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COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE DRUMHELLER

PLAINTIFF JESSICA ERNST

DEFENDANTS ENCANA CORPORATION, ENERGY RESOURCES CONSERVATION  
BOARD and HER MAJESTY THE QUEEN IN RIGHT OF ALBERTADOCUMENT REPLY BRIEF OF ARGUMENT ON THE SPECIAL APPLICATION TO  
STRIKE PARAGRAPHS FROM THE FRESH STATEMENT OF CLAIM

JUSTICE CHAMBERS – JANUARY 18, 2013

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## **I. BACKGROUND**

1. The Reply Brief of the Applicant, Her Majesty the Queen in Right of Alberta ("the Province") is submitted in response to the Brief of Argument and Book of Authorities of the Respondent, Jessica Ernst ("the Plaintiff") filed on December 21, 2012.
2. The Province's Reply Brief is filed in accordance with the Order of the Honourable Madam Justice Veldhuis dated October 1, 2012.
3. The Province's Reply Brief addresses the Plaintiff's arguments opposing the Province's application to strike out specific paragraphs, or portions thereof of paragraphs 64, 65, 66, 67, 69, 70, 72, 74, 75, 77, 79, 84 and 85 of the Fresh Statement of Claim filed in the Judicial Centre of Drumheller Court File No. 0702-00120 on June 25, 2012 on the basis that the Plaintiff has failed to show any or any adequate reason why the Province should not be entitled to the Order it is seeking. In particular, the Province submits that the Plaintiff has failed to demonstrate why the evidence, argument and reference to third parties contained in the "Fresh Statement of Claim" is proper in a Statement of Claim.
4. With respect to paragraph 5 of the Plaintiff's Brief, the Province agrees that its application scheduled for January 18, 2013 does not seek to dismiss the Plaintiff's claim on the basis that it does not owe the Plaintiff a duty of care. The Province, however, does not agree that it owes the Plaintiff a duty of care. The Province submits that once the Plaintiff's claim is in its final proper form, it is at liberty to make whatever applications it deems appropriate and necessary, in accordance with the Rules of Court, including an application to dismiss the Plaintiff's claim on the basis that it does not owe the Plaintiff a duty of care. The Province submits that it is not required under the Rules of Court or pursuant to the Order of Justice Veldhuis dated October 1, 2012 to make an application to dismiss the Plaintiff's claims at this juncture simply because another Defendant, specifically the Energy Resources Conservation Board is making such an application on January 18, 2013.



## **II. OVERVIEW**

5. In addition to what is contained herein, the Province relies on the arguments set forth in its Brief filed on December 5, 2012 ("Province's Brief").
6. In specific response to the Plaintiff's Brief filed on December 21, 2012, the Province specifically disagrees with the Plaintiff's characterization of the defects contained in the Fresh Statement of Claim as "narrow", "formal" or "technical".
7. While the Province admits that following the Court's direction on April 26, 2012, the Plaintiff's fourth iteration of her claim, the "Fresh Statement of Claim" improves upon the Second Amended Statement of Claim, the Fresh Statement of Claim still contains *substantive improper* defects including but not limited to the pleading of evidence and argument and the inclusion of irrelevant and unnecessary third party claims and information.
8. The Province submits that the substantive improper defects contained in the Fresh Statement of Claim are specifically prohibited under the Alberta Rules of Court and case law previously cited in the Province's Brief.
9. As already outlined in the Province's Brief, it is plain and obvious that paragraphs 69, 70, 75, 77 contain evidence and those paragraphs or portions thereof, should be struck.
10. The Province's Reply Brief will specifically address the Plaintiff's argument in her Brief regarding information and allegations regarding third parties and the argumentative and speculative allegations within the Fresh Statement of Claim.

## **III. THIRD PARTY INFORMATION AND ALLEGATIONS**

11. As outlined in the Province's Brief, it is plain and obvious that paragraphs 64,

66, 69 and 72 contain unnecessary and improper third party information and allegations. The Province further submits that third party information is not proper in the Fresh Statement of Claim as it is not a class action.

12. The Plaintiff argues that information regarding “other landowners” is relevant to the Province’s knowledge of water contamination. With respect, “other landowners” concerns, complaints or information is irrelevant to the issues in this action, specifically whether:

- a. The Province owed a duty of care to the Plaintiff;
- b. The Province breached that duty of care to the Plaintiff; and
- c. The Plaintiff suffered damages as a result of the breach.

13. Not only is the issue regarding “other landowners” irrelevant, the Province submits that these allegations unduly complicate this action and confuse the issues. If these allegations are allowed to stand, the production of documentation and questioning will have almost no limitation as it could potentially be all landowners in the undefined Rosebud “area” in the vicinity of any oil and gas activity.

14. The removal of the allegations regarding third parties would have no impact on the Plaintiff’s claim against the Province. For example, if the words “other landowners” in paragraph 64 were struck out, the paragraph would look as follows:

“Alberta Environment’s representations had the effect of, and were intended to encourage and foster reliance on Alberta Environment by Mrs. 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.

15. On the contrary, if one leaves the words “other landowners” in paragraph 64, this allegation will necessitate production from the Province regarding “other landowners” who have not been identified and who are simply not relevant to whether Alberta Environment responded to the Plaintiff’s complaints regarding water contamination.
16. Similar examples of the Plaintiff’s attempt to broaden the scope of the Plaintiff’s allegations into something akin to a class action occur in paragraphs 69, 72, 77 and 79 of the Fresh Statement of Claim.
17. It is the Province’s submission that any information or allegations regarding “other landowners”, who are not parties to the action are *substantive* and *improper* defects in the Fresh Statement of Claim. These defects can be easily and efficiently excised from the Fresh Statement of Claim. For example:
  - Paragraph 69 states: *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 ...~~*
  - Paragraph 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 caused by oil and gas development.*
18. The Province submits that the excision of the information regarding third parties does not change the nature of the claim against the Province but has the clear benefit of identifying the real issues and the real parties in dispute and facilitating the quickest means of resolving the claim at the least expense.
19. Paragraph 66 should be struck in its entirety as it is completely irrelevant and improper to allege a “number of landowners” made complaints and Alberta

Environment did not conduct an investigation with respect to those landowners. While the Plaintiff argues that this paragraph (along with the other paragraphs that reference “other landowners” and other wells) are relevant because it goes to the knowledge and representations of Alberta Environment, with respect the Plaintiff’s argument is flawed. In determining whether or not the Province breached a duty of care to Ms. Ernst, it is not necessary for Ms. Ernst to prove that Alberta Environment knew of other complaints (if there were any) and it is not necessary for Ms. Ernst to prove that Alberta Environment did or did not investigate other landowners’ complaints (if there were any).

20. The Plaintiff argues at paragraphs 29 – 34 of her Brief that what matters is what Alberta Environment knew and any references to “other landowners” does not necessitate any inquiry into what actually happened to the water of neighbouring landowners. However, the Province submits that the subject of any complaint (if there were any) and the substance of any response (if there was any) with respect to “other landowners” is exactly the information that the Plaintiff is looking for. If it is not relevant to the Plaintiff what actually happened to the wells of other landowners, then how is it relevant to the Plaintiff’s claim against the Province?
21. Further, the allegations regarding “other landowners” are too vague to respond to adequately thereby making them virtually impossible to prove or disprove.
22. The Province submits that the Plaintiff is simply trying to cast negative aspersions with respect to the Province without any supporting facts such as dates, identity or location of the “other landowners” let alone types or causes of contamination (if any). This allegation is a true scattershot approach and will lead to an undefined fishing expedition.
23. Ultimately, the Province submits that if these allegations are allowed to remain in the Statement of Claim, a further application may be necessary to obtain particulars with respect to the “other landowners”.



24. While the Plaintiff argues at paragraphs 33 and 34 of her Brief that the allegations are “entirely focused on Alberta Environment and the Plaintiff”, a review of the Fresh Statement of Claim simply does not bear this out.
25. If the Plaintiff was solely focused on her own situation, specifically the alleged contamination of her water well, the Fresh Statement of Claim would not contain:
- references to Encana “diverting fresh water from underground aquifers without the required diversion permits” [paragraph 65];
  - “concerns regarding potential impacts on groundwater caused by Encana’s CBM activities” [paragraph 67];
  - “significant and legitimate unanswered questions regarding CBM activities at Encana wells” [paragraph 77];
  - “breaches of the Water Act including dewatering of the Rosebud aquifer without approval or a permit” [paragraph 79 (e)]; and
  - references to failure to investigate “long-term impacts of CBM activities on the Rosebud aquifer” [paragraph 79(i)].
26. These topics clearly venture into subjects that are not relevant to whether Ms. Ernst’s water is contaminated and whether the Province owes Ms. Ernst a duty of care and whether the Province breached that duty.

#### **IV. ARGUMENT AND SPECULATION**

27. It is plain and obvious that paragraphs 66, 69, 72, 74, 75, 77, 84 and 85 contain argument and those paragraphs, or portions thereof, should be struck.
28. The Province specifically disagrees with the Plaintiff’s characterization of words such as “hazardous”, “pollutants”, “contaminated” or “contamination” as descriptive. They are conclusions that are purposely plead to sensationalize the Plaintiff’s claim.

29. Paragraphs 84 and 85 are particularly egregious examples that seemingly ignore the comments made by Justice Veldhuis at the April 26, 2012 application in Drumheller.
30. It is the Province's submission that there is very little difference between alleging that there the Defendants are engaging in "risky and illegal CBM practices" as alleged in the Second Amended Statement of Claim versus the Defendants having a "reckless and destructive resource development practice" (paragraph 84 of the Fresh Statement of Claim) or engaging in "dangerous drilling" which "shows a cynical disregard for the environment" (paragraph 85 of the Fresh Statement of Claim). These allegations are clearly argumentative and improper in a pleading.

#### **V. FOUNDATIONAL RULES OF COURT**

31. With respect, the Plaintiff's argument at paragraphs 40-43 that editing the Statement of Claim would be contrary to the Foundational *Rules of Court* is misguided and contrary to common sense. The Province submits that there is no doubt that allowing a substantively flawed claim with vague allegations involving third parties to move forward will ultimately take more time and more resources. Accordingly, the Province submits that its application is both appropriate and appropriately timed.
32. The purpose of the foundational *Rules of Court* and the purpose of this application to ensure that the claim advanced by the Plaintiff can be fairly and justly resolved in a timely and cost-effective manner.
33. By allowing substantive improper defects to remain in the Fresh Statement of Claim, the Province submits that what could otherwise could be a relatively straightforward claim involving the alleged contamination of the Plaintiff's water could become unduly complicated and tremendously expensive for all parties.

**VI. RELIEF SOUGHT**

34. The Province respectfully requests an Order striking the paragraphs in issue in the Fresh Statement of Claim, or in the alternative, portions of the paragraphs in issue, so that a determination of this case on its merits can be fairly and justly resolved in or by a court process in a timely and cost-effective way.
35. The Province further requests costs of this application payable in any event of the cause.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 3<sup>rd</sup> day of January 2013.

**ALBERTA JUSTICE**

Per: 

NEIL R. BOYLE and NANCY A. McCURDY