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Ernst v. Alberta Energy Regulator: A "Frack-tious" Divide on Statutory Immunities and Charter Damages

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Part V

The Scope of Charter Rights and Redress

Ernst v. Alberta Energy Regulator: A "Frack-tious" Divide on Statutory Immunities and Charter Damages

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I. OVERVIEW

In *Ernst v. Alberta Energy Regulator*,[1] the Supreme Court of Canada considered whether a statutory immunity provision could bar a plaintiff from bringing a claim for Charter[2] damages against an administrative tribunal, and, if so, whether the provision was itself unconstitutional.

On these issues, the Court deeply divided. Four justices, led by Cromwell J., held that the statutory immunity provision in Alberta's *Energy Resources Conservation Act*[3] barred Ms. Ernst's claim for Charter damages, and that the provision itself was not unconstitutional. Four other justices, led by McLachlin C.J.C. and Moldaver and Brown JJ., held that it was not plain and obvious that the statutory immunity provision barred the claim for Charter damages and in so determining, deemed it unnecessary to consider the constitutional issue. The remaining judge, Abella J., wrote a separate decision that agreed with Cromwell J. on the issue of whether the

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1 [2017] S.C.J. No. 1, 2017 SCC 1 (S.C.C.) [hereinafter "*Ernst*"].

2 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

3 R.S.A. 2000, c. E-10 [hereinafter "ERCA"]. The ERCA was repealed and replaced with the *Responsible Energy Development Act*, S.A. 2012, c. R-17.3, proclaimed June 17, 2013 but the ERCA remained the applicable statute in force at the time of the allegations from Ms. Ernst's Fresh Claim: *Ernst v. EnCana Corp.*, [2013] A.J. No. 1045, 2013 ABQB 537, at para. 9 (Alta. Q.B.) [hereinafter "*Ernst* (QB)"].

provision barred Ms. Ernst's claim, but held that it was inappropriate to consider the constitutional question, as this issue was being raised *de novo* before the Supreme Court of Canada.

In many ways, the divisions on display in *Ernst* reflect the nature of the difficult public law issues before it. *Ernst* required the Court to consider, among other issues, the availability of Charter damages against an administrative tribunal, the applicability of statutory immunity provisions with respect to constitutional claims, and the appropriateness of scrutinizing the constitutional validity of legislation *de novo* at the Supreme Court of Canada.

To help make sense of the Court's attempt to grapple with these issues, this paper provides an overview of the competing opinions in order to answer a basic yet difficult question: what exactly did the Court decide? Next, this paper attempts to situate *Ernst* within larger recent debates in the Supreme Court's jurisprudence, particularly with respect to section 24(1) of the Charter. In doing so, it seeks to address *Ernst*'s practical meaning and, in particular, its broader implications with respect to the constitutionality of immunities, both common law and statutory.

II. BACKGROUND

1. Ms. Ernst's Claim Against the Regulator Was Part of a Larger Claim Involving EnCana Corporation and the Province of Alberta

The Supreme Court's decision in *Ernst* involves one aspect of a larger civil action that was commenced by Jessica Ernst against three separate parties, including the Energy Resources Conservation Board (the predecessor to the Alberta Energy Regulator,[4] the "Regulator").

Ms. Ernst owns land near the hamlet of Rosebud in southern Alberta. All of her claims related to allegations that EnCana Corporation had damaged her fresh water supply, through fracking and other activities near her property. In addition to suing EnCana, Ms. Ernst sued both the province of Alberta and the Regulator.

As against Alberta, Ms. Ernst alleged that the province owed her a duty to protect her water supply, and that it failed to adequately respond

[4] At the time of Ms. Ernst's original claim, the Board was known as the Energy Resources Conservation Board. Pursuant to the *Responsible Energy Development Act*, the Board has been succeeded by the Alberta Energy Regulator: see *Ernst* (QB), *id.*, at para. 9.

to her complaints regarding EnCana.[5] As against the Regulator, Ms. Ernst claimed negligence in respect of its regulation of EnCana. She further claimed that the Regulator violated her section 2(b) rights under the Charter (freedom of expression) when, from November 2005 to March 2007, it refused to accept communications from her as it considered her prior communications to be of a threatening nature.[6]

Ms. Ernst originally commenced her claim in December 2007. She amended her claim in both April 2011 and again in February 2012. She also filed a Fresh Claim in June 2012.[7]

2. The Original Applications to Strike the Claim

Both the Regulator and Alberta applied in the Alberta Court of Queen's Bench to strike the portions of the Fresh Claim that related to them, either in whole or in part.[8]

The Regulator argued it was "plain and obvious" that Ernst's claim in negligence could not succeed because as a statutory body, the Regulator could not owe Ms. Ernst a private law duty of care.[9] With respect to the Charter claim, the Regulator argued that Charter protection does not extend to situations where there are threats or acts of violence, and section 2(b) does not "include the right to an audience."[10] The Regulator further argued that Ms. Ernst was out of time for bringing her Charter claim.

Finally, the Regulator argued that, in any event, the immunity provision found in section 43 of the *Energy Resources Conservation Act* acted as an absolute bar to the action, including Ms. Ernst's claim for Charter damages. That section provides:

> 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.

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5 *Ernst v. Alberta (Energy Resources Conservation Board)*, [2014] A.J. No. 975, 2014 ABCA 285, at para. 2 (Alta. C.A.) [hereinafter "*Ernst* (CA)"].

6 *Id.*, at para. 3; *Ernst* (QB), *supra*, note 3, at paras. 36-38.

7 *Ernst* (QB), *id.*, at para. 4.

8 *Id*.

9 *Id.*, at para. 18.

10 *Id.*, at paras. 35-37.

Alberta's application was much more limited in scope. It argued that various paragraphs or portions of paragraphs in the Claim should have been struck as these were "'frivolous, irrelevant or improper'".[11]

3. The Court of Queen's Bench Allows the Regulator's Application and Dismisses Alberta's Application

Chief Justice Wittmann granted the Regulator's application to strike the portions of the claim relating to it for three reasons:

1. The Regulator could not owe a duty of care to Ms. Ernst and for that reason, it was "plain and obvious" her claims in negligence against the Regulator could not succeed.[12]
2. Subject to section 43 of the ERCA and any applicable limitations period, Ernst's Charter claim was valid.
3. However, all of Ms. Ernst's claims against the Regulator, including the Charter claims, were barred by section 43 of the ERCA.

In considering whether section 43 could apply to Ms. Ernst's Charter claims, Wittmann C.J.Q.B. held that there were strong policy reasons that supported this determination. In particular, he cited McLachlin C.J.C.'s articulation of countervailing factors against awarding Charter damages in *Vancouver (City) v. Ward*,[13] namely the existence of alternative remedies and concerns over good governance.[14] Moreover, Wittmann C.J.Q.B. held that there was a real fear that allowing Charter claims to defeat statutory immunity clauses would create an inappropriate "end-run" around such clauses:

> The mischief that arises circumventing an otherwise valid immunity provision is obvious. Parties would come to the litigation process dressed in their *Charter* clothes whenever possible.[15]

Finally, Wittman C.J.Q.B. held that if the constitutional validity of section 43 were at issue, a Notice of Constitutional Question should have been provided to the Attorneys General of Alberta and Canada. On this

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[11] *Id.*, at para. 101.

[12] *Ernst v. EnCana Corp.*, [2014] A.J. No. 1259, 2014 ABQB 672, at paras. 28-29 (Alta. Q.B.).

[13] [2010] S.C.J. No. 27, 2010 SCC 27 (S.C.C.) [hereinafter "*Ward*"]; *Ernst* (QB), *supra*, note 3, at para. 84.

[14] *Ernst* (QB), *id.*, at paras. 85-89.

[15] *Id.*, at para. 81.

point, he observed that while constitutional notice is a procedural requirement, it is necessary to facilitate "full argument of any constitutional issues" and is "a matter of procedural fairness" to the relevant Attorneys General.[16]

Chief Justice Wittmann dismissed Alberta's application, noting that while the pleadings may not have been perfectly drafted, "[n]othing of substance" would turn on having Ernst substitute the various impugned language in the claim. He went on to note on this point that "[t]inkering with pleadings ... is not, in this case, useful to the advancement of the action".[17] Alberta does not appear to have appealed this determination.

4. A Unanimous Panel of the Alberta Court of Appeal Affirms the Court of Queen's Bench's Decision

Ms. Ernst appealed, and a unanimous panel of the Court of Appeal dismissed her appeal. The Court upheld Wittman C.J.Q.B.'s determinations on negligence, and upheld his determination on section 43 of the ERCA. At the Court of Appeal, Ms. Ernst did not challenge the constitutional validity of section 43.[18]

With respect to section 43, the Court held that there was "nothing constitutionally illegitimate" about applying statutory immunity provisions in the context of Charter claims.[19] Citing the same passage from *Ward* setting out the countervailing factors that would render section 24(1) damages inappropriate,[20] the Court of Appeal noted that an effective avenue of redress did exist for Ms. Ernst's Charter complaint — judicial review.[21] As a result, the Court concluded that the lower court made no reviewable error in striking the claim as against the Regulator.[22]

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16 *Id.*, at para. 89.

17 *Id.*, at para. 130.

18 On this point, see Abella J.'s decision where she notes that Ms. Ernst did not challenge the constitutional validity of s. 43 at the Court of Appeal and indeed, argued that as such, she did not have to file a Notice of Constitutional Question before that court: *Ernst*, *supra*, note 1, at para. 124.

19 *Ernst* (CA), *supra*, note 5, at para. 30.

20 *Id.*, at para. 29, citing *Ward*, *supra*, note 13, at paras. 33, 40.

21 *Ernst* (CA), *id.*, at para. 30.

22 *Id.*

5. The Supreme Court Dismisses the Appeal, But Divides Sharply

Ms. Ernst sought and received leave to appeal to the Supreme Court of Canada. The appeal focused solely on issues relating to the applicability of section 43.[23] On these issues, the Court struggled to resolve the key questions before it, namely:

1. whether a claim for Charter damages should be struck out on the basis of a statutory immunity clause; and
2. if so, whether the statutory immunity clause is itself unconstitutional.

A majority of five judges — *per* Cromwell J., writing for a plurality of four judges and Abella J., on her own — upheld the lower courts' determination that Ms. Ernst's Charter claim was barred by section 43 of the ERCA.

But a differently configured majority of five judges — *per* McLachlin C.J.C. and Moldaver and Brown JJ. (the "McLachlin C.J.C. plurality"), writing for themselves and for Côté J., and Abella J., writing on her own — held that the constitutional issues should be left for another day.

The ultimate result was that the appeal was dismissed and Ms. Ernst's claims were struck. However, the decision leaves us with no majority decision on the question of whether the statutory immunity provision is unconstitutional.

6. A Plurality of Judges Led by Cromwell J. Would Have Upheld the Lower Courts' Decisions

In his plurality decision, Cromwell J. upheld the Court of Appeal's determination that section 43 barred Ms. Ernst's claims.

Justice Cromwell begins his discussion by setting out section 43, his underscoring of certain passages emphasizing the broad and encompassing nature of the provision: "No action or proceeding may be brought against the Board … in respect of any act or thing done purportedly in pursuance of this Act … or a decision, order or direction of the Board."[24] Justice Cromwell observed that there was "virtually no argument" regarding the correct statutory interpretation of section 43, because it was "common

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[23] *Ernst*, *supra*, note 1, at para. 8.

[24] *Id.*, at para. 9 (emphasis in original).

ground between the parties" that "on its face", the provision barred Ms. Ernst's claim for Charter damages.[25]

He went further, stating that it "was not open to the Court"[26] to conclude, as the McLachlin C.J.C. plurality did, that it was not plain and obvious that section 43 barred the claim. Justice Cromwell made this determination for two key reasons:

1. Ernst's position, at all levels of court (including before the Supreme Court), was that the immunity clause formed a complete bar to her claim.[27] To reach a different conclusion would be unfair to the Board, which would be deprived of the opportunity to make submissions on the issue;[28] and

2. to determine that it was not plain and obvious that the provision applied would cast doubt on the scope of all immunity provisions, a result that would be "unnecessary, undesirable and unjustified."[29]

Having found that the immunity provision barred the Charter claim, the only question left, in Cromwell J.'s opinion, was whether section 43 was, as Ms. Ernst claimed, constitutionally invalid. If valid, then the clause would apply as a complete bar.

On this point, Cromwell J. expressly considered the merits of the Charter claim, even though they had been raised for the first time before the Supreme Court. In so doing, he rejected the McLachlin C.J.C. plurality's suggestion (which was also adopted by Abella J.) that the Court ought not to conduct a constitutional review on the basis of an inadequate record. Justice Cromwell pointed out that if the record were inadequate, the appropriate result would also be to dismiss the constitutional challenge.[30]

Applying *Ward*,[31] Cromwell J. concluded that Charter damages would never be an appropriate remedy against the Regulator. Here, he focused on *Ward*'s identification of two countervailing factors that may weigh

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[25] *Id.*, at para. 10.

[26] *Id.*, at para. 11.

[27] Justice Cromwell does, however, agree that the Court is not bound by the legal submissions made by the parties before it, citing *R. v. Sappier*, [2006] S.C.J. No. 54, 2006 SCC 54, at para. 62 (S.C.C.); *Ernst*, *id.*, at para. 15.

[28] *Ernst*, *id.*, at para. 16.

[29] *Id.*, at para. 17.

[30] *Id.*, at paras. 20-23, pointing out that there is a presumption of constitutional validity and it is the Charter applicant who bears the burden of demonstrating that an impugned law is unconstitutional.

[31] *Supra*, note 13.

against the award of damages in the Charter context: "where there is an *effective alternative remedy* or where damages would be *contrary to the demands of good governance*."[32]

In Ms. Ernst's case, both of these factors, together with the concern over undermining the purpose of the statutory provision, inexorably led Cromwell J. to the conclusion that damages would not be an appropriate and just remedy for any Charter breaches found against the Regulator.[33]

In Cromwell J.'s view, the availability of judicial review was important for two reasons. First, judicial review is meant to provide substantial, effective and timely Charter relief. Second, the availability of judicial review distinguishes this case from others in which the Court has crafted an elevated liability threshold in preference to a complete immunity.[34]

With respect to good governance concerns, Cromwell J. noted that concerns taken from the law of proximity in negligence are apposite. Allowing claimants to bring claims for damages against the Board would have the potential of depleting the Board's resources, resulting in "defensive actions" that would chill the Board's ability to carry out its statutory duties effectively. Moreover, immunity from civil claims for quasi-judicial and regulatory decision-makers ensures that the Board is free from interference and able to make fair and effective decisions without the distraction of litigation.[35]

Finally, Cromwell J. held that it would not be proper to have the Court conduct a case-by-case analysis of whether the particular claim for Charter damages was, or was not covered by the immunity provision. In his view, it would frustrate the purpose of immunity clauses if a mere pleading of an allegation could call into question a decision-maker's conduct for which she would otherwise be immune.[36]

7. A Separate Plurality Led by McLachlin C.J.C. and Moldaver and Brown JJ. Would Have Allowed the Appeal

The McLachlin C.J.C. plurality disagreed sharply with Cromwell J. on both issues. The plurality would have allowed the appeal for the reason that it was not plain and obvious that the statutory immunity provision barred the Charter claims.

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32 *Ernst*, *supra*, note 1, at para. 26 (emphasis added).
33 *Id.*, at para. 31.
34 *Id.*, at paras. 34-38.
35 *Id.*, at para. 47.
36 *Id.*, at paras. 56-57.

In their view, Cromwell J. conducted the analysis in reverse. The McLachlin C.J.C. plurality held that the appropriate template for assessing these issues is to determine:

1. first, whether it is plain and obvious that Charter damages could not be an appropriate and just remedy; and
2. if so, whether "it is plain and obvious that the immunity clause, on its face, applies to [the plaintiff's] claim for Charter damages."

Only if both of these conditions had been satisfied would the McLachlin C.J.C. plurality have struck the claim.[37]

Applying the framework from *Ward*, the McLachlin C.J.C. plurality concluded that it was not plain and obvious that Charter damages were an inappropriate or unjust remedy. On the first step of the *Ward* framework, they held that Ms. Ernst had properly pleaded her Charter claim, *i.e.*, that there were pleaded facts which, assumed to be true, could sustain a Charter breach. The Regulator had told Ernst to stop expressing herself to the media, to the public and prevented her from participating in the Board's public complaints process. According to the McLachlin C.J.C. plurality, both of these elements were sufficient for the section 2(b) claim to survive a motion to strike.[38]

On the second step, the McLachlin C.J.C. plurality assessed the question of whether damages could fulfil one or more of the functions of compensation, vindication or deterrence as articulated in *Ward*. On this point, they held that Ms. Ernst had pleaded that "the Board's actions were punitive, arbitrary and retaliatory", which is sufficient to establish the functions of deterrence and vindication.[39]

On the fourth step of the *Ward* analysis, whether the quantum of damages is appropriate and just, the McLachlin C.J.C. plurality held that this issue was best left for trial.[40]

The McLachlin C.J.C. plurality then moved on to consider the third step of the *Ward* analysis, whether there were countervailing considerations that make it plain and obvious that Charter damages would not be appropriate and just. The plurality's reasons on this point constitute the bulk of its decision, as this was the definitive factor that led Cromwell J. to dismiss the appeal.

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37 *Id.*, at para. 149.
38 *Id.*, at paras. 158-159.
39 *Id.*, at paras. 160-161.
40 *Id.*, at para. 162.

On these points, the McLachlin C.J.C. plurality disagreed that the availability of judicial review or concerns over good governance were sufficient to conclude that Charter damages were not available here.

With respect to alternative remedies, they held that judicial review would not achieve the same objectives as Charter damages, namely, vindication of Charter rights and deterring future breaches. They noted, moreover, that damages are not generally available as a remedy in judicial review.[41]

With respect to good governance concerns, the McLachlin C.J.C. plurality found that judicial and quasi-judicial immunity from liability may constitute a compelling countervailing factor in some cases. The plurality notes, however, that the Regulator was not acting in its adjudicative capacity when it barred further communications with Ms. Ernst.[42] On this point, the McLachlin C.J.C. plurality found that Cromwell J.'s decision recognized too "broad" and "sweeping" an immunity for the Regulator:[43] "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."[44]

On a related note, the McLachlin C.J.C. plurality did not agree that concerns underlying the limitation of public authority liability in negligence (*i.e.*, excessive demands on resources, chilling effect on fulfilling statutory duties and protection of quasi-judicial decision-making) are dispositive in the Charter context.

For these reasons, the McLachlin C.J.C. plurality would not have struck the claim against the Regulator as it was not plain and obvious that section 43 is a complete bar to Ms. Ernst's Charter claim. They held that it was arguable that punitive acts by the Board fall outside the scope of the immunity clause. While this position was not pursued by any party on the appeal, the plurality notes that the Court is not bound by the positions taken by the parties.

Moving on to the second step of the analysis, the McLachlin C.J.C. plurality held that it was not necessary nor desirable to consider the constitutional validity of section 43. First, given their finding that it was not plain and obvious that the Charter claim could not proceed, it was

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41 *Id.*, at paras. 166-167.
42 *Id.*, at paras. 168-175.
43 *Id.*, at para. 177.
44 *Id.*, at para. 176.

unnecessary to consider the constitutional issue. Second, they agreed that the record before the Court was not adequate to consider this issue.[45]

Finally, the McLachlin C.J.C. plurality indicated that had a court eventually agreed that section 43 barred Ms. Ernst's claim, it would then be open to her to seek to have the provision declared unconstitutional. At that point, the necessary Notice of Constitutional Question would need to be provided to the Attorneys General.[46]

8. Justice Abella Casts the Deciding Vote in Favour of Dismissing the Appeal

In a separate decision concurring with Cromwell J. in the result, Abella J. held that the statutory immunity provision applied to bar the claim. However, unlike Cromwell J., Abella J. held that it would be inappropriate to consider the constitutional question as no Notice of Constitutional Question had been filed.

Like Cromwell J., Abella J. held that the immunity contained in section 43 was clear and unqualified, thus forming a complete bar to Ernst's claim.[47] Justice Abella agreed that unless the clause were found to be invalid, the lower courts were correct in striking out the claims against the Regulator.

Having made this determination, Abella J. then dedicated the bulk of her reasons to address why it would be inappropriate to determine the constitutional issue, focusing in particular on the importance of Notices of Constitutional Question. On this point, she noted that Notices of Constitutional Question serve a "'vital purpose'" by ensuring both that courts have a full evidentiary record before invalidating legislation and that governments are given the fullest opportunity to support the validity of legislation.[48]

Citing *Guindon v. Canada*,[49] Abella J. held that there was no basis to allow Ms. Ernst to raise a new Charter issue for the first time at the Supreme Court.[50] She observed that the public interest requires that the fullest and best evidence be put before the Court when it is asked to decide constitutional issues. This requires participation of the appropriate

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45 *Id.*, at para. 189.
46 *Id.*, at para. 190.
47 *Id.*, at paras. 70-72.
48 *Id.*, at para. 99.
49 [2015] S.C.J. No. 41, 2015 SCC 41 (S.C.C.).
50 *Ernst*, *supra*, note 1, at para. 99.

Attorneys General. In this case, the Attorney General of Alberta was prevented from offering justificatory evidence for the Court's consideration.[51]

In this case in particular, Abella J. noted that Ms. Ernst's attack on the statutory immunity provision would have profound implications for judicial and quasi-judicial decision-makers who are protected by statutory and common law immunities. These immunities protect decision-makers' independence and impartiality and thereby facilitate the administration of justice. For this reason, the Supreme Court has accepted that regulatory boards are immune from negligence claims that arise from policy decisions.[52]

Interestingly, Abella J. opined that in her view, the *Ward* analysis would likely have led to the same conclusion that Cromwell J. reached: that Charter damages would likely not have been found to be an "appropriate and just" remedy in Ms. Ernst's case. Further, Abella J. agreed with Cromwell J. that judicial review would have been the appropriate procedure for challenging the Regulator's actions.[53]

Ultimately, however, Abella J. emphasized that the question of whether Charter damages could be an appropriate remedy requires a proper consideration of the constitutionality of the immunity provision.[54] On this point, Abella J. concluded her decision by taking Ms. Ernst to task for essentially advancing a new, contrary argument on the constitutional issue in the Supreme Court. Contrary to previous positions taken in the lower courts, Ms. Ernst explicitly challenged the constitutional validity of section 43 for the first time at the Supreme Court. As Abella J. noted, Ms. Ernst did not provide proper notice to do so.[55]

Justice Abella commented that if permitted, such conduct would allow an applicant to deprive the relevant Attorneys General and other parties of the ability to meaningfully participate in the proceeding. Such conduct in breach of the requirements of the jurisprudence and the governing statutes, "should not be rewarded in this Court with redemptive forgiveness."[56]

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51 *Id.*, at para. 111.
52 *Id.*, at para. 118.
53 *Id.*, at paras. 123-127.
54 *Id.*, at para. 123.
55 *Id.*, at para. 124.
56 *Id.*, at para. 125.

9. Why Was the Court So Divided in *Ernst*?

By a narrow 5-4 majority, the Supreme Court in *Ernst* confirmed that the statutory immunity provision in section 43 of the ERCA barred all of Ms. Ernst's claims, including those under the Charter. A different 5-4 majority, however, refused to consider the issue of whether the provision was itself unconstitutional.

Fortunately, decisions from the Supreme Court that are as deeply split as *Ernst* are rare.[57] Not surprisingly, however, the decision and its perceived lack of clarity from the Court has attracted a fair amount of critical commentary.[58]

So why did the Court divide so deeply? At first blush, many of the principles discussed in the various opinions are not new, but represent re-articulations of settled principles in public law. These include:

- *The unwillingness to decide constitutional cases in a factual vacuum*: From its earliest jurisprudence, the Supreme Court has held that Charter cases should not be decided on the basis of an inadequate factual record. The majority's refusal to decide the constitutional issue, particularly since it was raised in explicit fashion for the first time at the Supreme Court, is consistent with settled jurisprudence on this point.[59]

- *Primacy of judicial review*: Recent jurisprudence from the Supreme Court has generally affirmed that where judicial review is available,

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[57] For example, similarly split decisions in constitutional cases have occurred in *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791, 2005 SCC 35 (S.C.C.) (a 3-3-1 split decision over whether a prohibition on obtaining private health care violated the Charter) and *Reference re Assisted Human Reproduction Act*, [2010] S.C.J. No. 61, 2010 SCC 61 (S.C.C.) (a 4-4-1 split decision over the constitutional validity of provisions of that Act). Note, however, that the Court has more recently issued competing opinions in: *Haaretz.com v. Goldhar*, [2018] S.C.J. No. 28, 2018 SCC 28 (S.C.C.); *Groia v. Law Society of Upper Canada*, [2018] S.C.J. No. 27, 2018 SCC 27 (S.C.C.); *Centrale des syndicats du Québec v. Quebec (Attorney General)*, [2018] S.C.J. No. 18, 2018 SCC 18 (S.C.C.) and *Quebec (Attorney General) v. Alliance du personnel professional et technique de la santé et des services sociaux*, [2018] S.C.J. No. 17, 2018 SCC 17 (S.C.C.).

[58] See, for example, Dean Lorne Sossin, "Damaging the Charter: Ernst v. Alberta Energy Regulator" (January 20, 2012), online: <thecourt.ca> [hereinafter "Sossin"]; Matthew Lewans, "Damages for Unconstitutional Administrative Action? A Comment on Ernst v. Alberta Energy Regulator" (2017) 30 Can. J. Admin. L. & Prac. 379 [hereinafter "Lewans"]; Julia Kindrachuk, "Statutory Immunity from Charter Damages: Ernst v. Alberta Energy Regulator" (2015) 78 Sask. L. Rev. 379 [hereinafter "Kindrachuk"].

[59] See *MacKay v. Manitoba*, [1989] S.C.J. No. 88, [1989] 2 S.C.R. 357, at 361-62 (S.C.C.); *Danson v. Ontario (Attorney General)*, [1990] S.C.J. No. 92, [1990] 2 S.C.R. 1086, at 1099-1101 (S.C.C.).

all issues, including constitutional issues, should be raised first in this context.[60]

- *Administrative bodies must be able to control their own processes*: The good governance concern identified by Cromwell J. aligns with the general principle that adjudicative bodies must be able to control their own processes. A corollary to this is that, similar to courts, they must also be able to operate without undue fear of litigation.[61]

Despite this, the decision in *Ernst* is also reflective of a larger ongoing debate in the Supreme Court's jurisprudence regarding the availability of damages under section 24(1) of the Charter. In this regard, there is a clear doctrinal tension as between Cromwell J.'s acceptance that Charter damages would *never* be an appropriate remedy against the Board and McLachlin C.J.C.'s case-specific application of the *Ward* framework. In our view, it is this larger debate that goes some way towards explaining why the Court split as it did in *Ernst.*

10. Situating *Ernst* Within the Court's Section 24(1) Jurisprudence

One of the more compelling struggles in *Ernst* is its failure to provide a substantive holding on arguably the most interesting issue before the Court, namely, whether an immunity clause like section 43 of the ERCA is contrary to the Charter.

The arguments made by Ms. Ernst and others was that section 24(1) enshrines the right of a successful claimant to an appropriate Charter remedy. Any limitation on the availability of such a remedy would therefore be inconsistent with the Charter and of no force or effect.[62] This

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[60] See *Okwuobi v. Lester B. Pearson School Board*, [2005] S.C.J. No. 16, 2005 SCC 16, at paras. 38-55 (S.C.C.); *C.B. Powell Ltd v. Canada (Border Services Agency)*, [2010] F.C.J. No. 274, 2010 FCA 61, at paras. 30-31 (F.C.A.); *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, [2012] S.C.J. No. 10, 2012 SCC 10, at paras. 35-37 (S.C.C.); *Zellers Inc. v. Royal Cobourg Centres Ltd.*, [2001] O.J. No. 3792, 156 O.A.C. 133, at para. 18 (Ont. C.A.). But, see *Canada (Attorney General) v. Telezone Inc.*, [2010] S.C.J. No. 62, 2010 SCC 62 (S.C.C.), where the Supreme Court held that where a plaintiff alleges the elements of a private law cause of action, the provincial court should not generally decline jurisdiction on the basis that the claim could be pursued as an application for judicial review.

[61] *Knight v. Indian Head School Division No. 19*, [1990] S.C.J. No. 26, [1990] 1 S.C.R. 653, at 685 (S.C.C.); *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] S.C.J. No. 25, [1989] 1 S.C.R. 560, at para 46 (S.C.C.); *Keith v. Canada (Correctional Service)*, [2012] F.C.J. No. 505, 2012 FCA 117, at para. 49 (F.C.A.); *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, 2008 SCC 9, at paras. 27, 48-49, 54 (S.C.C.).

[62] Kindrachuk, *supra*, note 58.

proposition flows from the basic principle of constitutional supremacy: the Crown cannot immunize itself from effective constitutional relief by mere grant of statutory immunity.

However, it is recognized that the discretion afforded to courts under section 24(1) of the Charter is not absolute. The jurisprudence recognizes numerous constitutionally valid qualifications that structure and limit the exercise of section 24(1) powers.[63]

The limitations that have been placed upon section 24(1) generally fall within three categories: (1) textual limitations imposed by the requirement that a section 24(1) remedy be appropriate and just in the circumstances; (2) limitations arising from concerns relating to effective administration of the state; and (3) procedural limitations that govern the adjudication of all cases, including claims for Charter relief. In our view, it is only when these boundaries of section 24(1) are understood that one can undertake a principled assessment of whether a statutory grant of Crown immunity is constitutionally invalid.

(a) Textual Limitations on Section 24(1) Discretion

Section 24(1) of the Charter entrenches the judicial discretion to provide an individual remedy for the infringement of Charter rights and freedoms.[64] The section states that: "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."

It is widely acknowledged that section 24(1) confers upon courts the broadest of remedial authority. As McIntyre J. observed in *R. v. Mills*,[65] "[i]t is difficult to imagine language which could give the court a wider and less fettered discretion."[66] Moreover, like all provisions of the Charter, section 24(1) is to be given a generous and expansive interpretation: narrow, technical or legalistic approaches are to be avoided.[67]

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[63] Peter Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Reuters, 2016), at ch. 40.2(g) [hereinafter "Hogg"].

[64] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] S.C.J. No. 63, 2003 SCC 62, at para. 41 (S.C.C.) [hereinafter "*Doucet-Boudreau*"].

[65] [1986] S.C.J. No. 39, [1986] 1 S.C.R. 863 (S.C.C.) [hereinafter "*Mills*"].

[66] *Id.*, at 965.

[67] *Doucet-Boudreau*, *supra*, note 64, at paras. 23-24; *Ontario v. 974649 Ontario Inc.*, [2001] S.C.J. No. 79, 2001 SCC 81, at para. 18 (S.C.C.) [hereinafter "*Dunedin*"].

At the same time, the discretion afforded by section 24(1) is not unconstrained. There are textual limitations arising from the requirement that a Charter remedy be appropriate and just in the circumstances. In interpreting this requirement, courts have developed certain broad principles to guide the exercise of section 24(1) discretion. For instance, the Supreme Court has recognized that an appropriate and just remedy is one that is responsive to the facts and circumstances of a violation, such that the remedy meaningfully vindicates the rights and freedoms of the claimant.[68]

At the same time, an appropriate and just remedy must also be fair to the party against which it is imposed. In this regard, the remedy should not result in substantial hardships that are unrelated to securing the right at issue.[69] The costs and practicalities, including the availability of financial resources and competing demands on the public purse, are therefore relevant considerations in assessing whether a remedy meets the textual requirements of section 24(1).[70]

The identification of an appropriate and just remedy is also guided by constitutional constraints on the role of the judiciary. As the Supreme Court has recognized, section 24(1) is not an invitation for courts to intrude upon legislative powers or to erase distinctions between branches of government.[71] With this in mind, it has been cautioned that an appropriate and just remedy is one that is respectful of basic constitutional principles, such as the separation of powers, and that does not involve the courts in non-adjudicative functions, such as policy-making, that are beyond the expertise of the judiciary.[72] In crafting a Charter remedy, therefore, courts must also be sensitive to their constitutional role, avoiding remedies that unduly entrench upon the powers of other branches of government.[73]

As well, in *Ward*, the Supreme Court set out a new, functional approach that governs awards of monetary damages under section 24(1). Under this approach, damages are an appropriate and just remedy only where monetary compensation serves a useful function by furthering the general objects of the Charter.[74] This will be the case where monetary

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68 *Ward*, *supra*, note 13, at para. 19; *Doucet-Boudreau*, *id.*, at para. 55.

69 *Doucet-Boudreau*, *id.*, at para. 58.

70 *Assoc. des parents de l'école Rose-des-vents v. British Columbia (Education)*, [2015] S.C.J. No. 21, 2015 SCC 21, at para. 49 (S.C.C.).

71 *Dunedin*, *supra*, note 67, at para. 23.

72 *Doucet-Boudreau*, *supra*, note 64, at para. 57.

73 *Id.*, at paras. 34, 56.

74 *Ward*, *supra*, note 13, at paras. 24-25.

damages serve the purpose of: (i) compensating the claimant for losses caused by the Charter breach; (ii) vindicating constitutional values; and/or (iii) deterring against future breaches.[75] As the Court held, achieving one or more of these objects is a basic prerequisite that must be satisfied before damages will be an appropriate exercise of section 24(1) discretion.

Importantly, these limitations on section 24(1) do not arise by statute. They are, rather, imposed by the language of the provision, namely the requirement that a Charter remedy be appropriate and just in the circumstances. Thus, even on a purely textual analysis, the remedial discretion under section 24(1) has its limits. Judges must weigh a host of competing concerns when fashioning a remedy that is effective for the claimant, respectful of limitations on judicial power and, with respect to Charter damages, functional.

(b) Effective Administration of the State

When considering whether a Charter remedy meets the "appropriate and just" requirement, concerns relating to good governance have weighed heavily in the balance. In particular, Canadian courts have shown a clear reluctance to impose a Charter remedy that will unduly interfere with the effective administration of state functions. This limitation on the availability of section 24(1) relief arises from the acknowledgement that the state must be afforded some degree of protection from Charter relief, particularly where the imposition of liability would impede the government's policy-making, legislative and adjudicative functions.[76]

The jurisprudence in this area has developed primarily in the area of Charter damages. In this context, courts have acknowledged that the Crown benefits from some qualified immunities designed to protect essential Crown functions from exposure to liability. This stipulation to section 24(1) emanates primarily from the Supreme Court's decision in *Mackin v. New Brunswick (Minister of Finance)*.[77] In that case, a majority of the Court held that New Brunswick legislation abolishing that province's system of supernumerary judges violated the section 11(d) guarantee of judicial independence and was therefore unconstitutional. Despite this finding of invalidity, the Court refused to

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[75] *Id.*, at paras. 27-29.

[76] *Id.*, at para. 40.

[77] [2002] S.C.J. No. 13, 2002 SCC 13 (S.C.C.) [hereinafter "*Mackin*"].

order damages on the basis that, absent conduct that is clearly wrong, in bad faith or an abuse of power, the Crown enjoys immunity from liability for conduct done pursuant to valid legislation.[78] For this reason, it is generally held that an action for damages under section 24(1) of the Charter cannot be combined with an action for declarations of invalidity under section 52(1) of the *Constitution Act, 1982*.[79]

Mackin affirms that some Crown functions are so essential to the effective administration of the state that their exercise should be unimpeded by exposure to liability, including with respect to Charter damages. In that case, for example, the interest deserving of protection was the effectiveness and efficiency of governmental administration, which would be undermined if duly enacted laws were not given their full force and effect as long as they are not declared invalid.[80] The underlying rationale to this qualified immunity is that the state must be afforded a measure of leniency for the free and effective discharge of essential Crown functions:

> The *Mackin* principle recognizes 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. Legislative and policy-making functions are one such area of state activity. The immunity is justified because the law does not wish to chill the exercise of policy-making discretion.[81]

Eight years after *Mackin*, the Supreme Court's decision in *Ward* reaffirmed that the requirements of good governance may, in certain cases, limit the availability of an award of Charter damages.[82] In doing so, the Court acknowledged that *Mackin* is not the only situation in which section 24(1) damages should be avoided due to the negative impacts that exposure to liability would have on the administration of government.[83] While the Court did not specifically identify any new branches of qualified immunity — leaving it to future courts to define on a case-by-case basis — it did acknowledge that "[d]ifferent situations may call for different thresholds" and that courts may look to private law

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78 *Id.*, at para. 78.

79 Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11; *Mackin*, *id.*, at para. 81; *Mancuso v. Canada (National Health and Welfare)*, [2015] F.C.J. No. 1245, 2015 FCA 227, at para. 29 (F.C.A.).

80 *Mackin*, *id.*, at para. 79.

81 *Ward*, *supra*, note 13, at para. 40.

82 *Id.*, at para. 39.

83 *Id.*, at para. 42.

thresholds and defences for guidance in determining whether Charter damages are appropriate and just.[84]

Since *Ward*, the Supreme Court has recognized at least one additional branch of qualified Crown immunity from Charter damages, namely the limited immunity given to prosecutors recognized in *Henry v. British Columbia (Attorney General)*.[85] Henry brought an action against the Crown for Charter damages arising from his false conviction and, specifically, for the Crown's failure to meet its disclosure obligations under the Charter. Writing for the majority, Moldaver J. recognized that the availability of Charter damages under section 24(1) is not unlimited, particularly where the imposition of liability would impede essential Crown functions, such as the administration of justice.[86] In this regard, he agreed that a heightened *per se* threshold of intentionality is needed to protect against "exposing prosecutors to an unprecedented scope of liability that would affect the exercise of their vital public function."[87] Where a Charter claimant fails to plead or prove facts to support a finding on this threshold requirement, damages will not be appropriate and just as a rule and without consideration of the case-specific framework prescribed by *Ward*.[88] By contrast, the Chief Justice and Karakatsanis J. declined to recognize any *per se* immunity from Charter damages, finding that concerns regarding good governance should instead be considered under the *Ward* framework on a case-by-case basis.[89]

In many ways, Cromwell J.'s decision in *Ernst* builds on *Henry* by confirming that not every allegation of Charter damages must proceed to an individualized, case-by-case consideration of whether Charter damages are appropriate and just.[90] Rather, the Crown should benefit from certain qualified exclusions from Charter damages, designed to protect governmental functions from the negative side-effects that would result from exposure to Charter liability:

> 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 governments. ... Granting

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84 *Id.*, at para. 43.
85 [2015] S.C.J. No. 24, 2015 SCC 24 (S.C.C.) [hereinafter "*Henry*"].
86 *Id.*, at paras. 36, 39.
87 *Id.*, at paras. 70-81, 91.
88 *Id.*, at para. 85.
89 *Id.*, at para. 107.
90 *Ernst*, *supra*, note 1, at para. 29.

> *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.[91]

For claims against judges and quasi-judicial decision-makers, this balance tips decidedly in favour of immunity from Charter damages. As Cromwell J. concludes, the traditional justifications for judicial immunity at common law (*i.e.*, to protect the administration of justice and judicial independence by permitting decision-makers to make decisions free from interference and without distraction or threat of litigation) resonate equally in the Charter context.[92] Interestingly, however, Cromwell J. also relies upon the availability of alternative remedies to justify this threshold limitation, perhaps suggesting a reversal of the *Ward* framework in which the complete list of countervailing considerations may also be considered at the threshold stage to justify qualifications to the availability of Charter damages.

As these cases show, the appropriate and just requirement also imposes internal qualifications to the availability of Charter damages arising from concerns regarding the impact that exposure to liability may have on the effective administration of the state. Importantly, these qualifications can, in certain contexts, be a complete bar to a Charter damages claim. As such, these qualifications further define the boundaries of section 24(1) and, in our view, must inform any assessment of the constitutionality of any external derogation to section 24(1)'s remedial powers.

(c) Procedural Limitations

While the Charter does not prescribe any procedural rules of its own, it does not exist in a procedural vacuum. Rather, section 24(1) operates concurrently with, and does not replace, procedural rules of general application.[93] This is to say that constitutional claimants must comply with the ordinary rules of practice, procedure, and evidence of the court in which their claim is made. This is despite the fact that a failure to comply with such rules might defeat an otherwise valid claim and preclude

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91 *Id.*, at para. 25 (citations omitted).

92 *Id.*, at paras. 51-52.

93 *Ward*, *supra*, note 13, at para. 43; *Mills*, *supra*, note 65, at 953, 956.

the availability of effective and meaningful relief under section 24(1).[94] Compliance with procedural rules must therefore be understood as an intrinsic prerequisite to any appropriate and just remedy under section 24(1), rather than an external derogation of the remedial jurisdiction given by the section.

In addition to codes of procedure, there are a number of other constitutionally valid procedural qualifications to the availability of section 24(1) relief. Statutory limitation periods are one example. As the Supreme Court has confirmed, limitation periods of general application are applicable to constitutional cases, including claims for personal relief under section 24(1).[95] In *Ravndahl v. Saskatchewan*, for example, the Court did not question the applicability of Saskatchewan's limitation statute to a claim for personal relief under section 24(1), despite the fact that the application of the limitation period had the effect of defeating a widow's equality claim for Charter damages.[96] Four years later, in *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, the Court confirmed that claims for personal remedies can be barred by the running of a limitation period.[97] In this way, the Supreme Court appears to agree that the purpose of limitation periods are as valid in the context of an action for Charter damages as for any other type of claim, such that it would neither be appropriate nor just to grant a section 24(1) remedy in the face of a claimant's failure to comply with these statutory rules.[98]

While the constitutional legitimacy of statutory limitation periods of general application is therefore clear, case law suggests that courts may question the constitutional validity of short, specialized limitation periods, particularly where they have the effect of immunizing the Crown from effective constitutional review.[99] In *Prete v. Ontario*, for example, the Ontario Court of Appeal held that a six-month limitation period for actions against the Crown did not apply to an action for damages under section 24(1).[100] While this result may conflict with *Ravndahl*, we agree with Hogg *et al.* that the result is consistent with the proposition, described

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[94] See Hogg, *supra*, note 63, at 40.2(j); *Pearson v. Canada*, [2006] F.C.J. No. 1175, 2006 FC 931, at para. 50 (F.C.) [hereinafter "*Pearson*"].

[95] *Kingstreet Investments Ltd. v. New Brunswick*, [2007] S.C.J. No. 1, 2007 SCC 1, at para. 59 (S.C.C.); *Ravndahl v. Saskatchewan*, [2009] S.C.J. No. 7, 2009 SCC 7, at para. 17 (S.C.C.) [hereinafter "*Ravndahl*"].

[96] *Ravndahl*, *id*.

[97] [2013] S.C.J. No. 14, 2013 SCC 14, at para. 134 (S.C.C.).

[98] *Pearson*, *supra*, note 94, at para. 54.

[99] [1993] O.J. No. 2794, 16 O.R. (3d) 161 (Ont. C.A.) [hereinafter "*Prete*"]; *Pearson*, *id*.

[100] *Prete*, *id*.

above, that section 24(1) operates within the existing framework of Canadian law. To the extent that a statutory qualification on section 24(1) erects a more onerous procedural framework for constitutional claims that has the effect of insulating against constitutional review, the validity of such a rule is probably suspect.[101]

Another constitutionally valid procedural limitation on the availability of section 24(1) relief is the statutory requirement that constitutional claimants notify Attorneys General of their intention to seek constitutional relief. Indeed, the failure of Ms. Ernst to comply with this requirement was the basis upon which Abella J. was prepared to dispose of her action. This is for good reason. As Abella J. rightly points out, notice requirements serve an important purpose, both for governments and courts. With respect to the former, governments should be afforded a full opportunity to support the constitutionality of their legislation or actions. Regarding the latter, notification ensures that courts have a full evidentiary record, including justificatory evidence, before invalidating legislation. In light of the important function served by notice requirements, there should be no doubt that non-compliance is also a constitutionally valid limitation on the availability of section 24(1) relief.

Given that the Charter does not prescribe its own procedural code, it is a practical necessity that the existing framework of procedural rules apply equally to the adjudication of Charter claims. The existing procedural landscape should therefore be regarded as internal to section 24(1), further defining the boundaries of what is an appropriate and just Charter remedy. Understood in this way, procedural limitations on the availability of Charter relief are constitutionally sound insofar as they are rules of general application and/or do not have the purpose or effect of insulating against effective and meaningful constitutional relief.

11. A Framework for Assessing the Constitutionality of Statutory Immunity

Certain commentators have questioned the applicability of statutory immunity provisions in the section 24(1) context, arguing that this would appear inconsistent with the principles of the rule of law and/or constitutional supremacy.[102] Put another way, should a statutory

[101] Hogg, *supra*, note 63, at 40.2(j).

[102] See, for example: Sossin, *supra*, note 58; Lewans, *supra*, note 58.

provision be able to set limits on a claim brought under a constitutional provision?

This question is perhaps not as easily answered as it might first appear. As we have illustrated above, the Supreme Court's jurisprudence acknowledges the legitimacy of certain constraints, including statutory ones, surrounding the provision of relief under section 24(1). These existing limitations provide important context when assessing the constitutionality of statutory immunity provisions like section 43 of the ERCA. To the extent that an immunity or limitations provision is consistent with these recognized constraints on the availability of section 24(1) relief, concerns about the rule of law or constitutional supremacy should not arise. These provisions may serve an important constitutional purpose by flagging those areas in which there is legitimate concern that exposure to liability will have an unacceptably damaging impact on good governance.

With respect to limitations on the availability of section 24(1) that go beyond those already acknowledged by the jurisprudence, such limitations would more easily be regarded as constitutionally inconsistent insofar as they have the purpose, or effect, of immunizing against effective and meaningful Charter relief. Even where this is the case, however, the jurisprudence described above suggests that such limitations may still be justified by the Crown. While such justification will often arise from concerns regarding good governance, Cromwell J.'s decision in *Ernst* suggests that other factors, such as the availability of alternative remedies, may also be considered.

III. Conclusion

Ultimately, *Ernst* is perhaps most likely to be recognized as a "stepping stone" decision, as it leaves its most important and interesting issue unanswered: whether and in what circumstances a statutory immunity provision can bar a claim for Charter damages. This is not to say, however, that *Ernst* is jurisprudentially insignificant. The decision lays the groundwork and provides signposts for future cases, in particular emphasizing the Court's need for an adequate factual record to consider these issues. The decision also lays bare fundamental divisions within the Supreme Court regarding the availability of Charter damages, particularly in the face of statutory or common law immunities. As one commentator notes, these divisions are reflective of

a broader debate regarding the appropriate role, if any, that traditional private law immunities should play in governing the availability of Charter relief.[103] For now, however, *Ernst* leaves the Court planted in the middle, acknowledging both the need for meaningful Charter relief while also accommodating the numerous existing, constitutionally valid, and reasonable limits on section 24(1).

[103] Sossin, *id.*