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## CASE SUMMARY: SUPREME COURT OF CANADA DENIES FRACKING OPPONENT A CLAIM FOR DAMAGES AGAINST THE ALBERTA ENERGY REGULATOR

**Administrative Law – Human rights complaints – Charter of Rights and Freedoms – Freedom of expression; Boards and tribunals – Jurisdiction to grant Charter remedies – Remedies – Charter relief; Natural resources**

*Ernst v. Alberta Energy Regulator*

Dismissal of claim Alberta Energy Regulator breached right of freedom of expression under s. 2(b) of the Charter and for Charter damages

[2017] S.C.J. No. 1

2017 SCC 1

Supreme Court of Canada

January 13, 2017

B. McLachlin C.J. and R.S. Abella, T.A. Cromwell, M.J. Moldaver, A. Karakatsanis, R. Wagner, C. Gascon, S. Côté and R. Brown JJ.

The appellant Jessica Ernst claimed the respondent Alberta Energy Regulator (the “Board”) breached her right of freedom of expression under s. 2(b) of the Charter.

The appellant brought a claim against the Board for Charter damages for allegedly punishing her for publicly criticizing the Board and by preventing her, for a period of 16 months, from speaking to key offices within it.

The Board is a statutory, independent, quasi-judicial body responsible for regulating Alberta’s energy resource and utility sectors under various statutes. The Board is protected by a broadly worded immunity clause pursuant to s. 43 of the Energy Resources Conservation Act, R.S.A. 2000, c. E-10, which provides that no action or proceeding may be brought against the Board in respect of any act or thing done purportedly in pursuance of the legislation or a decision, order, or direction of the Board. It was common ground between the parties that s. 43, on its face, purported to bar the appellant’s claim for Charter damages.

The Board applied to strike the claim on the basis it is protected by the immunity clause which precludes all claims in relation to the Board’s actions done pursuant to its enabling legislation.

Both the Alberta Court of Queen’s Bench and the Alberta Court of Appeal struck the appellant’s claims on the basis of the immunity clause.

On appeal to the Supreme Court of Canada, the appellant argued the immunity clause is unconstitutional because it purports to bar her claim for Charter damages.

Mr. Justice Cromwell, for the majority, with Madam Justice Abella concurring in the result, held the claim for Charter damages should be struck and the appeal dismissed.

Cromwell J. held the appellant failed to discharge her burden of showing the immunity clause is unconstitutional and found that Charter damages would never be an appropriate remedy against the Board, taking into account the need to strike an appropriate balance between constitutional rights and effective government, for three reasons:

1. First, the alternative remedy of judicial review is available to substantially address the appellant's alleged Charter breach.
2. Second, granting Charter damages undermines the effectiveness of the Board and inhibits effective governance (referred to as "good governance concerns").
3. Third, determining Charter damages against the Board on a case-by-case basis in a highly factual and contextual manner would largely undermine the purposes served by the immunity clause.

Cromwell J. concluded that these factors considered collectively negated the appropriateness of an award of Charter damages against the Board.

Abella J., in reasons concurring in the result, held the appellant's claim for Charter damages should be struck and the appeal dismissed because the appellant did not seek to challenge the constitutionality of the immunity clause in prior proceedings and the Supreme Court should not entertain a constitutional argument in the absence of a proper notice and a full evidentiary record.

This case was digested by [Joel A. Morris](#) of Harper Grey LLP. If you would like to discuss this case further, please feel free to contact him directly at [jmorris@harpergrey.com](mailto:jmorris@harpergrey.com) or review his biography at <http://www.harpergrey.com>.