

No Deference Without Independence: *Ernst v. Alberta (Energy Resources Conservation Board)*

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Introduction

In *Ernst v. Alberta (Energy Resources Conservation Board)*,¹ the Court of Appeal of Alberta unanimously dismissed an appeal from a case management decision barring a claim for damages for a breach of section 2(b) of the *Canadian Charter of Rights and Freedoms* brought directly against Alberta's Energy Resources Conservation Board.² As the case management judge below explained, this is a novel area of law, and novelty alone is an insufficient ground to strike out a claim. At the same time, however, in a case likely to be heard by the Supreme Court of Canada, neither the case management judge nor the Court of Appeal of Alberta appears to have sufficiently appreciated the broader administrative law context of this relatively novel issue. Can there be administrative deference - let alone immunity - in the absence of administrative independence?

Background Facts

Jessica Ernst owns land near Rosebud, Alberta. The oil company EnCana Corporation carried out construction, drilling, and hydraulic fracturing activities in the surrounding area. Ernst claimed against EnCana, alleging that these activities harmed her fresh water supply. Ernst further claimed against the Board, which has regulatory jurisdiction over EnCana, for "negligent administration of a regulatory regime."³ Finally, Ernst sued Alberta, alleging that the province - through its Environment and Sustainable Resource Development department - breached its duty to protect her water supply and failed to adequately respond to her complaints about EnCana's activities.⁴

Ernst's *Charter* claim against the Board, however, is of a different nature. Ernst participated in several regulatory proceedings before the Board and claims that she was a "vocal and effective critic" of the Board's performance.⁵ As a result, she claims that between 2005 and 2007 the Board's Compliance Branch refused to accept any additional communications from her. According to Ernst, the Board's refusal to accept her communications violated her freedom of expression under section 2(b) of the *Charter*, for which she claimed personal damages pursuant to section 24(1).⁶

¹ *Ernst v. Alberta (Energy Resources Conservation Board)*, 2014 ABCA 285 [*"Ernst v. Alberta"*].

² The Energy Resources Conservation Board is now called the Alberta Energy Regulator [*"Board"*]. The Board is responsible for overseeing and regulating the oil and gas industry in Alberta.

³ *Ernst v. Alberta*, at para. 2.

⁴ *Id.*

⁵ *Id.*, at para. 3.

⁶ *Id.*, at paras. 3, 24-30.

The Case Management Decision

Before the case management judge below, the Board argued that section 2(b) of the *Charter* does not create a “right to an audience.” The Board further argued that it was not obligated to accommodate whatever form of expression that Ernst chose. The case management judge refused to summarily strike out Ernst’s *Charter* claim, however, finding that it was not plain and obvious that it would be unsustainable as a cause of action.⁷ Indeed, the case management judge found that “the *Charter* claim of Ernst against the ERCB is valid.”⁸

But the case management judge did find that any claim - including a *Charter* claim - was barred by section 43 of the *Energy Resources Conservation Act*, which provides 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) 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.⁹

On the basis of this provision the case management judge barred Ernst’s *Charter* claim against the Board for a “personal remedy” of \$50,000.¹⁰

The Court of Appeal of Alberta’s Decision

On appeal from the case management judge’s decision on this issue, Ernst argued that section 43 of the *Energy Resources Conservation Act* is inapplicable to her *Charter* claim. Ernst grounded this argument in the text of both section 24(1) of the *Charter* and section 52 of the *Constitution Act, 1982*, which respectively provide as follows:

24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances[.]

52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Because section 24(1) entitles an individual to a *Charter* remedy that is “appropriate and just in the circumstances” and section 52(1) of the Constitution provides that any law inconsistent with the Constitution is of no force or effect, Ernst argues that section 43 of the *Energy Resources Conservation Act* cannot bar her *Charter* claim.

A unanimous panel of the Court of Appeal of Alberta disagreed: “These two sections of the Constitution should not, however, be read that literally.”¹¹

⁷ *Ernst v. EnCana Corporation*, 2013 ABQB 537, at paras. 31-43 [“*Ernst v. EnCana*”].

⁸ *Id.*, at para. 130 (subsection V. A. (b)).

⁹ *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, s. 43. This section was repealed and replaced by section 27 of the *Responsible Energy Development Act*, S.A. 2012, c. R-17.3.

¹⁰ *Ernst v. EnCana*, at paras. 59-89.

¹¹ *Ernst v. Alberta*, at para. 25.

That is of course correct. But what the Court of Appeal failed to recognize is the entirely trite law that the *Charter* must be given a broad and purposive interpretation.¹²

Moreover, as La Forest J. observed in *Canadian Egg Marketing Agency v. Richardson*, “the *Charter* is essentially an instrument for checking the powers of government over the individual.”¹³

Given both the broad scope and purpose of section 24(1) of the *Charter* read in conjunction with section 52(1) of the Constitution, it is difficult to understand the Court’s view that an immunity clause contained in an ordinary provincial statute can oust Constitutional rights and remedies.

How does the Court justify its interpretation? The Court began by analogizing statutory immunity provisions to statutes of limitation. The Court’s reasoning is that if statutes of limitations can bar *Charter* claims, then so too can immunity provisions. But this reasoning suffers from a patently defective flaw. Statutes of limitation merely prescribe limits with respect to the time in which a claim must be brought, whereas statutory immunity claims purport to bar claims outright.¹⁴ The Court’s analogy is plainly inapt and incorrect as a matter of law.

The Court of Appeal proceeded to argue that sections 24(1) and 52(1) do not have the effect of abolishing long standing common law limitations on the availability of remedies against public officials, such as the immunity extending to those performing quasi-judicial functions.¹⁵ According to the Court, “[t]o the extent that administrative tribunals perform judicial or quasi-judicial functions, it is contrary to long standing common law traditions to expose them, as decision-makers, to personal liability for their decisions.”¹⁶

There are three fatal flaws in the Court’s reasoning. The first and most obvious is that, in the case at bar, Ernst is claiming against the *Board*, not the Board’s members in their personal capacities; recall that section 43 of the *Energy Resources Conservation Act* purports to immunize “the Board or a member of the Board”. But the long-standing common law traditions that the Court of Appeal summons in support of its interpretation apply - if at all - to Board *members*, not to the *Board itself*.

Second, in the case at bar the Board was not performing either a judicial or quasi-judicial function capable of attracting immunity. Rather, the Board was performing a *regulatory* function: namely, its regulatory inspection scheme, which Ernst alleges the Board negligently failed to implement. It is important to further note that the conduct impugned in this case cannot attract immunity on the basis that it represents an example of the state’s legislative or policy-making functions. On its face, the Board’s alleged failure to implement its regulatory inspection scheme is clearly a failure of policy *operation*, which does not traditionally attract immunity.

¹² The purposive approach to the interpretation of the *Charter* was spelled out most fully by the Supreme Court of Canada in *R. v. Big M Drug Mart*, [1995] 1 S.C.R. 295.

¹³ *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157, at paras. 55-57.

¹⁴ *Ernst v. Alberta*, at para. 26.

¹⁵ *Id.*, at para. 27. The Court of Appeal goes on to further analogize immunity provisions to notice requirements (which, again, are not absolute bars to claims) and preconditions (ditto).

¹⁶ *Id.*, at para. 17(g) (citations omitted).

The third flaw in the Court's reasoning flows from the second and is the most fundamental of all - the Court's unexamined assumption that the Board merits immunity because it is independent. This unexamined assumption underlying the Court's reasoning is the most pressing issue in Canadian administrative law today. While I cannot hope to fully treat this issue in the space provided here, I will conclude with an initial sketch of the problem.

Conclusion: No Deference Without Independence

In an article on Canadian administrative law, Justice Louis LeBel made the following observation:

But, given the importance of administrative justice, we should perhaps question whether administrative adjudicative administration should not be given stronger constitutional protection after all. Canadians deal with administrative action and justice more often than with civil or criminal courts in their daily lives.¹⁷

In light of Justice LeBel's apposite remarks about the importance of Canadian administrative law to ordinary Canadians like Jessica Ernst, the real issue raised by this case is not administrative immunity. The real question is whether Canadian courts can continue to expand the depth and scope of administrative deference in the absence of administrative independence.

In 2013, for instance, Alberta dissolved the Energy Resources Conservation Board and transferred its powers, along with those of the Alberta Environment and Sustainable Resource Development department, to the Alberta Energy Regulator (AER). The AER named Gerry Protti, the founding president of the Canadian Association of Petroleum Producers (CAPP) - the oil and gas industry's principal lobby group - as its chairman. Before heading up CAPP, Mr. Protti spent 15 years at EnCana. About Mr. Protti, *The Globe and Mail* reported that "[n]o one questions whether he understands the oil and gas business. Some, however, question his independence."¹⁸ And not only because of his previous positions in the oil and gas industry, but also because the AER receives 100 percent of its operating funds from the industry that it purports to regulate.¹⁹ Meanwhile, as *The Globe and Mail* more recently reported, "[o]il sands production has surged - from 1.3 million barrels per day in 2006, to 1.9 million by 2012, a figure projected to double by 2022 - but the resource's regulation has remained dubious."²⁰

¹⁷ The Honourable Justice Louis LeBel, "Notes for an Address: Reflections on Natural Justice and Procedural Fairness in Canadian Administration" (2013) 26 CJALP 51, at p. 57, quoted in Trevor Guy, "Administrative judicial tribunals: Does the rule of law matter?" (2013) 32(2) *The Advocates Journal* 32, at p. 32.

¹⁸ Carrie Tait, "Alberta revamps energy regulator in bid to polish environmental image" *The Globe and Mail*, May 13, 2013, available online: <http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/alberta-revamps-energy-regulator-in-bid-to-polish-environmental-image/article11901575/> (accessed November 11, 2014).

¹⁹ Leslie Young & Anna Mehler Paperny, "Watching the pipelines: How good are Alberta's energy regulators?" *Global News Data Desk*, May 22, 2013, available online: <http://globalnews.ca/news/571507/watching-the-pipelines-how-good-are-albertas-energy-regulators/> (accessed November 11, 2014).

²⁰ Josh Wingrove, "Sins of omission: Who's looking out for the environment?" *The Globe and Mail*, October 31, 2014, available online: <http://www.theglobeandmail.com/report-on-business/rob-magazine/big-oils-pollution-problem/article21352392/?page=all> (accessed November 15, 2014).

Relatedly, the independence and impartiality of the National Energy Board (NEB) has also been put into question.²¹ According to Andrew Nikiforuk, the NEB's board members include:

no public health expert. There is no expert in environmental assessment, there is no pipeline safety expert, there is no representative from First Nations, there's no representative or expert from fisheries, no oil spill or contamination expert.

It's a very striking board, it's a board of white people, mostly Conservatives, all based in Calgary, all with very similar backgrounds, *whose job is largely to facilitate the pipeline approval in the country.*²²

The NEB's lack of independence and impartiality was further questioned in a recent application for judicial review before the Federal Court of Appeal.²³

More broadly still, the legitimacy of Canadian administrative justice as a whole is in a state of crisis. More than 40 officially sanctioned or commissioned studies have recommended the elimination of patronage and "at pleasure" appointments, the seconding of executive branch staff to tribunal positions, and the integration of judicial tribunals into their host industries, among a great many other reforms aimed at enhancing administrative independence and the rule of law.²⁴ Given the ever-broadening jurisdiction of Canadian administrative boards and tribunals, including jurisdiction over not only the adjudication of *Charter* rights²⁵ but also the governance of the country's economy and natural environment, enhancing administrative independence and impartiality is among the very most pressing issues in Canadian law today.

²¹ The National Energy Board is a federal administrative board responsible for regulating interprovincial and international oil pipelines, energy development, and trade in the Canadian public interest. See <http://www.neb-one.gc.ca/bts/whwr/strtgcpn-eng.html>.

²² Canadian Broadcasting Corporation, "National Energy Board's impartiality over pipeline decisions questioned" November 5, 2014 (emphasis added), available online:

<http://www.cbc.ca/m/touch/canada/newbrunswick/story/1.2824507> (accessed November 11, 2014). See also Daniel Tencer, "Has The National Energy Board Been 'Captured By Industry'?" *The Huffington Post Canada*, November 5, 2014, available online: http://www.huffingtonpost.ca/2014/11/05/regulatory-capture-national-energy-board_n_6108628.html (accessed November 11, 2014).

²³ *Forest Ethics Advocacy Association v. The National Energy Board*, Federal Court of Appeal File No. A-273-13. The Court refused to consider evidence of the oil and gas industry's capture of the NEB on purely procedural grounds: *Forest Ethics Advocacy Association v. The National Energy Board*, 2014 FCA 88 (CanLII).

²⁴ Ron Ellis, *Unjust by Design: Canada's Administrative Justice* (Vancouver: UBC Press, 2013).

²⁵ See e.g. *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395.