Court of Queen's Bench of Alberta

Citation: Ernst v. EnCana Corporation, 2013 ABQB 537

Date:
Docket: 0702 00120
Registry: Hanna/Drumheller

Between:

Jessica Ernst

Plaintiff

- and -

EnCana Corporation, Energy Resources Conservation Board and Her Majesty the Queen In Right of Alberta

Defendants

Reasons for Judgment of the Honourable Chief Justice Neil Wittmann

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I. Introduction

[1] Jessica Ernst ("Ernst") sued EnCana Corporation ("EnCana"), the Energy Resources Conservation Board (the "ERCB") and Her Majesty the Queen in Right of Alberta ("Alberta"). The claims against EnCana are for damaging the Ernst water well and the Rosebud aquifer, the source of fresh water supplied to the Ernst home near Rosebud, Alberta. It is alleged that, between 2001 and 2006, EnCana engaged in a program of shallow drilling to extract methane gas from coal beds and, in so doing, used a technique known as hydraulic fracturing, which included the use of hazardous and toxic chemicals in its hydraulic fracturing fluids, resulting in contamination of the Rosebud aquifer and the Ernst water well. The claim against EnCana is grounded in a number of different legal theories, including negligence, nuisance, the rule in *Rylands v Fletcher*, and trespass.

[2] The claim against the ERCB is that it was negligent in its administration of its statutory regulatory regime, that it failed to respond to Ernst concerns about water contamination from the EnCana drilling activity, that the ERCB knew that EnCana had perforated and fractured directly into the Rosebud aquifer, and that it failed to respond. Further, it is alleged that the ERCB owed a duty to Ernst to take reasonable steps to protect her well water from foreseeable contamination. It is also alleged that, by its conduct, the ERCB breached section 2(b) of the *Canadian Charter*

of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 c 11 (the "*Charter*"), by barring Ernst from communicating with the ERCB through the usual public communication channels, and thereafter ignored her for a period of time until she agreed to communicate with the ERCB directly only, and not publically through the media or through communications with other citizens.

[3] The claim against Alberta is specifically against Alberta Environment and Sustainable Resource Development ("Alberta Environment"). Ernst alleges she relied on Alberta Environment to protect underground water supplies and to responsibly and reasonably respond to any of her complaints; that by October 2004, Alberta Environment knew that EnCana was diverting water from underground aquifers without the required permits from Alberta Environment; and that a number of land owners had made complaints regarding suspected contamination of the Rosebud aquifer by mid-2005. It is alleged that, in late 2005, Ernst contacted Alberta Environment to report her concerns about EnCana's activities. Further, it is alleged that Alberta Environment failed to take any action until March 2006, when it tested the Ernst well and other water wells in the region. The tests allegedly indicated high concentrations of methane, hazardous chemicals and petroleum pollutants. Ernst claims that Alberta Environment's investigation into the contamination of the Ernst water well was conducted negligently and in bad faith and prevented the Alberta Research Council from conducting an adequate review on the information provided by Alberta Environment. It is alleged that Alberta Environment owed a duty to Ernst to protect her water well from foreseeable contamination caused by drilling for shallow methane gas, that it failed to conduct a reasonable investigation and to take remedial steps to correct damage, and that Alberta Environment breached its duty to Ernst.

II. Background

[4] Ernst filed the original Statement of Claim on December 3, 2007 and an Amended Statement of Claim on April 21, 2011. A Second Amended Statement of Claim was filed February 7, 2012. Applications were made by EnCana, the ERCB and Alberta to strike paragraphs from the Second Amended Statement of Claim. In addition, the ERCB sought Summary Judgment against Ernst. The applications were returnable April 26 and 27, 2012 and were heard by the Case Management Justice, Madam Justice Veldhuis. At the hearing, Madam Justice Veldhuis suggested that Ernst consider redrafting the Statement of Claim in a manner that complied with the *Alberta Rules of Court*, Alta Reg 124/2010 (the "*ARC*"). Counsel agreed, with the result that a Fresh Statement of Claim (the "Fresh Claim") was drafted. Thus, the applications returnable April 26 and 27, 2012 did not proceed, and are moot insofar as the Second Amended Statement of Claim is concerned. The Fresh Claim was filed June 25, 2012. The Fresh Claim is the subject of the present applications.

[5] The present applications were returnable before Madam Justice Veldhuis on January 18, 2013. The present applications are brought respectively by the ERCB and Alberta. EnCana has not made any application with respect to the Fresh Claim.

[6] In its application, the ERCB requests an Order striking certain paragraphs of the Fresh Claim; in the alternative, granting Summary Judgment in favour of the ERCB; in the further alternative, better particulars with respect to the same paragraphs in the Fresh Claim; costs of the April 2012 application on a full indemnity basis and costs of the present application on the same basis.

[7] Alberta's application seeks an Order from the Court striking certain paragraphs, or portions thereof, from the Fresh Claim; or in the alternative, particulars and costs.

[8] In accordance with the practice of the Court, written briefs were filed by the ERCB, Alberta and Ernst. Counsel argued the applications orally before Madam Justice Veldhuis on January 18, 2013. Madam Justice Veldhuis reserved her decision. On February 8, 2013, Madam Justice Veldhuis was appointed a Justice of the Court of Appeal of Alberta with her residence in Edmonton. Thereafter, I was advised by Madam Justice Veldhuis that she met with counsel for all of the parties, who agreed that I would become the Case Management Judge. Counsel was advised that I would be willing to rehear the applications. The parties appeared before me on a conference call on April 15, 2013 and agreed that I would decide the applications based on the written briefs and materials filed and on the basis of a transcript of the oral argument made January 18, 2013, with the caveat that should the Court require further oral argument from the parties, it would reconvene to hear it. The Court is able to decide the applications without reconvening.

[9] I note that, subsequent to argument and before the release of this decision, the *Energy Resources Conservation Act*, RSA 2000, c E-10 (the "*ERCA*") was repealed and replaced by the *Responsible Energy Development Act*, SA 2012, c R-17.3 upon Proclamation on June 17, 2013. This resulted in the creation of the Alberta Energy Regulator, which succeeded the ERCB. However, the *ERCA* remains the applicable statute in force at the time the allegations in Ernst's Fresh Claim arose. As a result, this decision references the *ERCA* and the ERCB.

III. The ERCB Application

[10] The specific paragraphs the ERCB seeks to have struck from the Fresh Claim are paragraphs 24-58, 81-84 and 87. Paragraphs 24-58 are all subsumed under the heading "B. Claims Against the Defendant ERCB". They are then divided into (I) "Negligent Administration of a Regulatory Regime" and (ii) "Breach of s.2(b) of the *Canadian Charter of Rights and Freedoms.*" Paragraphs 81-84 of the Fresh Claim are under the heading "III. DAMAGES" alleging that Ernst suffered damages as the result of the ERCB's negligence and breach of Ernst's *Charter* rights, and that those damages include general and aggravated damages, punitive and exemplary damages, interest and costs. In the alternative, the ERCB asks the Court to grant Summary Judgment in favour of the ERCB.

[11] In some cases, the nature of the remedy, if granted, may have consequences in the event of a successful application. But in this case, the *Limitations Act*, RSA 2000, c L-12 (the "*Limitations Act*") would seemingly preclude a new Statement of Claim being issued in the

event of success in striking out the claim. An order granting Summary Judgment would bar a future claim on the same subject matter, applying the doctrine of *res judicata*.

[12] The grounds asserted by the ERCB in support of both remedies is that no private duty of care is owed by the ERCB to Ernst, and that the ERCB is immune from liability for any acts done in the circumstances by reason of the statutory provisions of section 43 of the *ERCA*.

A. Striking the Fresh Claim

[13] The ERCB cites the following authorities pertaining to the applicable law in an application to strike a Statement of Claim: *ARC*, r 1.2 and 3.68; *Donaldson v Farrell*, 2011 ABQB 11 at para 30; *Roasting v Lee* (1998), 222 AR 234 at para 6, 63 Alta LR (3d) 260; *First Calgary Savings & Credit Union Ltd v Perera Shawnee Ltd*, 2011 ABQB 26; *Tottrup v Lund*, 2000 ABCA 121, 255 AR 204; *SA (Dependent Adult) v MS*, 2005 ABQB 549, 383 AR 264; *Hunt v Carey Canada Inc*, [1990] 2 SCR 959; *Hughes Estate v Hughes*, 2006 ABQB 159, 396 AR 250, varied 2007 ABCA 277, 417 AR 52; *Alberta Adolescent Recovery Centre v Canadian Broadcasting Corporation*, 2012 ABQB 48, 396 AR 250.

[14] There is no serious dispute between Ernst and the ERCB as to the proper legal test to strike a Statement of Claim or portions thereof. Rule 3.68 of the *ARC* states as follows:

> 3.68(1) If the circumstances warrant and a condition under subrule (2) applies, the Court may order one or more of the following:
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> (a) that all or any part of a claim or defence be struck out;
>
> (b) that a commencement document or pleading be amended or set aside;
>
> (c) that judgment or an order be entered; ...
>
> (2) The conditions for the order are one or more of the following: ...
>
> (b) a commencement document or pleading discloses no reasonable claim or defence to a claim;
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> (c) a commencement document or pleading is frivolous, irrelevant or improper;
>
> (d) a commencement document or pleading constitutes an abuse of process;
>
> (e) an irregularity in a commencement document or pleading is so prejudicial to the claim that it is sufficient to defeat the claim.
>
> (3) No evidence may be submitted on an application made on the basis of the condition set out in subrule (2)(b).

[15] The ERCB also cites *ARC*, Rule 1.2 which states as follows:

> 1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.
>
> (2) In particular, these rules are intended to be used

> (a) to identify the real issues in dispute,
> (b) to facilitate the quickest means of resolving a claim at the least expense, ...
> (e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.

[16] The test articulated is that it must be "plain and obvious" that the pleading does not disclose a reasonable cause of action: *First Calgary Savings & Credit Union Ltd* at para 4. Or, as stated by Ernst, the Supreme Court of Canada has cast the "plain and obvious" test as being "beyond reasonable doubt": *Hunt* at para 32. Neither novelty, complexity, nor length, prevents a plaintiff from proceeding with the case unless it is certain to fail: *Hunt* at para 33. I will proceed to deal with the argument presented by the ERCB and Ernst in three parts. Firstly, I address the negligence claim and the duty of care issue. Secondly, I discuss the *Charter* argument. And thirdly, I examine the impact of the *Limitations Act* and the statutory immunity argument on the claims.

1. The Ernst Negligence Claim Against the ERCB

a. Overview

[17] The claim in negligence against the ERCB is set forth in paragraphs 24-41 of the Fresh Claim:

> 24. The ERCB is the government agency responsible for overseeing and regulating the oil and gas industry, including all aspects of CBM development. In particular, the ERCB is exclusively tasked with licensing gas wells, and enforcing significant legislative and regulatory provisions that are intended to protect the quality and quantity of groundwater supply from interference or contamination due to oil and gas development, including CBM Activities.
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> 25. These legislative and regulatory provisions are contained in, among other sources, *Oil and Gas Conservation Regulations*, Alta. Reg. 151/1971; *Guide 65: Resources Applications for Conventional Oil and Gas Reservoirs* (2003); *Guide G-8: Surface Casing Depth - Minimum Requirements* (1997); *Guide 9: Casing Cement, Minimum Requirements; Guide 56: Energy Development Application Schedules* (2003); and *Informational Letter IL 91-11; Coalbed Methane Regulation* (1991).
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> 26. In or before 1999, the ERCB used its statutory powers to establish a detailed Compliance Assurance Enforcement Scheme, which included set procedures for receiving and investigating public complaints, inspecting oil and gas operations to ensure that licenses were in compliance with all applicable rules, and taking appropriate enforcement and remedial action against oil and gas companies when non-compliance occurred. This

scheme was operationalized through the Operations Division of the ERCB, and specifically both through the ERCB's Compliance, Environment and Operations Branch, and its Public Safety / Field Surveillance Branch. The ERCB's Operations Division operates numerous Field Offices located throughout Alberta.

27. The ERCB made numerous public representations regarding what individuals adversely impacted by oil and gas activities could expect from the ERCB's enforcement branches and field offices and from its published investigation and enforcement compliance mechanisms. In particular, the ERCB represented that:

a. the ERCB ensures that water and agricultural lands are protected from adverse impacts caused by oil and gas activities;
b. the ERCB specifically protects all freshwater aquifers from adverse impacts caused by oil and gas activities;
c. ERCB Field Offices are responsible for, and do in fact, inspect oil and gas operations to ensure compliance with all applicable standards, specifications and approval conditions;
d. ERCB field staff investigate and respond to all public complaints to ensure that appropriate action is taken; and
e. when non-compliance is identified, the ERCB triggers an established policy for ERCB enforcement action.

28. These representations had the effect of, and were limited to, encourage and foster reliance on the ERCB by Ms. Ernst and other landowners. In particular, Ms. Ernst relied on the ERCB to prevent negative impacts on groundwater caused by oil and gas development; to respond promptly and reasonably to her complaints regarding impacts on her well water potentially caused by CBM Activities; and to take prompt and reasonable enforcement and remedial action when breaches of regulations or other requirements were identified.

29. Prior to engaging in CBM activities, EnCana submitted to the ERCB license applications for the EnCana Wells. The ERCB knew that EnCana intended to engage in new and untested CBM Activities at the EnCana Wells at shallow depths underground located at the same depths as in-use freshwater aquifers, including the Rosebud Aquifer. Despite this knowledge, the ERCB licensed the EnCana Wells without taking adequate steps to ensure that EnCana would take proper precautions to protect freshwater aquifers from contaminations caused by shallow CBM Activities.

30. Between 2001 and April 1, 2006, with the knowledge of the ERCB, EnCana conducted shallow CBM Activities at dozens of EnCana Wells in close proximity to the Rosebud Aquifer and the Ernst Water Well, as detailed above.

31. On or before January 2005, the ERCB knew that various landowners who rely and depend upon the Rosebud Aquifer had made several complaints regarding possible contamination of well water supplied by the Rosebud Aquifer. These complaints also raised concerns about possible connections between potential water contamination and local oil and gas activities.

32. In or around late 2005 and throughout 2006, Ms. Ernst attempted to engage in direct and personal interactions with the ERCB on the specific issue of water contamination at her property and to register her concerns regarding specific EnCana wells. During this period, Ms. Ernst attempted to use ERCB's publicized compliance and enforcement mechanisms. Ms. Ernst specifically interacted with various employees of the ERCB including, among others, Mr. Neil McCrank, the then-Chairman of the ERCB; Mr. Richard McKee, a senior lawyer at the ERCB; and Mr. Jim Reid, Manager of the ERCB's Compliance and Operations Branch.

33. As a result of Ms. Ernst's direct interaction with the ERCB, the ERCB knew that Ms. Ernst had serious and substantiated concerns regarding her water and oil and gas development including that:
    a. the quality of her well water had suddenly radically worsened in 2005 and 2006;
    b. there was good reason to believe that the radical change in her water was specifically linked to EnCana's CBM Activities at the EnCana Wells; and
    c. EnCana had breached ERCB requirements while conducting CBM activities at the nearby EnCana Wells.

34. On or before March 2006, the ERCB knew that EnCana had perforated and fractured directly into the Rosebud Aquifer.

35. In or around 2006, the ERCB knew that Alberta Environment had conducted tests on Ms. Ernst's well water indicating that her water was contaminated with various chemical contaminants, and contained very high levels of methane.

36. Despite clear knowledge of potentially serious industry-related water contamination and knowledge of potential breaches of ERCB requirements, the ERCB failed to respond reasonably or in accordance with its specific published investigation and enforcement process. Instead,

the ERCB either completely ignored Ms. Ernst and her concerns, or directed her to the ERCB's legal counsel, Mr. McKee, who in turn refused to deal with her complaints.

37. Despite serious water contamination necessitating truck deliveries of safe water to the Plaintiff's household and to other landowners who also depend upon the Rosebud Aquifer, the ERCB did not conduct any form of investigation into the causes of contamination of Ms. Ernst's well water or the Rosebud Aquifer.

38. At all material times, the ERCB owed a duty to the Plaintiff to exercise a reasonable standard of care, skill and diligence in taking reasonable and adequate steps to protect her well water from foreseeable contamination caused by drilling for shallow methane gas; to conduct a reasonable investigation after contamination of her water was reported; and to take remedial steps to correct the damage caused.

39. The ERCB breached this duty, and continues to breach this duty, by failing to implement the ERCB's own specific and published investigation and enforcement scheme; failing to conduct any form of investigation; and arbitrarily preventing the Plaintiff from participating in the usual regulatory scheme.

40. Particulars of the ERCB's negligence include:

a. failing to take reasonable steps to ensure that the EnCana Wells licensed by the ERCB would not pose a serious risk of contamination to the Plaintiff's underground freshwater sources, including the Rosebud Aquifer;

b. failing to adequately inspect and investigate known and/or credible allegations of water contamination of Plaintiff's underground freshwater sources, including the Rosebud Aquifer, and of the possible link between such contamination and the EnCana Wells license by the ERCB.

c. failing to adequately inspect and investigate known and/or credible allegations of breaches of oil and gas requirements under the jurisdiction of the ERCB at the EnCana Wells;

d. failing to use available enforcement powers to stop CBM Activities that were causing contamination of the Plaintiff's underground freshwater sources, including the Rosebud Aquifer and to remediate water contamination and other harms caused by oil and gas industry activity that had already occurred;

e. failing to implement the ERCB's established and publicized enforcement and investigation scheme;

f. failing to conduct adequate groundwater testing and monitoring;
g. failing to investigate potential long-term impacts of CBM Activities on the Rosebud Aquifer; and
h. failing to promptly inform the Plaintiff of potential contamination of the Rosebud Aquifer and of the potential risks posed by such contamination to the Plaintiff's health, safety and property.

41. The ERCB's various omissions as listed above were taken in bad faith.

b. Duty of Care and Statutory Immunity

[18] The essence of the ERCB argument is that the duty of care issue is separate and distinct from the statutory immunity argument and that the ERCB, as a statutory body, does not owe Ernst a private duty of care. The ERCB says that there can be no cause of action against the ERCB, for without a duty of care, there can be no action in negligence. The ERCB also relies on section 43 of the *ERCA* for its statutory immunity argument. Ernst joins issue on each of these points by alleging the ERCB can and does owe Ernst a duty of care and that the statutory immunity clause, properly interpreted, provides no immunity to the ERCB in the circumstances.

[19] The parties have cited the following authorities: *Cooper v Hobart*, 2001 SCC 79, [2001] 3 SCR 537; *Anns v Merton London Borough Council*, [1977] 2 All ER 118, [1977] UKHL 4, [1978] AC 728, (UK HL); *Edwards v Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 SCR 562; *Fullowka v Pinkerton's of Canada Limited*, 2010 SCC 5, [2010] 1 SCR 132; *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42, [2011] 3 SCR 45; Peter W Hogg, Patrick J Monahan & Wade K Wright, *Liability of the Crown,* 4th ed (Toronto: Carswell, 2011); *Nette v Stiles*, 2010 ABQB 14, 489 AR 347; *Burgess (Litigation Guardian of) v Canadian National Railway* (2005), 78 OR (3d) 209 (SCJ), aff'd (2006), 85 OR (3d) 798 (CA), leave to appeal to SCC refused, 31698 (February 8, 2007); *Smorag v Nadeau,* 2008 ABQB 714, 461 AR 156; *Swinamer v Nova Scotia (Attorney General)*, [1994] 1 SCR 445; *Condominium Corp No 9813678 v Statesman Corp*, 2009 ABQB 493, 472 AR 33; *Adams v Borrel*, 2008 NBCA 62, 297 DLR (4th) 400, leave to appeal to SCC refused, 32888 (February 19, 2009); *Just v British Columbia*, [1989] 2 SCR 1228; *Ingles v Tutkaluk Construction Ltd*, 2000 SCC 12, [2000] 1 SCR 298; *Rothfield v Manolakos*, [1989] 2 SCR 1259; *Heaslip Estate v Mansfield Ski Club Inc*, 2009 ONCA 594, 96 OR (3d) 401; *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 SCR 129; *Sauer v Canada*, 2007 ONCA 454, 31 BLR (4th) 20; *Oil and Gas Conservation Act*, RSA 2000, c O-6, ss 4(b), 4(f); *Morguard Properties Ltd v Winnipeg (City)*, [1983] 2 SCR 493; *Tardif (Estate of) v Wong,* 2002 ABCA 121, 303 AR 103; *Alberta Utilities Commission Act,* SA 2007, c A-37.2, s 69; *Agrology Profession Act,* SA 2005, c A-13.5, s 98(1); *Alberta Human Rights Act*, RSA 2000, c A-25.5, s 41; *Child and Family Services Authorities Act,* RSA 2000, c C-11, s 19; *Court of Queen's Bench Act,* RSA 2000, c C-31, s 14; *Emergency Medical Aid Act,* RSA 2000, c E-7, s 2; *Farm Implement Act*, RSA 2000, c F-7, s 44; *Fisheries (Alberta) Act*, RSA 2000, c F-16, s 42; *Gaming and Liquor Act*, RSA 2000, c G-1, s 32; *Health Professions Act*, RSA 2000, c H-7, s 126(1); *Health Quality Council of Alberta Act*, SA 2011, c

H-7.2, s 23; *Persons with Developmental Disabilities Community Governance Act*, RSA 2000, c P-8, s 20; *Regulated Forestry Profession Act*, RSA 2000, c R-13, s 95(1); *Safety Codes Act*, RSA 2000, c S-1, s 12(1); *Securities Act*, RSA 2000, c S-4, s 222(1); *Mercure v A Marquette & Fils Inc*, [1977] 1 SCR 547; *Encampment Creek Logging Ltd v Alberta*, 2005 ABQB 787, 402 AR 55; *Berardinelli v Ontario Housing Corp*, [1979] 1 SCR 275; *Tottrup*; *ERCA*, ss 2(e.1), 43; *Responsible Energy Development Act*.

[20] From these authorities, a number of principles arise. The approach for assessing whether to impose a duty of care on a public authority was set out in *Anns* and is the analysis to be undertaken in Canada. The two-step analysis was described in *Cooper* at paragraph 24 as follows:

> In *Anns, supra,* at pp. 751-52, the House of Lords, per Lord Wilberforce, said that a duty of care required a finding of proximity sufficient to create a *prima facie* duty of care, followed by consideration of whether there were any factors negativing that duty of care. This Court has repeatedly affirmed that approach as appropriate in the Canadian context.

[21] In *Fullowka*, the Supreme Court of Canada reiterated the test, including a consideration of foreseeability of harm in the determination of whether there is a *prima facie* duty of care, at paragraph 18:

> This question must be resolved by an analysis of the applicable legal duties, following the approach set down by the Court in a number of cases, including *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; *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263; *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643; and *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129. The analysis turns on whether the relationship between the appellants and the defendants discloses sufficient foreseeability and proximity to establish a *prima facie* duty of care and, if so, whether there are any residual policy considerations which ought to negate or limit that duty of care: see, e.g., *Hill*, at para. 20. The analysis must focus specifically on the relationships in issue, as there are particular considerations relating to foreseeability, proximity and policy in each: see, e.g., *Hill*, at para. 27.

[22] The summary contained in *Liability of the Crown* at pages 242-243 sets out the following principles:

1) A public authority will not be open to liability for negligence unless the public authority was in a "close and direct" or proximate relationship with the plaintiff.

2) The relevant statutory scheme is not the exclusive, or even a necessary, source of proximity in cases involving public authorities: *Hill* and

Fullowka, as well as *Cooper* and *Edwards*, on one reading, provide the support for this conclusion.

3) However, the statutory scheme will *preclude* a duty of care, where such a duty would conflict with the statute: *Hill* provides the support for this conclusion.

4) In addition, the statutory scheme *may* also play a positive role in *establishing* proximity: *Fullowka* provides the support for this conclusion. The cases do not explicitly foreclose the possibility of an exceptional case where the statutory scheme alone will establish proximity: that possibility was implicitly left open in *Cooper* and *Edwards*; explicitly left open in *Broome*, which was that statutory duties "do not *generally,* in and of themselves, give rise to private law duties of care"; and affirmed in *Elder Advocates.* However, the cases are clear that the statutory scheme will, by and large, not be sufficient to establish proximity, and that it will be necessary to point to other factors, arising from the actual relationship between the parties, to establish the required nexus or "closeness of connection": all six decisions provide the support for this conclusion, either explicitly or by implication.

5) Factors suggesting proximity include physical and causal closeness, assumed or imposed obligations, and "expectations, representations, reliance, and the property or other interests involved". The courts are reluctant to find proximity between a public authority and members of the public with whom the public authority has had no contact, even if the public authority has knowledge of a general risk of harm and legal authority to prevent or minimize that risk: *Cooper; Edwards*. The courts are less reluctant to find proximity where a public authority has contact with a member of the public, making it aware of a specific risk of harm: *Fullowka.* [footnotes omitted]

[23] The learned authors go on to state that it is clear that statutes alone are generally not sufficient to establish necessary proximity. Ernst relies heavily on the line of authority involving a statutory investigation and inspection regime.

[24] Counsel for the ERCB argues that one of the latest iterations of the distinguishing features of a private law duty of care owed by regulator is contained in *Fullowka*. In that case, unionized miners were on strike. Replacement workers were brought in. A striking miner circumvented security and set off an explosion that killed nine miners. The families claimed against a number of parties, including the security company and the Crown for negligently failing to prevent the explosion and deaths. The alleged private law duty of care was that the mine inspectors had a statutory duty to inspect the mine and to order the cessation of work if they considered it unsafe. The labour dispute had become violent before the explosion.

[25] Justice Cromwell, for the Court, distinguished *Cooper* and *Edwards* with respect to the proximity analysis. In *Cooper*, the Registrar of mortgage brokers regulated the mortgage broker in question. A client of the mortgage broker suffered damages. The allegation was that the Registrar owed a duty to the broker's client. Similarly in *Edwards*, it was alleged that the Law Society owed a duty to a claimant who was a client of a regulated lawyer.

[26] In *Fullowka*, Justice Cromwell stated at paragraphs 41-45:

> 41. In the case of the mining safety regulators and the miners, the closeness of the relationship is somewhere between that in *Hill*, on the one hand, and *Cooper* and *Edwards* on the other. Under the *MSA* [*Mining Safety Act*], the onus for maintaining mine safety is on the owner, management and employees of the mine. Section 2 of the *MSA* imposes on management the duty to take all reasonable measures to enforce the Act and on workers the duty to take all necessary and reasonable measures to carry out their duties according to the Act. Under s. 3, the owner is to ensure that the manager is provided with the necessary means to conduct the operation of the mine in full compliance with the *MSA* and under s. 5(3), the manager, or the competent person authorized by the manager, is to personally and continually supervise work involving unusual danger in an emergency situation. A worker has the right to refuse to do any work when he or she has reason to believe that there is an unusual danger to his or her health or safety (s. 8(1)(a)) and is to report the circumstances to the owner or supervisor (s. 8(2)). A worker acting in compliance with these provisions is protected against discharge or discipline for having done so (s. 8(9)). Thus, much as the regulatory schemes at issue in *Cooper* and *Edwards* put the onus on lawyers and mortgage brokers to observe the rules, the scheme set out in the *MSA* puts the onus on mine owners, management and workers to observe safety regulations. The role of the mining inspectors is essentially to see that the persons who have the primary obligation to comply with the *MSA* -- mine owners, managers and workers -- are doing so. In that sense, their role is analogous to the roles of the Law Society and the Registrar of Mortgage Brokers discussed in *Edwards* and *Cooper*.
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> 42. However, the relationship between the inspectors and the miners was considerably closer and more direct than the relationships in issue in *Edwards* or *Cooper*. While no single factor on its own is dispositive, there are three factors present here which, in combination, lead me to this conclusion.
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> 43. The persons to whom mining inspectors are said to owe a duty -- those working in the mine -- is not only a much smaller but also a more clearly defined group than was the case in *Cooper* or *Edwards*. There, the alleged duties were owed, in effect, to the public at large because they extended to all clients of all lawyers and mortgage brokers.
>
> 44. In addition, the mining inspectors had much more direct and personal dealings with the deceased miners than the Law Society or the Registrar had with

> the clients of the lawyer or mortgage broker in *Edwards* and *Cooper*. As pointed out in *Hill*, in considering whether the relationship in question is close and direct, the existence, or absence, of personal contact is significant. The murdered miners were not in the sort of personal contact with the inspectors as the police in *Hill* were with Mr. Hill as a particularized suspect. However, the relationship between the miners and the inspectors was much more personal and direct than the relationship between the undifferentiated multitude of lawyers' clients and the Law Society as considered in *Edwards* or the undifferentiated customers of mortgage brokers as considered in *Cooper*. As the trial judge found in this case, visits by inspectors to the mine during the strike were "almost daily" occurrences, 11 official inspections were conducted and at any time a tour of the mine was required, the inspector would be accompanied by a member of the occupational health and safety committee (para. 256). There was therefore more direct and personal contact with miners than there was with the clients in either *Cooper* or *Edwards*.
>
> 45 Finally, the inspectors' statutory duties related directly to the conduct of the miners themselves. This is in contrast to the Law Society in *Edwards* or the Registrar in *Cooper* who had no direct regulatory authority over the claimants who were the clients of the regulated lawyers and mortgage brokers.

[27] Applying the contrasting authorities analysed by Cromwell J. in *Fullowka* and the principles articulated in the other authorities as summarized in *Liability of the Crown*, I am of the view that the duties owed by the ERCB in the circumstances of this case are not private duties. They are public duties. The necessary relationship of proximity between Ernst and the ERCB is absent. The duties of the ERCB owed to the public are derived from the *ERCA*.

[28] None of the paragraphs in the Fresh Claim elevate the ERCB's public duties to a private duty owed to Ernst. She stands in her relationship to the ERCB much like the plaintiffs in *Edwards* and *Cooper* to the regulators in those cases, notwithstanding that she was in direct contact with the ERCB. In all three instances, a member of the public may communicate with the regulator (the Law Society of Upper Canada in *Edwards*, the Registrar under the *Mortgage Brokers Act*, RSBC 1996, c 313 in *Cooper*, and the ERCB in this matter), but the regulator has no direct regulatory authority over the member of the public. Whether a private duty arises does not turn on whether an individual does or does not communicate directly with the regulator; regardless, there is no sufficient proximity to ground a private duty. Nor was there a relationship established between Ernst and the ERCB outside the statutory regime which created a private duty.

[29] Having found no private duty owed and no sufficient proximity to ground a public duty, it is unnecessary to determine whether the harm to Ernst was foreseeable. It is also unnecessary to consider the second part of the *Anns* test, that is, whether there would be any policy reason, assuming proximity, to impose a private duty.

[30] In the result, there will be an Order striking the allegations of negligence against the ERCB contained in paragraphs 24-41 inclusive.

c. The Charter Argument

[31] In the Fresh Claim, Ernst alleges that the ERCB breached her section 2(b) rights that she holds under the *Charter*.

[32] This section states:

> 2. Everyone has the following fundamental freedoms:
>
> ...
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication

[33] The Fresh Claim contains allegations pertaining to the *Charter* breach in paragraphs 42-58 as follows:

> 42. In its role as the government agency responsible for regulating all aspects of the oil and gas industry, the ERCB has established a specific forum and process for communicating with the public and hearing public complaints and concerns regarding the oil and gas industry.
>
> 43. The ERCB, as a public body, invited and encouraged public participation and communication in the regulatory process, including through both its Compliance and Operations Branch, and its Field Surveillance Branch. In particular, in communications directly with landowners located adjacent to oil and gas developments, the ERCB emphasizes the importance of public involvement in the regulation of oil and gas development in Alberta and strongly encourages such public participation.
>
> 44. The ERCB further frequently represented to such landowners that it is responsible for responding to and addressing all public complaints, including by investigating all such complaints.
>
> 45. Throughout 2004 and 2005, Ms. Ernst frequently voiced her concerns regarding negative impacts caused by oil and gas development near her home both through contact with the ERCB's compliance, investigation and enforcement offices, and through other modes of public expression, including the press and through communication with institutions and fellow landowners and citizens.
>
> 46. Ms. Ernst was a vocal and effective critic of the ERCB. Her public criticisms brought public attention to the ERCB in a way that was unwanted by the ERCB and caused embarrassment with the organization.

47. Ms. Ernst pleads that as a result of, and in response to, her public criticisms, the ERCB seized on an offhand reference to Weibo Ludwig made by Ms. Ernst and used it as an excuse to restrict her speech by prohibiting her from communicating with the ERCB through the usual channels for public communication with the ERCB. These serious restrictions greatly limited her ability to lodge complaints, register concerns and to participate in the ERCB compliance and enforcement process. As a result, Ms. Ernst was unable to adequately register her serious and well-founded concerns that CBM Activities were adversely impacting the Rosebud Aquifer, and her groundwater supply.

48. In particular, in a letter dated November 24, 2005, Mr. Jim Reid, the Manager of the Compliance Branch of the ERCB, informed Ms. Ernst that he had instructed all staff at the Compliance Branch of the ERCB to avoid any further contact with her. Mr. Reid also notified Ms. Ernst that he had reported her to the Attorney General of Alberta, the RCMP and the ERCB Field Surveillance Branch.

49. On December 6, 2005, Ms. Ernst wrote to the ERCB to seek clarification of what was meant by Mr. Reid's comments, and what restrictions she faced when attempting to communicate with at the ERCB. This letter was returned unopened.

50. On December 14, 2005, Ms. Ernst wrote to Mr. Neil McCrank, the then-Chairman of the ERCB, to seek further clarification. Ms. Ernst did not receive a response.

51. On January 11, 2006, Ms. Ernst again wrote to Mr. McCrank and again asked for clarification. Mr. McCrank failed to provide any further clarification or explanation regarding the restriction of communication. Instead, Mr. McCrank directed Ms. Ernst to Mr. Richard McKee of the ERCB's legal branch. Mr. McKee continued to ignore, deflect and dismiss Ms. Ernst's request for an explanation regarding her exclusion from effective participation in the ERCB public complaints process and her request for the reinstatement of her right to communicate with the ERCB through the usual channels.

52. In his communications with Ms. Ernst, Mr. McKee, on behalf of the ERCB, confirmed that the ERCB took a decision in 2005 to discontinue further discussion with Ms. Ernst, and that the ERCB would not re-open regular communication until Ms. Ernst agreed to raise her concerns only with the ERCB and not publicly through the media or through communications with other citizens.

53. On October 22, 2006, Ms. Ernst again wrote to Mr. McCrank to request that she be permitted to communicate unhindered with the ERCB like any other member of the public. Specifically, Ms. Ernst requested the right to be able to file a formal objection to oil and gas development under the usual ERCB regulatory process for receiving such objections. Mr. McCrank did not respond to this request.

54. On March 30, 2007, 16 months after the original letter restricting Ms. Ernst's participation in ERCB processes, Mr. McCrank informed Ms. Ernst that she was again free to communicate with any ERCB staff.

55. Ms. Ernst pleads that Mr. Reid's letter and the subsequent restriction of communication were a means to punish Ms. Ernst for past public criticisms of the ERCB, to prevent her from making future public criticisms of the ERCB, to marginalise her concerns and to deny her access to the ERCB compliance and enforcement process, including, most importantly, its complaints mechanism.

56. Ms. Ernst pleads that the decision to restrict her communication with the ERCB, and the decision to continue such restriction, was made arbitrarily, and without legal authority.

57. Throughout this time, Ms. Ernst was prevented from raising legitimate and credible concerns regarding oil and gas related water contamination with the very regulator mandated by the government to investigate and remediate such contamination and at the very time that the ERCB was most needed. Her exclusion from the ERCB's specific and publicized investigation and enforcement process prevented her from raising concerns with the ERCB regarding its failure to enforce requirements under its jurisdiction, including those aimed at protecting groundwater quantity and quality.

58. The ERCB's arbitrary decision to restrict Ms. Ernst's communication with the ERCB, specifically by prohibiting her from communicating with the enforcement arm of the ERCB, breached Ms. Ernst's rights contained in s.2(b) of the *Canadian Charter of Rights and Freedoms* by:

a. punitively excluding Ms. Ernst from the ERCB's own complaints, investigation and enforcement process in retaliation for her vocal criticism of the ERCB, thereby punishing her for exercising her right to free speech; and

b. arbitrarily removing Ms. Ernst from a public forum of communication with a government agency that had been established to accept public concerns and complaints about oil and gas industry activity, thereby blocking her and preventing her from

> speaking in a public forum that the ERCB itself had specifically established to facilitate free speech.

[34] The parties have cited the following authorities with respect to the *Charter* argument: *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927; *Baier v Alberta*, 2007 SCC 31 at para 20, [2007] 2 SCR 673; *Ontario (Attorney General) v Dieleman* (1994), 20 OR (3d) 229 (Gen Div); *R v Breeden*, 2009 BCCA 463, 277 BCAC 164, leave to appeal to SCC refused, 33488 (April 22, 2010); *Ross v New Brunswick School District No 15*, [1996] 1 SCR 825; *Public Service Alliance of Canada v Canada*, 2001 FCT 890, 209 FTR 306; *Pacific Press, A Division of Southam Inc v British Columbia (Attorney General)* (1998), 52 BCLR (3d) 197 (SC), aff'd 61 BCLR (3d) 377 (CA), leave to appeal to SCC refused, 27045 (May 21, 1999); *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139; *Haydon v Canada*, [2001] 2 FC 82 (FCTD); *Pridgen v University of Calgary*, 2010 ABQB 644, 497 AR 219, aff'd 2012 ABCA 139, 524 AR 251; *R v Watson*, 2008 BCCA 340, 83 BCLR (4th) 243, leave to appeal to SCC refused, 33037 (June 18, 2009); *Cunningham v Alberta (Minister of Aboriginal Affairs and Northern Development)*, 2009 ABCA 239, 457 AR 297, reversed 2011 SCC 37, [2011] 2 SCR 670; *Greater Vancouver Transportation Authority v Canadian Federation of Students - British Component*, 2009 SCC 31, [2009] 2 SCR 295.

[35] The position of the ERCB with respect to the *Charter* argument is that whether a breach of section 2(b) has occurred involves a two-stage analysis. Relying on *Irwin Toy*, the two steps are, first, whether the activity in question is a protected form or method of expression. If it is, it then must be decided whether the purpose or effect of the government action infringes on the right to free expression.

[36] Both parties agree that section 2(b) is to be given a broad and purposive interpretation. However, the ERCB relies on *Baier* to assert that *Charter* protection of free expression would not extend to situations where there are threats or acts of violence.

[37] The ERCB goes on to cite *Dieleman* for the proposition that any *Charter* right to free expression does not include the right to an audience.

[38] The ERCB relies on paragraph 47 of the Fresh Claim where Ernst alleges her reference to Weibo Ludwig was "offhand". Ernst alleges the ERCB used it as an excuse to restrict her speech by prohibiting her from communicating with the ERCB through the usual channels for public communication with the ERCB. The ERCB says the significance of this comment is the context of numerous violent acts of eco-terrorism against oil and gas development in Alberta which were undertaken by Weibo Ludwig. Further, the ERCB says it is required to take such threats seriously, and that it reported the threat to the RCMP. Moreover, the ERCB asserts that paragraphs 42-58 of the Fresh Claim demonstrate that Ernst continued to contact the ERCB after it ceased communications with her, and that the gist of her claim is not that the ERCB breached her right to free expression, but rather, that it did not respond to her communications or did not respond in a way that Ernst found satisfactory. This, it is said, leads to a proposition that the section 2(b) *Charter* right is not a right to be listened to, but rather, only a right to speak.

[39] Ernst argues the *Charter* issues by alleging two forms of breach: first, that the ERCB violated Ernst's section 2(b) *Charter* right by punishing her for criticizing the ERCB in public and to the media, and second, that Ernst's right to freedom of expression was infringed because she was prohibited and restrained in her communication with the ERCB. The first argument is based on paragraphs 55-57 of the Fresh Claim, where Ernst claims that in a letter dated November 24, 2005 from the ERCB, all staff at the Compliance Branch of the ERCB were instructed to avoid further contact with her, that she was reported to the RCMP, and that these restrictions "were a means to punish" Ernst for past public criticisms and were calculated to prevent her from making future public criticisms of the ERCB. The second breach alleged by Ernst is that, in November 2005, the ERCB took action against Ernst which was intended to, and did in fact, restrict and constrain Ernst's ability to communicate with key officials of the ERCB. Further, Ernst asserts that her expression was not a "violent expression" and that there is no foundation for this argument by the ERCB because there is no evidence in front of the Court to establish that assertion.

[40] With respect to the ERCB's assertion that section 2(b) of the *Charter* does not guarantee the right to an audience or a captive audience, Ernst denies that she is making that claim. Reference is made to *Dieleman*, where it was held that enjoining a free safe zone around abortion clinics was not an infringement of the protestors' section 2(b) *Charter* right because women who sought to use the abortion clinics were, in effect, "a captive audience" and could not avoid listening to the protestors by their free choice. Ernst argues that this is an entirely different situation, as there is no "captive audience" as in *Dieleman*. Further, Ernst argues that the ERCB does not and cannot respond to the first *Charter* breach claim, that is, that the ERCB sought to punish Ernst for her speech by prohibiting her from communicating with the Compliance Branch of the ERCB.

[41] Citing *Baier*, Ernst argues that positive rights cases are those where a government has, through a statute, created a platform for expression that only some individuals are able to access, but says that Ernst does not make any claims for a positive right of expression requiring government support. Ernst says she invokes the circumstance that the ERCB has taken an action which limits, prohibits or restricts or otherwise constrains free expression. Ernst says that the restriction on her communication was arbitrary.

[42] Taking all of the arguments into consideration, it is to be remembered that because a cause of action may be novel, it is not necessarily "doomed to fail" by reason of novelty alone. One might question whether it is possible for a government entity, which admittedly the ERCB is, not to owe a private law duty to a plaintiff and thus cannot be held liable in negligence to her, but that, at the same time, may have breached her *Charter* rights, giving rise to a claim for damages. But the claim for a breach of a *Charter* right is not dependant on the proximity analysis originating in *Anns*, nor the distinction between a public law and a private law duty. To a certain extent, a claim for a *Charter* breach is based upon the establishment of a right and an infringement of it by the action of a government or government agency. That is what is alleged here and, however novel the claim might be, I cannot say that it is doomed to fail or that the claim does not disclose a cause of action. I agree with Ernst that the ERCB cannot rely on its argument on the Weibo eco-terrorism claim, in the total absence of evidence. There is none.

[43] Therefore, unless the *Limitations Act* is engaged so as to prohibit the Fresh Claim based on the *Charter* argument, or unless the statutory immunity clause bars the *Charter* claim, it will stand.

2. The Charter Claim and the Limitations Act

[44] Section 3(1) of the *Limitations Act* states as follows:

> 3 (1) Subject to section 11, if a claimant does not seek a remedial order within
>
> (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
>
> (i) that the injury for which the claimant seeks a remedial order had occurred,
>
> (ii) that the injury was attributable to conduct of the defendant, and
>
> (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,
>
> or
>
> (b) 10 years after the claim arose,
>
> whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

The Positions of the Parties

a. The Position of the ERCB

[45] The ERCB argues that summary judgment may be granted if a claim is filed outside the limitation period: *Borchers v Kulak*, 2009 ABQB 457, 479 AR 136 at para 36. The ERCB also argues that the *Limitations Act* applies to a constitutional cause of action where personal claims for a constitutional remedy are in issue: *Ravndahl v Saskatchewan*, 2009 SCC 7, [2009] 1 SCR 181 at paras 16-17.

[46] The ERCB acknowledges there is no affidavit evidence in support of its application for summary dismissal of the *Charter* claim on the basis of the *Limitations Act*, and asserts that it does not need to file any evidence because "on the plaintiff's own facts, the purported decision to exclude her from the ERCB complaint process took place on or before November 24th, 2005, more than 2 years before the Plaintiff filed her Statement of Claim." ERCB Written Brief, para. 149.

[47] The reference to November 24, 2005 is an allegation contained in paragraph 48 of the Fresh Claim. The ERCB also submits that the summary judgment rules contained in the *ARC* specifically reference that judgment may be given "at any time and in action" when admissions of fact are made in a pleading: *ARC*, r 7.2(a). The ERCB concedes that Rule 7.3(2) states that an application for summary judgment "must be supported by an affidavit swearing positively that one or more of the grounds described in sub-rule (1) have been met", but points out that the

sentence carries on to state an alternative, namely "or by other evidence to the effect that the grounds have been met". It simply asserts that "other evidence" referenced in Rule 7.3(2) includes admissions of fact in the pleadings.

b. The Position of Ernst

[48] Ernst submits that because the original Statement of Claim was filed December 3, 2007, the ERCB's Application for Summary Judgment, in order to be successful, must contain proof that Ernst knew before December 3, 2005 that a *Charter* breach had occurred, that the breach was attributable to the ERCB, and that the breach warranted bringing a proceeding. Further, Ernst says that the ERCB cannot prove, nor has it proven, any of these elements. As an example, Ernst states that the pleadings are entirely silent on the crucial issue as to when Ernst actually received and read the November 24, 2005 letter.

[49] I agree with the submissions of Ernst on the *Limitations Act* issue. Asserting in a pleading as a matter of fact that a letter dated November 24, 2005 crystallized a *Charter* claim, if any, in favour of Ernst is not the same as alleging that any event occurred with the knowledge of the plaintiff, so as to constitute an admission of fact. There is no admission of fact that Ernst received the letter prior to December 3, 2005, only that the letter is dated prior to then. That is not sufficient proof upon which to ground an order granting summary judgment, assuming that it is an admission of fact constituting a ground for dismissal. I do not decide whether the other elements asserted by Ernst have been proven or not, in terms of whether a *Charter* breach has occurred or, if so, whether the conduct of the ERCB warranted bringing an action prior to December 3, 2005.

3. Statutory Immunity and the Ernst Claims

[50] I must ascertain whether the statutory immunity clause, section 43 of the *ERCA*, serves to bar the Ernst claims for negligence and damages for a *Charter* breach in any event. That section states 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.

[51] The ERCB argues that this section is an absolute bar to the Ernst claims against it. Ernst argues that section 43 cannot bar her claim. She advances a statutory interpretation argument and a constitutional argument in support of her position. I consider both arguments below.

a. Statutory Interpretation Argument

[52] Ernst elaborates on principles of statutory interpretation to argue that section 43 does not protect the ERCB in the circumstances. Ernst basically says that her claim against the ERCB is

for the sin of omission, not comission. She asserts that the statutory protection afforded the ERCB by section 43 is in respect only of "any act or thing done or purported to be done" not any act or thing it omitted to do. In support of her argument, Ernst cites section 69 of the *Alberta Utilities Commission Act* which states as follows:

> 69. No action or proceeding in respect of any act or thing done or omitted to be done or purported to be done or omitted to be done in good faith under this or any other enactment or under a decision, order or direction of the Commission may be brought against the Commission, any member or any person referred to in section 68(1).

[53] In addition, Ernst cites the *Responsible Energy Development Act*, section 27 which states as follows:

> 27. No action or proceeding may be brought against the Regulator, a director, a hearing commissioner, an officer or an employee of the Regulator, or a person engaged by the Regulator, in respect of any act or thing done or omitted to be done in good faith under this Act or any other enactment.

[54] As noted, this statute came into force on June 17, 2013. It repeals the *ERCA* and establishes a single Alberta Energy Regulator, to, amongst other things, consider and decide applications pertaining to energy resource enactments including pipelines, wells, processing plants, mines and other operations for the recovery of energy resources.

[55] Given that statutes restricting action are to be strictly construed, Ernst says that section 43 of the *ERCA* affords no protection to the ERCB because her claim against the ERCB stems not from the ERCB's actions, but from its failure to act.

[56] The ERCB replies, emphasizing adjectives in the Fresh Claim against the ERCB, namely that it did not respond "reasonably" (paragraph 36 of the Fresh Claim), failed to conduct a "reasonable investigation" (paragraph 38 of the Fresh Claim), arbitrarily prevented "the Plaintiff from participating in the regulatory scheme" (paragraph 39 of the Fresh Claim), and so on. In short, the ERCB says that the claim against it is for what it did, and falls squarely within the provisions of section 43.

[57] I do not accept the argument that the lack of the words "or anything omitted to be done" in section 43, render its interpretation as providing statutory immunity to the ERCB only in situations where it has acted, as opposed to failed to act. A decision taken by a regulator to act in a certain way among alternatives inherently involves a decision not to act in another way. Picking one way over another does not render the ERCB immune from an action or proceeding, depending on its choice. This construction would result in an irrational distinction and lead to an absurdity. Moreover, to the extent that the other statutes providing statutory immunity to the regulator are relevant in that they contain the additional phrase "or anything omitted to be done", I regard those words as mere surplusage in the circumstances. Therefore, I hold that section 43

bars any actions or proceeding against the ERCB, in terms of both its decisions to act and the acts done pursuant to those decisions, and its decisions not to act.

[58] Therefore, even if I had found that the ERCB owed a duty of care to Ernst sufficient to establish a tort claim, her claim in negligence is barred in any event by section 43 of the *ERCA*.

b. Constitutional Argument

[59] That leads to the question as to whether there is a reason in principle not to apply the reasoning I have already given, in terms of the statutory immunity of the ERCB, to the personal claim for damages pursuant to the *Charter,* as well as the claim for negligence.

[60] During oral argument, counsel for Ernst argued that the government cannot legislate immunity to preclude legal action arising out of its own *Charter* breaches. Counsel for Ernst handed to the Court an excerpt from the case *Prete v Ontario* (1993), 16 OR (3d) 161 (CA), application for leave to appeal to SCC dismissed with costs, [1994] 1 SCR x. In that case, a claim for damages as a remedy was brought pursuant to section 24(1) of the *Charter*, alleging the Attorney General of Ontario arbitrarily, capriciously and without any reasonable grounds preferred a direct indictment on a charge of murder against the plaintiff. The issue before the Court was whether a six-month limitation period in section 11(1) of the *Public Authorities Protection Act*, RSO 1980, c 406, barred the proceedings. That section prohibited any action against any person in the intended execution of any statutory or other public duty, unless it was commenced within six months after the cause of action arose.

[61] The Court also considered the applicability of a statutory immunity clause in the *Proceedings Against the Crown Act,* RSO 1980, c 393. Sections 5(1) and 5(6) provide:

> 5(1) Except as otherwise provided in this Act and notwithstanding section 11 of the *Interpretation Act*, the Crown is subject to all liabilities in tort to which, if it were a person of full age and capacity, it would be subject,
>
> (a) in respect of a tort committed by any of its servants or agents;
> (b) in respect of a breach of duties that one owes to one's servants or agents by reason of being their employer;
> (c) in respect of any breach of the duties attaching to the ownership, occupation, possession or control of property; and
> (d) under any statute, or under any regulation or by-law made or passed under the authority of any statute.
>
> ...
>
> 5(6) No proceeding lies against the Crown under this section in respect of anything done or omitted to be done by a person while discharging or purporting

> to discharge responsibilities of a judicial nature vested in the person or responsibilities that the person has in connection with the execution of judicial process. [emphasis added]

[62] In *Prete,* the Court, relying on the judgment of Lamer J. in *Nelles v Ontario*, [1989] 2 SCR 170, stated that prosecutorial immunity, to the extent it may bar a remedy under the *Charter*, cannot stand alone. The Court said that these reasons were "strongly persuasive" that a statutory enactment cannot bar a *Charter* remedy, and pointed out that section 32(1)(b) of the *Charter* applies to the legislature of government in each province: para 8. Similarly, the Court in *Prete* found that there would be no immunity available under section 5(6) of the *Proceedings Against the Crown Act*, where a *Charter* remedy is claimed.

[63] One of the interesting propositions from *Prete* is that a claim for malicious prosecution without any *Charter* aspect may be subject to a statutory limitation or protection afforded to the Crown or the Attorney General, while the same claim brought under the *Charter*, would be subject to no such bar.

[64] The statutory immunity clause in section 43 of the *ERCA* applies to "any act or thing done" in pursuance of the *ERCA* or any Act administered by the ERCB. The statutory immunity clause in section 5(6) of the *Proceedings Against the Crown Act* in *Prete* applies to all liabilities in tort under section 5, which are set out in section 5(1). I am not bound by the Ontario Court of Appeal decision in *Prete*, and find it is distinguishable in any event on the basis of the wording of the statutory immunity clause.

[65] I must therefore determine whether a generally worded statutory immunity clause will apply when a claim is asserted for damages for a *Charter* breach. There is appellate and Supreme Court of Canada jurisprudence on the issue of whether a limitation period applies to a *Charter* claim. Distinctions are made as to whether the claim is personal (for example, seeking damages for breach of an individual's *Charter* rights) or general (such as seeking the striking down of legislation), and whether the limitation period applies to everyone, or is specific in its application. The law relating to whether a limitation period applies to a *Charter* claim provides a helpful starting point in determining whether the statutory immunity clause in section 43 of the *ERCA* applies in this case.

[66] In *Alexis v Darnley*, 2009 ONCA 847, 100 OR (3d) 232, leave to appeal to the SCC refused, 33560 (April 29, 2010), the Ontario Court of Appeal found that a general *Limitations Act, 2002* provision applied to a personal claim under section 24(1) of the *Charter*. At paragraphs 16 and 17, the Court reviewed a number of cases from provincial Courts of Appeal and found that limitation periods of general application, that is, that are applicable to everyone, apply to personal *Charter* claims, but do not apply to statutes which immunize the government itself from a *Charter* claim. This is distinguishable from *Prete*, where the issue was a six-month limitation period that applied only to the Crown.

[67] The only Alberta case cited by the parties was *Garry v Canada*, 2007 ABCA 234, leave to appeal to SCC denied [2008] 1 SCR viii. *Garry* was an application before a single justice of

the Court of Appeal to restore an appeal to the list, and stands as some authority in Alberta for the proposition that general limitation periods apply to *Charter* claims. Justice Côté noted that "no authority has been shown to say that general limitation periods do not apply to *Charter* claims": para 21. He goes on to distinguish *Prete* on the basis that:

> ...[*Prete*] was about interpreting the short limitation period for suing the Crown and public authorities in Ontario. Alberta has no equivalent legislation; the Crown gets no special treatment here. That case is not about general limitation statutes: para 21.

[68] The Supreme Court of Canada has considered the application of statutory limitation periods to personal claims for constitutional relief in several cases, including *Ravndahl*. In *Ravndahl*, the plaintiff was a widow whose former husband died of injuries he sustained during his employment. As a result, the plaintiff received benefits under the Saskatchewan *Workers' Compensation Act* of 1978 (the "*WCA*"). She lost her benefits pursuant to section 68 of the *WCA* in 1984, when she remarried. After the *Charter* came into effect on April 17, 1985, the *WCA* was amended and ultimately provided for compensation to continue to be paid to a surviving dependent spouse if he or she remarried after April 17, 1985. The plaintiff brought an action in 2000 pursuant to the equality provision in section 15 of the *Charter*, seeking an order reinstating her spousal pension and awarding damages, and declaring that the *WCA*, as amended in 1985, was of no force and effect.

[69] The Supreme Court of Canada concluded that the plaintiff's personal claims for declarations and damages were statute-barred by the limitation period, but that her claim for a declaration of constitutional invalidity was not. Chief Justice McLachlin, for the Court noted:

> 16 ...Personal claims for constitutional relief are claims brought as an individual *qua* individual for a personal remedy. As will be discussed below, personal claims in this sense must be distinguished from claims which may enure to affected persons generally under an action for a declaration that a law is unconstitutional.
>
> 17 The argument that *The Limitation of Actions Act* does not apply to personal claims was abandoned before us, counsel for the appellant conceding that *The Limitation of Actions Act* applies to such claims. This is consistent with this Court's decision in *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3, which held that limitation periods apply to claims for personal remedies that flow from the striking down of an unconstitutional statute: paras 16-17.

[70] These principles were recently reiterated by the Supreme Court of Canada in *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, 355 DLR (4th) 577, where the majority concluded:

> 134 ...[A]lthough claims for personal remedies flowing from the striking down of an unconstitutional statute are barred by the running of a limitation period, courts retain the power to rule on the constitutionality of the underlying statute. ...
>
> 135 Thus, this Court has found that limitations of actions statutes cannot prevent the courts, as guardians of the Constitution, from issuing declarations on the constitutionality of legislation. By extension, limitations acts cannot prevent the courts from issuing a declaration on the constitutionality of the Crown's conduct: paras 134-135. [See also: *Ravndahl* at para 17; *Kingstreet Investments Ltd v New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 SCR 3 at para 59]

[71] In *Manitoba Metis Federation*, the Manitoba Metis Federation sought declaratory relief, not personal remedies. They made no claim for damages or land. The Supreme Court of Canada concluded that *The Limitation of Actions Act* did not apply, and the claim was not statute-barred.

[72] In contrast, the plaintiff in this case does not seek to strike down legislation; she seeks a personal remedy, namely damages. If the issue in dispute were the applicability of a limitation period found in a general limitations statute, it is clear that the general limitations statute would apply to this action.

[73] The difficulty this Court is faced with is that a statutory immunity clause is not the same as a limitation period in a general limitations statute. Section 43 of the *ERCA* purports to bar absolutely any action brought against the ERCB. On the face of it, this would include a *Charter* claim for a personal remedy, as opposed to an application challenging a provincial statute or regulation on the basis of its validity against *Charter* scrutiny. A statutory immunity clause is of general application in the sense that it immunizes a government agency from suit, and does not target individual parties. At the same time, this does not necessarily deprive a party of any remedy. As was pointed out in oral argument by counsel for the ERCB, the time-tested and conventional challenge to an administrative tribunal's decision is judicial review, not an action against the administrative tribunal.

[74] I see commonalities between statutory immunity provisions and limitation periods of general application that apply to *Charter* claims for personal remedies. Both are statutory bars to claims that may otherwise have merit. In *Prete*, the Ontario Court of Appeal concluded that both the limitation period and the statutory immunity provisions in the *Proceedings Against the Crown Act* could not infringe upon the plaintiff's ability to seek a remedy under the *Charter*. Justice Carthy, for the majority, noted:

> Put in this *Charter* context, I see no valid comparison between procedural rules of court and statutory limitation periods. I do see identity between statutes granting immunity and those imposing limitation periods after the time when the limitation arises: para 14.

[75] Where a party seeks a general constitutional remedy, as opposed to a personal remedy, a statutory immunity clause will not apply. In the pre-*Charter* decision *Amax Potash Ltd v*

Saskatchewan, [1977] 2 SCR 576, the Supreme Court of Canada considered whether a statutory provision giving absolute immunity for government actions could be challenged as violating the Constitution. The Government of Saskatchewan sought to pass legislation imposing a tax on potash producers, who brought an action challenging the validity of the tax as beyond the powers of the Province. They sought a declaration of invalidity and repayment of all moneys that may be paid by them on account of the tax. Saskatchewan relied on a statutory immunity clause in *The Proceedings Against the Crown Act*, RSS 1965, c 98, s 5(7). Justice Dixon, for the Court, concluded that:

> ...s. 5(7) of *The Proceedings against the Crown Act* is *ultra vires* the Province of Saskatchewan in so far as it purports to bar the recovery of taxes paid under a statute or statutory provision which is beyond the legislative jurisdiction of the Legislature of Saskatchewan: at 594.

[76] The principle underlying the Court's decision is that the preservation of the Constitution is paramount. Justice Dixon cited earlier Supreme Court of Canada authority in *British Columbia Power Corporation Ltd v British Columbia Electric Co Ltd*, [1962] SCR 642 at 644:

> In a federal system, where legislative authority is divided, as are also the prerogatives of the Crown, as between the Dominion and the Provinces, it is my view that it is not open to the Crown, either in right of Canada or of a Province, to claim a Crown immunity based upon an interest in certain property, where its very interest in that property depends completely and solely on the validity of the legislation which it has itself passed, if there is a reasonable doubt as to whether such legislation is constitutionally valid. To permit it to do so would be to enable it, by the assertion of rights claimed under legislation which is beyond its powers, to achieve the same results as if the legislation were valid. ...

[77] This Court considered the constitutionality of a Crown immunity provision in *Alberta v Kingsway General Insurance Co*, 2005 ABQB 662, 53 Alta LR (4th) 147. In that case, the Government of Alberta passed legislation to freeze auto insurance premiums. Kingsway General Insurance Company ("Kingsway") commenced legal action against Alberta for damages and declaratory relief as a result of this legislation. Subsequently, the Government of Alberta passed further legislation explicitly naming Kingsway's lawsuit, extinguishing it without costs, and precluding similar litigation against Alberta. In response to Alberta's motion for summary judgment on the basis of the legislation extinguishing Kingsway's lawsuit, Kingsway sought a declaration that the legislation providing immunity to Alberta was *ultra vires* the government of Alberta, or otherwise unconstitutional.

[78] This Court considered whether the legislation extinguishing Kingsway's lawsuit was of no force and effect under section 52 of the *Constitution Act, 1982*, noting that "[o]ne of the Courts' most important roles in relation to the rule of law is to ensure that legislatures conform to the Constitution": para 62. This Court concluded (at para 67):

> Thus, characterization of legislation as a Crown immunity clause does not end the inquiry. Such a clause does not shield the Crown from constitutional challenges to the legislation, whether or not it purports on its face to do so. [...]

[79] In *Kingsway General*, this Court concluded the impugned legislation was not aimed at evading the Constitution, even assuming that Kingsway could succeed in its action for damages: para 84. This Court found that, in its essence, the impugned legislation barred a claim, not a litigant, and was not materially different from other limitations statutes or statutory immunity legislation: para 72. It targeted insurers, but treated them all equally: para 87. The impugned legislation was not *ultra vires* the Government of Alberta: para 160.

[80] The remedies sought in *Amax Potash* and *Kingsway General* were general; the relief sought was to strike or read down legislation providing immunity. The principle set out in those decisions that statutory immunity clauses cannot protect the government from constitutional challenges is the same approach as has been taken in respect of limitation periods. The question remains whether the same principle applies to when a plaintiff seeks damages or other personal remedies for a *Charter* breach.

[81] I cannot accede to the proposition that statutory immunity clauses in favour of government officials or tribunals have no application when a personal claim for damages for a *Charter* remedy is asserted. 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.

[82] I conclude that statutory immunity clauses apply to claims for personal remedies pursuant to the *Charter*. I reach this conclusion for two reasons. Firstly, it is my view that the reasons why limitation periods apply to claims for personal remedies under the *Charter* also apply to statutory immunity clauses because statutory immunity clauses and limitation periods are both legislated bars to what may otherwise be a meritorious claim.

[83] Secondly, there are strong policy reasons for the application of immunity clauses to claims for personal remedies under the *Charter*. Policy considerations are given effect when the merits of a claim for a *Charter* breach are examined. In my view, these policy considerations also apply when determining whether a statutory immunity clause applies.

[84] The Supreme Court of Canada established a four-step inquiry in awarding damages for a *Charter* breach in *Vancouver (City) v Ward*, 2010 SCC 27, [2010] 2 SCR 28. This case involved an award of damages for an unreasonable search and seizure. The Supreme Court of Canada held that "damages may be awarded for *Charter* breach under section 24(1) where appropriate and just": para 4. The four-step inquiry was summarized in paragraph 45:

> If the claimant establishes breach of his *Charter* rights and shows that an award of damages under s.24(1) of the *Charter* would serve a functional purpose, having regard to the objects of s.24(1) damages, and the state fails to negate that the

> award is "appropriate and just", the final step is to determine the appropriate amount of the damages.

[85] There is no comprehensive list of considerations as to what is "appropriate and just", or indeed, "inappropriate and unjust". Chief Justice McLachlin, for the Court, noted that:

> A complete catalogue of countervailing considerations remains to be developed as the law in this area matures. At this point, however, two considerations are apparent: the existence of alternative remedies and concerns for good governance: para 33.

[86] In discussing grounds of good governance that could negate the appropriateness of section 24(1) damages, McLachlin C.J. explained (at para 43):

> ...When appropriate, private law thresholds and defences may offer guidance in determining whether s.24(1) damages would be "appropriate and just". While the threshold for liability under the *Charter* must be distinct and autonomous from that developed under private law, the existing causes of action against state actors embody a certain amount of "practical wisdom" concerning the type of situation in which it is or is not appropriate to make an award of damages against the state. Similarly, it may be necessary for the court to consider the procedural requirements of alternative remedies. Procedural requirements associated with existing remedies are crafted to achieve a proper balance between public and private interests, and the underlying policy considerations of these requirements should not be negated by recourse to s.24(1) of the *Charter*. As stated earlier, s.24(1) operates concurrently with, and does not replace, the general law. These are complex matters which have not been explored on this appeal. I therefore leave the exact parameters of future defences to future cases.

[87] In *Ward*, the Supreme Court of Canada contemplated that there may be private law thresholds and defences that may negate awarding damages for a *Charter* breach in the interest of good governance. In my view, if parties seeking damages could circumvent a statutory immunity clause by alleging a *Charter* breach, such a breach would be alleged in litigation against the government wherever possible. This would lessen considerably the effectiveness of such statutory immunity clauses, and would undermine the ability of the Legislature or Parliament to balance public and private interests.

[88] Ernst seeks a personal remedy for a *Charter* breach against the ERCB. For the above reasons, I view section 43 of the *ERCA* as an absolute bar to the Ernst claims against the ERCB. Those claims are struck and, in the alternative, dismissed.

[89] As a final point on the constitutional issue, as was argued by counsel for the ERCB orally, if Ernst seeks as a remedy a declaration striking down section 43 of the *ERCA*, a Notice of Constitutional Question should be given to the Attorneys 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.

B. Ordering Particulars

[90] The ERCB requested in the alternative that particulars be ordered for paragraphs 27, 29, 31, 32, 45, 47, 51, and 52 of the Fresh Claim. I granted the application striking or dismissing Ernst's claims against the ERCB for negligence and for breach of her *Charter* rights. It is therefore unnecessary for me to rule on the ERCB's application for particulars.

C. Costs

[91] The ERCB application seeks costs against Ernst forthwith, in any event of the cause, for the April 26, 2012 application.

1. Position of the ERCB

[92] The main thrust of the ERCB's position is that it was a successful party at the application returnable April 26, 2012. It says that Madam Justice Veldhuis "expressed highly negative views regarding the then-existing Statement of Claim and ultimately directed a new Statement of Claim be filed": ERCB Written Brief, para 164. Further the ERCB alleges that Madam Justice Veldhuis directed Ernst file a new Statement of Claim "in order to rectify the fundamental flaws and improper context contained" in the previous Statement of Claim, resulting in the then-applications to strike never being heard: ERCB Written Brief, para 165.

2. Position of Ernst

[93] I cannot find either in the transcript of the oral argument nor in the written brief of Ernst that Ernst made any submissions on the issue of the costs of the April 26, 2012 application.

3. Decision

[94] The transcript of the April 26, 2012 proceedings is relatively short. The body of it contains 26 pages. After dealing with some preliminary matters, Madam Justice Veldhuis addressed counsel beginning at page 7 of the transcript. She had before her the second amended Statement of Claim filed February 7, 2012 and was dealing with three applications, one each from EnCana, the ERCB and Alberta. She indicated that both the ERCB and Alberta had requested that certain paragraphs or in the alternative the entirety of the Statement of Claim be struck or summary judgment given, or in the further alternative in the case of ERCB, costs by Ernst be provided. EnCana also asked for similar relief but in the alternative asked for an Order requiring the Plaintiff to issue a Fresh Statement of Claim.

[95] Madam Justice Veldhuis found that, clearly, a number of paragraphs in the second Amended Statement of Claim were improper in that they contained "inflammatory and inappropriate language in places". Further, some paragraphs were repetitive. She indicated that she regarded herself as having authority to order amendments pursuant to *ARC* Rule 3.68(1)(b) in the event a pleading was frivolous, irrelevant or improper and that "many paragraphs" in the second Amended Statement of Claim were improper. She concluded at page 11:

> It is my recommendation that this Statement of Claim return to the Plaintiff for redrafting in a manner that complies with the *Alberta Rules of Court* should the plaintiff wish to proceed with the matter.

[96] She then asked counsel for comments. Alberta's counsel indicated that her recommendation "made good sense". The ERCB counsel indicated he was "supportive". Ernst's counsel expressed "appreciation".

[97] This Court notes a number of things arising. First, as has often been said, costs are always in the discretion of the Court. Secondly, there is no finding of outrageous or egregious conduct on the part of Ernst. Thirdly, the concept that the applications of EnCana, ERCB and Alberta were "successful" on April 26, 2012 is inconsistent with what happened. What happened was that the Court on its own initiative, in trying to manage a case that is difficult to manage, recommended the issuance of a Fresh Claim before proceeding with applications to strike or for summary judgment, or, in the alternative, for particulars. It was the initiative to issue a Fresh Claim that was viewed as an important step by all towards solidifying, in an organized way, pleadings which could be dealt with in terms of either surviving applications for summary judgment or striking on the basis that they were not likely to be subject to further amendment.

[98] It is the view of this Court that if success were determined to be in favour of EnCana, the ERCB or Alberta on April 26, 2012, party-and-party costs would be awarded. This Court does not take that view. This Court takes the view that the briefs that were prepared for those applications, in terms of the law and analytical framework, involve the same concepts which were in front of this Court and which have just been adjudicated upon. Therefore, any costs that flow from the applications can be dealt with by this Court as costs of these applications. In short, I decline to award any costs for the April 26, 2012 applications because the resolution of the issues on that day were initiated by Madam Justice Veldhuis on her own motion, and were seemingly applauded by all counsel.

IV. Alberta's Application

A. Overview

[99] As stated earlier, Alberta has sought an Order from the Court striking certain paragraphs of the Fresh Claim or in the alternative, particulars and costs. I will deal with each, in turn.

[100] The paragraphs in the Fresh Claim sought to be struck by Alberta are as follows:

64. Alberta Environment's representations had the effect of, and were intended to, encourage and foster reliance on Alberta Environment by Ms. Ernst. In particular, Ms. Ernst relied on Alberta Environment to protect underground water supplies; to respond promptly and reasonably to any complaints raised by her or other landowners; and to undertake a prompt and adequate investigation into the causes of water contamination once identified.

65. By October 2004, Alberta Environment knew that EnCana was diverting fresh water from underground aquifers without the required diversion permits from Alberta Environment.

66. By mid 2005, Alberta Environment knew that a number of landowners had made complaints regarding suspected contamination of the Rosebud Aquifer potentially caused by oil and bas development. At that time, despite repeated complaints, Alberta Environment did not conduct an investigation or take any steps to respond to reported contamination of the Rosebud Aquifer.

67. In late 2005, Ms. Ernst contacted Alberta Environment to report concerns regarding her well water, and to register concerns regarding potential impacts on groundwater caused by EnCana's CBM Activities. Alberta Environment failed to take any action regarding Ms. Ernst's concerns at that time.

69. On March 3, 2006, several months after concerns were initially raised by Ms. Ernst, Alberta Environment began an investigation into possible contamination of numerous water wells in the Rosebud region, including the Ernst Well. Tests conducted on these water wells showed the presence of hazardous chemicals and petroleum pollutants in water drawn from the Rosebud Aquifer. These tests also indicated high concentrations of methane in water drawn from the Rosebud Aquifer.

70. Alberta Environment specifically tested the Ernst Water Well. Tests conducted on the Ernst Water Well revealed that Ms. Ernst's water contained very high and hazardous levels of methane. Alberta Environment tests also indicated that Ms. Ernst' well water was contaminated with F-2 hydrocarbons, 2-Propanol 2-Methyl and Bis (2-ethyhexyl) phalate; that levels of Strontium, Barium and Potassium in her water had doubled; and that her well water contained greatly elevated levels of Chromium.

72. Alberta Environment knew that contaminants found in Ms. Ernst's water and in water drawn from elsewhere in the Rosebud Aquifer were related to and indicative of contamination cause by oil and gas development.

74. Throughout the material time, Alberta Environment and its lead investigator, Mr. Kevin Pilger, dealt with Ms. Ernst in bad faith. In particular;

a. Mr. Pilger concluded, before any investigation had begun, that the water wells he was responsible for investigating were not impacted by CBM development;
b. Mr. Pilger repeatedly accused Ms. Ernst of being responsible for the contamination of her well water before conducting any investigations;
c. Mr. Pilger falsely and recklessly accused Ms. Ernst of fabricating and forging a hydrogeologist's report that indicated EnCana had fractured and perforated into the Rosebud Aquifer;
d. Alberta Environment stonewalled and otherwise blocked all of Ms. Ernst's attempts to gain access to relevant information regarding the contamination of her well and local CBM development; and
e. Alberta Environment shared information collected as part of the investigation with EnCana, while refusing to release this information to Ms. Ernst, her neighbours or to the general public.

75. In November 2007, almost two years after the original complaint, Alberta Environment contracted the Alberta Research Council to complete a "Scientific and Technical Review" of the information gathered regarding Ms. Ernst's complaints to determine possible causes of water contamination. Alberta Environment in fact prevented an adequate review from taking place by radically restricting the scope of the review by instructing the ARC to review only the limited information provided by Alberta Environment. As a result, the ARC review failed to consider relevant data and information as part of its review.

77. Despite knowledge of breaches of legal requirements under its jurisdiction at the EnCana Wells, despite continued serious water contamination, and despite significant and legitimate unanswered questions regarding CBM Activities at the EnCana Wells and potential impacts on the Rosebud Aquifer, Alberta Environment closed the investigation into Ms. Ernst's contaminated water on January 16, 2008, and stopped delivering safe, drinkable water to her home in April 2008.

79. Alberta Environment breached this duty, and continues to breach this duty, by negligently implementing Alberta Environment's own specific and published investigation and enforcement scheme. In particular, Alberta Environment:
    a. Conducted a negligent investigation into the contamination of the Ernst Water Well, as detailed above;
    b. Unduly and negligently restricted the scope of both the Alberta Environment investigation and the ARC review.

84. The actions of EnCana, the ERCB and Alberta Environment, as detailed above, amount to high-handed, malicious and oppressive behaviour that justifies punitive damages. In relation to the Defendant EnCana, it is appropriate, just and necessary for the Court to assess large punitive damages to act as a deterrent to offset the large financial gains that EnCana derived from reckless and destructive resource development practices in the Rosebud region.

85. In the alternative to the Plaintiff's claims for compensatory remedies from EnCana, the Plaintiff claims the restitutionary remedy of disgorgement based on the doctrine of 'waiver of tort'. As detailed above, EnCana's shallow and dangerous drilling of natural gas wells in the Rosebud area shows a cynical disregard for the environment and for the rights of the public and the Plaintiff. By negligently conducting CBM activities, including perforation and fracturing of coal seams at dangerously shallow depths at CBM wells located near the Plaintiff's home, EnCana gained access to natural gas that would have remained inaccessible but for its negligent conduct. The Plaintiff asserts that EnCana is liable to disgorge the profits gained through the sale of this wrongfully obtained natural gas.

B. Grounds Asserted by Alberta

[101] Alberta submits that their only issue is whether the paragraphs at issue in the Fresh Claim should be struck out on the grounds they are "frivolous, irrelevant or improper".

C. General Principles

[102] The *ARC* contain useful guidance with respect to the content of pleadings. As noted by Alberta, *ARC* Rule 13.6(1)(a) and *ARC* Rule 13.6(2)(a) require only relevant matters in terms of the facts upon which a party relies, but not the evidence to prove those facts and the pleading must be succinct. *ARC* Rule 13.6(3) requires a party to state any matter relied upon which may take another party by surprise.

[103] The *ARC* also contain an expressability for the Court to strike out any or all part of a claim in *ARC* Rule 3.68(1)(a) with one of the grounds being relied on by Alberta in *ARC* Rule 3.68(2)© that a commencement document is frivolous, irrelevant or improper. Further, *ARC*

Rule 3.68(3) prohibits any evidence being submitted on an application pursuant to Rule 3.68(2)(b).

[104] The case law relied on by Alberta includes *Donaldson v Farrell*, 2011 ABQB 11 at para 28; *Mikisew Cree First Nation v Canada* (1997), 214 AR 194 (QB); *K v EK*, 2004 ABQB 159, 362 AR 195; *AJG v Alberta*, 2006 ABQB 446, 402 AR 340 at paras 27 and 28.

[105] From these cases, Alberta says that pleadings are not intended to be prolix: *Donaldson* at para 28, and must not go beyond a summary of the facts or be argumentative. *AJG, Mikisew* and *K v EK* include examples of irrelevant and embarrassing pleadings, pleading evidence, argumentative statements, paragraphs that are redundant, a bare assertion of the legal right or the lack of a cause of action that does not exist at all.

[106] Ernst also cites *ARC* Rule 13.6(1)(a) and *ARC* Rule 13.6(2)(a). The cases relied on by Ernst to articulate the purpose of pleadings include *Touche Ross Ltd v McCardle* (1987), 66 Nfld & PEIR 257 (Sup Ct - Gen Div); *Guccione v Bell*, 1999 ABQB 219, 239 AR 277, aff'd 2001 ABCA 265, 299 AR 192; *Murphy v Kenting Drilling Co* (1996), 190 AR 77 (QB); *Donaldson*; *Hunt*; *Alberta Adolescent Recovery Centre*.

[107] The submissions of Ernst surrounding the case law include that essence of a properly drawn pleading is "clarity and disclosure": *Touche Ross* at para 4, that the burden on a party seeking to strike out pleadings is extremely onerous or high, and that it must be plain and obvious or beyond reasonable doubt that the facts as pleaded, which must be assumed to be true, do not disclose a reasonable cause of action: *Hunt* at paras 32-33; *Alberta Adolescent Recovery Centre* at para 29. Ernst further says that a Court must exercise caution in striking portions of a claim to the same extent as it would in striking the whole of the claim, and that for a pleading to be "frivolous" it must be asserted in bad faith or be hopeless: *Guccione* at paras 6-7; *Donaldson* at para 24; *Alberta Adolescent Recovery Centre* at para 28.

[108] Finally, Ernst admonishes the Court not to strike out portions of the claim where the matter is to go to trial in any event, on the basis a case should not be tried piecemeal: *Murphy* at paras 9-10.

[109] I find that the statements of the applicable principles by both parties are accurate in the context in which they are asserted. As is the case with so many other legal principles, the difficulty is not in stating the applicable principle, but rather, in applying it to the particular situation at hand.

D. Positions of the Parties

1. Alberta

[110] Alberta submits that the impugned paragraphs or portions thereof are frivolous, irrelevant and improper, in that they contain flaws falling into five distinct categories. Alberta submits that

Ernst pleads evidence, pleads argument, asserts irrelevant facts, statements or theories, involves non-parties, and is redundant and unnecessarily prolix.

[111] With respect to paragraph 64, Alberta's complaint is that it ought not to contain the words "or other land owners" because they are not parties to the action, and that the allegation unduly broadens the scope and puts Alberta in a position of having to respond to similar fact evidence. With respect to paragraph 65, Alberta complains that it is too general and that it should be confined to contamination of Ernst's water on Ernst's land. Further, Alberta submits that what Alberta Environment knew, in terms of diverting water from underground aquifers, was irrelevant.

[112] Alberta's complaint about paragraph 66 is also that it refers to "a number of land owners" and contamination of the "Rosebud Aquifer", rather than being restricted to the Ernst water contamination. Alberta also submits that the phrases "suspected contamination" and "potentially caused by oil and gas development" are speculative and increase the scope of questioning.

[113] In paragraph 67, Alberta says that the reference to "potential impacts on ground water" caused by EnCana's CBM Activity is irrelevant to the Ernst claim that her water from her well was contaminated.

[114] In paragraph 69, Alberta asserts the reference to "numerous water wells" is improper and that the paragraph contains evidence, specifically the results of tests allegedly conducted by Alberta Environment. Further, it is alleged that the words "hazardous and pollutants" in paragraph 69 are argumentative and ought to be struck.

[115] In paragraph 70, Alberta complains that the words "very high and hazardous" and "contaminated" are argumentative and ought to be struck. Also, Alberta says the remainder of the paragraph referring to test results is evidence, and is therefore improper.

[116] In paragraph 72, Alberta submits that the words "and in water drawn from elsewhere on the Rosebud aquifer" refers to persons not parties, is argumentative because of the allegation that contamination was "related to" an indicative of contamination caused by oil and gas.

[117] Alberta takes issue with paragraph 74 because of the references to the "Rosebud Aquifer" and "water wells", as opposed to the Ernst well, and reference to a "local CBM development", "neighbours", and to the "general public".

[118] Paragraph 75, according to Alberta, contains evidence and argument, namely that the "Scientific and Technical Review" was flawed. That an adequate review was prevented from taking place is also argumentative.

[119] Alberta submits that paragraph 77 contains evidence and argument, and is embarrassing, and is thus improper. Alberta also says the reference to "significant and legitimate unanswered questions regarding CBM Activities at the EnCana wells" is irrelevant to whether or not Alberta

Environment owed a duty to the plaintiff, or, if such a duty was owed, whether Alberta Environment breached it.

[120] In paragraph 79, Alberta takes issue with the wording of paragraphs (d), (e), (f), (g), (h) and (i) and says that those allegations are irrelevant to the plaintiff's claim that the water on her land was contaminated. Alberta asserts that the plaintiff is asking this Court to embark on a public enquiry into the fracturing of coalbed methane in the oil and gas industry, and that this is improper.

[121] In paragraph 84, Alberta complains that the reference to "reckless and destructive resource development practices in the Rosebud region" puts the plaintiff in the position of appearing to have the ability to speak for, and litigate on behalf of, residents of the Rosebud region, as if it were a class action, which it is not. Alberta also says that the words "reckless and destructive resource development practice" are simply improper in a pleading and are conclusary, which determination must be made only following presentation of evidence argued.

[122] With respect to paragraph 85, pertaining on its face only to an allegation against EnCana, Alberta says that the Plaintiff is asking the Court to confirm that the drilling of natural gas wells in the Rosebud area is "dangerous" and "shows a cynical disregard for the environment and for the rights of the public and the plaintiff." Alberta repeats its allegations that these are conclusary determinations to be made only after a hearing, and that, in any event, Ernst doesn't have the ability to speak for, and litigate on behalf of, the Rosebud area residents.

2. Ernst

[123] Ernst states that Alberta's concerns are misplaced, insofar as they seem to be based on a pleading reference to complaints of other land owners regarding well water or the Rosebud aquifer generally, and thus, that these allegations are "akin to a class action" or somehow involve third parties. Ernst says that these facts are relevant to the knowledge of Alberta Environment about possible contamination of well water in Ernst's area and that these facts are highly relevant and necessary for a negligence claim against Alberta.

[124] Ernst submits that Alberta has engaged in a "formal and selective" approach in its approach to striking portions of the pleadings and states that it "is far from 'plain and obvious' that portions of the pleading should be struck, as frivolous, improper or irrelevant." Ernst asserts that words and phrases in a pleading must be read in context.

[125] Ernst also takes the position that there is a fundamental misunderstanding on the part of Alberta as to the nature of the negligence claims brought against it, in that there is no claim on behalf of any other party other than the plaintiff. She alleges that the knowledge and representations of Alberta Environment are relevant to the Ernst water well claim.

[126] Moreover, Ernst makes the point that it is necessary to set up facts in the pleading to establish a relationship of proximity between Ernst and Alberta, as well as the standard of care, causation, harm, damages, and that an important aspect of the elements of the tort include

Alberta's knowledge of complaints of suspected contamination of the Rosebud Aquifer. In addition, Ernst refers to representations made through Alberta Environment's "compliance assurance program" and states that these representations are facts relevant to the plaintiff's reliance on Alberta Environment.

[127] Ernst concludes her submissions by denying that the impugned paragraphs contain evidence or argument, and noting that editing the paragraphs would be contrary to the foundational *Rules of Court*. She refers to *ARC* Rule 1.2(2) in support of her submission that the *ARC* are intended to be used to identify the real issues in dispute and to facilitate the quickest means of resolving a claim at the least expense.

3. Analysis

[128] It is noteworthy that most, if not all, of Alberta's application is to strike only portions of paragraphs of the Fresh Claim. In *Donaldson* at paragraph 24, Graesser J. quotes from Stevenson and Côté, *Alberta Civil Procedure Handbook*, Vol 1 (Edmonton: Juriliber, 2010) at 3-100 and 3-101 with respect to *ARC* Rule 3.68. Justice Graesser comments that this commentary is "appropriate and consistent with the foundational rules". Excerpts from the commentary include these:

> More time and money is wasted over this rule and then any other. There are two reasons for that. The first reason is smaller. Even where there is some small hope of disposing of a suit summarily, it can almost always be done under R. 7.3 and usually more easily. ...
>
> The second reason is very large. Rarely is there a fatal flaw which falls within R. 3.68. Therefore, the most common misuse of R. 3.68 is trying to strike out claims which are only probably bad, not certainly bad.

[129] And further, the learned authors state with respect to sub-paragraphs (c) and (d) of *ARC* Rule 3.68(2)(c) and (d), that even when these attacks succeed, "they usually only remove or amend a short passage in the impugned pleading, and that does little to help the party attacking the pleading". What is not set forth in *Donaldson* from the same passage in the *Alberta Civil Procedure Handbook*, which this Court also would include, is this:

> Rule 3.68 offers no hope of having a claim (or defence) struck out for prolixity or bad drafting, unless the pleading is unintelligible and gibberish. Occasionally, it might be a way to achieve compulsory amendment. But why spend money to improve your opponent's pleadings? Why turn a Master or Judge into a free lawyer for your opponent?

[130] This Court agrees with the substance of most of Ernst's opposition to Alberta's motion. Were this a course on drafting a perfect pleading, it might be said that some of the impugned words or phrases ought to be excised or substituted. In my view, that is not the function of a Case Management Judge. Nothing of substance would turn on such a substitution at this point in

the development of the action. Tinkering with pleadings by a Court is not, in this case, useful to the advancement of the action, in accordance with the foundational rules. Therefore, Alberta's application is dismissed. As Alberta itself points out, some of its concerns about the allegations of Ernst may be cured by a request for particulars and the answers given or ordered accordingly. This is a method by which the scope or breadth of disclosure can be properly controlled.

V. Overall Conclusion

A. The ERCB Application

a. The ERCB application to strike Ernst's claims against the ERCB in negligence, namely paragraphs 24-41, is granted and the paragraphs are struck.

b. The *Charter* claim of Ernst against the ERCB is valid, subject to the application of the *Limitations Act* and section 43 of the *ERCA*.

c. The Ernst claims against the ERCB are in any event barred by section 43 of the *ERCA*.

B. Costs of the April 2012 Applications

[131] There will be no costs of the April 2012 applications.

C. Alberta's Application

[132] Alberta's application to strike paragraphs, or portions thereof, of the Fresh Claim is dismissed.

D. Costs

[133] Ernst will have her costs against Alberta for its application, in any event of the cause. The ERCB will have its costs of the application to strike or dismiss the Ernst claim against it. If the parties are unable to agree, they may make an appointment to speak to costs.

Heard on the 18th day of January, 2013.
Dated at Hanna/Drumheller, Alberta this 16th day of September, 2013.

Neil Wittmann
C.J.C.Q.B.A.

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