E.R. 576, at pp. 581-82, and *Fray v. Blackburn* (1863), 3 B. & S. 576, 122 E.R. 217. Second, immunity protects the capacity of these decision-making institutions to fulfill their functions without the distraction of time-consuming litigation.

[52] These grounds for immunity resonate in the context of claims for *Charter* damages.

[53] If actions for *Charter* damages were brought against the Board, it would inevitably be involved in defending those suits and thereby distracted from its statutory responsibilities. As Hogg, Monahan and Wright observe in relation to judicial immunity, the public relies on judges and the courts to resolve difficult problems, and “a judge would be placed in an intolerably vulnerable position, and there would be no end to litigation, if a disappointed litigant could turn around and bring fresh proceedings against the judge”: p. 283. The same may be said of quasi-judicial decision-makers: Ontario Law Reform Commission, *Report on the Liability of the Crown* (1989), at p. 29.

[54] Furthermore, allowing *Charter* damages claims to be brought for the Board’s actions and decisions has the potential to distort the appeal and review process. The corollary of immunity is that a judicial or quasi-judicial decision can be challenged only through judicial review or the appeals process: *Royer v. Mignault*,

[1988] R.J.Q. 670 (C.A.), at pp. 673-74. This prevents judicial and quasi-judicial decision-makers from having to justify their decisions beyond the justification disclosed by the record which will be available for appeal or judicial review: *Canada (Attorney General) v. Slansky*, 2013 FCA 199, [2015] 1 F.C.R. 81, at para. 136, per Mainville J.A., concurring. It is worth remembering that in order not to compromise the decision-maker's impartiality or the finality of his or her decision, the decision-maker has a limited role in an appeal or judicial review proceeding: see, e.g., *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 S.C.R. 147. However, no such limit can apply to the scope of a quasi-judicial regulatory board's defence against damages claims. Moreover, damages claims against such bodies, whether under the *Charter* or otherwise, open up new avenues of collateral attack. By protecting judicial and quasi-judicial decision-makers from having to defend their decisions against damages suits, the immunity simultaneously strengthens public confidence in the legal system, preserves impartiality, both in fact and in perception, and closes off routes of collateral attack. See *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796, at pp. 828-30.

[55] To conclude on this point, the policy reasons that underlie the common law and statutory immunities for regulatory and quasi-judicial boards like this one relate directly to the types of good governance concerns identified in *Ward*. Opening the Board to damages claims will distract it from its statutory duties, potentially have a chilling effect on its decision making, compromise its impartiality, and open up new and undesirable modes of collateral attack on its decisions.

(3) Case-by-Case Consideration Undermines the Purposes of the Immunity

[56] Ms. Ernst argues that claims for *Charter* damages must be assessed on a case-by-case basis to determine whether damages would be an appropriate and just remedy. However, as has been pointed out many times, requiring a case-by-case examination of particular claims largely undermines the purpose of conferring immunity in the first place: *Gonzalez*, at para. 49.

[57] Immunity is easily frustrated where the mere pleading of an allegation of bad faith or punitive conduct in a statement of claim can call into question a decision-maker's conduct: *Gonzalez*, at para. 53. Even qualified immunity undermines the decision-maker's ability to act impartially and independently, as the mere threat of litigation, achieved by artful pleadings, will require the decision-maker to engage with claims brought against him or her. As Lord Denning M.R. held, to be truly free in thought, judges should not be "plagued with allegations of malice or ill-will or bias or anything of the kind": *Sirros*, at p. 136, cited by *Morier*, at pp. 739-40.

C. *To sum up*

[58] As Ms. Ernst accepts, the immunity clause purports to bar her claim for *Charter* damages. That being the case, her damages claim must be struck and the appeal dismissed unless she succeeds in challenging the constitutionality of the immunity provision. She has failed to do so. It follows that her claim for *Charter* damages should be struck out and the appeal dismissed.

[59] I would answer the constitutional question as follows:

Is s. 43 of the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, constitutionally inapplicable or inoperable to the extent that it bars a claim against the regulator for a breach of s. 2(b) of the *Canadian Charter of Rights and Freedoms* and an application for a remedy under s. 24(1) of the *Canadian Charter of Rights and Freedoms*?

Answer: To the extent that s. 43 purports to bar a claim for *Charter* damages, the answer is no.

#### IV. Disposition

[60] I would dismiss the appeal with costs.

The following are the reasons delivered by

ABELLA J. —

[61] Two statutory provisions are at stake. The first is Alberta's requirement that before a constitutional challenge can be brought, the government must be given notice so that the law is given a thorough airing, with all parties having a chance to bring and test the evidence. This protects the public interest by ensuring that laws are not casually or cavalierly either set aside or upheld. It also ensures the existence of a full and proper record on appeal.

[62] The second provision is an immunity clause protecting an administrative tribunal (like almost all quasi-judicial and judicial bodies in Alberta and the rest of Canada) from being sued for damages. This protects the public interest by ensuring that adjudicative bodies responsible for making independent decisions are not casually or cavalierly dragged into litigation that drains their attention and public resources.

[63] Jessica Ernst is asking this Court to decide whether an immunity clause insulating a quasi-judicial tribunal from lawsuits, bars her from bringing a claim for *Charter* damages against that tribunal.

[64] Ms. Ernst's claim is for damages under s. 24(1) of the *Canadian Charter of Rights and Freedoms* from a quasi-judicial administrative body, the Energy Resources Conservation Board.<sup>2</sup> She claims that *Charter* damages are warranted because of the Board's decision to stop communicating with her, in essence finding her to be a vexatious litigant. Bypassing judicial review, she chose instead to designate the Board's decision as unconstitutional, claiming it breached her right to freedom of expression under s. 2(b) of the *Charter*. The Alberta Court of Queen's Bench and the Alberta Court of Appeal had no difficulty finding that s. 43 of the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, an immunity clause in the Board's enabling statute, bars any and all claims against the Board, including claims for *Charter* damages.

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<sup>2</sup> Now known as the Alberta Energy Regulator.

[65] Ms. Ernst at no stage gave the required *formal* notice of a constitutional challenge to s. 43. In fact, in both prior proceedings, she expressly denied that she was challenging the constitutionality of the immunity clause. Instead, she was challenging the *applicability* of the clause to her *Charter* claim. She claimed to be entitled to a remedy for a *Charter* breach under s. 24(1), regardless of whether s. 43 entitled her to get a remedy.

[66] Ms. Ernst's argument that she was not seeking to challenge the validity of s. 43, only its applicability to a *Charter* damages claim, is unsustainable. The immunity clause either complies with the *Charter* or it does not. But either way, there must be a judicial determination of the constitutional validity, and therefore the constitutional applicability, of the provision. Ms. Ernst's argument that the immunity clause does not apply when a *Charter* remedy is being sought, is an argument that there is no need to go through the necessary steps to determine whether a provision is *Charter*-compliant in order to disregard it. This invokes Alice in Wonderland.

[67] Since Ms. Ernst did not seek to challenge the constitutionality of s. 43 in the prior proceedings, there is no record either to justify or impugn the provision. This means that for the time being, the provision's constitutionality is intact, which means that the Board's immunity is intact, which means that Ms. Ernst cannot, under these circumstances, legally sustain a claim that the Board is vulnerable to a damages claim, either under the *Charter* or otherwise. As a result, I agree with the Alberta courts that Ms. Ernst's claim ought to be struck.

[68] *R. v. Imperial Tobacco Canada Ltd.*, [2011] 3 S.C.R. 45, sets out the accepted test for striking out a claim:

A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83; *Odhavji Estate*; *Hunt*; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

...

... The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *Donoghue v. Stevenson* [, [1932] A.C. 562 (H.L.)] Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial. (at paras. 17-21)

[69] This is not a cascading, multi-factored test, it is a simple one: Is it plain and obvious that s. 43 bars Ms. Ernst's claim?

[70] The immunity clause in this case is absolute and unqualified:

**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.

[71] The legislature clearly chose not to qualify the immunity in any way. Any argument that it should not apply to conduct alleged to be punitive, or that it applies to adjudicative but not to other kinds of Board decisions, is nowhere evident in the statutory language. That is precisely why determining the constitutionality of the clause based on a full evidentiary record is so important. It may be that the clause could be amended to permit suits for punitive conduct, but that is *not* what the clause now says. Moreover, creating a novel distinction between adjudicative and non-adjudicative conduct for purposes of limiting the scope of the immunity clause, strikes me as being an unhelpful unravelling of established jurisprudence.

[72] As a result, it is plain and obvious, based on the plain and obvious language of s. 43, that Ms. Ernst's claim is barred. The fact that her claim alleges "punitive" conduct cannot change the unqualified language in s. 43.

[73] Without a proper determination of the constitutionality of the immunity clause, there can be no assessment of its inapplicability or inoperability. It follows that Ms. Ernst's claim for *Charter* damages should be struck, and the appeal dismissed.

#### Background

[74] The Board is an independent quasi-judicial body responsible for regulating the development of Alberta's energy resources. It licenses gas wells and enforces legislative and regulatory provisions that are intended to protect the



groundwater supply from interference or contamination due to oil and gas development. The Board has detailed procedures for receiving and investigating public complaints, conducting compliance inspections, and taking appropriate enforcement and remedial action when necessary. As set out in its enabling legislation, the Board is authorized to conduct hearings, inquiries and investigations, award costs and receive witnesses.

[75] Ms. Ernst owns land near Rosebud, Alberta. She opposed the activities of EnCana Corporation, which engaged in hydraulic fracturing and drilling close to her property. Throughout 2004 and 2005, Ms. Ernst frequently voiced her concerns about the negative impacts caused by oil and gas development near her home. She did this through contact with the Board's compliance, investigation and enforcement offices. She also voiced her concerns publicly.

[76] EnCana's activities resulted in Ms. Ernst bringing claims against EnCana, the Board, and the government of Alberta in December of 2007.

[77] The claim against EnCana was based on damage to Ms. Ernst's water supply. Alberta was sued because it had failed to respond to her complaints about EnCana's activities notwithstanding that it owed Ms. Ernst a duty to protect her water supply. Ms. Ernst's claims against EnCana and against the province were not before this Court.

[78] The claim against the Board was binary. One claim was in negligence, alleging that the Board, which has regulatory jurisdiction over the activities of EnCana, had negligently administered the regulatory regime under the *Energy Resources Conservation Act*.

[79] The second claim against the Board was that it had breached Ms. Ernst's s. 2(b) right to freedom of expression by "arbitrarily, and without legal authority" restricting her communications with the Board.

[80] Ms. Ernst claimed that because of her public criticisms, and because of a reference she made to Weibo Ludwig (who was convicted for carrying out bombings and other destructive acts against oil industry installations in Alberta), the Board prohibited her from communicating with it. As a result, Ms. Ernst claimed she was unable to properly register her concerns that EnCana was adversely impacting the Rosebud Aquifer and her groundwater supply.

[81] The Manager of the Board's Compliance Branch wrote to Ms. Ernst and told her that all staff were instructed to avoid further contact with her, and that he had reported her to the Attorney General of Alberta, the RCMP and the Board's Field Surveillance Branch.

[82] When Ms. Ernst sought clarification of the restrictions she faced, she was directed to the Board's Legal Branch, which informed her that the Board "took a decision in 2005 to discontinue further discussion with" her, and would not re-open

communications through the regular channels unless she agreed to raise her concerns only through the Board.

[83] In March 2007, Ms. Ernst was informed that she was again free to communicate with any staff at the Board.

[84] Rather than seeking judicial review of the Board's decision to stop communicating with her when she was first informed of this in November 2005, Ms. Ernst waited two years and then filed a statement of claim on December 3, 2007, an amended statement of claim on April 21, 2011, and a second amended statement of claim on February 7, 2012.

[85] The remedy Ms. Ernst sought for this second breach was “damages in the amount of \$50,000.00 under section 24(1) of the *Canadian Charter of Rights and Freedoms*”.

[86] The Board applied to strike out portions of Ms. Ernst's pleadings for failing to disclose a reasonable cause of action. It relied on its immunity clause, s. 43 of the *Energy Resources Conservation Act*, arguing that it provided a complete bar to both the negligence and *Charter* damage claims against the Board. The Board also argued that the appropriate way for Ms. Ernst to challenge the Board's discretionary decision was through judicial review.

[87] The case management judge at the Queen’s Bench, Wittmann C.J., found that the proposed negligence claim was unsupportable at law since there was no private law duty of care owed to Ms. Ernst by the Board based on this Court’s decisions in *Cooper v. Hobart*, [2001] 3 S.C.R. 537, and *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562 ((2013), 85 Alta. L.R. (5th) 333 (Q.B.)), at paras. 28-29).

[88] Wittmann C.J. also held that s. 43 barred Ms. Ernst’s claim for *Charter* damages. He stated that in order to properly challenge the constitutionality of s. 43, Ms. Ernst was required to give the necessary notice to the Attorneys General of Alberta and Canada but had failed to do so:

. . . if Ernst seeks as a remedy a declaration striking down section 43 of the [*Energy Resources Conservation Act*], a Notice of Constitutional Question should be given to the Attorney General of Alberta and Canada, pursuant to section 24 of the *Judicature Act*, RSA 2000, c J-2. The ensuing 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. (at para. 89)

[89] In Wittmann C.J.’s view, to allow personal *Charter* damage claims to circumvent statutory immunity clauses would cause the “[p]arties [to] come to the litigation process dressed in their *Charter* clothes whenever possible”, and to allege “such a breach . . . in litigation against the government wherever possible”.

[90] In any event, Wittmann C.J. noted that Ms. Ernst was not without a remedy since he agreed with the Board that she could have brought judicial review proceedings, the “time-tested and conventional challenge to an administrative tribunal’s decision”.

[91] Ms. Ernst set out three issues in her formal Notice of Appeal:

Did the Court err in finding that the statutory immunity clause contained within section 43 of the *Energy Resources Conservation Act* bars an otherwise valid claim for breach of the right to freedom of expression made pursuant to the *Canadian Charter of Rights and Freedoms*?

Did the Court err in finding that the [Board] does not owe a private duty of care to Ms. Ernst?

Did the Court err in finding that the statutory immunity clause contained within section 43 of the *Energy Resources Conservation Act* bars Ms. Ernst’s claim against the [Board] for negligent omissions?

[92] Of particular significance, is Ms. Ernst’s answer to question 7 in the Notice of Appeal. The question on the form was: “Is the constitutional validity of an Act or Regulation being challenged as a result of this appeal?” Ms. Ernst’s response was: “No. The appeal, however, does relate to a claim made under s. 24 of the *Canadian Charter of Rights and Freedoms*.”

[93] In other words, once again, she denied that she was seeking to challenge the constitutionality of s. 43.

[94] Nonetheless, she sent a letter to the Attorneys General of Alberta and Canada, paradoxically confirming that she was not challenging the constitutionality of s. 43 under the *Charter*, but was challenging whether it applied to *Charter* claims:

Please note that it is the Appellant's position that she is 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 *Energy Resources Conservation Act* ("ERCA") to claims made pursuant to the *Canadian Charter of Rights and Freedoms*. Specifically, her position is that the statutory immunity contained within s. 43 of the *ERCA* cannot apply to claims made pursuant to the *Charter*. In the alternative the Appellant is seeking a declaration that to the extent that s. 43 of the *ERCA* is inconsistent with s. 24(1) of the *Charter*, it is of no force and effect. Because the Appellant is not challenging the constitutional validity of any enactment, the Appellant's position is that notice is not required under s. 24(1) the *Judicature Act*. Nevertheless, the Appellant is providing this notice out of an abundance of caution.

...

The Appellant has brought a claim against the Energy Resources Conservation Board alleging that the ERCB infringed her right to freedom of expression as guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*. The Appellant seeks a remedy, namely *Charter* damages, under s. 24(1) of the *Charter*.

...

The Appellant will argue that a statutory immunity clause cannot provide immunity from valid *Charter* claims. The *Charter* guarantees not only fundamental freedoms, but crucially, also guarantees the right of Canadians to seek a remedy when these fundamental *Charter* rights and freedoms are violated. Section 24(1) of the *Charter* specifically provides remedies for unconstitutional government acts. These constitutional rights cannot be taken away by a statutory enactment purporting to grant immunity to the ERCB.

...

In sum, the Appellant is challenging the applicability of s. 43 of the *Energy Resources Conservation Act* to claims made pursuant to the

Canadian *Charter of Rights and Freedoms*. To the extent that s. 43 of the ERCA is inconsistent with s. 24(1) of the *Charter*, it is of no force and effect. (Underlining added; footnotes omitted.)

[95] The Attorney General of Alberta intervened, arguing that because proper notice had not been given under s. 24 of Alberta's *Judicature Act*, R.S.A. 2000, c. J-2, he had been precluded from adducing evidence under s. 1. The Court of Appeal summarized his argument as follows:

The Minister of Justice and Solicitor General of Alberta intervened on the appeal arguing that proper notice had not been given (under s. 24 of the *Judicature Act*, RSA 2000, c. J-2) of the constitutional challenge to s. 43 of the *Energy Resources Conservation Act*. The Minister of Justice took the position that the appellant was attempting to raise a new argument on appeal, and that Alberta had been denied the opportunity to call evidence on the topic.

[96] The Court of Appeal dismissed the appeal.

[97] On appeal to this Court, Ms. Ernst reformulated her claim to add a challenge to the constitutional validity of s. 43.

### Analysis

[98] All the provinces have statutes that require notice to be given to the Attorney General of that province in any proceeding where the constitutionality of a statute is in issue. Most provinces require that notice be given to the Attorney General

of Canada as well. In Alberta, this requirement is found in s. 24 of Alberta's

*Judicature Act*:

**24(1)** If in a proceeding the constitutional validity of an enactment of the Parliament of Canada or of the Legislature of Alberta is brought into question, the enactment shall not be held to be invalid unless 14 days' written notice has been given to the Attorney General of Canada and the Minister of Justice and Solicitor General of Alberta.

**(2)** When in a proceeding a question arises as to whether an enactment of the Parliament of Canada or of the Legislature of Alberta is the appropriate legislation applying to or governing any matter or issue, no decision may be made on it unless 14 days' written notice has been given to the Attorney General of Canada and the Minister of Justice and Solicitor General of Alberta.

**(3)** The notice shall include what enactment or part of an enactment is in question and give reasonable particulars of the proposed argument.

**(4)** The Attorney General of Canada and the Minister of Justice and Solicitor General of Alberta are entitled as of right to be heard, either in person or by counsel, notwithstanding that the Crown is not a party to the proceeding.

[99] Notice requirements serve a "vital purpose" when constitutional questions arise in litigation. They ensure "that courts have a full evidentiary record before invalidating legislation and that governments are given the fullest opportunity to support the validity of legislation" (*Guindon v. Canada*, [2015] 3 S.C.R. 3, at para. 19; see also *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, at paras. 58-59; *R. v. Aberdeen* (2006), 384 A.R. 395 (C.A.); *TransCanada Pipelines Ltd. v. Beardmore (Township)* (2000), 186 D.L.R. (4th) 403 (Ont. C.A.), at paras. 160-62; *R. v. Lilgert* (2014), 16 C.R. (7th) 346 (B.C.C.A.), at paras. 7-22).



[100] In Alberta, the Court of Appeal has emphasized that it requires strict adherence to the notice provisions regarding constitutional questions found in the *Judicature Act (Aberdeen; Broddy v. Alberta (Director of Vital Statistics))* (1982), 142 D.L.R. (3d) 151 (Alta. C.A.), at para. 41; *Seweryn v. Alberta (Appeals Commission for Alberta Workers' Compensation)*, 2016 ABCA 239, at paras. 3-5 (CanLII); *R. v. Redhead* (2006), 384 A.R. 206 (C.A.), at paras. 46-47). In *Aberdeen*, the Crown appealed a determination made as to the constitutionality of the retrospective application of the *Sex Offender Information Registration Act*, S.C. 2004, c. 10, on the ground that proper notice under the *Judicature Act* was not given to the Attorneys General of Alberta and Canada. The Court of Appeal allowed the appeal in language of relevance to our case:

The requirement of notice is to ensure that governments have a full opportunity to support the constitutional validity of their legislation, or to defend their action or inaction, and to ensure that courts have an adequate evidentiary record in constitutional cases. The notice requirements depend on whether a constitutional remedy is sought and whether the remedy falls under s. 52(1) of the *Constitution Act*, 1982 or ss. 24(1) or 24(2) of the *Charter*.

That raises the question, what is the nature of the constitutional remedy sought here? The respondents submit that the remedy being sought is under s. 24(1) of the *Charter* and therefore the notice is not required. We disagree. The nature of the relief sought is essentially a s. 52(1) remedy. We find the reasoning adopted by the court in *R. v. Murrins (D.)* (2002), 201 N.S.R. (2d) 288 [C.A.], persuasive. In *Murrins*, supra, the court considered the retrospective application of a DNA order in the face of the same s. 11(i) *Charter* argument as is made before us. The court held that if the retrospective application of a DNA order resulted in a *Charter* infringement of Murrins' rights, it would violate the s. 11(i) *Charter* right of every offender who is subject to such an application and who committed the designated offence prior to its enactment. Thus, the issue was not simply whether Murrins' right under

s. 11(i) *Charter* was infringed, but whether the provision was constitutionally valid.

That logic applies with equal force to the appeals before us. Despite the attempt by defence counsel to characterize the issue as a s. 24(1) *Charter* remedy, it is in effect a s. 52(1) *Charter* remedy that challenges the constitutional validity of the retrospective application of [the *Sex Offender Information Registration Act*, S.C. 2004, c. 10].

The argument that de facto notice was received is not supported by the evidence. The practical effect of the absence of notice was addressed in *Eaton v. Board of Education of Brant County*, [1997] 1 S.C.R. 241, where the court favoured the view that in the absence of notice, the decision is ipso facto invalid. Were we in error on the approach to be taken, the record itself establishes prejudice to the Crown: no one appeared for the federal Crown and hence it had no opportunity to make submissions or to supplement the record. Secondly, there was no opportunity to put forward an evidentiary record in support of a s. 1 *Charter* argument on the part of either Attorney General.

(*Aberdeen*, at paras. 12-15, per Paperny J.A.)

[101] This approach is precisely the route Ms. Ernst took almost a decade after the Alberta Court of Appeal impugned it, arguing that her claim was a s. 24(1) *Charter* remedy and that notice was therefore not required. As in *Aberdeen*, hers is a veiled s. 52 *Charter* claim.

[102] The Alberta Court of Appeal's censure was echoed by this Court in *Guindon*. In *Guindon*, this Court concluded that a new constitutional question ought not be answered at this level unless the state of the record, the fairness to all parties, the importance of having the issue resolved by this Court, the question's suitability for decision, and the broader interests of the administration of justice demand it. *Guindon* emphasized that the "test for whether new issues should be considered is a

stringent one”, and the discretion to hear new issues “should only be exercised exceptionally and never unless the challenger shows that doing so causes no prejudice to the parties”.

[103] The threshold for the exceptional exercise of this Court’s discretion to answer a new constitutional question, articulated most recently in *Guindon* but also in full view in this Court’s prior decision in *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241, is nowhere in sight in this case.

[104] As the prior jurisprudence confirms, the fact that, at the request of a party, the Chief Justice has framed a constitutional question, does not obligate the Court to answer it if it would be inappropriate to do so (*Bell ExpressVu Limited Partnership*, at para. 59; *Eaton*, at para. 47).

[105] The Attorney General of Alberta and the Board both explicitly articulated their concerns objecting to the improper notice and the raising of new constitutional questions on appeal. The Board raised the matter before this Court in its response to Ms. Ernst’s motion to state a constitutional question. The Attorney General of Alberta raised the notice issue at the Alberta Court of Appeal, and his materials were attached in the Board’s response materials as well.

[106] While those concerns were raised before *Guindon* was released, they were nevertheless based on Alberta’s and this Court’s analogous jurisprudence. The

Board's response to Ms. Ernst's motion to state a constitutional question, for example, stated:

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.

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.

[107] This brings us to the factors set out in *Guindon*, which gave structure to this Court's prior jurisprudence. Beginning with the "state of the record", Ms. Ernst is asking this Court to pronounce on the constitutional applicability and operability of s. 43 in the absence of any submissions or evidence from the Attorney General of Alberta. This is troubling for several reasons.

[108] First, the public interest requires that the fullest and best evidence possible be put before the Court when it is asked to decide the constitutionality of a law. This was explained by Sopinka J. in *Eaton* where he said:

In our constitutional democracy, it is the elected representatives of the people who enact legislation. While the courts have been given the power to declare invalid laws that contravene the *Charter* and are not saved under s. 1, this is a power not to be exercised except after the fullest opportunity has been accorded to the government to support its validity. To strike down by default a law passed by and pursuant to the act of Parliament or the legislature would work a serious injustice not only to the elected representatives who enacted it but to the people. Moreover, in this Court, which has the ultimate responsibility of determining whether an impugned law is constitutionally infirm, it is important that in making that decision, *we have the benefit of a record that is the result of thorough examination of the constitutional issues in the courts or tribunal from which the appeals arise.* (Emphasis added; para. 48)

[109] This requires the participation and input of the appropriate Attorneys General, especially from the jurisdiction of the legislation in question. In this case, there is no such evidentiary record about the constitutionality of s. 43 because until she came to this Court, Ms. Ernst denied that she was even challenging the constitutionality of s. 43.

[110] In *Guindon*, the Court was also concerned about the waste of judicial resources that would result from the Court not considering the case on its merits by “[i]nsisting on the notice provision in the lower courts, where . . . it would serve no purpose to do so” because this Court had “the benefit of fully developed reasons for judgment on the constitutional point in both of the courts below”, and several Attorneys General had “addressed the merits of the constitutional argument” before this Court (at paras. 35-36).

[111] In the case before us, the constitutionality of s. 43 was never fully or properly addressed, again because of Ms. Ernst’s express denial that she was

challenging it. This meant that the Attorney General of Alberta, among others, was prevented from offering justificatory evidence for the Court of Appeal's — and this Court's — consideration.

[112] The “fairness to the parties” factor also weighs heavily against this Court exercising its discretion to decide the constitutionality of s. 43. In *Guindon*, in finding that the constitutionality of the provision at issue *should* be decided, the Court observed that “[n]o one has suggested that any additional evidence is required, let alone requested permission to supplement the record” (para. 35). In this case, the opposite is true. The Board, as already stated, asked this Court not to hear the constitutional question because it was not properly raised in the courts below, leaving it, rather than the Attorney General, unfairly as the sole defender of a provision in its enabling statute. At the Alberta Court of Appeal, the Attorney General of Alberta, for his part, also expressly raised concerns about the lack of notice and his inability to adduce evidence at the trial court and the appellate court. He stated that the government was “depriv[ed] . . . of an opportunity to adduce any relevant evidence”, and that it was “precluded from considering whether to call evidence of justification under s. 1” essentially because of the indirect and unclear nature of how the issue was raised there.

[113] The failure to provide notice about the intention to challenge the constitutionality of s. 43 has therefore resulted in no record and in the Attorney General of Alberta having lost the opportunity to properly meet the case against it.

This makes Ms. Ernst's request that this Court assess the application of the statutory immunity clause inappropriate — and unwise.

[114] Ms. Ernst's approach represents not only an improper collateral attack on s. 43's constitutionality, it is a dramatic jurisprudential development with profound implications for judicial and quasi-judicial decision-makers across Canada. It is crucial to note that immunity clauses protecting judicial and quasi-judicial bodies are found in, among other Canadian statutes, the *Courts of Justice Act*, R.S.O. 1990, c. C.43, ss. 33.1(21), 49(27), 82, and 86.2(19), providing immunity for Judges, Masters, Case Management Masters, and Judicial Council; the *Provincial Court Act*, R.S.A. 2000, c. P-31, s. 68, providing immunity for Mediators; the *Court of Queen's Bench Act*, R.S.A. 2000, c. C-31, s. 14, providing immunity for Masters; the *Provincial Court Act*, R.S.B.C. 1996, c. 379, ss. 27.3 and 42, providing immunity for tribunals, any person acting on their behalf, and Provincial Court Judges; the *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 12(6), providing immunity for Prothonotaries; the *Justices of the Peace Act*, R.S.N.W.T. 1988, c. J-3, s. 4(5), providing immunity for the Justices of the Peace Review Council; *The Justices of the Peace Act, 1988*, S.S. 1988-89, c. J-5.1, s. 12.9, providing immunity for the Chief Judge, the Justices of the Peace Review Council, the investigation committee and any member or officer of the Council or committee; *The Human Rights Code*, C.C.S.M., c. H175, s. 62, providing immunity for the Manitoba Human Rights Commission, any of its members, officers, employees and adjudicators; the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, Part 8, providing immunity to tribunal members, adjudicators and registrars; the *Law*

*Society Act*, R.S.O. 1990, c. L.8, s. 9, providing immunity for benchers, officers and employees; the *Labour Board Act*, S.N.S. 2010, c. 37, s. 11, providing immunity for the Labour Board and its members; the *Labour Relations Code*, R.S.B.C. 1996, c. 244, s. 145.4, providing immunity for mediators and the industrial inquiry commission; the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Sch. A, s. 179(1), providing immunity for members, officers and employees of the Workplace Safety and Insurance Board or a person engaged by the Board to conduct examinations; the *Environmental Review Tribunal Act, 2000*, S.O. 2000, c. 26, Sch. F, s. 8.1(1), providing immunity for any member or employee of the Tribunal; and the *Public Inquiry Act*, S.B.C. 2007, c. 9, s. 32, providing immunity for a commission, commissioners, and persons acting on behalf of or under the direction of a commissioner.

[115] The jurisprudence also confirms that judicial and quasi-judicial decision-makers are protected by common law immunities. This includes law society benchers and investigators acting on their behalf (*Edwards*); public inquiry officials (*Alkasabi v. Ontario*, 1994 CarswellOnt 3639, 48 A.C.W.S. (3d) 1306, at paras. 15-17; *Morier v. Rivard*, [1985] 2 S.C.R. 716, at pp. 737-45); and judges (*MacKeigan v. Hickman*, [1989] 2 S.C.R. 796, at pp. 830-31; *Taylor v. Canada (Attorney General)* (2000), 184 D.L.R. (4th) 706 (F.C.A.), at paras. 25-29); see also discussions in Peter W. Hogg, Patrick J. Monahan, and Wade K. Wright, *Liability of the Crown*, (4th ed. 2011), at pp. 283-91; and Robert D. Kligman, “Judicial Immunity” (2011), 38 *Adv. Q.* 251, at pp. 251-61.



[116] Immunizing these judicial and quasi-judicial adjudicators from personal damages claims is grounded in attempts to protect their independence and impartiality, and to facilitate the proper and efficient administration of justice. In *Canada (Attorney General) v. Slansky*, [2015] 1 F.C.R. 81 (C.A.), at paras. 134-37, Mainville J.A. summarized the role that immunity plays for the judiciary:

The principle of judicial independence has resulted in concomitant immunities, most notably (a) the immunity of a judge from suit and prosecution, and (b) the immunity of a judge from testifying about or otherwise justifying the reasons for a particular decision beyond those given in open court: *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796 (*MacKeigan*), at page 830.

The immunity of a judge from suit and prosecution has long been recognized as necessary to maintain public confidence in the judicial system: *Garnett v. Ferrand* (1827), 6 B. & C. 611, at pages 625-626, quoted approvingly in *Morier et al. v. Rivard*, [1985] 2 S.C.R. 716 (*Morier*), at page 737. The immunity serves to ensure that the judge is free in thought and independent in judgment: *Morier*, at pages 737-745. As noted by Lord Denning in *Sirros v. Moore* [1975] 1 Q.B. 118 (C.A.), quoted approvingly in *Morier*, at page 739 and in *R. v. Lippé*, (C.A.), [1991] 2 S.C.R. 114, at pages 155-156:

If the reason underlying this immunity is to ensure “that they may be free in thought and independent in judgment,” it applies to every judge, whatever his rank. Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself: “If I do this, shall I be liable to damages?”

The additional immunity from accounting for or justifying judicial decisions beyond those reasons provided in open court also serves to ensure the independence of judges and to instil public confidence in the judicial process: *MacKeigan*, at pages 828-830. As noted by McLachlin J. (as she then was), at page 831 of that decision, “To entertain the demand that a judge testify before a civil body, an emanation of the legislature or executive, on how and why he or she made his or her decision would be to strike at the most sacrosanct core of judicial independence.”

It is important to bear in mind that these immunities are there not for the benefit of individual judges; rather they exist for the benefit of the community as a whole. Indeed, an independent judiciary free from improper influence is an essential component of a free and democratic society.

[117] The same analysis applies to quasi-judicial decision-makers, which is why legislatures and Parliament have extended statutory immunity to administrative boards and tribunals: see Hogg, Monahan and Wright, at p. 289, and Kligman, at pp. 259-61.

[118] Further, this Court has already accepted an immunity that protects regulatory boards from negligence claims that arise from the policy decisions they make, whether or not they are made in their adjudicative capacity: *Cooper*, at para. 38, and *Edwards*. In *Edwards*, for example, the Law Society of Upper Canada was sued in negligence for failing to properly investigate and remedy a situation where a lawyer's trust fund had been compromised, despite the Law Society being advised of the suspicious use of the fund by the lawyer himself. The *Law Society Act* has an immunity clause in s. 9 which states:

**9.** No action or other proceedings for damages shall be instituted against the Treasurer or any bencher, official of the Society or person appointed in Convocation for any act done in good faith in the performance or intended performance of any duty or in the exercise or in the intended exercise of any power under this Act, a regulation, a by-law or a rule of practice and procedure or for any neglect or default in the performance or exercise in good faith of any such duty or power.

[119] The claim was struck as disclosing no cause of action by Sharpe J., who found that the Law Society’s quasi-judicial function immunized it from liability in negligence. Finlayson J.A. at the Court of Appeal agreed with Sharpe J., and concluded that the jurisprudence “clearly establishes a judicial immunity from negligence for the Law Society’s discipline process” ((2000), 48 O.R. (3d) 329 (C.A.), at p. 343). On appeal to this Court, no issue was taken with Finlayson J.A.’s finding that the quasi-judicial immunity provided by s. 9 of the *Law Society Act* also extended to the Law Society’s employees who investigate complaints. Applying the same logic, the immunity in s. 43 of the *Energy Resources Conservation Act* would apply to the Compliance Branch’s decision to cease communicating with Ms. Ernst. That means that artificial binary distinctions between adjudicative and other administrative decisions should be avoided, since these decisions too are subject to judicial review.

[120] The analogous functions between courts and quasi-judicial decision-makers mean that extra caution should be exercised before this Court nibbles away at the immunity clause in this case. There are profound and obvious implications for *all* judges and tribunals from such a decision, and it should not be undertaken without a full and tested evidentiary record. It may or may not be the case that governments will be able to justify immunity from *Charter* damages, but until the s. 1 justificatory evidence is explored, this Court should not replace the necessary evidence with its own inferences.

[121] This Court said in *Vancouver (City) v. Ward*, [2010] 2 S.C.R. 28, that “granting damages under the *Charter* is a new endeavour, and an approach to when damages are appropriate and just should develop incrementally” (para. 21). It is worth noting that this Court has found *Charter* damages to be available on only two occasions: in response to a *Charter* breach resulting from abusive police conduct towards a detained suspect (*Ward*), and in response to a *Charter* breach resulting from a prosecutor’s inadequate evidentiary disclosure to a criminal accused (*Henry v. British Columbia (Attorney General)*, [2015] 2 S.C.R. 214). In both cases, the conduct justifying damages was committed by individuals who were under the direction of the state. *Charter* damages have never been awarded against independent judicial or quasi-judicial decision-makers. This does not mean that such damages are beyond reach, but they are tied to the question of the constitutionality of immunity clauses and the extent to which they should be read down.

[122] Moreover, it is important to note that in *Ward* and *Henry*, this Court had the benefit of significant contributions from various Attorneys General when deciding the s. 24(1) damages claims. In *Ward*, the Attorney General of British Columbia was directly involved in the litigation from the trial stage onwards, and before this Court, the Attorneys General of Canada, Ontario and Quebec intervened. Similarly in *Henry*, the Attorneys General of British Columbia and Canada were involved from the trial stage onwards, and before this Court, eight other provincial Attorneys General intervened.

[123] I agree that an analysis pursuant to *Ward* likely leads to the conclusion that *Charter* damages are not an “appropriate and just” remedy in the circumstances, but in my respectful view the question of whether such damages are appropriate requires a prior determination of the constitutionality of the immunity clause. If the clause is constitutional, there is no need to embark on a *Ward* analysis. If, on the other hand, it is found to be unconstitutional, only then does a *Ward* analysis become relevant.

[124] A final comment about the questionable nature in which the new constitutional question has arisen before this Court. Ms. Ernst acknowledged in the hearing before us that she was aware that s. 43 was being used to bar her claim at the Court of Queen’s Bench and that she did not give the proper notice there. She must also be taken to be aware of the requirement of constitutional notice confirmed by Alberta’s Court of Appeal, which expressly rejected the approach taken by Ms. Ernst of arguing that she was seeking a finding of constitutional inapplicability under s. 24(1) rather than unconstitutionality under s. 52. Yet at the Court of Appeal, Ms. Ernst’s Notice of Appeal stated that she was *not* challenging the constitutional validity of s. 43, and that, as a result, no notice was required. She also stated, confusingly, that she would be arguing that s. 43 was “of no force and effect”. This is hardly the kind of notice required by s. 24 of the *Judicature Act*. It was not until she was before this Court that she first expressed a clear intention to challenge the constitutionality of s. 43, essentially depriving both the Alberta Attorney General and others from the opportunity of meaningfully participating in prior proceedings.

[125] This is not conduct that should be rewarded in this Court with redemptive forgiveness. Ms. Ernst's conduct was procedurally in breach of her province's jurisprudence and statutory requirements, and of the public interest that jurisprudence and legislation was designed to protect.

[126] I therefore agree with both Wittmann C.J. and the Alberta Court of Appeal that Ms. Ernst's *Charter* claim should be dismissed for not disclosing a reasonable cause of action pursuant to the *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 3.68, in light of the immunity clause.

[127] I also agree with them that judicial review was the appropriate means of addressing her concerns. As Wittmann C.J. concluded, "the time-tested and conventional challenge to an administrative tribunal's decision is judicial review, not an action against the administrative tribunal". The Court of Appeal agreed, and held that

. . . limits on remedies do not offend the rule of law, so long as there remains some effective avenue of redress: *Ward* at paras. 34-5, 43. The long standing remedy for improper administrative action has been judicial review. There is nothing in s. 43 that would have prevented the appellant from seeking an order in the nature of *mandamus* or *certiorari* to compel the Board to receive communications from her. Further, she could have appealed any decisions of the Board to this Court, with leave . . . . (at para. 30)

[128] When the Board made the decision to stop communicating with Ms. Ernst through the normal complaints process, it was exercising its discretionary authority

under its enabling legislation (s. 16 of the *Energy Resources Conservation Act*). Issues about the legality, reasonableness, or fairness of this discretionary decision are issues for judicial review (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at para. 28). Even the language used by Ms. Ernst in her statement of claim — that the Board’s decision “was made arbitrarily, and without legal authority” — evokes the terminology of a claim for judicial review.

[129] Ms. Ernst had the opportunity to seek timely judicial review of the Board’s decision. She chose not to. Instead, she attempted to frame her grievance as a claim for *Charter* damages. That is precisely why s. 43 exists —to prevent an end-run by litigants around the required process, resulting in undue expense and delay for the Board and for the public (*Hryniak v. Mauldin*, [2014] 1 S.C.R. 87).

[130] I would dismiss the appeal with costs.

The reasons of McLachlin C.J. and Moldaver, Côté and Brown JJ. were delivered by

THE CHIEF JUSTICE AND MOLDAVER AND BROWN JJ. —

[131] Section 24(1) of the *Canadian Charter of Rights and Freedoms* ensures that those whose rights or freedoms have been violated have access to “appropriate and just” remedies. But s. 24(1) was not enacted in a vacuum. It was born into a legal system with limits which, in some cases, prevent claims from being brought, including claims against the state. This appeal concerns the operation of one such

limit — a statutory immunity clause — on an application to strike a claim for a remedy under s. 24(1).

[132] The appellant, Jessica Ernst, brought a claim against the respondent, the Alberta Energy Regulator (the “Board”), seeking, among other things, *Charter* damages under s. 24(1) for breaching her right to freedom of expression under s. 2(b) of the *Charter*. In moving to strike Ms. Ernst’s claim, the Board relied in part on s. 43 of its enabling statute<sup>3</sup> which essentially bars all claims against the Board. The case management judge found that, although Ms. Ernst’s pleadings raised an arguable *Charter* claim, s. 43 immunized the Board. He accordingly struck her claim for *Charter* damages, and his decision was upheld by the Court of Appeal of Alberta.

[133] We would allow the appeal. Just as it is not plain and obvious that *Charter* damages could in no circumstances be an appropriate and just remedy in a claim against the Board or any quasi-judicial decision-maker like it, it is not plain and obvious that Ms. Ernst’s claim is barred by s. 43. Ms. Ernst seeks *Charter* damages as a remedy for actions by the Board that Ms. Ernst says were intended to punish her. It is arguable that such punitive acts fall outside the scope of the immunity that s. 43 confers. Accordingly, we would hold that Ms. Ernst’s claim cannot be struck on the basis of s. 43.

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<sup>3</sup> The Board’s enabling statute was at all material times the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10 (“*ERCA*”). This statute has since been repealed and replaced with the *Responsible Energy Development Act*, S.A. 2012, c. R-17.3. The new legislation has a provision similar to s. 43 of the *ERCA* (s. 27). Under the *ERCA*, the regulator was known as the Energy Resources Conservation Board (the “*ERCB*”). The new statute replaced the *ERCB* with the Board, and as a result, the Board is named as the respondent as the successor to the *ERCB*.



[134] On appeal to this Court, Ms. Ernst argued that it is not plain and obvious that s. 43 bars her claim for *Charter* damages because, in her submission, s. 43 is unconstitutional. Since we would conclude that it is not plain and obvious that s. 43 bars her claim at all, it is not necessary to consider s. 43's constitutionality at this stage of the proceedings. If it is subsequently determined that s. 43 does, indeed, bar Ms. Ernst's claim for *Charter* damages, then she may challenge its constitutionality at that juncture.

[135] We add this. This is a difficult case raising novel and difficult issues. It is not surprising that counsel and judges at all levels have struggled to find the appropriate template through which to view Ms. Ernst's claim. In the end, and with great respect for contrary views, we have concluded that the test for striking out Ms. Ernst's claim at the outset has not been satisfied, and that the matter should be returned to the Alberta courts to decide the important issues of free speech and *Charter* remedies that her case raises.

#### I. Factual Background

[136] In 2007, Ms. Ernst claimed against the Board, EnCana Corporation, and the Province of Alberta, alleging that EnCana contaminated her water while shallow drilling for the extraction of methane gas, and that Alberta and the Board were indirectly responsible for this contamination. Only the claim against the Board is raised here.

[137] Ms. Ernst's claim against the Board is twofold. First, she says the Board was negligent in administering its statutory regime, and that its failure to comply with certain statutory duties resulted in the contamination of her well. Secondly, she says that the Board breached her right to freedom of expression under s. 2(b) of the *Charter*, and that she is entitled to *Charter* damages under s. 24(1). Only this second aspect of her claim is before us.

[138] Because this matter arises from an application to strike, Ms. Ernst's allegations must be taken as true. Those allegations are straightforward.

[139] Ms. Ernst lives near Rosebud, Alberta. A well draws water for her home from geological formations that comprise an aquifer, or a series of aquifers.

[140] The Board is a statutory government agency established to regulate the oil and gas industry in Alberta. It conducts inspections and investigations in respect of legislative and regulatory provisions intended to protect groundwater from contamination due to oil and gas development, and takes enforcement action when warranted. To these ends, it has a specific process for communicating with the public and hearing public complaints.

[141] In 2004 and 2005, Ms. Ernst was a critic of the Board. She frequently expressed her concerns to the Board about the oil and gas development near her home. She also spoke to the media and to the public.

[142] Ms. Ernst alleges that her public criticism was a source of embarrassment to the Board, prompting it to take steps to silence her. In November 2005, the manager of the Board’s Compliance Branch informed her by letter that all of its staff had been instructed to avoid contact with her. When Ms. Ernst wrote several letters asking why she was being excluded from the Board’s public complaints process, the Board directed her to its legal branch, which initially ignored and later refused her request for an explanation. Eventually, the Board informed Ms. Ernst that it would communicate with her only if she agreed to raise her concerns directly with the Board, and not through the media or members of the public.

[143] In October 2006, Ms. Ernst wrote to the Board, asking that she be free to communicate unconditionally with the Board, like other members of the public. This letter went unanswered. It was not until March 2007 that the Board informed Ms. Ernst that she was free to communicate unconditionally with it.

[144] In her statement of claim, Ms. Ernst alleges that the Board breached her right to freedom of expression under s. 2(b) of the *Charter*, in that the Board’s actions “were a means to punish Ms. Ernst for past public criticisms” and “to prevent her from making future public criticisms” of the Board (A.R., at p. 72). In particular, Ms. Ernst alleges that the Board “*punitively*” excluded her from its own complaints, investigation and enforcement process “in retaliation for her vocal criticism” and “*arbitrarily*” removed her “from a public forum of communication with a government agency that had been established to accept public concerns and complaints” (A.R., at

p. 72 (emphasis added)). Ms. Ernst claims damages of \$50,000 and relies on s. 24(1) of the *Charter*, which provides:

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.

[145] The Board applied to strike Ms. Ernst's claim in negligence and her *Charter* damages claim, arguing that s. 43 of the *ERCA* plainly and obviously bars both claims. Section 43 reads as follows:

**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) [technical specialists or personnel] 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.

## II. Decisions Below

[146] The case management judge struck both of Ms. Ernst's claims (2013 ABQB 537, 570 A.R. 317). He disposed of the negligence claim as barred by s. 43 and, though he rejected the Board's argument that Ms. Ernst's pleadings did not disclose a violation of s. 2(b) of the *Charter*, he struck her claim for *Charter* damages as barred by the same provision.

[147] The Court of Appeal unanimously dismissed Ms. Ernst's appeal (2014 ABCA 285, 580 A.R. 341). In doing so, it did not consider whether Ms. Ernst's pleadings made out a s. 2(b) claim, as the Board did not raise this issue on appeal. The Court of Appeal agreed with the case management judge that s. 43 of the *ERCA* barred Ms. Ernst's claim for *Charter* damages.

### III. Analysis

[148] A claim "will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action" (*R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 17; see also Rule 3.68 of the *Alberta Rules of Court*, Alta. Reg. 124/2010). The issue on this appeal is thus whether Ms. Ernst's claim should be struck out because it discloses no cause of action, either because it is plain and obvious that *Charter* damages could not be an appropriate and just remedy in Ms. Ernst's action against the Board, or else because it is plain and obvious that the immunity clause in s. 43 of the *ERCA* bars her claim.

[149] In deciding whether a claim for *Charter* damages should be struck out on the basis of a statutory immunity clause, the court must first determine whether it is plain and obvious that *Charter* damages could not be an appropriate and just remedy in the circumstances of the plaintiff's claim. If it is not plain and obvious that *Charter* damages could not be appropriate and just, then the court must determine whether it is plain and obvious that the immunity clause, on its face, applies to the plaintiff's

claim for *Charter* damages. If it is plain and obvious that the immunity clause applies, then the court must give effect to the immunity clause and strike the plaintiff's claim, unless the plaintiff successfully challenges the clause's constitutionality.

[150] In this case, then, the first issue is whether it is plain and obvious that *Charter* damages could not be an appropriate and just remedy in the circumstances of Ms. Ernst's claim. If it is, the appeal may be dismissed and the claim struck without any reliance on the immunity clause. Our colleague Cromwell J. goes further; he would hold not only that *Charter* damages are not appropriate and just in the circumstances of Ms. Ernst's claim, but also that *Charter* damages could *never* be appropriate and just in the circumstances of *any* claim against the Board — or, indeed, against any quasi-judicial decision-maker like it. He therefore concludes that s. 43 is not unconstitutional to the extent that it bars a claim against the Board for *Charter* damages.

[151] If, by contrast, it is not plain and obvious that *Charter* damages could not be an appropriate and just remedy, the Court must consider the second issue — whether it is plain and obvious that s. 43 of the *ERCA* applies to Ms. Ernst's claim. If it is, the appeal must be dismissed and the claim struck on the basis of the immunity clause, unless the immunity clause is unconstitutional and therefore of no force and effect.

[152] If, however, it is not plain and obvious that s. 43 applies to Ms. Ernst's claim, the appeal must be allowed and it will not be necessary to consider s. 43's constitutionality at this stage. We would dispose of the appeal on this basis.

A. *It Is Not Plain and Obvious That Charter Damages Could Not Be an Appropriate and Just Remedy*

[153] In *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28, this Court set out a framework for assessing whether damages are an appropriate and just remedy in the circumstances. We turn now to consider how that framework can be applied here, at the application to strike stage.

[154] To survive an application to strike, the claimant must first plead facts which, if true, could prove a *Charter* breach (see *Ward*, at para. 23). MS. ERNST HAS MET THIS THRESHOLD.

[155] The Board submits that Ms. Ernst's s. 2(b) claim must be struck because s. 2(b) does not guarantee a right to be heard. We do not agree that Ms. Ernst's claim necessarily depends on her establishing that s. 2(b) guarantees the positive right she asserts.

[156] A s. 2(b) infringement may result where state action, *in purpose or effect*, "restrict[s] attempts to convey a meaning" (*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 973). If an individual's expression promotes one

of the principles underpinning s. 2(b) of the *Charter* and state action has the effect of limiting that expression, a s. 2(b) infringement may result (*Irwin Toy*, at p. 976).

These principles were summarized in *Irwin Toy* as follows:

... (1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed. [p. 976]

[157] Ms. Ernst has pleaded that the Board is a government agency and a public body that encouraged public participation and communication in its regulatory process. She has pleaded that she was a “vocal and effective” critic of the Board, but that the Board took steps to restrict her speech by refusing to communicate with her or allow her to participate in its compliance and enforcement process until she “agreed to raise her concerns only with the [Board] and not publicly through the media or through communications with other citizens” (A.R., at pp. 70-71). The effect of the Board’s action was to “greatly limi[t] her ability to lodge complaints, register concerns and to participate in the [Board’s] compliance and enforcement process” (A.R., at p. 70).

[158] Ms. Ernst’s pleadings raise two possible sources of limits on her freedom of expression: (1) the Board told her she had to stop expressing herself *to the media and the public* or else it would not hear her complaints; and (2) Ms. Ernst was prohibited *from participating in the Board’s public complaints and enforcement*



*process*. The first amounts to an allegation that the Board acted with the *purpose* of limiting Ms. Ernst's expressive activity in the public sphere. The second amounts to an allegation that the Board's action had the *effect* of limiting Ms. Ernst's expression in the Board's complaints and enforcement process, where that expression was consistent with her participation in social and political decision making relating to oil and gas development in southern Alberta.

[159] On either front, these pleadings establish the elements of an admittedly novel s. 2(b) claim. The test for granting an application to strike is stringent: it is “only if the statement of claim is certain to fail because it contains a ‘radical defect’ that the plaintiff should be driven from the judgment” (*Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15). A court must “err on the side of permitting a novel but arguable claim to proceed” (*Imperial Tobacco*, at para. 21). We cannot say, on the basis of Ms. Ernst's pleadings, that it is plain and obvious that she cannot establish a breach of s. 2(b) of the *Charter*.

[160] Ms. Ernst has therefore pleaded a viable s. 2(b) claim against the Board for the purposes of the first step of the *Ward* analysis on an application to strike. The second step, on an application to strike, requires the claimant to demonstrate that damages could fulfill one or more of the functions of compensation, vindication, or deterrence (*Ward*, at paras. 24-31). Ms. Ernst has met this threshold, as well. She has not pleaded any injury caused by the Board that could give rise to compensatory *Charter* damages. But the fact that the claimant has not suffered compensable loss

“does not preclude damages where the objectives of vindication or deterrence” are served by an award of *Charter* damages (*Ward*, at para. 30). Ms. Ernst’s pleadings allege that the Board’s actions were punitive, arbitrary, and retaliatory. These allegations are sufficient to establish that the functions of vindication and deterrence could be supported by an award of *Charter* damages.

[161] WE note the case management judge’s concern that, absent the automatic application of statutory immunity clauses, “[p]arties would come to the litigation process dressed in their *Charter* clothes whenever possible” (trial reasons, at para. 81). However, parties can only come to court “in their *Charter* clothes” if they have pleaded all the elements of a *Charter* breach, and facts upon which an award of *Charter* damages could be functionally justified. *Charter* claims are not easy to make out; they require specific factual allegations. Where the state shows that a claimant has merely affixed a *Charter* label on what is in substance a private law claim, that claim should be struck at one of the first two steps of the *Ward* analysis.

[162] AT THE THIRD STEP OF *WARD*, AS APPLIED ON AN APPLICATION TO STRIKE, THE STATE MAY SHOW THAT COUNTERVAILING CONSIDERATIONS MAKE IT PLAIN AND OBVIOUS THAT *CHARTER* DAMAGES COULD NOT BE APPROPRIATE AND JUST (SEE *WARD*, AT PARAS. 32-45). WE WILL RETURN TO THIS STEP SHORTLY. The fourth step of the *Ward* analysis concerns the quantum of damages that would be appropriate and just in the circumstances. Since this is a matter best left for summary procedure or trial, the

claimant need not plead facts which show that the quantum of damages sought is appropriate and just.

[163] To be clear, claims that proceed beyond the application to strike stage need not advance to a full trial on the merits. Other summary procedures — in Alberta, for example, summary judgment or summary trial — can be employed on a more fully developed record.

[164] Cromwell J. accepts that Ms. Ernst has pleaded facts which satisfy the first two steps of the *Ward* analysis for the purposes of an application to strike. At the third step, however, he holds that countervailing factors make it plain and obvious that *Charter* damages cannot be an appropriate and just remedy in the circumstances of Ms. Ernst's claim against the Board — or, indeed, in *any* claim against the Board, or against any quasi-judicial decision-maker like it. We respectfully disagree.

[165] *Charter* damages will not be available where countervailing factors render s. 24(1) damages inappropriate or unjust. In *Ward*, this Court identified such countervailing factors as including the availability of alternative remedies and good governance concerns. We propose to elaborate briefly on these two factors.

(1) Alternative Remedies

[166] *Charter* damages, to be recoverable, must meet at least one of the following objectives: compensating the loss caused by the breach, vindicating or

affirming the right with respect to the harm done to the claimant and society, and deterring future breaches of the right by regulating state behaviour. Where a plaintiff has pleaded facts on the basis of which an award of *Charter* damages could be justified under one or more of these objectives, the burden shifts to the state to show that it is plain and obvious that the same objective or objectives can be met through other remedies.

[167] The Board submits, and our colleagues Abella and Cromwell JJ. agree, that Ms. Ernst had an alternative and effective remedy because she could have pursued judicial review of the Board's conduct. We cannot agree. In our view, the Board has not shown that it is plain and obvious that judicial review will meet the same objectives as an award of *Charter* damages, namely, vindicating Ms. Ernst's *Charter* right and deterring future breaches. At the very least, it would be premature to conclude, based on the pleadings alone, that judicial review would provide an effective alternative remedy to *Charter* damages in this case, let alone in *all* cases, against the Board. We note that, under the *Alberta Rules of Court*, damages are not available through judicial review.<sup>4</sup>

(2) Good Governance Concerns

[168] In *Ward*, this Court recognized that good governance concerns may render an award of *Charter* damages unjust or inappropriate. Such concerns were understood in *Henry v. British Columbia (Attorney General)*, 2015 SCC 24, [2015] 2

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<sup>4</sup> Rule 3.24.

S.C.R. 214, as “policy factors that will justify restricting the state’s exposure to civil liability” (para. 39).

[169] A court must keep two interrelated principles in mind when considering such concerns. First, as *Ward* makes clear, *Charter* compliance is itself a foundational principle of good governance (para. 38). Second, courts must consider good governance concerns in a manner that remains protective of *Charter* rights, since the “appropriate and just” analysis under s. 24(1) is designed to redress the *Charter* breach.

[170] Bearing those principles in mind, if the state can establish, without relying on an immunity clause, that good governance concerns make it plain and obvious that *Charter* damages cannot be appropriate and just in the circumstances, then the plaintiff’s claim will be struck. This, in substance, is the conclusion reached by Cromwell J. He points to common law and statutory immunities enjoyed by judges and various quasi-judicial decision-makers, as well as good governance concerns rooted in the “practical wisdom” of the common law, to support his conclusion that *Charter* damages can never be an appropriate and just remedy in an action against the Board.

[171] We acknowledge that our common law recognizes absolute immunity from personal liability for judges in the exercise of their adjudicative function. This is necessary to maintain judicial independence and impartiality (*Sirros v. Moore*, [1975] 1 Q.B. 118 (C.A.); *Gonzalez v. British Columbia (Ministry of Attorney General)*,

2009 BCSC 639, 95 B.C.L.R. (4th) 185; *Taylor v. Canada (Attorney General)*, [2000] 3 F.C. 298 (C.A.), leave to appeal refused, [2000] 2 S.C.R. xiv). Such immunity is not inconsistent with the *Charter*, as judicial immunity itself is a fundamental constitutional principle (*Taylor*, at para. 57). Similarly, we anticipate that compelling good governance concerns rendering *Charter* damages inappropriate or unjust will exist where the state actor has breached a *Charter* right while performing an adjudicative function.

[172] But that is not the case before us. There is nothing in the record which indicates that the Board was acting in an adjudicative capacity when it informed Ms. Ernst that she could no longer write to the Board until she stopped publically criticizing it. We see no compelling policy rationale to immunize state actors in *all* cases, including where, as here, the impugned conduct is said to have been “punitive” in nature. To be precise, what Ms. Ernst alleges is that the Board, far from exercising an adjudicative function, effectively sought to punish her by barring access to those functions so long as she continued to criticize the Board in public. Our colleague Abella J. suggests that the Board, in deciding to stop communicating with Ms. Ernst, “in essence f[ound] her to be a vexatious litigant” (para. 64). We see no basis for our colleague’s characterization.

[173] Further, we disagree with our colleague Cromwell J. that the policy concerns which underlie the negation of any negligence law duty of care owed by the Board to Ms. Ernst support an absolute immunity from *Charter* damages claims for

the Board. In his view, certain policy considerations which negate a duty of care should also render an award of *Charter* damages inappropriate or unjust, namely: (i) excessive demands on resources, (ii) the potential “chilling effect” on the behaviour of the state actor, and (iii) protection of quasi-judicial decision making. However, immunity in negligence law does not necessarily translate into immunity under the *Charter*. Though public regulators such as the Board will rarely be found to owe a duty of care in negligence law (*Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562, at para. 18; *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537), this Court has rejected the argument that “the balancing of policy factors . . . which led this Court to establish a qualified immunity shielding prosecutors from tort liability absent a showing of malice . . . is also dispositive” in the context of *Charter* damages (*Henry*, at paras. 52 and 56). Considerations supporting private law immunity from liability for negligent conduct do not automatically support absolute immunity from *Charter* damages claims for more serious misconduct, including conduct amounting to bad faith or an abuse of power.

[174] Because good governance concerns should limit the availability of *Charter* damages only so far as necessary, this Court has recognized qualified immunities from claims for *Charter* damages, preconditioning an award upon the claimant establishing a threshold of misconduct or fault. In *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405, the Court recognized that state actors should be afforded some immunity from claims for *Charter* damages, so as not to unduly constrain the effectiveness of state action under statutes that are

subsequently declared invalid. This was said to furnish “a means of creating a balance between the protection of constitutional rights and the need for effective government” (para. 79). *Mackin* cautions, however, that immunity — even in this qualified form — would not cover conduct that is “clearly wrong, in bad faith or an abuse of power” (*ibid.*). The state and its representatives are required to exercise their powers in good faith and to respect constitutional rights. This makes sense because, as noted in *Henry*, *Charter* breaches “cover a spectrum of blameworthiness, ranging from the good faith error, quickly rectified, to the rare cases of egregious failures” (para. 91). In *Henry*, the Court held that a heightened liability threshold must be met in cases of wrongful non-disclosure, which addressed concerns about the “risk of undue interference with the ability of prosecutors to freely carry out their duties” (para. 76).

[175] In the private law context, the Court recognized in *Hinse v. Canada (Attorney General)*, 2015 SCC 35, [2015] 2 S.C.R. 621, that the Minister of Justice’s exercise of the power of mercy is entitled to only a *qualified* immunity from claims for damages. In that case, the Court held that damages in a civil case could still be awarded where the Minister of Justice acts in “bad faith” or with “serious recklessness” when reviewing an application for mercy (para. 69). Likewise, in *Nelles v. Ontario*, [1989] 2 S.C.R. 170, Lamer J. (as he then was) noted that an action for malicious prosecution against the Attorney General or a Crown Attorney will lie only where the prosecutor has “perpetrated a fraud on the process of criminal justice and in doing so has perverted or abused his office and the process of criminal justice” (p. 194).



[176] These cases demonstrate that certain state actors are subject to *qualified* immunities. A judge, though absolutely immune in respect of his or her adjudicative role, is not necessarily immune in respect of acts or omissions outside his or her adjudicative role. A prosecutor is not immune where he or she perverts or abuses his or her office or intentionally withholds material evidence that he or she knows or should know is material to an accused's ability to make full answer and defence. The Minister of Justice is not immune when he or she acts in bad faith or with serious recklessness in reviewing an application for mercy. Never has this Court held, simply because a governmental decision-maker has *an* adjudicative role — or a prosecutorial role, or a ministerial role — that *Charter* damages can never be an appropriate and just remedy, regardless of the circumstances.

[177] Cromwell J. asserts that when the countervailing factors he identifies are considered cumulatively, rather than individually or in isolation, they justify complete immunity from *Charter* damages claims for the Board and decision-makers like it. He would therefore hold, for the first time, that *Charter* damages can never be an appropriate and just remedy in *any* action against *any* quasi-judicial decision-maker like the Board. In our view, whether the countervailing factors are examined individually or collectively, the record at this juncture does not support recognizing such a broad, sweeping immunity for the Board in this case, let alone in every case.

[178] In the final analysis, it is not plain and obvious to us that *Charter* damages could not be an appropriate and just remedy in the circumstances of Ms.

Ernst’s claim against the Board. That being so, the remaining question is whether it is plain and obvious that s. 43 of the *ERCA* bars that claim. In our view, it does not.

B. *It Is Not Plain and Obvious That the Immunity Clause Bars the Plaintiff’s Claim*

[179] Recall that s. 43 of the *ERCA* provides that “[n]o action or proceeding may be brought against the Board . . . 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.” The issue is thus whether it is plain and obvious that the wrong pleaded — i.e., acts intended to punish Ms. Ernst — would always and inevitably fall within the s. 43 bar to litigation. More precisely, the question is whether punitive conduct is clearly caught by the phrase, “any act or thing done purportedly in pursuance of” the *ERCA* or other legislation administered by the Board, or any regulation, or any “decision, order or direction”.

[180] We cannot conclude that it is plain and obvious that actions taken by the Board purely to punish a member of the public would necessarily fall within the phrase “done purportedly in pursuance” of the *ERCA* or any other instrument. It is arguable that the *ERCA* does not authorize punitive conduct, either expressly or impliedly. Nor does it plainly and obviously give persons acting under it or any other instrument the power to punish anyone as it allegedly punished Ms. Ernst. If, as Ms. Ernst asserts, “the decision to restrict her communication with the [Board], and the decision to continue such restriction, was made arbitrarily, and without legal

authority” (A.R., at p. 72 (emphasis added)), the immunity clause may not apply to her claims in respect of these particular allegations.

[181] The courts below assumed that, by its terms, s. 43 of the *ERCA* plainly and obviously bars Ms. Ernst’s entire claim. In his submissions to this Court, Ms. Ernst’s counsel did the same. That assumption may ultimately prove correct, but it is not plainly and obviously so at this stage. If it is ultimately established that the actions of which Ms. Ernst complains were, in fact, “purportedly in pursuance” of the *ERCA*, other legislation or regulation, or a Board decision, order or direction, the immunity clause will bar her claim unless s. 43 is unconstitutional. In our view, those issues remain to be determined on a fuller record.

[182] Our colleague Cromwell J. takes issue with our approach to the immunity clause. He stresses that this argument was not made by Ms. Ernst before this Court. We accept that this is so. However, as he correctly notes, the Court is not bound by the positions taken by the parties on questions of law. Ms. Ernst’s assumption that s. 43 of the *ERCA* bars all actions or proceedings against the Board, “regardless of the nature of the claim” (A.F., at para. 63), is not binding on us. The interpretation of s. 43 and particularly the phrase “in respect of any act or thing done purportedly in pursuant of this Act” raises a question of law, involving as it does a matter of statutory interpretation.

[183] Apart from our not being bound by the positions of the parties on questions of law, as we shall explain, the circumstances of this case are exceptional and, in our view, compel the Court to consider an issue not raised by the parties.

[184] First, Ms. Ernst raises a novel and difficult legal problem involving the interplay between legislative immunity clauses and s. 24(1) of the *Charter*. The significance of this issue cannot be overstated and it has proved challenging to counsel and the courts below. The complexity of this matter has understandably resulted in submissions which have not comprehensively addressed the issues in this case. In these circumstances, the Court may go beyond the parties' submissions to make a proper determination of the matter according to law.

[185] Second, the issues raised by Ms. Ernst's claim are of significant public importance. The allegations against the Board are serious. She says that the Board abused its powers to punish a citizen and to curtail her freedom of expression, thereby breaching her s. 2(b) *Charter* right. Whether Ms. Ernst may advance a claim for *Charter* damages against the Board in the face of a statutory immunity clause which may bar such claims will have consequences which extend far beyond the facts of this case. In our view, the fact that Ms. Ernst did not argue that s. 43 does not apply to her claim should not impede the just determination of a legal issue which has such broad ramifications for the public.

[186] Since it is not plain or obvious that *Charter* damages could never be appropriate and just or that s. 43 of the *ERCA* bars Ms. Ernst's claim, the application

to strike must fail and the appeal must be allowed. It is therefore unnecessary to determine s. 43's constitutionality, and we would decline to do so.

C. *We Decline to Answer the Constitutional Question*

[187] The constitutional question at issue on this appeal was stated by the Chief Justice as follows:

Is s. 43 of the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, constitutionally inapplicable or inoperable to the extent that it bars a claim against the regulator for a breach of s. 2(b) of the *Canadian Charter of Rights and Freedoms* and an application for a remedy under s. 24(1) of the *Canadian Charter of Rights and Freedoms*?

[188] Where the state applies to strike a claim for *Charter* damages on the basis of a statutory immunity clause and it is not plain and obvious that *Charter* damages could not be an appropriate and just remedy but it *is* plain and obvious that the immunity clause would bar the plaintiff's claim, the plaintiff may defeat the application to strike by successfully challenging the clause's constitutionality. That is what Ms. Ernst sought to do in her appeal to this Court.

[189] We would decline her invitation to strike down s. 43 as unconstitutional, for two reasons. First, it is not necessary to do so to dispose of this appeal; as discussed above, it is not plain and obvious that, on its face, s. 43 bars Ms. Ernst's claim for *Charter* damages. Second, even if it were necessary to consider s. 43's constitutionality, the record before us does not provide an adequate basis on which to

do so; we have received neither submissions nor evidence on the application, if any, of s. 1 of the *Charter* to s. 43, for example.

[190] We would therefore leave for another day the question of whether s. 43 or a similar immunity clause can constitutionally bar a claim for *Charter* damages. All we have determined on this appeal is that, for the purposes of the application to strike, it is not plain and obvious that s. 43 applies to Ms. Ernst's claim. If a court ultimately finds that s. 43 does bar Ms. Ernst's claim, Ms. Ernst would still have the opportunity to seek a declaration that s. 43 of the *ERCA* is unconstitutional and to provide proper notice of her constitutional challenge to the Attorney General of Canada and the Minister of Justice and Solicitor General of Alberta in accordance with s. 24 of Alberta's *Judicature Act*, R.S.A. 2000, c. J-2.

[191] The constitutionality of s. 43 could then be dealt with at first instance. It would be open to the state to adduce evidence of countervailing considerations which may render *Charter* damages inappropriate or unjust, to make submissions on the extent, if any, to which s. 1 applies to Ms. Ernst's s. 24(1) claim and to provide any other evidence in support of the clause's constitutionality. Of course, it would be similarly open to Ms. Ernst to answer such evidence or submissions with evidence and submissions of her own.

#### IV. Conclusion

[192] We would allow the appeal, and set aside the order striking the claim, with costs to Ms. Ernst throughout. Ms. Ernst may proceed with her claim for *Charter* damages unless and until it is established that it is barred by s. 43.

*Appeal dismissed with costs, MCLACHLIN C.J. and MOLDAVER, CÔTÉ and BROWN JJ. dissenting.*

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