Court of Queen's Bench of Alberta

Citation: Ernst v EnCana Corporation, 2014 ABQB 672

Date: 20141107
Docket: 0702 00120
Registry: 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. Overview

[1] The Plaintiff, Jessica Ernst ["**Ernst**"], lives near Rosebud, Alberta. She brought an action against EnCana Corporation ["**EnCana**"], the Energy Resources Conservation Board [the "**ERCB**"] and Her Majesty the Queen in Right of Alberta ["**Alberta**"], claiming that EnCana contaminated her well water and the Rosebud aquifer, which is the source of fresh water for her home. Ernst claims EnCana caused this damage through contamination from hazardous and toxic chemicals used for hydraulic fracturing from 2001 to 2006. Her claim against EnCana includes negligence, nuisance, the rule in *Rylands v Fletcher*, and trespass.

[2] Ernst's claim against the ERCB and Alberta is that they failed to properly investigate and remediate the contamination.

[3] Ernst's claim against the ERCB is that it was negligent in administering its statutory regime, and failed to respond to her concerns about her well water. She also alleges a breach of her rights under 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, because the ERCB barred her from communicating with them through the usual public communication channels. In a decision dated September 16, 2013, Ernst's claims against the ERCB were struck and dismissed: 2013 ABQB 537 [the "**September 2013 Decision**"]. This decision was upheld by the Court of Appeal of Alberta: 2014 ABCA 285 [the "***Ernst v ERCB* Appeal**"].

[4] Ernst's claim against Alberta is specifically against Alberta Environment and Sustainable Resource Development, which operated as Alberta Environment during the material time ["**Alberta Environment**"]. In essence, Ernst alleges that Alberta Environment was negligent in its administration of the environmental regulatory regime. She alleges that Alberta Environment failed to properly monitor and regulate EnCana's activities, and conducted a negligent investigation into the contamination of her well water, even as land owners complained of suspected water contamination. In the **September 2013 Decision**, I dismissed Alberta's application to strike certain paragraphs of Ernst's Fresh Statement of Claim on the grounds that they were frivolous, irrelevant or improper.

[5] Alberta now brings this application to strike all paragraphs of the Fresh Statement of Claim containing allegations against it on the basis that it fails to disclose a reasonable cause of action. In the alternative, Alberta requests summary judgment dismissing the action as against it on the basis that there is no merit to Ernst's claims against it. Neither EnCana nor the ERCB participated in this application.

II. Facts

A. Procedural History

[6] Ernst originally commenced this action by Statement of Claim filed December 3, 2007, which was amended by Amended Statement of Claim filed April 21, 2011 and further amended by a Second Amended Statement of Claim filed February 7, 2012. Ultimately, Ernst filed a Fresh Statement of Claim [the "**Fresh Claim**"] on June 25, 2012. The Fresh Claim is the subject of the present application.

[7] There have already been several applications on the pleadings, one of which did not proceed because Ernst filed the Fresh Claim, and one of which resulted in the **September 2013 Decision**.

[8] As a result of the **September 2013 decision**, the claims against the ERCB were struck. The allegations in the Fresh Claim against EnCana and Alberta remain, subject to this decision in response to Alberta's application.

B. Background regarding Alberta Environment

[9] Alberta Environment is the provincial government ministry responsible for environmental protection. In part, it is responsible for overseeing development and its impact on water, including groundwater. Alberta Environment has statutory oversight and enforcement mechanisms for matters involving the environment, found in the ***Water Act***, RSA 2000, c W-3 [the "***Water Act***"] and the ***Environmental Protection and Enhancement Act***, RSA 2000, c E-12 [the "***EPEA***"].

[10] In the Fresh Claim, Ernst pleads, at para 61, that:

> In or before 2000, Alberta Environment established a detailed and specific "Compliance Assurance Program" with the stated goal of ensuring compliance with the laws, regulations and legal requirements under the jurisdiction of Alberta Environment. The Compliance Assurance Program included procedures for receiving and investigating public complaints; for conducting inspections of alleged breaches of legal requirements; and for conducting enforcement procedures to ensure appropriate enforcement and remedial action when noncompliance occurred. The Compliance Assurance Program was operationalized through the Regional Services Division of Alberta Environment. The compliance branch of Alberta Environment included inspectors and investigators who were responsible for, among other things, investigating specific complaints made by the public.

[11] Ernst alleges that, between February 2006 and April 2008, Alberta Environment staff and provincial government ministers made specific representations to her regarding her concerns about contamination of her well water: Fresh Claim, para 63; that Alberta Environment received individual complaints regarding possible contamination of numerous water wells, including Ernst's well: Fresh Claim, paras 66-67; and that Alberta Environment conducted tests specifically on Ernst's well: Fresh Claim, para 69.

[12] Ernst further alleges that in November 2007, Alberta Environment contracted the Alberta Research Council to review the information gathered regarding Ernst's complaints to determine possible causes of water contamination: Fresh Claim, para 75; and that ultimately, Alberta Environment closed the investigation into Ernst's water well in January 2008, and stopped delivering water to her home in April 2008: Fresh Claim, para 77.

C. This Application

[13] Alberta applies once again to strike portions of the Fresh Claim, submitting that paragraphs 59-84 and 88 fail to disclose a reasonable cause of action. Paragraphs 64-67, 69-70, 72, 74-75, 77, 79 and 84 were also the subject of Alberta's previous application to strike that I dismissed for the reasons set out in the **September 2013 Decision**.

[14] The paragraphs in the Fresh Claim that Alberta seeks to strike relate to allegations of negligent administration of a regulatory regime and to the relief sought, including damages. Paragraphs 59-84 and 88 are set out in **Appendix A** attached to this decision. Alberta argues Ernst has no reasonable claim against it because: (a) Alberta does not owe a private duty of care to Ernst; and, (b) Alberta has statutory immunity as a result of provisions in the ***Water Act*** and the ***EPEA***.

[15] In the alternative, Alberta seeks summary judgment dismissing the action as against it on the basis that it is plain and obvious that Ernst's claim has no merit.

[16] Ernst resists Alberta's application on the basis that: (a) Alberta's application to strike is its third attack on the pleadings, and is therefore an abuse of process; (b) both the application to strike portions of the Fresh Claim and for summary judgment dismissing the action must fail, as it is not plain and obvious that Alberta cannot owe a duty of care to Ernst; and, (c) Alberta does not have statutory immunity for acts taken in bad faith.

III. Issues

[17] The issues for determination on this Application are:

1. Do the impugned paragraphs in the Fresh Claim disclose no reasonable claim, and therefore should they be struck? In particular:

   i. Is this second Application to Strike an abuse of process?

   ii. Does Alberta owe Ernst a private duty of care, failing which the claim against Alberta should be struck?

   iii. Does Alberta benefit from a statutory immunity clause that would result in the claim against it being struck?

2. Alternatively, should summary judgment be granted dismissing the action as against Alberta? Specifically:

   i. Is it necessary for Alberta to file affidavit evidence on a motion for summary judgment?

   ii. Is this a proper application for summary judgment, or has Alberta mischaracterized what is actually an Application to Strike?

   iii. Does Alberta satisfy the test for summary judgment?

IV. Analysis and Decision

A. Striking Portions of Fresh Claim

[18] As stated earlier, Ernst's claims against Alberta are set out in paragraphs 59-84 and 88 of the Fresh Claim, and are reproduced in **Appendix A** to this decision. It is these paragraphs that Alberta seeks to have struck, which would result in no further claim against it. These paragraphs may be paraphrased and summarized as follows:

1. Alberta's response to complaints by the Plaintiff and a "number of landowners" about suspected contamination caused by oil and gas development was not timely;

2. Tests conducted by Alberta on water wells in the Rosebud region, including on Ernst's property, showed the presence of hazardous chemicals and pollutants, including a high concentration of methane;

3. Alberta was aware that contamination in the Rosebud region, including on Ernst's property, was as a result of oil and gas development;

4. Alberta's investigations were conducted negligently and in bad faith;

5. Alberta restricted the scope of a study it contracted from the Alberta Research Council, and then negligently and unreasonably relied upon the results;

6. Subsequent to the Alberta Research Council study, Alberta closed its investigation and discontinued Ernst's supply of fresh water;

7. Alberta failed to report breaches of the ***Water Act*** and the ***EPEA*** to the Compliance Manager; and,

8. Alberta failed to take any enforcement steps against EnCana.

[19] The other paragraphs Alberta seeks to strike, paragraphs 81-84 and 88 of the Fresh Claim, relate to the damages claimed as a result of Alberta's alleged negligence. Alberta argues that there is no reasonable claim against it, as it does not owe Ernst a private duty of care. Further, Alberta submits that it has statutory immunity from Ernst's claims.

i. Abuse of process

[20] As a preliminary issue, Ernst argues that Alberta's application is an abuse of process.

[21] This is the second application brought by Alberta to strike portions of the Fresh Claim, and the third time Alberta has challenged Ernst's pleading. The first application was brought pursuant to Rule 3.68(2)(c) and (d) to strike certain allegations on the basis that they were frivolous, irrelevant or improper, or constituted an abuse of process. I dismissed that application for the reasons set out in the **September 2013 Decision**. The present application is brought pursuant to Rule 3.68(2)(b) to strike the claim against Alberta in its entirety on the basis that the Fresh Claim discloses no reasonable claim.

[22] There is no absolute rule governing the order in which a party may attack the opposing party's pleadings. That said, it is usually most convenient to bring all attacks at the same time, and failure to do so may be the subject of a costs award: ***Alexander v Pacific Trans-Ocean Resources Ltd***, [1993] AJ No 142 (CA) at para 7.

[23] I agree with Ernst's submission that multiple attacks on the same pleading should be discouraged. At the same time, I acknowledge that there may be circumstances where there is an explanation for multiple attacks on a pleading. A meritorious application to strike a pleading should not be rejected simply because another application for similar relief has already been brought. In this case, I find it significant that Alberta's applications to strike portions of the Fresh Claim do not seek to strike identical portions of the Fresh Claim, and are brought pursuant to different subsections of Rule 3.68(2). I therefore find this second application attacking Ernst's Fresh Claim is not an abuse of process. However, I will consider whether this application could have been brought as part of Alberta's first application when deciding on costs of this application.

ii. The Test on an Application to Strike

[24] Rule 3.68 of the ***Alberta Rules of Court***, Alta Reg 124/2010 ["***ARC***"] sets out options for this Court to deal with significant deficiencies in statements of claim. It provides, in part:

> 3.68 (1) If the circumstances warrant and a condition under subrule (2) applies, the Court may order one or more of the following:
>
> (a) that all or any part of a claim or defence be struck out;

> ...
>
> (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;
>
> ...

[25] The purpose and intention of the ***ARC*** 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": ***ARC*** 1.2(1). Alberta submits that one of the purposes of Rule 1.2 is to ensure that a defendant is not subjected to needless litigation where there is a process that could make that determination. An application to strike portions of a statement of claim may, if successful or if it results in the clarification of a claim or defence, be a cost-effective way of proceeding. More often, however, it causes the parties to incur additional costs and delays the proceedings. Graesser J. commented on this in ***Donaldson v Farrell***, 2011 ABQB 11 [***"Donaldson"***], where he considered an application to strike a statement of claim on the basis that it was an abuse of process and did not disclose a cause of action. He struck portions of the statement of claim, but did not strike it in its entirety. In discussing Rule 3.68, Graesser J. noted at para 24:

> The commentary in W.A. Stevenson's and J.E. Côté's *Alberta Civil Procedure Handbook* (Edmonton: 2010, vol.1) at p. 3-100 & 3-101 on Rule 3.68 (3) is appropriate and consistent with the foundational rules:
>
> > More time and money is wasted over this Rule than 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 grounds for the two Rules are very different, but almost any fatal flaw in an opponent's pleading would also give ground for summary judgment under R. 7.3.
> >
> > 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.
> >
> > Aside from rare cases of true abuse of process, the only other paragraph of R. 3.68(2) offering any real hope is (b), disclosing no cause of action (if the statement of claim is under attack), or disclosing no ground of defence (if the statement of defence is). Paragraph (c) is not really an independent ground of attack, because it is probably impossible to have any relevant pleading disclosing a cause of action (or defence) which would fit within (c). What is more, even when attacks under (c) or (d) 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.
> >
> > There are some rare types of abuse of process discussed below, falling under para. (d) of R. 3.68(2). Sometimes a motion to strike

> out a statement of claim is based on it being frivolous, vexatious, embarrassing or an abuse of process, rather than on absence of cause of action. Nevertheless the plaintiff can still plead anything arguably relevant, and the court should still be cautious and only strike out in a clear case.

[26] In ***Olson Lemons LLP v Kearl***, 2012 ABQB 95, I noted, at para 13:

> The new ARC have not changed the test articulated for striking out a claim in the cases decided pursuant to the old ARC: *Donaldson v. Farrell*, 2011 ABQB 11 (Alta. Q.B.) at para. 30. In the *Alberta Civil Procedure Handbook*, 2011, Volume 1, Stevenson and Côté (Jubiler), it is stated at 3-97, with respect to the striking out rule that "more time and money is wasted over this rule than any other". The text goes on to state that ... "the most common misuse of ARC 3.68 is trying to strike out claims which are only probably bad, not certainly bad".

[27] The relief sought by Alberta is to have the entire claim struck as against it. In their written submissions, the parties both argued that the test for striking an entire claim is whether it is plain and obvious or beyond reasonable doubt that the claim cannot succeed: ***Donaldson*** at para 30; ***Alberta Adolescent Recovery Centre v Canadian Broadcasting Corp***, 2012 ABQB 48, 541 AR1 at para 25; ***Tottrup v Alberta (Minister of Environment)***, 2000 ABCA 121, 255 AR 204 at paras 7-9.

[28] Alberta also relies on the Supreme Court of Canada's decision in ***R v Imperial Tobacco***, 2011 SCC 42, [2011] 3 SCR 45, where the Court considered a motion to strike claims brought pursuant to the British Columbia *Supreme Court Rules*, and reiterated the test at para 17:

> A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial. ...

[29] The Court of Appeal of Alberta has very recently stated that the test has evolved from a determination as to whether it is "plain and obvious" that the claim is "certain to fail because it contains a radical defect", and further noted that a test of "beyond a reasonable doubt" is inapplicable in civil proceedings: ***Ernst v ERCB*** **Appeal** at paras 14-15. The applicable test is explained by the Court of Appeal at paras 13-15, as follows:

> 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.

[30] I must determine, reading the Fresh Claim generously and taking the alleged facts as true, whether there is any reasonable prospect that Ernst's claim will succeed. This test is applied below.

iii. Duty of Care

a. Legal Principles

[31] There is a distinction between public duties of care owed to the public at large, and private duties of care owed to individuals. In this case, Ernst alleges Alberta was negligent in its actions relating to her well water and, more generally, in respect of the Rosebud aquifer. In order to establish negligence, it is necessary for her to prove that Alberta owes her a private duty of care.

[32] Alberta argues that it owes Ernst no private duty of care; its duties are public duties. Alberta states that as the claims against it are in negligence, there can be no cause of action if there is no duty of care; that in the result, Ernst's claim cannot succeed and should be struck.

[33] Ernst submits that Alberta's position is overbroad. She argues that a government can owe a private duty of care in some circumstances. Further, Ernst argues that there are many circumstances where courts have found governments to owe a private duty of care to an individual, even where public duties are also owed.

[34] In the **September 2013 Decision**, I set out the approach for assessing whether to impose a duty of care on a public authority at paragraphs 20 to 26. The Supreme Court of Canada discussed the approach in ***Fullowka v Pinkerton's of Canada Ltd***, 2010 SCC 5, [2010] 1 SCR 132 ["***Fullowka***"], at para 18:

> ...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. ... The analysis must focus specifically on the relationships in issue, as there are particular considerations relating to foreseeability, proximity and policy in each... . [citations omitted]

[35] The two-part test outlined in ***Fullowka*** was originally set out by Lord Wilberforce in the House of Lords decision of ***Anns v Merton London Borough Council***, [1977] 2 All ER 118, [1977] UKHL 4, [1978] AC 728 (UK HL) ["***Anns***"], relied upon by the Supreme Court of Canada in ***City of Kamloops v Nielsen***, [1984] 2 SCR 2 ["***Kamloops***"]. It was subsequently considered in ***Cooper v Hobart***, 2001 SCC 79, [2001] 3 SCR 537 ["***Cooper***"] and ***Edwards v Law Society of Upper Canada***, 2001 SCC 80, [2001] 3 SCR 562 ["***Edwards***"].

[36] The Supreme Court of Canada discussed the development of the *Anns* test in ***Edwards*** and ***Cooper***. In ***Edwards***, the *Anns* test was set out at para 9:

> At the first stage of the *Anns* test, the question is whether the circumstances disclose reasonably foreseeable harm and proximity sufficient to establish a *prima facie* duty of care. The focus at this stage is on factors arising from the relationship between the plaintiff and the defendant, including broad considerations of policy. The starting point for this analysis is to determine

> whether there are analogous categories of cases in which proximity has previously been recognized. If no such cases exist, the question then becomes whether a new duty of care should be recognized in the circumstances. Mere foreseeability is not enough to establish a *prima facie* duty of care. The plaintiff must also show proximity - that the defendant was in a close and direct relationship to him or her such that it is just to impose a duty of care in the circumstances. Factors giving rise to proximity must be grounded in the governing statute when there is one, as in the present case.

[37] In ***Cooper***, the *Anns* test was described in more detail at para 30:

> In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the *Anns* analysis is best understood as follows. At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. It may be, as the Privy Council suggests in *Yuen Kun Yeu* , that such considerations will not often prevail. However, we think it useful expressly to ask, before imposing a new duty of care, whether despite foreseeability and proximity of relationship, there are other policy reasons why the duty should not be imposed.

[38] The first question to ask is whether there is a reasonable prospect that a private duty of care is owed by Alberta Environment. This may be shown by an analogous category of cases where a private duty of care has been found. If not, the next question is whether a new duty of care could be recognized in this case, applying the *Anns* test as articulated in ***Cooper*** and ***Edwards***.

[39] Ernst argues that this case is analogous to cases alleging negligent investigation or negligent inspection by government actors or public authorities. In my view, this is an overly broad category to be analogous. While this case does involve allegations of negligent investigation and inspection, the nature of Alberta Environment and its statutory powers distinguish it from the public authorities and regulators in existing decisions. There are no decisions identified by the parties where Alberta Environment has been found to owe a private duty of care.

[40] It is therefore necessary to consider whether a duty of care could be recognized in this case. This requires a consideration of whether the circumstances alleged by Ernst could disclose reasonably foreseeable harm and proximity sufficient to establish a *prima facie* duty of care. If so, the second branch of the *Anns* test is whether there are any broad policy considerations that may negate a *prima facie* duty of care.

[41] In ***Cooper***, the Supreme Court of Canada discussed the first branch of the *Anns* test in paras 31-35:

> 31. On the first branch of the *Anns* test, reasonable foreseeability of the harm must be supplemented by proximity. The question is what is meant by proximity. Two things may be said. The first is that "proximity" is generally used in the authorities to characterize the type of relationship in which a duty of care may arise. The second is that sufficiently proximate relationships are identified through the use of categories. The categories are not closed and new categories of negligence may be introduced. But generally, proximity is established by reference to these categories. This provides certainty to the law of negligence, while still permitting it to evolve to meet the needs of new circumstances.
>
> 32. On the first point, it seems clear that the word "proximity" in connection with negligence has from the outset and throughout its history been used to describe the type of relationship in which a duty of care to guard against foreseeable negligence may be imposed. "Proximity" is the term used to describe the "close and direct" relationship that Lord Atkin described as necessary to grounding a duty of care in *McAlister (Donoghue) v. Stevenson*, *supra*, at pp. 580-81:
>
> > Who then, in law, is my neighbour? The answer seems to be — persons who <u>are so closely and directly affected</u> by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question.
> >
> > . . . . .
> >
> > I think that this sufficiently states the truth if <u>proximity</u> be not confined to mere physical proximity, but be used, as I think it was intended, to extend to <u>such close and direct relations</u> that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act. [Emphasis added.]
>
> 33. As this Court stated in *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.) at para. 24, *per* La Forest J.:
>
> > The label "proximity", as it was used by Lord Wilberforce in *Anns*, *supra*, was clearly intended to connote that the circumstances of the relationship inhering between the plaintiff and the defendant are of <u>such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs</u>. [Emphasis added.]
>
> 34. Defining the relationship may involve looking at expectations, representations, reliance, and the property or other interests involved. Essentially, these are factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair

having regard to that relationship to impose a duty of care in law upon the defendant.

35. The factors which may satisfy the requirement of proximity are diverse and depend on the circumstances of the case. One searches in vain for a single unifying characteristic. As stated by McLachlin J. (as she then was) in *Canadian National Railway v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021 (S.C.C.), at p. 1151: "[p]roximity may be usefully viewed, not so much as a test in itself, but as a broad concept which is capable of subsuming different categories of cases involving different factors" (cited with approval in *Hercules Managements*, *supra*, at para. 23). Lord Goff made the same point in *Davis v. Radcliffe*, [1990] 2 All E.R. 536 (England P.C.), at p. 540:

> ... it is not desirable, at least in the present stage of the development of the law, to attempt to state in broad general propositions the circumstances in which such proximity may or may not be held to exist. On the contrary, following the expression of opinion by Brennan J in *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 at 43-44, it is considered preferable that 'the law should develop categories of negligence incrementally and by analogy with established categories'.

[42] It is necessary to consider the relationship between the parties and determine whether it is the "type of relationship in which a duty of care to guard against foreseeable negligence may be imposed": ***Cooper*** at para 32. The first stage of the *Anns* test focuses on factors arising from the relationship between the parties, including broad questions of policy relating to their relationship: ***Cooper*** at para 30.

[43] If I find the first stage of the *Anns* test is satisfied, I must consider the second stage, whether there are residual policy considerations outside of the relationship between the parties that would negate the duty of care, described in ***Cooper*** at para 39:

> 39. The second step of *Anns* generally arises only in cases where the duty of care asserted does not fall within a recognized category of recovery. Where it does, we may be satisfied that there are no overriding policy considerations that would negative the duty of care. In this sense, I agree with the Privy Council in *Yuen Kun Yeu* that the second stage of *Anns* will seldom arise and that questions of liability will be determined primarily by reference to established and analogous categories of recovery. However, where a duty of care in a novel situation is alleged, as here, we believe it necessary to consider both steps of the *Anns* test as discussed above. This ensures that before a duty of care is imposed in a new situation, not only are foreseeability and relational proximity present, but there are no broader considerations that would make imposition of a duty of care unwise.

[44] Generally, there is insufficient foreseeability and proximity to establish a private law duty of care between a regulator and an individual; the duties owed are to the public: ***Ernst v ERCB*** **Appeal** at para 16. There may be sufficient proximity between a regulator and an individual where the regulator embarks upon a course of conduct calling for operational decisions relating to that individual, as opposed to policy decisions where the duty is owed to the public at large.

Government actors are not liable in negligence for policy decisions, but may be liable for operational decisions about how a policy is executed: ***Cooper*** at para 38; ***Elder Advocates of Alberta Society v Alberta Health Services***, 2012 ABCA 355, 539 AR 251 at para 19.

[45] In ***Kamloops***, the Supreme Court of Canada considered whether a building inspector owed a duty of care to a subsequent purchaser of a house, and was liable in negligence. Writing for the majority, Wilson J. adopts the reasoning of Lambert J.A. in the Court of Appeal below regarding the distinction between public and private duties, and policy versus operational actions, at paras 65-66:

> 65. Lambert J.A., speaking for the Court of Appeal, found that the Building Inspector was under a public law duty to prevent the continuation of the construction of the building on structurally unsound foundations once he became aware that the foundations were structurally unsound. He was also under a public law duty to prevent the occupancy of the building by the Hughes or the plaintiff. He failed to discharge either of those public law duties. Lambert J.A. then went on to discuss the nature of the private law duty he was under. He said [at p. 319]:
>
> > I turn now to the private law duty. The conduct of the building inspector in response to the public law duties involved decisions on alternative courses of conduct which were, in my opinion, operational in character. The building was a danger to the occupant of the house and to adjoining property owners. It may have been a danger to anyone in the house. *Policy decisions could have confronted the city as to whether to prosecute or to seek an injunction. There may have been other policy choices. But a decision not to act at all, or a failure to decide to act, cannot be supported by any reasonable policy choice. That decision or failure was not 'within the limits of a discretion bona fide exercised', using again the words of Lord Wilberforce*. It was certainly open to the trial judge to reach that conclusion. Indeed, having regard to the evidence of Mr. Backmeyer, it was open to the trial judge to conclude that the decision not to act or the failure to decide to act, was influenced by the pressure exerted by Mr. Hughes Sr. in his capacity as alderman.
> >
> > I would follow the reasons of Lord Wilberforce in *Anns* in concluding that a private law duty was owed to Mr. Nielsen as the owner and occupier of the house at the time when the defective foundations first became apparent by causing actual subsidence and damage.
>
> (The italics are mine.)
>
> 66. It seems to me that Lambert J.A. was correct in concluding that the course of conduct open to the Building Inspector called for "operational" decisions. The essential question was what steps to take to enforce the provisions of the by-law in the circumstances that had arisen. He had a duty to enforce its provisions. He did not have a discretion whether to enforce them or not. He did, however, have a

discretion as to how to go about it. This may, therefore, be the kind of situation envisaged by Lord Wilberforce when, after discussing the distinction between policy decisions and operational decisions, he added the rider [*Anns*, at p. 754]:

> Although this distinction between the policy area and the operational area is convenient, and illuminating, it is probably a distinction of degree; many 'operational' powers or duties have in them some element of 'discretion.' It can safely be said that the more 'operational' a power or duty may be, the easier it is to superimpose upon it a common law duty of care.

It may be, for example, that although the Building Inspector had a duty to enforce the by-law, the lengths to which he should go in doing so involved policy considerations. The making of inspections, the issuance of stop orders and the withholding of occupancy permits may be one thing; resort to litigation, if this became necessary, may be quite another. Must the city enforce infractions by legal proceedings or does there come a point at which economic considerations, for example, enter in? And if so, how do you measure the "operational" against the "policy" content of the decision in order to decide whether it is more "operational" than "policy" or vice versa? Clearly this is a matter of very fine distinctions.

[46] There are numerous decisions involving public authorities or regulators where a private duty of care is alleged. In their submissions, Ernst and Alberta refer to a number of them in support of their respective positions. In her submissions, Ernst categorized them in terms of proximity of the relationship, and identified factors including whether the individual was known to the public authority, whether there was interaction between the individual and the authority, and whether specific representations were made by the authority to the individual. This analysis is of assistance in determining whether there is any reasonable prospect that Ernst can establish a private duty of care owed to her. Ernst's submissions may be summarized as follows, in order from least proximate to most proximate relationship between the public authority or regulator and the plaintiff:

(a) ***Eliopoulos Estate v Ontario (Minister of Health & Long Term Care)*** (2006), 82 OR (3d) 321 (CA) – The family of a man who died after contracting the West Nile Virus sued a government health authority for failing to prevent an outbreak of the virus. The plaintiff and defendant were unknown to each other and had no direct contact. The government health authority made no representations to the plaintiff. The Ontario Court of Appeal found there was no duty of care owed.

(b) ***Cooper*** (2001 SCC) – This was a class action brought against a statutory regulator for failing to oversee the conduct of an investment company. The plaintiffs were unknown to the defendant regulator, and no representations were made from the regulator to the plaintiffs. The Supreme Court of Canada found there was no duty of care owed.

(c) ***Edwards*** (2001 SCC) – This was a class action brought against the Law Society of Upper Canada (a statutory regulator) for failing to properly monitor a lawyer's trust account. The plaintiffs were unknown to the defendant, and the defendant made no

representations directly to the plaintiffs. The Supreme Court of Canada found there was no duty of care owed.

(d) ***Holtslag v Alberta***, 2006 ABCA 51, 380 AR 133, leave to appeal to SCC refused, 31411 (September 14, 2006) – This was a class action brought against the Director of Building Standards for negligent approval of a building product, and claimed Alberta was vicariously liable for the Director's actions. The plaintiffs were unknown to the defendant, and there was no direct contact between them. The defendant made no direct representations to the plaintiffs. At trial, the Alberta Court of Appeal found no duty of care was owed.

(e) ***Nette v Stiles***, 2010 ABQB 14, 489 AR 347 – This was a class action brought against a statutory regulator, the Alberta College and Association of Chiropractors. The plaintiffs and defendant were unknown to each other, had no direct interaction or contact, and no representations had been made by the defendant. On an application for certification, the Alberta Court of Queen's Bench found there was no duty of care owed.

(f) ***Taylor v Canada (Attorney General)***, 2012 ONCA 479, 111 OR (3d) 161 – This was a class action brought against Canada for alleged negligence against Health Canada in exercising its regulatory duties, and statutory powers and responsibilities. The representative plaintiff alleged Health Canada failed to protect the class from unsafe medical devices. The plaintiffs were unknown to the defendant and they had no direct contact, although the defendant made general public representations about the safety of the medical devices. On considering a stated case, the Ontario Court of Appeal concluded at para 122, that: "At this stage of the proceedings, it is not plain and obvious that the allegations in the Fresh Claim cannot support a finding that Health Canada owed the plaintiff a *prima facie* private law duty of care."

(g) ***Adams v Borell***, 2008 NBCA 62, 336 NBR (2d) 223 – The plaintiff sued a government agency for failure to engage in a timely investigation of the cause of a potato virus. The plaintiff and defendant were unknown to each other, and had no direct interaction or contact. However, the defendant was specifically engaged in an investigation of a particular potato virus that impacted farmers. The New Brunswick Court of Appeal found there was a duty of care owed by the government agency.

(h) ***Finney v Barreau du Quebec***, 2004 SCC 36, [2004] 2 SCR 17 – The plaintiff sued the Barreau du Quebec for its mishandling of a complaint against a specific lawyer. The plaintiff was known to the defendant as a complainant, although there was limited interaction between them. The defendant had knowledge of the specific lawyer's record of professional misconduct. The Supreme Court of Canada upheld the Court of Appeal's finding of liability, noting that the "Barreau must exercise judgment and care in performing its disciplinary functions" at para 44. Further:

> The decisions made by the Barreau were operational decisions and were made in a relationship of proximity with a clearly identified complainant, where the harm was foreseeable: at para 46.

(i) ***Fullowka*** (2010 SCC) – The plaintiffs were the surviving members of murdered miners who brought an action against the security firm hired by the mine and the

Crown for failure to close the mine despite clear knowledge of a dangerous situation. The murdered miners were known to the defendants, although there was no direct interaction between them. There were direct visits by inspectors to the mine. While there was a duty of care owed, the defendants met the requisite standard of care.

(j) ***Kamloops*** (1984 SCC) – The plaintiff sued a municipality for negligence of a municipal building inspector. The plaintiff was a subsequent purchaser of a home so had no direct contact with the defendant. However, the building inspector had visited the building site. The Supreme Court of Canada concluded there was a duty of care owed.

(k) ***River Valley Poultry Farm Ltd v Canada (Attorney General)***, 2009 ONCA 326 – The plaintiff egg producer sued Health Canada and the Canadian Food Inspection Agency regarding its investigation of whether the plaintiff's chicken flock was infected by salmonella. There was direct contact between the plaintiff and the defendants, including a direct visit to the farm and testing of the flock. No duty of care was found, as the relationship between the parties lacked sufficient proximity.

(l) ***Rothfield v Manolakos***, [1989] 2 SCR 1259 – The plaintiffs brought an action against a municipality for negligence of a building inspector. There was direct contact between the plaintiffs and defendants, and the building inspector visited the building site. A duty of care was found owing by the majority of the Supreme Court of Canada.

(m) ***Ingles v Tutkaluk Construction Ltd***, 2000 SCC 12, [2000] 1 SCR 298 – The plaintiff sued a municipality for negligence of a building inspector. As in the above building inspection cases, the plaintiff was known to the defendant, and had direct interaction. The building inspector visited the building site. Once the municipality chose to implement a policy decision and conduct an inspection, it owed a duty of care to all who reasonably might be injured as a result of its negligence.

(n) ***Hill v Hamilton-Wentworth Regional Police Services Board***, 2007 SCC 41, [2007] 3 SCR 129 – The plaintiff sued a police services board for negligent investigation when he was investigated, arrested, tried, wrongfully convicted but eventually acquitted of a criminal offence. The plaintiff was known to the defendant, and there was direct contact between the plaintiff and defendant. The majority of the Supreme Court of Canada held a duty of care was owed.

[47] Below, I consider whether there is any reasonable prospect that Ernst can establish that Alberta Environment owed her a duty of care, erring on the side of generosity in permitting a novel claim to proceed.

b. Application to the present case

[48] The first stage of the *Anns* test is whether there is reasonably foreseeable harm and a sufficiently proximate relationship to establish a *prima facie* duty of care. For the purpose of this application, I must determine whether there is any reasonable prospect that Ernst can establish that she had a close, direct relationship with Alberta Environment, and that the harm to her was reasonably foreseeable, such that a duty of care could be recognized.

[49] As stated earlier, the allegations of Ernst in the Fresh Claim must be accepted as proven facts for the purpose of this application. Therefore, I accept that Alberta Environment staff and

provincial government ministers made specific representations to Ernst regarding her concerns about contamination of her well water from February 2006 to April 2008: Fresh Claim, para 63. Alberta Environment attended at her property to conduct tests specifically on her well water: Fresh Claim, para 69. Alberta Environment received other individual complaints but did not investigate possible contamination of numerous water wells, including the Ernst well: Fresh Claim, paras 66-67. Alberta Environment contracted the Alberta Research Council in November 2007 to review the information gathered about Ernst's complaints, and ultimately closed their investigation into her well water in January 2008: Fresh Claim, paras 75, 77.

[50] The ERCB and Alberta had different roles with respect to Ernst. Her allegations against the ERCB, which have been struck, related to the ERCB's administration of its regulatory regime and its communications with her. Ernst's allegations against Alberta include complaints about how it administered its regulatory regime, as well as allegations of a negligent investigation and inadequate response to her complaints about contamination of her well water. These allegations concern direct contact between Alberta and Ernst, and assert specific representations were made to Ernst. These facts, if proven at trial, could establish a sufficiently proximate relationship between Ernst and Alberta Environment. Further, if the allegations that her well water and the Rosebud aquifer have been contaminated as a result of hydraulic fracturing, Ernst could establish foreseeable harm.

[51] The second stage of the *Anns* test is whether there are any residual policy considerations which would limit any *prima facie* duty of care ought to negate or limit that duty of care. The issue on this Application is whether there is any reasonable prospect that Ernst can overcome any residual policy considerations raised by Alberta.

[52] Alberta argues that a private duty of care in this case would conflict with the public interest inherent in the ***EPEA*** and the ***Water Act***. Further, Alberta argues that to find a duty of care in this case would expose Alberta to indeterminate liability.

[53] Ernst argues that these concerns are misplaced. She argues that her primary complaint is regarding the conduct of a specific investigation carried out by Alberta Environment on her specific water well. Further, she argues that this court should be circumspect in determining residual policy considerations at the pleadings stage.

[54] I agree with Ernst's submissions. First, if, at trial, a court finds Alberta owes Ernst a private duty of care, such a finding will be based on the facts and evidence of her specific case to establish proximity and foreseeability sufficient to establish a duty of care. In addition, a finding that there is a duty of care does not necessarily lead to liability – there must be a breach of that duty and the breach must cause the damage complained of.

[55] Second, it is difficult at the pleadings stage to fully evaluate the policy concerns identified by Alberta without evidence and before a statement of defence has been filed. The Ontario Court of Appeal considered this issue in ***Haskett v Trans Union of Canada Inc*** (2003), 63 OR (3d) 577 (CA), in the context of an appeal from an order striking out a statement of claim under Rule 21 of the Ontario *Rules of Civil Procedure*, RRO 1990, Reg 194, at para 24:

> On a Rule 21 motion, the court applies this two-stage analysis to the facts as pleaded in the Statement of Claim in order to determine not whether a duty of care will be recognized, but whether it is plain and obvious that no duty of care can be recognized. If it is not plain and obvious, then the action can proceed and

> the issue will be determined at a trial. See *Hunt v. T&N plc*, [1990] 2 S.C.R. 959 (S.C.C.), at 980. In that context, the court may well recognize potential policy concerns at the second stage but should be circumspect in using those policy concerns to determine, without a Statement of Defence and without any evidence, that it is plain and obvious that there is no cause of action: *Hughes v. Sunbeam Corp. (Canada)* (2002), 61 O.R. (3d) 433 (Ont. C.A.), at para 35, *Anger v. Berkshire Investment Group Inc.*, [2001] O.J. No. 379 (Ont. C.A.), at para 8.

[56] While this is a novel claim, I find there is a reasonable prospect Ernst will succeed in establishing that Alberta owed her a *prima facie* duty of care. The allegations plead in the Fresh Claim may establish, if proven at trial, that the relationship between Ernst and Alberta Environment was sufficiently close and direct, and that harm to Ernst was foreseeable. Further, at this stage in the proceedings, I am not satisfied that there are residual policy concerns that would negate a duty of care sufficient to defeat Ernst's claim. Alberta has not satisfied the test for striking the allegations against it in the Fresh Claim on the basis it cannot owe a private law duty to Ernst.

iv. Statutory Immunity

[57] Alberta also argues that its liability to Ernst is limited by the statutory provisions in the ***EPEA*** and the ***Water Act***. As a result, Alberta submits that Ernst's claim against it cannot succeed and should be struck on that basis.

[58] Section 220 of the ***EPEA*** provides:

> **Protection from liability**
> 220 No action for damages may be commenced against
>
> (a) a person who is an employee or agent of or is under contract to the Government or is an employee or agent of or is under contract to a Government agency,
>
> (b) a person who is designated as an inspector, investigator or analyst under section 25(3)(b), (c) or (d),
>
> (c) a person to whom the Minister has, under section 9 of the *Government Organization Act*, delegated a power, duty or function under this Act,
>
> (d) any person, including any employee of the Government, a Government agency, a local authority or the Government of Canada or an agency of that Government, to whom a power or duty has been delegated under section 17,
>
> (d.1) any person, including any employee of the Government, a Government agency, a local authority or the Government of Canada or an agency of that Government, to whom the administration of a provision of this Act has been transferred under section 18,
>
> (e) a member of the Environmental Appeals Board, or

> (f) a member, employee or agent of, or a person under contract to, a delegated authority referred to in section 37(d),
>
> for anything done or not done by that person in good faith while carrying out that person's duties or exercising that person's powers under this Act including, without limitation, any failure to do something when that person has discretionary authority to do something but does not do it.

[59] The above wording is the section that came into force on December 5, 2013. Section 220(c) is new, and (d) and (d.1) have been reworded. The changes do not make a difference to the section in issue in this matter.

[60] Section 157 of the ***Water Act*** provides:

> **Liability exemption**
> 157 No action for damages may be commenced against
> (a) a person who is an employee or agent of or is under contract to the Government or a Government agency,
> (b) an inspector, investigator or Director,
> (c) a person authorized in writing by the Director under section 95 or 119 or a person authorized by a Director or investigator under section 128,
> (d) a person to whom a delegation of a power, duty or function under this Act has been made by the Minister under section 9 of the *Government Organization Act*, or
> (e) a member of the Environmental Appeals Board,
> for anything done or not done by that inspector, investigator, Director, person or member in good faith while carrying out that inspector's, investigator's, Director's, person's or member's duties or exercising powers under this Act including, without limitation, any failure to do something when that inspector, investigator, Director, person or member has discretionary authority to do something but does not do it.

[61] Alberta submits that these statutory immunity clauses protect it and its employees, agents, and others from lawsuits by individuals affected by the administration of the legislation. Alberta argues that these statutory immunity clauses provide a clear indication by the legislature that it intended to exclude a private law duty.

[62] Ernst responds that both of the immunity clauses relied upon by Alberta only provide protection from liability for actions taken in good faith. Her claim is that Alberta was negligent, and acted in bad faith so the statutory immunity clauses do not apply.

[63] While that may be one approach for me to find that the statutory immunity clauses do not protect Alberta in this case, a plain reading of the sections is more significant. In ***R v Dudley***, 2008 ABCA 73, 425 AR 280, aff'd 2009 SCC 58, the Court of Appeal of Alberta applied a purposive approach to a statutory provision, at para 32:

> In determining Parliament's will in this respect a purposive or modern approach to statutory interpretation should be applied to s. 786(2) as described by Ruth

> Sullivan in her text *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, Ont.: Butterworths Canada Ltd., 2002) at 1:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[64] In ***Smorag v Nadeau Estate (Trustee of)***, 2008 ABQB 714, 461 AR 156, this Court considered a statutory immunity clause and its applicability to a guardian. The Court concluded that the clause in issue "should be read as setting out the extent of the guardian's authority, not as limiting a third party's right to sue the guardian for negligence": para 27. In reaching this conclusion, this Court noted, at para 28:

> It would take more express statutory language to limit or exclude a person's cause of action. Had the Legislature intended to limit the Guardian's liability as to third parties for decisions he or she makes, it could have said so expressly.

[65] I have reviewed the statutory immunity clauses relied on by Alberta with these principles in mind. Section 220 of the ***EPEA*** applies to various persons, members, employees and agents. Similarly, section 157 of the ***Water Act*** applies to certain persons, inspectors, investigators, Directors and members. Neither of the sections expressly includes the Province of Alberta or the government as a whole. These sections apply to individuals to protect them in carrying out their duties or exercising their powers under the respective Acts as long as they do so in good faith.

[66] The ordinary meaning of "person" is a natural person. This was set out by Gauthier J. in ***Minister of National Revenue v Stanchfield***, 2009 FC 99, at para 23, when discussing the meaning of "person" for the purpose of the ***Income Tax Act***, RSC 1985, c 1 (5th Supp):

> 23. When one uses simply the term "person", one necessarily includes the notion of the human being, as it is the very essence of the reality represented by this term. This explains why, in the Act, subsection 248(1) does not specifically mention the term "human being" in its definition of the term "person". This is not necessary given that, as explained by professors Duff, Alarie, Brooks and Philipps in *Canadian Income Tax Law*, "this definition merely *expands* on the ordinary meaning of the word "person"" (emphasis added). This is entirely consistent with the approach of the British Columbia Court of Appeal in *Lindsay* (see above at para. 10). There is thus absolutely no doubt that a natural person is directly included within the definition of the word "person" at subsection 248(1) of the Act. [Footnote omitted]

[67] In section 248 of the ***Income Tax Act***, "person" is defined as follows:

> "person", or any word or expression descriptive of a person, includes any corporation, and any entity exempt, because of subsection 149(1), from tax under Part I on all or part of the entity's taxable income and the heirs, executors, liquidators of a succession, administrators or other legal representatives of such a person, according to the law of that part of Canada to which the context extends;

[68] In the ***Interpretation Act***, RSA 2000, c I-8, the definition of a "person" is similarly defined as "a corporation and the heirs, executors, administrators or other legal representatives of

a person": s 28(nn). "Person" is not defined to include the Crown. In the ***Proceedings Against the Crown Act***, RSA 2000, c P-25, "person" does not include the Crown for the purpose of that Act: s 1(e).

[69] In contrast, in the **September 2013 Decision**, I held that the ERCB could rely on a statutory immunity clause in section 43 of the ***Energy Resources Conservation Act***, RSA 2000, c E-10 [the "***ERCA***"], which specifically provides that no action or proceeding could be brought against the ERCB. That section reads:

> 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.

[70] The statutory immunity clauses relied upon by Alberta apply to individuals acting pursuant to the ***EPEA*** and the ***Water Act***, and do not extend to any actions or proceedings brought against Alberta. I am not satisfied that these clauses preclude an action against Alberta, although, as in ***Edwards***, these clauses may provide evidence of the Legislature's intention to limit liability for certain acts taken in good faith: ***Edwards***, paras 16-17. In that case, the issue as to whether the immunity clause applied to the Law Society of Upper Canada was not directly considered. The Ontario Court of Appeal, upheld by the Supreme Court of Canada in ***Edwards***, viewed the immunity clause as evidence that the Legislature "recognized that the Society itself has been traditionally immunized from civil actions by the common law": ***Edwards v Law Society of Upper Canada (No 2)*** (2000), 48 OR (3d) 329 (CA) ["***Edwards* CA decision**"] at para 26; aff'd 2001 SCC 80. Further, it is noteworthy that the claim in ***Edwards*** did not explicitly or implicitly plead bad faith: ***Edwards* CA decision** at para 41.

[71] Alternatively, I agree with Ernst that the Fresh Claim cannot be struck as against Alberta at this stage on the basis of these statutory immunity clauses. She alleges bad faith, and the statutes only provide protection for actions taken in good faith. I am satisfied that there is a reasonable prospect that Ernst's claim will succeed on the issue of statutory immunity, assuming as I must, that the allegations in the Fresh Claim are true.

B. Summary Judgment

[72] In the alternative, Alberta seeks summary judgment dismissing the action as against it, relying on Rule 7.2(a) of the ***ARC*** to permit it to proceed with this application before filing a statement of defence. ***ARC*** r 7.2(a) states that on application, the Court may give judgment at any time in an action when admissions of fact are made in a pleading or otherwise. Alberta relies upon Rule 7.3(1)(b), that there is no merit to Ernst's claim or part of it.

[73] There are two preliminary issues raised in respect of Alberta's summary judgment application. First, is whether Alberta complied with the evidentiary requirements for summary judgment applications, as set out in Rule 7.3(2) of the ***ARC***. Second, Ernst argues that this is not properly a summary judgment application, and that Alberta is essentially seeking, in the alternative, to argue its application to strike portions of the Fresh Claim dressed up as an application for summary judgment. These issues are considered below, followed by a discussion of the test for summary judgment.

i. Evidence on Summary Judgment Applications

[74] Rule 7.3(2) of the ***ARC*** states:

> (2) The application [for summary judgment] must be supported by an affidavit swearing positively that one or more of the grounds described in subrule (1) have been met or by other evidence to the effect that the grounds have been met.

[75] Alberta relies upon the Fresh Claim and legislation in support of its application for summary judgment, and has not filed affidavit evidence. Alberta submits that affidavit evidence is not mandatory on an application for summary judgment, and that Rule 7.3(2) permits it to rely on other evidence to the effect that the grounds in Rule 7.3(1) have been met. Alberta relies on ***Terrigno v Kretschmer***, 2012 ABQB 750 ["***Terrigno***"], where Jeffrey J. considered the grammatical construction of Rule 7.3(2). He concluded:

> ...For this application it is enough that I conclude that sworn positive evidence in the record placed before me on this application *may* suffice for a successful summary dismissal application, even though it is not an affidavit "swearing positively that one or more of the grounds described in subrule (1) have been met". That evidence in other forms can constitute "other evidence to the effect that the grounds have been met.": para 21.

[76] ***Terrigno*** was subsequently relied on in ***Environmental Metal Works Ltd v Murray, Faber & Associates Inc***, 2013 ABQB 479, 568 AR 198. In that case, Marceau J. considered evidence filed on a summary judgment application, noting:

> None of the Affidavits filed in support of this application specifically depose one of the grounds set out in Rule 7.3(1). However, they did not have to depose one of those grounds. It is sufficient that they deposed "other evidence to the effect that the grounds have been met": para 36.

[77] As to what constitutes "other evidence", Alberta refers to ***Gauchier v Cunningham***, 2013 ABQB 493, where Gates J. proceeded to consider a summary judgment application, concluding that where a party "[relies] only on legal arguments and there is sufficient factual basis in the record to decide those legal arguments": para 25. However, in that case, there was other affidavit evidence before the Court: para 10.

[78] Alberta notes that this Court considered an application by the ERCB to strike portions of the Fresh Claim, and in the alternative for summary judgment, in the **September 2013 Decision**. In the present case, Alberta relies upon the Fresh Claim and legislation. I agree with Alberta that it may rely on other evidence in support of its summary judgment application as an alternative to relying on affidavit evidence. This may include admissions in a pleading, although a pleading is not itself evidence.

[79] In support of its position that an application for summary judgment can proceed without affidavit evidence, Alberta points to ***Jackson v Canadian National Railway***, 2013 ABCA 440, 566 AR 247 ["***Jackson***"], leave to appeal to SCC refused, 35730 (May 29, 2014) as an example of a summary dismissal application proceeding where, arguably, the only issue was the interpretation of legislation. The Court stated at paras 29-30:

> 29. The appellant submits that "evidentiary controversy" precludes summary dismissal at this stage of the proceedings because there are material facts in

> dispute. We agree with the chambers judge, however, that the central controversy is with respect to the interpretation of the [*Canada Transportation Act*], and not with respect to any contested material facts. The process of discovery is not of assistance in determining the meaning and intent of the statutory provisions. Thus, there are no genuine issues of material fact which require trial. In such a case, the question becomes whether the issue can fairly be decided on the record before the court. In *Tottrup*, this Court stated, at para 11:
>
> > There are, however, other types of summary judgment applications. In some cases the facts are clear and undisputed. The ultimate outcome of the case may depend on the interpretation of some statute or document, or on some other issue of law that arises from undisputed facts. In such cases the test for summary judgment is not whether the issue is "beyond doubt", but whether the issue of law can fairly be decided on the record before the court. If the legal issue is unsettled or complex or intertwined with the facts, it is sometimes necessary to have a full trial to provide a proper foundation for the decision. In other case it is possible to decide the question of law summarily...
>
> 30. We agree with the chambers judge that the *CTA* can be interpreted, to the extent necessary, on the record before the Court, so that summary dismissal is available and appropriate to grant if it is determined that the plaintiff has no chance of success. We turn, therefore, to whether she correctly interpreted the *CTA*.

[80] In ***Jackson***, the case management justice had affidavit evidence before her on the record, and referenced the affidavits in summarizing the factual matrix: 2012 ABQB 652 at para 7. It is therefore distinguishable from this case, where there is no affidavit (or other) evidence on the record.

[81] Rule 7.3(2) requires affidavit or other evidence addressing the factual grounds. In order to succeed on an application for summary judgment, the court must have sufficient facts when taken with the record to determine if the test for summary judgment has been met. I agree with Ernst that Alberta's failure to file an affidavit and the absence of "other evidence" as required under Rule 7.3(2) is fatal to its application for summary judgment in the context of this application.

ii. Whether this is properly a Summary Judgment Application, or is actually a mischaracterized Application to Strike

[82] Ernst argues that Alberta's application for summary judgment is, in effect, an application to strike. Alberta relies on the Fresh Claim and the legislation in support of its application for summary judgment, asking this Court to determine that there is no merit to Ernst's claims against it.

[83] Ernst submits that the question that must be resolved in both the application to strike and the application for summary judgment is essentially the same: does the Fresh Claim disclose a reasonable claim in law? Alberta argues that both applications are brought as either complimentary to one another, or in the alternative to one another.

[84] As discussed in the above section, affidavit or other evidence is required on this application for summary judgment. Such evidence is not permitted on this application to strike. A decision granting summary judgment finally determines the issues in an action, while a decision striking a statement of claim does not. Subject to limitation periods, a plaintiff can simply issue another statement of claim in a new action. Parties do not have to elect to bring one type of application or the other, and the applications may be brought in the alternative. While the tests on an application for summary judgment and an application to strike are similar, it is permissible to bring both applications.

iii. Test for summary judgment

[85] In the event I am in error in my interpretation of Rule 7.3(2) above, I find that Alberta has not satisfied me that Ernst's claim against it can be disposed of by way of summary judgment.

a. Legal Principles

[86] Alberta applies for summary judgment pursuant to Rule 7.3(1) of the ***ARC***, which provides:

> (1) A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds:
>
> ...
>
> (b) there is no merit to a claim or part of it;
>
> ...

[87] The Supreme Court of Canada discusses the test for summary judgment pursuant to the Ontario *Rules of Civil Procedure* in ***Hryniak v Mauldin***, 2014 SCC 7, [2014] 1 SCR 87 ["***Hryniak***"], where the court will grant summary judgment if "there is no genuine issue requiring a trial": r 20.04(2)(a). In ***Hryniak***, the Supreme Court of Canada explains, at paras 47 and 49:

> 47. Summary judgment motions must be granted whenever there is no genuine issue requiring trial...
>
> ...
>
> 49. There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[88] ***Hryniak*** has been explained and applied in Alberta by the Court of Appeal in ***Windsor v Canadian Pacific Railway Ltd***, 2014 ABCA 108, 94 Alta LR (5th) 301 ["***Windsor***"] at paras 13-16. The Court of Appeal confirmed that, although ***Hryniak*** applied the Ontario summary judgment rule, "the principles stated in it are consistent with modern Alberta summary judgment practice" as set out in Rule 7.3 of the *ARC*: para 14. Rule 7.3 "calls for a more holistic analysis of whether the claim has "merit"": para 14. The Court of Appeal further explains:

> Summary judgment is now an appropriate procedure where there is no genuine issue requiring a trial...The modern test for summary judgment is therefore to

> examine the record to see if a disposition that is fair and just to both parties can be made on the existing record: para 13.

[89] Case management judges are increasingly gatekeepers in the litigation process: ***Canadian Natural Resources Ltd v ShawCor Ltd***, 2014 ABCA 289 [***"CNRL"***] at para 7. The focus is on simplifying pre-trial procedures to promote access to justice:

> ...That relevant context includes the culture shift endorsed in *Hryniak*, one objective of which is to simplify pre-trial procedures in the delivery of justice. As the Supreme Court of Canada noted in *Hryniak, supra* at para 1: "Ensuring access to justice is the greatest challenge to the rule of law in Canada today": para 30.

[90] The Supreme Court of Canada in ***Hryniak*** emphasized the need to interpret summary judgment rules broadly, "favouring proportionality and fair access to the affordable, timely and just adjudication of claims": para 5. Two recent decisions of this Court similarly explain the importance of summary judgment in promoting the resolution of disputes and a cost-effective use of private and public resources in pursuing litigation: ***O'Hanlon Paving Ltd v Serengetti Developments Ltd***, 2013 ABQB 428, 567 AR 140 and ***Orr v Fort McKay First Nation***, 2014 ABQB 111. These decisions were cited by the Court of Appeal in ***Access Mortgage Corporation (2004) Limited v Arres Capital Inc***, 2014 ABCA 280 at paras 46-47:

> 46. *O'Hanlon Paving Ltd. v. Serengetti Developments Ltd.* (2013), 91 Alta. L.R. (5th) 1 (Alta. Q.B.), 16 explains why summary judgment is a valuable option in the dispute resolution process:
>
> > A summary judgment protocol recognizes that it is not unjust to deny a plaintiff with a meritless claim or a defendant with a meritless defence access to all stages of the litigation process. A litigant whose claim or defence is so weak that its chance of succeeding is very low, cannot reasonably expect the state to make available all parts of a publicly funded judicial process. ...
> >
> > Legislators in the United Kingdom, Canada and United States have introduced summary judgment into their litigation model to ensure that dispute resolution takes place at the earliest point in the litigation continuum where it is just to do so. A summary judgment protocol promotes expeditious dispute resolution and efficient use of private and public legal resources.
>
> 47. *Orr v. Fort McKay First Nation*, 2014 ABQB 111 (Alta. Q.B.), ¶29 also extolls the virtues of summary judgment:
>
> > By its terms, the formulation of the test for summary judgment in *Beier v. Proper Cat Construction Ltd.* keeps ... the judge's attention focussed upon resolving litigation in a timely and cost-effective manner by imposing a proportionate remedy where it can be said that a claim or defence ought to succeed or fail without further process. In doing so, it promotes robust application of Alberta's summary judgment rule despite its preclusion of factual determinations.

[91] Summary judgment in Alberta was also discussed in the concurring reasons of Wakeling J.A. in ***Can v Calgary (Police Service)***, 2014 ABCA 322, 560 AR 202.

[92] It is fair and just and in all parties' interests to dispense with claims where there is no genuine issue requiring trial. This ensures the parties concentrate their efforts and resources on the remaining issues in dispute, if any.

b. Application to the present case

[93] In this case, Alberta argues that Ernst's claim against it should be dismissed on the basis that the statutory regimes applicable to Alberta Environment establish only a duty of care to the public at large, and not a private duty of care to Ernst. In addition, Alberta relies upon the statutory immunity provisions contained in the ***EPEA*** and the ***Water Act***.

[94] I have considered both these arguments on Alberta's application to strike, as set out in sections IV.A.iii. and iv. above. On an application to strike, the test requires that the alleged facts in the statement of claim be taken as true, and that the court err on the side of generosity in permitting novel claims to proceed. On that basis, as set out above, there is a reasonable prospect that Ernst's claim that she is owed a private duty of care will succeed. There is also a reasonable prospect that Ernst will succeed in defeating Alberta's statutory immunity claims on the basis that the provisions Alberta relies upon do not protect it, or, in the alternative, that Alberta acted in bad faith, resulting in no protection.

[95] While Alberta advances the same arguments on its application for summary judgment, the test is different. The facts in the Fresh Claim are not taken to be true, and the onus is on Alberta to establish that there is no genuine issue requiring trial. Alberta has not satisfied me of this, or that there is no merit to Ernst's claim. In determining whether there is a private duty of care owed, it is necessary to make factual findings to determine the proximity of the relationship between Ernst and Alberta Environment, and whether harm was foreseeable. Evidence is also required to assess the policy concerns raised by Alberta in its argument on duty of care. With respect to Alberta's statutory immunity argument, it may be necessary to determine whether Alberta Environment acted in bad faith in order to evaluate whether there is statutory immunity for Alberta.

[96] While this Court is able to make findings of fact on an application for summary judgment, there is no evidence on the record that would enable me to do so in this case. It would not be fair or just for me to determine the merits of this action by way of summary judgment. On this basis, Alberta's application for summary judgment is dismissed.

V. Conclusion

[97] For the reasons set out above, Alberta's application to strike portions of the Fresh Claim is dismissed. Alberta's application for summary judgment is also dismissed.

VI. Costs

[98] The Court may make any order as to costs that is appropriate in the circumstances: ***Court of Queen's Bench Act***, RSA 2000, c C-31, s 21. This is a wide discretion, but must be exercised judicially and in accordance with established principles: ***Pharand Ski Corp v Alberta*** (1991), 122 AR 81 at para 8. Considerations for the Court in making a costs award are set out in Rule

10.33 of the ***ARC***. These include the degree of success of each party, and the conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action: ***ARC***, Rule 10.33(1)(a) and (2)(a).

[99] Ernst was wholly successful in responding to this Application. Further, although the roles played by the ERCB and Alberta in this matter are alleged to be very different, Alberta sought, in this Application, to rely on the same successful arguments made by the ERCB in the **September 2013 Decision**. These arguments could have been raised as part of Alberta's first application, but were not. Ernst was put to the time and expense of two applications, not one. As I indicated in paragraph 23 above, whether this Application could have been brought previously is an issue for consideration in determining costs.

[100] As a result of these considerations, Ernst shall have her costs against Alberta fixed at triple the column she received that was assessed or agreed to in the **September 2013 Decision**, in any event of the cause, payable on determination.

Heard on the 16th day of April, 2014.
Dated at Drumheller, Alberta this 7th day of November, 2014.

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

Appearances:

Murray Klippenstein and W. Cory Wanless, Klippensteins
for the Respondent, Jessica Ernst

Neil Boyle and Nancy McCurdy, Alberta Justice
for the Applicant, Her Majesty the Queen in Right of Alberta

APPENDIX A – Excerpts from Fresh Claim

C. Claims against the Defendant Alberta Environment

i. Negligent administration of a regulatory regime

59. Alberta Environment is the government ministry responsible for environmental protection, including the protection of both the quality and quantity of groundwater supply for the benefit of household users of that groundwater. Alberta Environment is tasked with enforcing significant legislative and regulatory provisions that are directed towards protecting water, including groundwater.

60. These legislative and regulatory provisions are contained in, among other sources, *Water (Ministerial) Regulation*, Alta Reg. 205/1998; *Alberta Environment Guidelines for Groundwater Diversion: For Coalbed Methane/Natural Gas in Coal Development* (2004); and *Groundwater Evaluation Guideline (Information Required when Submitting an Application under the* **Water Act)** (2003).

61. In or before 2000, Alberta Environment established a detailed and specific "Compliance Assurance Program" with the stated goal of ensuring compliance with the laws, regulations and legal requirements under the jurisdiction of Alberta Environment. The Compliance Assurance Program included procedures for receiving and investigating public complaints; for conducting inspections of alleged breaches of legal requirements; and for conducting enforcement procedures to ensure appropriate enforcement and remedial action when noncompliance occurred. The Compliance Assurance Program was operationalized through the Regional Services Division of Alberta Environment. The compliance branch of Alberta Environment included inspectors and investigators who were responsible for, among other things, investigating specific complaints made by the public.

62. Alberta Environment made numerous public representations regarding what landowners with concerns about water contamination could expect from Alberta Environment's Compliance Assurance Program. In particular, Alberta Environment represented that:

a. Alberta Environment's Compliance Assurance Program ensured that third parties complied with all regulatory requirements under the mandate of Alberta Environment;

b. Alberta Environment would respond quickly and appropriately to each complaint received from the public, including by conducting reasonable investigations when required; and

c. Alberta Environment staff would carry out any investigation competently, professionally and safely.

63. Further, between February 2006 and April 17, 2008, government ministers and Alberta Environment staff made numerous specific representations to Ms. Ernst regarding her specific concerns about the contamination of her well water. Alberta Environment represented that:

a. Alberta Environment would fully address Ms. Ernst's concerns regarding water contamination;

b. Alberta Environment would conduct a full and scientifically rigorous investigation into the causes of contamination of Ms. Ernst's water well;

c. Alberta Environment would deliver alternative safe drinking water to the Ernst Property;

d. Alberta Environment would conduct comprehensive sampling of the Ernst Water Well, and nearby EnCana Wells, as requested by Ms. Ernst; and

e. Alberta Environment would ensure that groundwater used by Ms. Ernst was safe.

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 gas 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.

68. By February 2005, Alberta Environment knew that EnCana had targeted, perforated and fractured the Rosebud Aquifer at an EnCana CBM well.

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's 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.

71. Alberta Environment knew that additional independent tests also indicated that water from the Ernst Water Well was contaminated with very high levels of methane.

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.

73. The Plaintiff pleads that Alberta Environment's investigation into contamination of the Ernst Water Well was conducted negligently and in bad faith. In particular, Alberta Environment:

a. conducted the investigation in an *ad hoc*, arbitrary and scientifically irrational manner, including without the benefit of a plan or protocol;

b. did not follow a sampling protocol when sampling water wells;

c. used unsterilized equipment when taking the samples;

d. committed sampling errors when collecting samples;

e. lost, destroyed or otherwise disposed of data collected by Alberta Environment investigators;

f. submitted samples for analysis that were contaminated or otherwise unusable;

g. failed to test water wells for various substances that could be indicative of industry contamination;

h. failed to complete isotopic fingerprinting on relevant methane and ethane samples;

i. failed to test or investigate specifically identified gas wells that potentially caused water contamination, in particular Well 05-14;

j. failed to investigate numerous CBM wells in the vicinity of the Ernst Property where EnCana had hydraulically fractured at shallow depths located in close proximity to the Rosebud Aquifer;

k. failed to obtain from EnCana a list of all chemicals used in CBM Activities so that Alberta Environment could undertake proper and adequate testing for such chemicals in the Ernst Water Well; and

l. failed to conduct tests and collect data that were needed to complete an adequate and responsible investigation.

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.

76. Alberta Environment then negligently and unreasonably relied on the conclusions contained within the Ernst Review, despite having knowledge of

serious and legitimate concerns that the Ernst Review was inadequate. In particular, Alberta Environment knew that the Ernst Review:

a. was based on an inadequate and negligently completed investigation, as detailed above;

b. failed to include or consider crucial data that was available, or could have been available if appropriate samples were taken;

c. included factually incorrect information;

d. relied excessively on abstract theoretical models due to lack of data;

e. failed to consider, account for, or explain the presence of indicators of potential oil and gas industry contamination; and

f. made conclusions that were not supportable on the available data.

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.

78. At all material times, Alberta Environment 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.

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;

c. negligently relied on an incomplete and inadequate review of the investigation, as detailed above;

d. failed to promptly inform the Plaintiff of potential contamination of the Rosebud Aquifer and potential risks to the Plaintiff's health, safety and property;

e. failed to investigate identified breaches of the **Water Act**, including EnCana's dewatering of the Rosebud Aquifer without approval or a permit, despite having specific evidence that such a breach had occurred;

f. failed to report specific breaches of the **Water Act** and the Environmental Protection and Enhancement Act and related regulations to the Compliance Manager;

g. failed to recommend to the Compliance Manager that enforcement action be taken;

h. failed to use available enforcement powers to stop CBM Activities that were causing contamination of the Rosebud Aquifer and the Plaintiff's water well and to remediate water contamination and other harms caused by oil and gas industry activity that had already occurred; and

i. failed to investigate potential long-term impacts of CBM Activities on the Rosebud Aquifer.

80. Alberta Environment's various acts and omissions as listed above were committed in bad faith.

III. DAMAGES

81. The Plaintiff suffered damages as a result of the Defendant EnCana's negligence, creation of a nuisance, breach of the rule in *Rylands v. Fletcher*, and trespass; as a result of the Defendant ERCB's negligence and breach of the Plaintiff's *Charter* rights; and as a result of the Defendant Alberta Environment's negligence as described above.

A. General and aggravated damages

82. For greater clarity, general damages suffered by the Plaintiff include but are not limited to:

a. substantial reduction in the value of the Ernst Property due to the initial and continuing contamination of the Property's water supply and the corresponding loss of use of the Property's water well;

b. loss of use of the Property and loss of amenity associated with the Property including that caused by the initial and continuing contamination of the Property's water supply;

c. environmental damage to Property that the Plaintiff, owing to her strongly held environmental beliefs, particularly values for its natural environmental qualities; and

d. mental and emotional distress and worry caused by living in a house that is at risk of exploding, and caused by the knowledge

and reasonable concern that the Plaintiff, her family and her friends had, unbeknownst to them, consumed and bathed in water containing unknown and likely dangerous contaminants with unknown potential health effects.

B. Special Damages

83. For greater clarity, special damages include but are not limited to:

a. disbursements associated with securing replacement water sources;

b. disbursements associated with research and investigation into the Plaintiff's water contamination issues, including costs associated with travel, scientific testing, 'Access to Information' requests, and hydrogeologists' reports.

C. Punitive and exemplary damages

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.

IV. REMEDY SOUGHT

88. The Plaintiff Jessica Ernst claims from the Defendant Her Majesty the Queen in Right of Alberta (as represented by the Ministry of the Environment):

a. general damages in the amount of $500,000.00;

b. special damages in the amount of $100,000.00;

c. aggravated damages in the amount of $100,000.00;

d. punitive and exemplary damages in the amount of $10,000,000.00;

e. prejudgment interest pursuant to the Judgment Interest Act, R.S.A. 2000, c. J-1 and amendments thereto;

f. postjudgment interest pursuant to the Judgment Interest Act, R.S.A. 2000, c. J-1 and amendments thereto;

g. costs; and

h. such further and other relief as seems just to this Honourable Court.