In the Court of Appeal of Alberta

Citation: Ernst v Alberta (Energy Resources Conservation Board), 2014 ABCA 285

Date: 20140915
Docket: 1301-0346-AC
Registry: Calgary

Between:

Jessica Ernst

Appellant
(Plaintiff)

- and -

Energy Resources Conservation Board

Respondent
(Defendant)

- and -

EnCana Corporation and Her Majesty the Queen in Right of Alberta

Not Parties to the Appeal
(Defendants)

The Court:

The Honourable Mr. Justice Jean Côté
The Honourable Mr. Justice Jack Watson
The Honourable Mr. Justice Frans Slatter

Reasons for Judgment Reserved

Appeal from the Order by
The Honourable Chief Justice N.C. Wittmann
Dated the 13th day of November, 2013
Filed on the 2nd day of December, 2013
(2013 ABQB 537, Docket: 0701 00120)

Reasons for Judgment Reserved

The Court:

[1] The appellant appeals from the decision of a case management judge, who struck out certain portions of her claim because they failed to disclose a reasonable cause of action: ***Ernst v EnCana Corporation***, 2013 ABQB 537, 85 Alta LR (5th) 333.

Facts

[2] The appellant owns land near Rosebud, Alberta. She has sued the defendant EnCana Corporation for damage to her fresh water supply allegedly caused by EnCana activities, notably construction, drilling, hydraulic fracturing and related activities in the region. The respondent Energy Resources Conservation Board has regulatory jurisdiction over the activities of EnCana, and the appellant has sued it for what was summarized as "negligent administration of a regulatory regime" related to her claims against EnCana. The appellant also sued the defendant Alberta, alleging that it (through its department Alberta Environment and Sustainable Resource Development) owed her a duty to protect her water supply, and that it failed to respond adequately to her complaints about the activities of EnCana.

[3] In addition, the appellant alleges in her claim that she participated in many of the regulatory proceedings before the Board, and that she was a "vocal and effective critic" of the Board. She alleges that between November 24, 2005 to March 20, 2007 the Board's Compliance Branch refused to accept further communications from her. For this she advances a claim for damages for breach of her right to free expression under s. 2(b) of the *Canadian Charter of Rights and Freedoms*. The Board defends its actions as being a legitimate response to what it perceived to be threats in her communications.

[4] The Board applied to strike out certain portions of the appellant's pleadings for failing to disclose a reasonable cause of action. The case management judge found that the proposed negligence claim against the Board was unsupportable at law (reasons, paras. 17-30). He applied the three-part analysis relating to foreseeability, proximity, and policy considerations set out in cases such as ***Cooper v Hobart***, 2001 SCC 79, [2001] 3 SCR 537 and ***Fullowka v Pinkerton's of Canada Ltd***, 2010 SCC 5, [2010] 1 SCR 132. He found no private law duty of care was owed to the appellant by the Board.

[5] In the alternative, the case management judge found (reasons, paras. 52-8) that any claim against the Board was barred by s. 43 of the *Energy Resources Conservation Act*, RSA 2000, c. E-10:

> 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.

(That section was repealed and replaced by s. 27 of the *Responsible Energy Development Act*, SA 2012, c. R-17.3). This conclusion, if correct, meant that the duty of care analysis was largely moot.

[6] The Board argued that the *Charter* right of "freedom of expression" did not extend so far as to create a "right to an audience". It argued that the appellant's right to express her views was never impeded, and that it had no duty under the *Charter* to accommodate whatever form of expression the appellant chose. The chambers judge concluded, however, that the damages claim for breach of the *Charter* was not so unsustainable that it could be struck out summarily (reasons, paras. 31-43). In an application to strike pleadings the court could not analyze the validity of the Board's argument that it was responding to what appeared to be threats. However, he concluded that s. 43 also barred the appellant's *Charter* claim for a "personal remedy" of $50,000 (reasons, paras. 59-89).

[7] The appellant then launched this appeal. The Minister of Justice and Solicitor General of Alberta intervened on the appeal arguing that proper notice had not been given (under s. 24 of the *Judicature Act*, RSA 2000, c. J-2) of the constitutional challenge to s. 43 of the *Energy Resources Conservation Act*. The Minister of Justice took the position that the appellant was attempting to raise a new argument on appeal, and that Alberta had been denied the opportunity to call evidence on the topic.

Issues and Standard of Review

[8] The appellant Ernst raises only three discrete issues:

a) Do the pleadings disclose a private law duty of care on the Board?

b) Does s. 43 of the *Energy Resources Conservation Act* bar a claim for negligent omissions?

c) Can s. 43 of the *Energy Resources Conservation Act* bar a *Charter* claim?

[9] To clarify, there was no appeal or cross-appeal on a number of other issues, such as:

a) whether the pleadings disclose a sustainable claim for a breach of the *Charter*;

b) whether sufficient notice of the constitutional attack on s. 43 of the *Energy Resources Conservation Act* was given under s. 24 of the *Judicature Act*, RSA 2000, c. J-2;

c) whether the pleading against the defendant Alberta could be struck as being frivolous or vexatious;

d) whether the action had been brought within the time limits in the *Limitations Act*, RSA 2000, c. L-12.

It is not necessary to address these other issues in order to resolve this appeal.

[10] The standard of review for questions of law is correctness: ***Housen v Nikolaisen***, 2002 SCC 33 at para. 8, [2002] 2 SCR 235. The findings of fact of the trial judge will only be reversed on appeal if they disclose palpable and overriding error, even when the chambers judge heard no oral evidence: ***Housen*** at paras. 19, 24-25; ***Andrews v Coxe***, 2003 ABCA 52 at para. 16, 320 AR 258.

[11] Whether a pleading discloses a cause of action is a question of law that is reviewed for correctness: ***Housen*** at para. 8; ***O'Connor Associates Environmental Inc. v MEC OP LLC***, 2014 ABCA 140 at para. 11, 95 Alta LR (5th) 264. The application of the *Rules* to a particular set of facts is a mixed question of fact and law, and the standard of review is palpable and overriding error: ***Housen*** at para. 36. If the law is correctly stated, then to the extent that there is a discretion involved in the decision to strike, the decision must be reasonable: ***O'Connor Associates*** at para. 12.

[12] The interpretation of a statute is a question of law reviewed for correctness. The interpretation of the Constitution is a question of law reviewed for correctness, and its application to a fixed set of facts is also reviewed for correctness: ***Consolidated Fastfrate Inc. v Western Canada Council of Teamsters***, 2009 SCC 53 at para. 26, [2009] 3 SCR 407.

The Test for Striking a Claim

[13] Any pleading can be struck out under R. 3.68(2)(b) if it discloses no reasonable claim or defence to a claim. On such an application, no evidence is admitted, and the pleaded facts are presumed to be true: R. 3.68(3).

[14] The modern test for striking pleadings is to be found in ***R. v Imperial Tobacco Canada Limited***, 2011 SCC 42 at paras. 19-21, [2011] 3 SCR 45:

> The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.
>
> This promotes two goods -- efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless. The same applies to judges and juries, whose attention is focused where it should be -- on claims that have a reasonable chance of success. ...

> Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *McAlister (Donoghue) v. Stevenson*, [1932] A.C. 562 (U.K. H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1963] 2 All E.R. 575 (U.K. H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *McAlister (Donoghue) v. Stevenson*. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial. (emphasis added)

The test is therefore whether there is any reasonable prospect that the claim will succeed, erring on the side of generosity in permitting novel claims to proceed.

[15] The appellant relied on an earlier statement of the test in ***Hunt v Carey Canada Inc.***, [1990] 2 SCR 959. ***Hunt*** at p. 980 used a more emphatic statement of the test, being whether it was "plain and obvious" that the action is "certain to fail because it contains a radical defect". That statement can be understood having regard to the unusually complex factual and legal issues underlying the ***Hunt*** claim. In any event, the law has evolved over the last 24 years, and the present formulation of the test found in ***Imperial Tobacco*** is whether there is a reasonable prospect of the claim succeeding. It is particularly unhelpful to characterize the test as being whether it has been shown "beyond a reasonable doubt" that the plaintiff's claim will fail. The test of "beyond a reasonable doubt" is a factual and evidentiary test that is unsuited to determining questions of law, and in any event it is inapplicable in civil proceedings: ***F.H. v McDougall***, 2008 SCC 53 at para. 49, [2008] 3 SCR 41.

The Cause of Action in Negligence

[16] In a long line of cases starting with ***Cooper v Hobart***, the Supreme Court has established a test for determining whether a regulator owes a private law duty of care to plaintiffs who might be damaged by activities of regulated parties. Generally speaking, there is insufficient foreseeability and proximity to establish a private law duty of care in these situations. The regulatory duties involved are owed to the public, not any individual. There are also strong policy considerations against finding regulators essentially to be insurers of last resort for everything that happens in a

regulated industry. The only anomaly is ***Fullowka***, in which sufficient proximity was found between injured mineworkers and mine safety inspectors.

[17] The numerous authoritative decisions in this area disclose a number of reasons why a duty of care is not generally placed on a regulator:

a) Policy decisions should not readily be questioned by subjecting them to a tort analysis, and the distinction between policy and operating decisions is difficult to make: ***Imperial Tobacco*** at paras. 86-90.

b) Were the law to impose a duty of care, very difficult issues then arise as to how one decides the standard of care to be applied. Exactly "how much regulation" satisfies the duty? See ***Fullowka*** at para. 89.

c) All regulators have public duties owed to the community at large, so recognizing private law duties may place the regulator in a conflict: ***Syl Apps Secure Treatment Centre v B.D.***, 2007 SCC 38 at paras. 28, 41, 49, [2007] 3 SCR 83; ***783783 Alberta Ltd. v Canada***, 2010 ABCA 226 at paras. 44-6, 482 AR 136.

d) The source of the supposed private law duty is a purely statutory obligation to perform a public duty, but the law is clear that a breach of a statute is not *per se* negligence: ***Canada (A.G.) v TeleZone Inc.***, 2010 SCC 62 at paras. 28-9, [2010] 3 SCR 585.

e) Because of the large number of persons that may be affected by the decision of a regulator, ". . . the fear of virtually unlimited exposure of the government to private claims, which may tax public resources and chill government intervention" are particularly acute: ***Alberta v Elder Advocates of Alberta Society***, 2011 SCC 24 at para. 74, [2011] 2 SCR 261.

f) It is primarily the function of the Legislature to determine the scope of civil liability. Where a regulatory statute provides a number of administrative and quasi-criminal remedies, but does not provide for any civil remedies, that strongly indicates that the statute contemplates no private civil duty. In that regard the *Energy Resources Conservation Act* can be compared with provisions (like Part 17 of the *Securities Act*, RSA 2000, c. S-4) which do contemplate civil remedies. Further, the very existence of s. 43 preludes any inference that the statute contemplates a private law duty of care: ***Edwards v Law Society of Upper Canada***, 2001 SCC 80 at paras. 16-7, [2001] 3 SCR 562. If the *Energy Resources Conservation Act* had contemplated a civil duty, it would undoubtedly have put the duty on EnCana, the regulated person who allegedly caused the damage in issue. The common law should not relocate the obvious target of liability.

g) To the extent that administrative tribunals perform judicial or quasi-judicial functions, it is contrary to long standing common law traditions to expose them, as decision-makers, to personal liability for their decisions: ***Welbridge Holdings Ltd. v***

> ***Greater Winnipeg***, [1971] SCR 957 at pp. 968-9; ***Slansky v Canada (A.G.)***, 2013 FCA 199 at paras. 135-7, 364 DLR (4th) 112; ***Butz v Economou***, 438 US 478 (1978) at pp. 508 ff. Exposing tribunal members to personal liability also undermines the testimonial immunity which they have traditionally enjoyed with respect to their decision making process: ***Ellis-Don Ltd v Ontario (Labour Relations Board)***, 2001 SCC 4 at paras. 36, 52, [2001] 1 SCR 221.

Many of these considerations are at play in this appeal.

[18] Forcing the Board to consider the extent to which it must balance the interests of specific individuals while attempting to regulate in the overall public interest would be unworkable in fact and bad policy in law. Recognizing any such private duty would distract the Board from its general duty to protect the public, as well as its duty to deal fairly with participants in the regulated industry. Any such individualized duty of care would plainly involve indeterminate liability, and would undermine the Board's ability to effectively address the general public obligations placed on it under its controlling legislative scheme.

[19] The case management judge correctly applied the test for determining whether the Board owed a private law duty of care to the appellant. No error has been shown in the decision to strike out these portions of the pleadings.

The Immunity Clause: Section 43

[20] The Board argued in the alternative that even if there was a private law duty of care, any action was foreclosed by s. 43. The appellant replies that s. 43 does not cover her claim, because it protects the Board only from claims arising from "any act or thing done". She argues that the section does not cover "omissions", something specifically mentioned in the new s. 27 of the *Responsible Energy Development Act*.

[21] The case management judge correctly concluded that such a narrow interpretation of the section is inconsistent with its broader purpose within the legislation. As he pointed out, the distinction between acts and omissions is, in any event, illusory:

> 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 failing 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. (emphasis added)

For example, the appellant pleads that the Board did not respond "reasonably" to EnCana's activities, and failed to conduct a "reasonable investigation". These pleadings can be read as alleging either a wrongful act, or an omission.

[22] The case management judge correctly concluded that any tort claim was barred by s. 43. Interpreting the section so that the Board and its members would only be protected for about half of their conduct would be absurd. The inclusion of "omissions" in the *Responsible Energy Development Act* should be seen as an effort to provide certainty in this area, and does not declare the previous state of the law: *Interpretation Act*, RSA 2000, c. I-8, s. 37.

The *Charter* Claim

[23] The case management judge declined to strike out the claim for damages as a result of the alleged breach of the *Charter* right to freedom of expression. He found that this area of the law was sufficiently novel and undeveloped to preclude striking out at this stage. He went on, however, to conclude that even if such a claim was potentially available, it too was barred by s. 43. The appellant argues that a provision like s. 43 cannot bar a claim under the *Canadian Charter of Rights and Freedoms*.

[24] The appellant's argument that s. 43 is inapplicable to *Charter* claims arises from the text of the *Charter*:

> 24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. . . .
>
> 52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

The argument is that s. 24 entitles a citizen to a remedy for a *Charter* breach that is "appropriate and just in the circumstances". Since s. 52 provides that any law that is inconsistent with the Constitution is of no force and effect, any limits on the remedies available under s. 24 are of no force and effect.

[25] These two sections of the Constitution should not, however, be read that literally. The law of Canada on the availability of specific remedies is well developed. While individual judges may have a wide discretion in selecting a remedy, that selection is guided by long-standing rules and

principles. The law has always recognized that to be "appropriate and just", remedies must be measured, limited, and principled.

[26] For example, every common law jurisdiction has one or more statutes of limitation. Those statutes have been studied by many law reform commissions, and while they have often recommended improvements, no such commission has ever suggested abolishing the laws of limitation because they are unjust or inappropriate. Statutes of limitation are reflections of important and valid public policy considerations. Thus, it has been recognized that limitation laws of general application apply to constitutional claims: ***Kingstreet Investments Ltd. v New Brunswick***, 2007 SCC 1 at paras. 59-60, [2007] 1 SCR 3; ***Ravndahl v Saskatchewan***, 2009 SCC 7 at paras. 16-7, [2009] 1 SCR 181; ***Manitoba Metis Federation v Canada (A.G.)***, 2013 SCC 14 at para. 134, [2013] 1 SCR 623; ***United States v Clintwood Elkhorn Mining Co.***, 553 U.S. 1 (2008) at p. 7. Limitations on the time to launch an appeal, or to seek judicial review, are virtually universal. If a citizen who experienced a *Charter* breach fails to seek a remedy within the specified time, the remedy is lost. Sometimes leave is required to launch an appeal. It cannot be suggested that those sorts of limits on remedies are unconstitutional.

[27] As a further example, s. 24 and s. 52 of the Constitution would not have the effect of abolishing long-standing common law limitations on the availability of remedies against public officials, such as the immunity extended to those performing quasi-judicial functions discussed *supra*, para. 17(g). Notice requirements such as those found in s. 24 of the *Judicature Act* are also legitimate limits on *Charter* remedies. Many common law causes of action are subject to preconditions of some kind (e.g., malice: ***Miazga v Kvello Estate***, 2009 SCC 51, [2009] 3 SCR 339), and failure to establish the precondition essentially bars any remedy. Even if that would bar an action for a *Charter* breach, the precondition would not offend s. 24 and s. 52 of the Constitution; any purported distinction between "liability" and "remedy" is illusory.

[28] In determining whether a *Charter* remedy is "appropriate and just" in the circumstances, individual judges, and the court system as a whole, will have regard to these traditional limits on remedies. The legislatures have a legitimate role in specifying the broad parameters of remedies that are available: ***Ontario v Criminal Lawyers' Association of Ontario***, 2013 SCC 43 at paras. 26-31, [2013] 3 SCR 3; ***Doucet-Boudreau v Nova Scotia (Minister of Education)***, 2003 SCC 62 at para. 56, [2003] 3 SCR 3. Having well established statutory rules about the availability of remedies is much more desirable than leaving the decision to the discretion of individual judges. Any such *ad hoc* regime would be so fraught with unpredictability as to be constitutionally undesirable. If the availability of a remedy were only known at the conclusion of a trial, it would defeat the whole point of protecting administrative tribunals from the distraction of litigation over their actions, and the consequent testimonial immunity.

[29] The law recognizes that moving from a *Charter* breach to a monetary damages remedy is not automatic or formalistic, but requires a careful analysis of whether that remedy is legitimate within the framework of a constitutional democracy, as one which vindicates the *Charter* right

through an appropriate invocation of the function and powers of a court: ***Vancouver (City) v Ward***, 2010 SCC 27 at para. 20, [2010] 2 SCR 28. As noted in ***Ward***:

> 33. However, even if the claimant establishes that damages are functionally justified, the state may establish that other considerations render s. 24(1) damages inappropriate or unjust. 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. . . .
>
> 40. The *Mackin* principle [*Mackin v New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 SCR 405] recognizes that the state must be afforded some immunity from liability in damages resulting from the conduct of certain functions that only the state can perform. Legislative and policy-making functions are one such area of state activity. The immunity is justified because the law does not wish to chill the exercise of policy-making discretion.

Protecting administrative tribunals and their members from liability for damages is constitutionally legitimate.

[30] Just as there is nothing illegitimate about time limits to seek constitutional remedies, so too there is nothing constitutionally illegitimate about provisions like s. 43:

(a) such provisions are general in nature, and not limited to *Charter* claims, nor impermissibly applied to select groups of litigants: ***Alexis v Toronto Police Service Board***, 2009 ONCA 847 at paras. 19-21, 100 OR (3d) 232;

(b) provisions immunizing decision makers from liability are not so uncommon or unusual in free and democratic societies as to render them constitutionally unreasonable: *supra*, para. 17(g);

(c) limits on remedies do not offend the rule of law, so long as there remain some effective avenues of redress: ***Ward*** at paras. 34-5, 43. The long standing remedy for improper administrative action has been judicial review. There is nothing in s. 43 that would have prevented the appellant from seeking an order in the nature of *mandamus* or *certiorari* to compel the Board to receive communications from her. Further, she could have appealed any decisions of the Board to this Court, with leave;

(d) remedial barriers that are well established in the common law have not been swept away by s. 52: ***Islamic Republic of Iran v Kazemi***, 2012 QCCA 1449 at paras. 118 to 120, 354 DLR (4th) 385, leave to appeal granted March 7, 2013, SCC #35034.

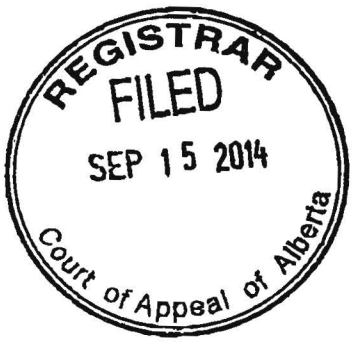
The conclusion of the case management judge that s. 43 bars the appellant's *Charter* claim (reasons, paras. 81-3) discloses no reviewable error.

Conclusion

[31] The appeal is dismissed.

Appeal heard on May 8, 2014

Reasons filed at Calgary, Alberta
this 15th day of September, 2014



Côté J.A.

Watson J.A.

Slatter J.A.

Appearances:

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for the Appellant

G. Solomon, Q.C. and C. Elliott
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L.H. Riczu
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