SCC Court File No.:

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

B E T W E E N:

JESSICA ERNST

Applicant
(Appellant)

-and-

ENERGY RESOURCES CONSERVATION BOARD

Respondent
(Respondent)

APPLICATION FOR LEAVE TO APPEAL
Jessica Ernst – Applicant

(Pursuant to Section 40 of the *Supreme Court Act*, RSC 1985, c S-26 and Rule 25 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

Lawyers for Jessica Ernst, Applicant:

KLIPPENSTEINS
Barristers & Solicitors
160 John Street, Suite 300
Toronto, ON M5V 2E5
Tel: (416) 598-0288
Fax: (416) 598-9520

Murray Klippenstein LSUC#: 26950G
murray.klippenstein@klippensteins.ca
W. Cory Wanless LSUC#: 57288M
cory.wanless@klippensteins.ca

Lawyers for the Energy Resources Conservation Board, Respondent:

JENSEN SHAWA SOLOMON DUGUID HAWKES LLP
800, 304 –8 Avenue SW
Calgary, AB T2P 1C2
Tel: (403) 571-1520
Fax: (403) 571-1528

Glenn Solomon QC
gsolomon@jssbarristers.ca

Agent for the Energy Resources Conservation Board, Respondent:

GOWLING LAFLEUR HENDERSON LLP
160 Elgin St., Suite 2600
Ottawa, ON K1P 1C3
Tel: (613) 786-0171
Fax: (613) 563-9869

Jeffrey W. Beedell
Jeff.beedell@gowlings.com

INDEX TAB

TABLE OF CONTENTS

Certificates

TAB 1

SCC Court File No.:

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

B E T W E E N:

JESSICA ERNST

Applicant
(Appellant)

-and-

ENERGY RESOURCES CONSERVATION BOARD

Respondent
(Respondent)

NOTICE OF APPLICATION FOR LEAVE TO APPEAL

TAKE NOTICE that the Applicant, Jessica Ernst, applies for leave to appeal to the Court, under Section 40 of the *Supreme Court Act*, RSC 1985, c S-26 and Rule 25 of the *Rules of the Supreme Court of Canada*, SOR/2002-156, from the judgment of the Court of Appeal of Alberta in Court File No. 1301-0346AC (the "**Judgment**") made September 15, 2014, for an order granting leave to appeal from the Judgment, along with costs of this application, or any further or other order that the Court may deem appropriate;

AND FURTHER TAKE NOTICE that this application for leave is made on the following grounds:

1. This case raises one of the most fundamental constitutional questions a court can consider: can legislation block an individual from seeking a remedy for a breach of her *Charter* rights pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms* (the "***Charter***")? In this case, the Court of Appeal of Alberta has held that it can.

2. The fundamental questions of whether a legislature can bar or otherwise restrict *Charter* claims for personal remedies made pursuant to s. 24(1) of the *Charter* through a general "protection from action" clause has not been squarely considered by the Supreme Court. Where the Supreme Court has considered this issue indirectly, it has come to the opposite conclusion to that of the Court of Appeal of Alberta.

3. The decision of the Court of Appeal of Alberta in this case puts the law in Alberta in conflict with appellate law in Ontario, creating significant uncertainty in the law across Canada.

4. The issues raised by this appeal impact all Canadians. General "protection from action" clauses similar to s. 43 of the *Energy Resources Conservation Act* are found in dozens of statutes across Canada, and in each and every province in Canada. The Supreme Court's guidance on whether such statues can bar actions brought pursuant s. 24(1) of the Charter will benefit all Canadians.

5. There are very good reasons to doubt the correctness of the decisions below. The Court of Appeal of Alberta's conclusion that a general "protection from action" clause can limit or eliminate the right of a citizen to pursue a remedy for a Charter breach pursuant to s. 24(1) of the *Charter* is contrary to constitutional principles laid down by the Supreme Court in other cases, and creates significant uncertainty and confusion within the law. This appeal provides a very good opportunity to correct the law on a fundamental constitutional question.

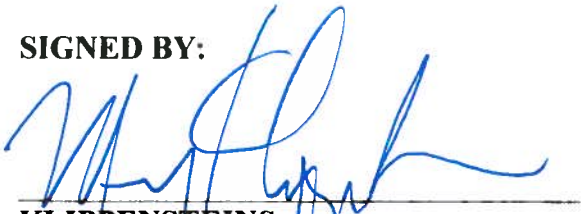
6. Review by this Court is therefore of national importance and will have value far beyond the interests of the parties and this particular dispute.

7. Sections 40 and 43 of the *Supreme Court Act*, and Rule 25 of the *Rules of the Supreme Court of Canada*.

8. Such further and other grounds as this Honourable Court may permit.

Dated at Toronto, Ontario this 12th day of November, 2014.

SIGNED BY:



KLIPPENSTEINS
Barristers & Solicitors
160 John Street, Suite 300
Toronto, ON M5V 2E5
Tel: (416) 598-0288
Fax: (416) 598-9520

Murray Klippenstein LSUC#: 26950G
murray.klippenstein@klippensteins.ca

W. Cory Wanless LSUC#: 57288M
cory.wanless@klippensteins.ca

Lawyers for the Applicant, Jessica Ernst

ORIGINAL TO: THE REGISTRAR

COPIES TO: **JENSEN SHAWA SOLOMON DUGUID HAWKES LLP**
800, 304 – 8 Avenue SW
Calgary, AB T2P 1C2
Phone: (403) 571-1520
Fax: (403) 571-1528

Glenn Solomon QC
gsolomon@jssbarristers.ca

Lawyers for the Respondent, Energy Resources Conservation Board

NOTICE TO THE RESPONDENT OR INTERVENER: A respondent or intervener may serve and file a memorandum in response to this application for leave to appeal within 30 days after the day on which a file is opened by the Court following the filing of this application for leave to appeal or, if a file has already been opened, within 30 days after the service of this application for leave to appeal. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration under section 43 of the *Supreme Court Act*.

TAB 2

Court of Queen's Bench of Alberta

Citation: Ernst v. EnCana Corporation, 2013 ABQB 537

Date: 20130919
Docket: 0702 00120
Registry: Hanna/Drumheller

Between:

Jessica Ernst

Plaintiff

- and -

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

Defendants

Reasons for Judgment of the Honourable Chief Justice Neil Wittmann

---

I. Introduction

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

[2] The claim against the ERCB is that it was negligent in its administration of its statutory regulatory regime, that it failed to respond to Ernst concerns about water contamination from the EnCana drilling activity, that the ERCB knew that EnCana had perforated and fractured directly

into the Rosebud aquifer, and that it failed to respond. Further, it is alleged that the ERCB owed a duty to Ernst to take reasonable steps to protect her well water from foreseeable contamination. It is also alleged that, by its conduct, the ERCB breached section 2(b) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 c 11 (the "*Charter*"), by barring Ernst from communicating with the ERCB through the usual public communication channels, and thereafter ignored her for a period of time until she agreed to communicate with the ERCB directly only, and not publically through the media or through communications with other citizens.

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

II. Background

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

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

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

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

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

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

III. The ERCB Application

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

exemplary damages, interest and costs. In the alternative, the ERCB asks the Court to grant Summary Judgment in favour of the ERCB.

[11] In some cases, the nature of the remedy, if granted, may have consequences in the event of a successful application. But in this case, the *Limitations Act*, RSA 2000, c L-12 (the "*Limitations Act*") would seemingly preclude a new Statement of Claim being issued in the event of success in striking out the claim. An order granting Summary Judgment would bar a future claim on the same subject matter, applying the doctrine of *res judicata*.

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

A. Striking the Fresh Claim

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

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

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

(3) No evidence may be submitted on an application made on the basis of the condition set out in subrule (2)(b).

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

1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.
(2) In particular, these rules are intended to be used
(a) to identify the real issues in dispute,
(b) to facilitate the quickest means of resolving a claim at the least expense, ...
(e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.

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

1. The Ernst Negligence Claim Against the ERCB

a. Overview

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

24. The ERCB is the government agency responsible for overseeing and regulating the oil and gas industry, including all aspects of CBM development. In particular, the ERCB is exclusively tasked with licensing gas wells, and enforcing significant legislative and regulatory provisions that are intended to protect the quality and quantity of groundwater supply from interference or contamination due to oil and gas development, including CBM Activities.

25. These legislative and regulatory provisions are contained in, among other sources, *Oil and Gas Conservation Regulations*, Alta. Reg. 151/1971; *Guide 65: Resources Applications for Conventional Oil and Gas*

Reservoirs (2003); *Guide G-8: Surface Casing Depth - Minimum Requirements* (1997); *Guide 9: Casing Cement, Minimum Requirements; Guide 56: Energy Development Application Schedules* (2003); and *Informational Letter IL 91-11; Coalbed Methane Regulation* (1991).

26. In or before 1999, the ERCB used its statutory powers to establish a detailed Compliance Assurance Enforcement Scheme, which included set procedures for receiving and investigating public complaints, inspecting oil and gas operations to ensure that licenses were in compliance with all applicable rules, and taking appropriate enforcement and remedial action against oil and gas companies when non-compliance occurred. This scheme was operationalized through the Operations Division of the ERCB, and specifically both through the ERCB's Compliance, Environment and Operations Branch, and its Public Safety / Field Surveillance Branch. The ERCB's Operations Division operates numerous Field Offices located throughout Alberta.

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

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

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

enforcement and remedial action when breaches of regulations or other requirements were identified.

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

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

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

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

33. As a result of Ms. Ernst's direct interaction with the ERCB, the ERCB knew that Ms. Ernst had serious and substantiated concerns regarding her water and oil and gas development including that:

a. the quality of her well water had suddenly radically worsened in 2005 and 2006;

b. there was good reason to believe that the radical change in her water was specifically linked to EnCana's CBM Activities at the EnCana Wells; and

c. EnCana had breached ERCB requirements while conducting CBM activities at the nearby EnCana Wells.

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

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

36. Despite clear knowledge of potentially serious industry-related water contamination and knowledge of potential breaches of ERCB requirements, the ERCB failed to respond reasonably or in accordance with its specific published investigation and enforcement process. Instead, the ERCB either completely ignored Ms. Ernst and her concerns, or directed her to the ERCB's legal counsel, Mr. McKee, who in turn refused to deal with her complaints.

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

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

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

40. Particulars of the ERCB's negligence include:

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

b. failing to adequately inspect and investigate known and/or credible allegations of water contamination of Plaintiff's underground freshwater sources, including the Rosebud Aquifer, and of the possible link between such contamination and the EnCana Wells license by the ERCB.
c. failing to adequately inspect and investigate known and/or credible allegations of breaches of oil and gas requirements under the jurisdiction of the ERCB at the EnCana Wells;
d. failing to use available enforcement powers to stop CBM Activities that were causing contamination of the Plaintiff's underground freshwater sources, including the Rosebud Aquifer and to remediate water contamination and other harms caused by oil and gas industry activity that had already occurred;
e. failing to implement the ERCB's established and publicized enforcement and investigation scheme;
f. failing to conduct adequate groundwater testing and monitoring;
g. failing to investigate potential long-term impacts of CBM Activities on the Rosebud Aquifer; and
h. failing to promptly inform the Plaintiff of potential contamination of the Rosebud Aquifer and of the potential risks posed by such contamination to the Plaintiff's health, safety and property.

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

b. Duty of Care and Statutory Immunity

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

[19] The parties have cited the following authorities: *Cooper v Hobart*, 2001 SCC 79, [2001] 3 SCR 537; *Anns v Merton London Borough Council*, [1977] 2 All ER 118, [1977] UKHL 4, [1978] AC 728, (UK HL); *Edwards v Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 SCR 562; *Fullowka v Pinkerton's of Canada Limited*, 2010 SCC 5, [2010] 1 SCR 132; *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42, [2011] 3 SCR 45; Peter W Hogg, Patrick J Monahan & Wade K Wright, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011); *Nette v*

Stiles, 2010 ABQB 14, 489 AR 347; *Burgess (Litigation Guardian of) v Canadian National Railway* (2005), 78 OR (3d) 209 (SCJ), aff'd (2006), 85 OR (3d) 798 (CA), leave to appeal to SCC refused, 31698 (February 8, 2007); *Smorag v Nadeau*, 2008 ABQB 714, 461 AR 156; *Swinamer v Nova Scotia (Attorney General)*, [1994] 1 SCR 445; *Condominium Corp No 9813678 v Statesman Corp*, 2009 ABQB 493, 472 AR 33; *Adams v Borrel*, 2008 NBCA 62, 297 DLR (4th) 400, leave to appeal to SCC refused, 32888 (February 19, 2009); *Just v British Columbia*, [1989] 2 SCR 1228; *Ingles v Tutkaluk Construction Ltd*, 2000 SCC 12, [2000] 1 SCR 298; *Rothfield v Manolakos*, [1989] 2 SCR 1259; *Heaslip Estate v Mansfield Ski Club Inc*, 2009 ONCA 594, 96 OR (3d) 401; *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 SCR 129; *Sauer v Canada*, 2007 ONCA 454, 31 BLR (4th) 20; *Oil and Gas Conservation Act*, RSA 2000, c O-6, ss 4(b), 4(f); *Morguard Properties Ltd v Winnipeg (City)*, [1983] 2 SCR 493; *Tardif (Estate of) v Wong*, 2002 ABCA 121, 303 AR 103; *Alberta Utilities Commission Act*, SA 2007, c A-37.2, s 69; *Agrology Profession Act*, SA 2005, c A-13.5, s 98(1); *Alberta Human Rights Act*, RSA 2000, c A-25.5, s 41; *Child and Family Services Authorities Act*, RSA 2000, c C-11, s 19; *Court of Queen's Bench Act*, RSA 2000, c C-31, s 14; *Emergency Medical Aid Act*, RSA 2000, c E-7, s 2; *Farm Implement Act*, RSA 2000, c F-7, s 44; *Fisheries (Alberta) Act*, RSA 2000, c F-16, s 42; *Gaming and Liquor Act*, RSA 2000, c G-1, s 32; *Health Professions Act*, RSA 2000, c H-7, s 126(1); *Health Quality Council of Alberta Act*, SA 2011, c H-7.2, s 23; *Persons with Developmental Disabilities Community Governance Act*, RSA 2000, c P-8, s 20; *Regulated Forestry Profession Act*, RSA 2000, c R-13, s 95(1); *Safety Codes Act*, RSA 2000, c S-1, s 12(1); *Securities Act*, RSA 2000, c S-4, s 222(1); *Mercure v A Marquette & Fils Inc*, [1977] 1 SCR 547; *Encampment Creek Logging Ltd v Alberta*, 2005 ABQB 787, 402 AR 55; *Berardinelli v Ontario Housing Corp*, [1979] 1 SCR 275; *Tottrup*; *ERCA*, ss 2(e.1), 43; *Responsible Energy Development Act*.

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

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

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

> This question must be resolved by an analysis of the applicable legal duties, following the approach set down by the Court in a number of cases, including *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537; *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562; *Odhavji Estate v.*

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

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

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

2) The relevant statutory scheme is not the exclusive, or even a necessary, source of proximity in cases involving public authorities: *Hill* and *Fullowka*, as well as *Cooper* and *Edwards*, on one reading, provide the support for this conclusion.

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

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

5) Factors suggesting proximity include physical and causal closeness, assumed or imposed obligations, and "expectations, representations, reliance, and the property or other interests involved". The courts are reluctant to find proximity between a public authority and members of the

> public with whom the public authority has had no contact, even if the public authority has knowledge of a general risk of harm and legal authority to prevent or minimize that risk: *Cooper; Edwards*. The courts are less reluctant to find proximity where a public authority has contact with a member of the public, making it aware of a specific risk of harm: *Fullowka*. [footnotes omitted]

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

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

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

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

> 41. In the case of the mining safety regulators and the miners, the closeness of the relationship is somewhere between that in *Hill*, on the one hand, and *Cooper* and *Edwards* on the other. Under the *MSA* [*Mining Safety Act*], the onus for maintaining mine safety is on the owner, management and employees of the mine. Section 2 of the *MSA* imposes on management the duty to take all reasonable measures to enforce the Act and on workers the duty to take all necessary and reasonable measures to carry out their duties according to the Act. Under s. 3, the owner is to ensure that the manager is provided with the necessary means to conduct the operation of the mine in full compliance with the *MSA* and under s. 5(3), the manager, or the competent person authorized by the manager, is to personally and continually supervise work involving unusual danger in an emergency situation. A worker has the right to refuse to do any work when he or she has reason to believe that there is an unusual danger to his or her health or safety (s. 8(1)(a)) and is to report the circumstances to the owner or supervisor (s. 8(2)). A worker acting in compliance with these provisions is protected against discharge or discipline for having done so (s. 8(9)). Thus, much as the regulatory

schemes at issue in *Cooper* and *Edwards* put the onus on lawyers and mortgage brokers to observe the rules, the scheme set out in the *MSA* puts the onus on mine owners, management and workers to observe safety regulations. The role of the mining inspectors is essentially to see that the persons who have the primary obligation to comply with the *MSA* -- mine owners, managers and workers -- are doing so. In that sense, their role is analogous to the roles of the Law Society and the Registrar of Mortgage Brokers discussed in *Edwards* and *Cooper*.

42. However, the relationship between the inspectors and the miners was considerably closer and more direct than the relationships in issue in *Edwards* or *Cooper*. While no single factor on its own is dispositive, there are three factors present here which, in combination, lead me to this conclusion.

43. The persons to whom mining inspectors are said to owe a duty -- those working in the mine -- is not only a much smaller but also a more clearly defined group than was the case in *Cooper* or *Edwards*. There, the alleged duties were owed, in effect, to the public at large because they extended to all clients of all lawyers and mortgage brokers.

44. In addition, the mining inspectors had much more direct and personal dealings with the deceased miners than the Law Society or the Registrar had with the clients of the lawyer or mortgage broker in *Edwards* and *Cooper*. As pointed out in *Hill*, in considering whether the relationship in question is close and direct, the existence, or absence, of personal contact is significant. The murdered miners were not in the sort of personal contact with the inspectors as the police in *Hill* were with Mr. Hill as a particularized suspect. However, the relationship between the miners and the inspectors was much more personal and direct than the relationship between the undifferentiated multitude of lawyers' clients and the Law Society as considered in *Edwards* or the undifferentiated customers of mortgage brokers as considered in *Cooper*. As the trial judge found in this case, visits by inspectors to the mine during the strike were "almost daily" occurrences, 11 official inspections were conducted and at any time a tour of the mine was required, the inspector would be accompanied by a member of the occupational health and safety committee (para. 256). There was therefore more direct and personal contact with miners than there was with the clients in either *Cooper* or *Edwards*.

45 Finally, the inspectors' statutory duties related directly to the conduct of the miners themselves. This is in contrast to the Law Society in *Edwards* or the Registrar in *Cooper* who had no direct regulatory authority over the claimants who were the clients of the regulated lawyers and mortgage brokers.

[27] Applying the contrasting authorities analysed by Cromwell J. in *Fullowka* and the principles articulated in the other authorities as summarized in *Liability of the Crown*, I am of the

view that the duties owed by the ERCB in the circumstances of this case are not private duties. They are public duties. The necessary relationship of proximity between Ernst and the ERCB is absent. The duties of the ERCB owed to the public are derived from the *ERCA*.

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

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

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

c. The Charter Argument

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

[32] This section states:

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

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

> 42. In its role as the government agency responsible for regulating all aspects of the oil and gas industry, the ERCB has established a specific forum and process for communicating with the public and hearing public complaints and concerns regarding the oil and gas industry.

43. The ERCB, as a public body, invited and encouraged public participation and communication in the regulatory process, including through both its Compliance and Operations Branch, and its Field Surveillance Branch. In particular, in communications directly with landowners located adjacent to oil and gas developments, the ERCB emphasizes the importance of public involvement in the regulation of oil and gas development in Alberta and strongly encourages such public participation.

44. The ERCB further frequently represented to such landowners that it is responsible for responding to and addressing all public complaints, including by investigating all such complaints.

45. Throughout 2004 and 2005, Ms. Ernst frequently voiced her concerns regarding negative impacts caused by oil and gas development near her home both through contact with the ERCB's compliance, investigation and enforcement offices, and through other modes of public expression, including the press and through communication with institutions and fellow landowners and citizens.

46. Ms. Ernst was a vocal and effective critic of the ERCB. Her public criticisms brought public attention to the ERCB in a way that was unwanted by the ERCB and caused embarrassment with the organization.

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

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

49. On December 6, 2005, Ms. Ernst wrote to the ERCB to seek clarification of what was meant by Mr. Reid's comments, and what restrictions she

faced when attempting to communicate with at the ERCB. This letter was returned unopened.

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

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

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

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

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

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

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

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

58. The ERCB's arbitrary decision to restrict Ms. Ernst's communication with the ERCB, specifically by prohibiting her from communicating with the enforcement arm of the ERCB, breached Ms. Ernst's rights contained in s.2(b) of the *Canadian Charter of Rights and Freedoms* by:
    a. punitively excluding Ms. Ernst from the ERCB's own complaints, investigation and enforcement process in retaliation for her vocal criticism of the ERCB, thereby punishing her for exercising her right to free speech; and
    b. arbitrarily removing Ms. Ernst from a public forum of communication with a government agency that had been established to accept public concerns and complaints about oil and gas industry activity, thereby blocking her and preventing her from speaking in a public forum that the ERCB itself had specifically established to facilitate free speech.

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

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

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

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

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

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

[40] With respect to the ERCB's assertion that section 2(b) of the *Charter* does not guarantee the right to an audience or a captive audience, Ernst denies that she is making that claim.

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

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

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

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

2. The Charter Claim and the Limitations Act

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

> 3 (1) Subject to section 11, if a claimant does not seek a remedial order within
> (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
> (i) that the injury for which the claimant seeks a remedial order had occurred,
> (ii) that the injury was attributable to conduct of the defendant, and

(iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,

or

(b) 10 years after the claim arose,

whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

The Positions of the Parties

a. The Position of the ERCB

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

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

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

b. The Position of Ernst

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

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

3. Statutory Immunity and the Ernst Claims

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

> 43. No action or proceeding may be brought against the Board or a member of the Board or a person referred to in section 10 or 17(1) in respect of any act or thing done purportedly in pursuance of this Act, or any Act that the Board administers, the regulations under any of those Acts or a decision, order or direction of the Board.

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

a. Statutory Interpretation Argument

[52] Ernst elaborates on principles of statutory interpretation to argue that section 43 does not protect the ERCB in the circumstances. Ernst basically says that her claim against the ERCB is for the sin of omission, not comission. She asserts that the statutory protection afforded the ERCB by section 43 is in respect only of "any act or thing done or purported to be done" not any act or thing it omitted to do. In support of her argument, Ernst cites section 69 of the *Alberta Utilities Commission Act* which states as follows:

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

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

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

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

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

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

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

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

b. Constitutional Argument

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

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

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

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

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

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

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

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

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

[67] The only Alberta case cited by the parties was *Garry v Canada*, 2007 ABCA 234, leave to appeal to SCC denied [2008] 1 SCR viii. *Garry* was an application before a single justice of the Court of Appeal to restore an appeal to the list, and stands as some authority in Alberta for the proposition that general limitation periods apply to *Charter* claims. Justice Côté noted that "no authority has been shown to say that general limitation periods do not apply to *Charter* claims": para 21. He goes on to distinguish *Prete* on the basis that:

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

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

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

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

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

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

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

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

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

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

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

[75] Where a party seeks a general constitutional remedy, as opposed to a personal remedy, a statutory immunity clause will not apply. In the pre-*Charter* decision *Amax Potash Ltd v Saskatchewan*, [1977] 2 SCR 576, the Supreme Court of Canada considered whether a statutory provision giving absolute immunity for government actions could be challenged as violating the Constitution. The Government of Saskatchewan sought to pass legislation imposing a tax on potash producers, who brought an action challenging the validity of the tax as beyond the powers of the Province. They sought a declaration of invalidity and repayment of all moneys that may be paid by them on account of the tax. Saskatchewan relied on a statutory immunity clause in *The Proceedings Against the Crown Act*, RSS 1965, c 98, s 5(7). Justice Dixon, for the Court, concluded that:

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

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

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

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

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

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

[79] In *Kingsway General*, this Court concluded the impugned legislation was not aimed at evading the Constitution, even assuming that Kingsway could succeed in its action for damages: para 84. This Court found that, in its essence, the impugned legislation barred a claim, not a litigant, and was not materially different from other limitations statutes or statutory immunity

legislation: para 72. It targeted insurers, but treated them all equally: para 87. The impugned legislation was not *ultra vires* the Government of Alberta: para 160.

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

[81] I cannot accede to the proposition that statutory immunity clauses in favour of government officials or tribunals have no application when a personal claim for damages for a *Charter* remedy is asserted. The mischief that arises circumventing an otherwise valid immunity provision is obvious. Parties would come to the litigation process dressed in their *Charter* clothes whenever possible.

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

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

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

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

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

> A complete catalogue of countervailing considerations remains to be developed as the law in this area matures. At this point, however, two considerations are

apparent: the existence of alternative remedies and concerns for good governance: para 33.

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

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

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

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

[89] As a final point on the constitutional issue, as was argued by counsel for the ERCB orally, if Ernst seeks as a remedy a declaration striking down section 43 of the *ERCA*, a Notice of Constitutional Question should be given to the Attorneys General of Alberta and Canada, pursuant to section 24 of the *Judicature Act*, RSA 2000, c J-2. The ensuing constitutional litigation could be pursued in a procedural matrix, which would consider the constitutional validity of the legislation, including whether a section 1 *Charter* defence might be available to the Legislature in the event a *Charter* breach is found. The procedural requirement to provide a Notice of Constitutional Question facilitates full argument of any constitutional issues and is a matter of procedural fairness necessary to ensure the Attorneys General of Alberta and Canada have an opportunity to be heard.

B. Ordering Particulars

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

C. Costs

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

1. Position of the ERCB

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

2. Position of Ernst

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

3. Decision

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

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

the event a pleading was frivolous, irrelevant or improper and that "many paragraphs" in the second Amended Statement of Claim were improper. She concluded at page 11:

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

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

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

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

IV. Alberta's Application

A. Overview

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

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

> 64. Alberta Environment's representations had the effect of, and were intended to, encourage and foster reliance on Alberta Environment by Ms. Ernst. In particular, Ms. Ernst relied on Alberta Environment to protect

underground water supplies; to respond promptly and reasonably to any complaints raised by her or other landowners; and to undertake a prompt and adequate investigation into the causes of water contamination once identified.

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

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

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

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

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

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

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

a. Mr. Pilger concluded, before any investigation had begun, that the water wells he was responsible for investigating were not impacted by CBM development;

b. Mr. Pilger repeatedly accused Ms. Ernst of being responsible for the contamination of her well water before conducting any investigations;

c. Mr. Pilger falsely and recklessly accused Ms. Ernst of fabricating and forging a hydrogeologist's report that indicated EnCana had fractured and perforated into the Rosebud Aquifer;

d. Alberta Environment stonewalled and otherwise blocked all of Ms. Ernst's attempts to gain access to relevant information regarding the contamination of her well and local CBM development; and

e. Alberta Environment shared information collected as part of the investigation with EnCana, while refusing to release this information to Ms. Ernst, her neighbours or to the general public.

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

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

79. Alberta Environment breached this duty, and continues to breach this duty, by negligently implementing Alberta Environment's own specific and published investigation and enforcement scheme. In particular, Alberta Environment:

a. Conducted a negligent investigation into the contamination of the Ernst Water Well, as detailed above;
b. Unduly and negligently restricted the scope of both the Alberta Environment investigation and the ARC review.

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

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

B. Grounds Asserted by Alberta

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

C. General Principles

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

[103] The *ARC* also contain an expressability for the Court to strike out any or all part of a claim in *ARC* Rule 3.68(1)(a) with one of the grounds being relied on by Alberta in *ARC* Rule 3.68(2)© that a commencement document is frivolous, irrelevant or improper. Further, *ARC* Rule 3.68(3) prohibits any evidence being submitted on an application pursuant to Rule 3.68(2)(b).

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

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

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

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

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

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

D. Positions of the Parties

1. Alberta

[110] Alberta submits that the impugned paragraphs or portions thereof are frivolous, irrelevant and improper, in that they contain flaws falling into five distinct categories. Alberta submits that Ernst pleads evidence, pleads argument, asserts irrelevant facts, statements or theories, involves non-parties, and is redundant and unnecessarily prolix.

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

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

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

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

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

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

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

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

[119] Alberta submits that paragraph 77 contains evidence and argument, and is embarrassing, and is thus improper. Alberta also says the reference to "significant and legitimate unanswered questions regarding CBM Activities at the EnCana wells" is irrelevant to whether or not Alberta Environment owed a duty to the plaintiff, or, if such a duty was owed, whether Alberta Environment breached it.

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

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

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

2. Ernst

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

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

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

[126] Moreover, Ernst makes the point that it is necessary to set up facts in the pleading to establish a relationship of proximity between Ernst and Alberta, as well as the standard of care, causation, harm, damages, and that an important aspect of the elements of the tort include Alberta's knowledge of complaints of suspected contamination of the Rosebud Aquifer. In addition, Ernst refers to representations made through Alberta Environment's "compliance

assurance program" and states that these representations are facts relevant to the plaintiff's reliance on Alberta Environment.

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

3. Analysis

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

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

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

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

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

advancement of the action, in accordance with the foundational rules. Therefore, Alberta's application is dismissed. As Alberta itself points out, some of its concerns about the allegations of Ernst may be cured by a request for particulars and the answers given or ordered accordingly. This is a method by which the scope or breadth of disclosure can be properly controlled.

V. Overall Conclusion

A. The ERCB Application

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

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

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

B. Costs of the April 2012 Applications

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

C. Alberta's Application

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

D. Costs

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

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

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

Appearances:

M. Klippenstein
C. Wanless
for the Plaintiff, Jessica Ernst

P.M. Bychawski
T.D. Gelbman
for the Defendant, EnCana Corporation

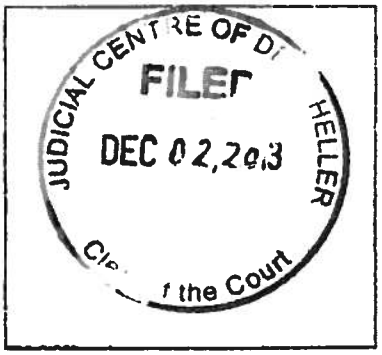
G.S. Solomon, Q.C.
C.J. Elliot
for the Defendant, Energy Resources Conservation Board

N.A. McCurdy
for the Defendant, Her Majesty the Queen in Right of Alberta

TAB 3

COURT FILE NUMBER 0702-00120

COURT	Court of Queen's Bench of Alberta
JUDICIAL CENTRE	Drumheller
PLAINTIFF(S)	JESSICA ERNST
DEFENDANT(S)	ENCANA CORPORATION, ENERGY RESOURCES CONSERVATION BOARD and HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA
DOCUMENT	Order



ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

KLIPPENSTEINS
Barristers & Solicitors
160 John Street, Suite 300
Toronto, Ontario M6H1V2
Murray Klippenstein/ Cory Wanless
Phone: 416-598-0288
Fax: 416-598-9520

DATE ON WHICH ORDER WAS PRONOUNCED: November 13, 2013

NAME OF MASTER/JUDGE WHO MADE THIS ORDER: The Honourable Chief Justice Wittmann

LOCATION OF HEARING: Court of Queen's Bench, Calgary, Alberta

---

UPON THE APPLICATION of the Applicant, Energy Resources Conservation Board; AND UPON the Application of Her Majesty the Queen in Right of Alberta; AND UPON having read and reviewed the pleadings and the proceedings herein, including the written Briefs of the parties and Authorities submitted by the parties; AND UPON having reviewed the transcripts of the submissions made by the parties; AND UPON having provided Written Reasons for Decision:

IT IS HEREBY ORDERED THAT:

1. The Application of the Energy Resources Conservation Board to strike the claims against the Energy Resources Conservation board in negligence, namely paragraphs 24 through 41 of the Fresh Statement of Claim, is granted, and the said paragraphs are struck in respect of the Energy Resources Conservation Board.

2. The Plaintiff's claims for a personal remedy for a *Charter* Breach against the ERCB are struck, and, in the alternative, dismissed.

3. Her Majesty the Queen in Right of Alberta's Application to strike paragraphs, or portions thereof, of the Fresh Statement of Claim is dismissed.

4. The Plaintiff is hereby awarded costs of and incidental to this Application as against Her Majesty the Queen in Right of Alberta, in any event of the cause.

5. The Energy Resources Conservation Board is hereby awarded the costs of and incidental to this Application, as against the Plaintiff.

6. The Parties may return to this Court to resolve any outstanding issues arising from this Order, including issues relating to costs of the April 2012 Applications in this Action.

The Honourable Neil C. Wittmann
Chief Justice of the Court of Queen's Bench of Alberta

TAB 4

In the Court of Appeal of Alberta

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

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

Between:

Jessica Ernst

Appellant
(Plaintiff)

- and -

Energy Resources Conservation Board

Respondent
(Defendant)

- and -

EnCana Corporation and Her Majesty the Queen in Right of Alberta

Not Parties to the Appeal
(Defendants)

The Court:

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

Reasons for Judgment Reserved

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

Reasons for Judgment Reserved

The Court:

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

Facts

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

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

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

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

> 43 No action or proceeding may be brought against the Board or a member of the Board or a person referred to in section 10 or 17(1) in respect of any act or thing done purportedly in pursuance of this Act, or any Act that the

> Board administers, the regulations under any of those Acts or a decision, order or direction of the Board.

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

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

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

Issues and Standard of Review

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

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

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

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

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

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

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

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

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

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

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

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

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

The Test for Striking a Claim

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

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

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

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

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

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

The Cause of Action in Negligence

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

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

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

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

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

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

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

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

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

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

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

Many of these considerations are at play in this appeal.

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

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

The Immunity Clause: Section 43

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

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

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

> as mere surplusage in the circumstances. Therefore, I hold that section 43 bars any actions or proceeding against the ERCB, in terms of both its decisions to act and the acts done pursuant to those decisions, and its decisions not to act. (emphasis added)

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

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

The *Charter* Claim

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

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

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

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

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

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

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

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

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

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

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

> 33. However, even if the claimant establishes that damages are functionally justified, the state may establish that other considerations render s. 24(1) damages inappropriate or unjust. A complete catalogue of countervailing considerations remains to be developed as the law in this area matures. At this point, however, two considerations are apparent: the existence of alternative remedies and concerns for good governance. . . .
>
> 40. The *Mackin* principle [*Mackin v New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 SCR 405] recognizes that the state must be afforded some immunity from liability in damages resulting from the conduct of certain functions that only the state can perform. Legislative and policy-making functions are one such area of state activity. The immunity is justified because the law does not wish to chill the exercise of policy-making discretion.

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

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

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

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

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

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

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

Conclusion

[31] The appeal is dismissed.

Appeal heard on May 8, 2014

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

Côté J.A.

Watson J.A.

Slatter J.A.

Appearances:

M. Klippenstein and W.C. Wanless
for the Appellant

G. Solomon, Q.C. and C. Elliott
for the Respondent

L.H. Riczu
for the Intervener

TAB 5

COURT OF APPEAL OF ALBERTA

FILED
SEP 30 2014
COURT OF APPEAL
CALGARY

COURT OF APPEAL FILE NUMBER:	1301-0346 AC
TRIAL COURT FILE NUMBER:	0702-00120
REGISTRY OFFICE:	CALGARY
PLAINTIFF/APPLICANT: STATUS ON APPEAL:	JESSICA ERNST Appellant
DEFENDANT/RESPONDENT: STATUS ON APPEAL:	ENERGY RESOURCES CONSERVATION BOARD Respondent
DEFENDANT/RESPONDENT: STATUS ON APPEAL:	ENCANA CORPORATION AND HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA Not Parties to the Appeal
DOCUMENT	JUDGMENT
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	JENSEN SHAWA SOLOMON DUGUID HAWKES LLP Barristers 800, 304 - 8 Avenue SW Calgary, Alberta T2P 1C2 Glenn Solomon, Q.C. Phone: 403 571 1508 Fax: 403 571 1528 File: 12133 001
DATE ON WHICH JUDGMENT WAS PRONOUNCED:	September 15, 2014
LOCATION OF HEARING:	Calgary, Alberta
NAME OF JUDGES WHO GRANTED THIS JUDGMENT:	Mr. Justice J. Côté Mr. Justice J. Watson Mr. Justice F. Slatter

I hereby certify this to be a true copy.

Robin Campbell
For Deputy Registrar
Court of Appeal of Alberta

UPON THE APPEAL of Jessica Ernst heard May 8, 2014, from the Order of the Honourable Chief Justice N. C. Wittmann granted on November 13, 2013 and filed December 2, 2013; AND UPON HEARING counsel for Jessica Ernst and the Energy Resources Conservation Board:

IT IS ORDERED AND ADJUDGED THAT:

1. **The Appeal is dismissed.**

"Illeen Moore"
D/ **REGISTRAR, Court of Appeal**

APPROVED AS BEING THE ORDER GRANTED:

Klippenstein

Per: _____
Murray Klippenstein
Solicitors for Jessica Ernst

Entered this 30 **day of** September, **2014.**

_____
Clerk of the Court

TAB 6

MEMORANDUM OF ARGUMENT

PART I – OVERVIEW OF POSITION AND STATEMENT OF FACTS

Overview

1. This case raises one of the most fundamental constitutional questions a court can consider: can legislation block an individual from seeking a remedy for a breach of her *Charter* rights pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms* (the "***Charter***")? In this case, the Court of Appeal of Alberta has held that it can.

2. The Applicant, Jessica Ernst ("**Ms. Ernst**" or the "**Applicant**") brought a *Charter* claim against the Energy Resources Conservation Board (the "**ERCB**"),[1] Alberta's energy regulator, seeking a remedy under s. 24(1) of the *Charter* for violation of her freedom of expression as protected by s. 2(b) of the *Charter*. Section 24(1) of the *Charter* provides:

> **Enforcement of guaranteed rights and freedoms**
> 24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such a remedy as the court considers appropriate and just in the circumstances.[2]

3. Both the Alberta Court of Queen's Bench[3] and the Court of Appeal of Alberta[4] held that the general "protection from action" clause contained in section 43 of the *Energy Resources Conservation Act* completely bars Ms. Ernst's *Charter* claim. Section 43 of the *Energy Resources Conservation Act* provides:

> **Protection from action**
> 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

[1] The ERCB has since been succeeded by the Alberta Energy Regulator through the *Responsible Energy Development Act,* SA 2012, c R-17.3. Under s. 83(3)(c) of the *Act*, "an existing cause of action, claim or liability to prosecution of, by or against the former Board is unaffected by the coming into force of this section and may be continued by or against the Regulator". For the purposes of this Memorandum of Argument the energy regulator will be referred to as the ERCB.

[2] *Canadian Charter of Rights and Freedoms*, s 24(1), Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 ("*Canadian Charter of Rights and Freedoms*").

[3] Reasons for Judgment of the Honourable Chief Justice Neil Wittmann of the Court of Queen's Bench of Alberta, dated September 16, 2014 ("ABQB Reasons") at paras 82 & 88 **|Tab 2 at 32-33|.**

[4] Reasons for Judgment of the Court of Appeal of Alberta, dated September 15, 2014 ("ABCA Reasons") at para 30 **|Tab 4 at 56|.**

> 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.[5]

4. The findings of the courts below serve to impoverish s. 24(1) of the *Charter*, and are directly contrary to the principle of constitutional supremacy. The Applicant seeks leave to appeal in this case so that the Supreme Court of Canada (the "**Supreme Court**") may consider the boundaries between the rights of Canadians to seek remedies for breaches of their *Charter* rights pursuant to s. 24(1), and the ability of both provincial and federal legislatures to eliminate those rights. The Applicant respectfully submits that the critical questions raised by this appeal are deserving of the Supreme Court's attention for four reasons.

5. First, while the *Charter* has been extensively litigated over the past 32 years, the fundamental question of whether a legislature can bar *Charter* claims for personal remedies made pursuant to s. 24(1) of the *Charter* has not been squarely considered by the Supreme Court. The closest this Honourable Court has come to adjudicating this issue directly is the case of *Nelles v Ontario* where, in *obiter dicta*, the Court appears to come to the opposite conclusion to that of the Court of Appeal of Alberta.[6] The present case provides an excellent opportunity to directly address this fundamental constitutional question.

6. Second, this case raises an important "separation of powers" question – namely whether it is the legislatures or the courts that may determine what is a "just and appropriate" remedy under s. 24(1) of the *Charter*. In the case at bar, the Court of Appeal of Alberta found that there are strong policy reasons to allow legislatures the power to define the available constitutional remedies available under s. 24(1) of the *Charter*.[7] While this issue has not been squarely considered by the Supreme Court, the Court of Appeal of Alberta's reasoning appears to contradict principles regarding the general nature of s. 24(1) set by the Supreme Court in cases such as *Doucet-Boudreau v Nova Scotia (Minister of Education)*.[8]

[5] *Energy Resources Conservation Act*, RSA 2000, c E-10, s 43. The *Energy Resources Conservation Act* was repealed on June 17, 2013, and replaced with the *Responsible Energy Development Act*, SA 2012. Section 27 of the *Responsible Energy Development Act* contains a substantially similar protection from action clause.
[6] *Nelles v Ontario*, [1989] 2 SCR 170 ("*Nelles*") at 196.
[7] ABCA Reasons at para 28 **[Tab 4 at 55]**.
[8] *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3 ("*Doucet-Boudreau*") at paras 41-51.

7. Third, the decision of the Court of Appeal of Alberta in this case puts the law in Alberta at odds with the law in Ontario. The Court of Appeal for Ontario has specifically held that "a statutory enactment cannot stand in the way of a constitutional entitlement".[9] As things stand now, the uneasy reality is that the rights of Ontarians to seek *Charter* remedies are significantly more robust than the rights of Albertans.

8. Fourth, general "protection from action" clauses similar to s. 43 of the *Energy Resources Conservation Act* are found in dozens of statutes across Canada. There are nearly identical "protection from action" clauses in the statute books of each and every province in Canada.[10] The Supreme Court's guidance on whether legislation can limit the remedies available under s. 24(1) of the *Charter* will benefit all Canadians.

The Action

9. The Applicant, Jessica Ernst is a landowner who resides on an acreage near Rosebud, Alberta. Her rural property is supplied with fresh water by a private well that draws from the Rosebud Aquifer.[11]

10. Between 2001 and 2006, the defendant EnCana Corporation ("**EnCana**") engaged in a new and untested program of drilling for methane gas from shallow coal beds at over 190 gas wells located adjacent to Ms. Ernst's property. This program included a technique known as "hydraulic fracturing" or "fraccing" at shallow depths underground. Shortly thereafter, Ms. Ernst's well water became severely contaminated with hazardous and flammable levels of methane and other toxic chemicals.[12]

11. Ms. Ernst has brought claims against the defendants EnCana, the ERCB and Her Majesty the Queen in Right of Alberta regarding the severe contamination of her well water and other harms. The portion of the Action against the ERCB includes claims for breaches of Ms. Ernst's fundamental freedoms under the *Charter* and for the negligent failure to implement the ERCB's inspection scheme.[13]

[9] *Prete v Ontario*, 16 OR (3d) 161 (CA) ("***Prete***" cited to QL) at paras 7-8 **|Tab 8 at 114-115|.**
[10] See examples from each of the ten provinces at paragraph 31 of this factum.
[11] Fresh Statement of Claim, dated June 25, 2012 ("**Statement of Claim**") at paras 1 & 5 **|Tab 7 at 86-87|.**
[12] Statement of Claim at paras 6-14 **|Tab 7 at 87-88|.**
[13] Statement of Claim at paras 24-58 **|Tab 7 at 92-99|.**

12. The present application for leave to appeal is concerned solely with the *Charter* claim pleaded against the ERCB as set out in paragraphs 42-58 of the Fresh Statement of Claim.[14] The Court of Appeal of Alberta's reasons regarding Ms. Ernst's *Charter* claim are found at paragraphs 23-30 of the Reasons for Judgment of the Court of Appeal of Alberta.[15] The Court of Queen's Bench reasons regarding the *Charter* claim are found at paragraphs 31-43 and 59-88 of the Reasons for Judgment of the Honourable Chief Justice Neil Wittmann of the Court of Queen's Bench of Alberta.[16]

Jessica Ernst's* Charter *claim against the ERCB

13. Ms. Ernst's *Charter* claim is made in the context of severe adverse impacts caused by the oil and gas industry near Ms. Ernst's home in Rosebud Alberta, including water that is so contaminated with methane that it can be lit on fire. Ms. Ernst was a vocal and effective critic of the ERCB's failure to adequately respond to these negative impacts. The pleadings state that the ERCB responded to Ms. Ernst's vocal and effective criticism by taking punitive action against her, and arbitrarily preventing her from communicating with key offices within the ERCB.

14. Ms. Ernst's *Charter* claim states that the ERCB breached her right to freedom of expression as guaranteed by the *Charter* by (i) punishing Ms. Ernst for publicly criticizing the ERCB and by (ii) arbitrarily preventing Ms. Ernst from speaking to key offices within the ERCB.[17]

15. The relevant particulars of the Statement of Claim are as follows:

a. Between 2001 and 2006, EnCana conducted shallow fraccing operations at dozens of gas wells in close proximity to Ms. Ernst's private property. It is alleged that EnCana's operations near Ms. Ernst's homes caused significant adverse impacts, including severe contamination of Ms. Ernst's well water with hazardous and flammable levels of methane and other toxic chemicals.[18]

[14] Statement of Claim at paras 42-58 **[Tab 7 at 96-99]**.
[15] ABCA Reasons at paras 23-30 **[Tab 4 at 54-56]**.
[16] ABQB Reasons at paras 31-43 and 59-88 **[Tab 2 at 18-20 & 26-33]**.
[17] Statement of Claim at para 58 **[Tab 7 at 99]**.
[18] Statement of Claim at paras 6 & 13-15 **[Tab 7 at 87-89]**.

b. The ERCB is the government agency responsible for overseeing and regulating the oil and gas industry. Importantly, the ERCB is tasked with protecting groundwater from contamination due to oil and gas development.[19] This Action deals solely with the ERCB's operational and administrative functions as carried out by the Operations Division of the ERCB, and specifically does not deal with any action taken by the ERCB in its role as an adjudicative tribunal.

c. Throughout 2004 and 2005, Ms. Ernst frequently voiced her concerns regarding negative impacts caused by EnCana's oil and gas developments near her home through contact with the ERCB's Operations Division.[20]

d. At the same time, Ms. Ernst frequently spoke publicly about her concerns regarding oil and gas development, and the failure of the ERCB to adequately address these concerns. Ms. Ernst was a vocal and effective critic of the ERCB; her public criticism brought unwanted public attention to the ERCB and caused embarrassment within the organization.[21]

e. The ERCB responded to this unwanted public criticism by severely restricting Ms. Ernst's communication with the ERCB and vindictively and arbitrarily prohibiting Ms. Ernst from communicating with the ERCB's compliance, investigation and enforcement offices in an attempt to control what issues Ms. Ernst raised publicly.[22] Richard McKee, a senior lawyer with the ERCB, confirmed that the ERCB had decided to stop communication with Ms. Ernst and would not re-open communication until Ms. Ernst agreed to stop voicing her concerns publicly and agreed to raise her concerns only to the ERCB.[23]

f. The decision to stop communication with Ms. Ernst was taken specifically as a means to punish Ms. Ernst for her past public criticism of the ERCB, to marginalize her concerns, and to deny her access to the ERCB complaints mechanism. Ms. Ernst was

[19] Statement of Claim at paras 24-26 **[Tab 7 at 92]**.
[20] Statement of Claim at para 45 **[Tab 7 at 97]**.
[21] Statement of Claim at paras 45-46 **[Tab 7 at 97]**.
[22] Statement of Claim at para 47 **[Tab 7 at 97]**.
[23] Statement of Claim at para 52 **[Tab 7 at 98]**.

> prevented from raising legitimate and credible concerns regarding water contamination with the very regulator mandated by the government to investigate and remediate such contamination and at the very time that the regulator was most needed.[24]

16. Ms. Ernst has claimed for a remedy for the breach of her constitutional rights under s. 24(1) of the *Charter*; this claim includes both a claim for *Charter* damages, as well as a general claim for "further and other relief as seems just to this Honourable Court".[25] At trial, Ms. Ernst will seek both a judicial finding that her *Charter* rights have been breached, as well as an appropriate *Charter* remedy for this breach, which may include monetary and/or declaratory relief.

The judgments below

17. The Defendant ERCB brought an application to the Court of Queen's Bench of Alberta seeking to strike out the Statement of Claim on the ground that it disclosed no reasonable claim (under r. 3.68 of the *Alberta Rules of Court*), or, in the alternative, seeking summary judgment in favour of the ERCB (under r. 7.3 of the *Alberta Rules of Court*). The grounds asserted by the ERCB in support of both remedies were the same: first, that there was no legal basis for the claims against the ERCB, and second, that the ERCB is immune from suit because of the statutory immunity provided by section 43 of the *Energy Resources Conservation Act*.[26] Again, section 43 of the *Energy Resources Conservation Act* provides:

> **Protection from action**
> 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.

18. On September 16, 2013, Wittmann CJ rendered his judgment in the above application, striking the Applicant's *Charter* claim against the ERCB.

[24] Statement of Claim at para 55-57 **|Tab 7 at 99|**.
[25] Statement of Claim at para 87 **|Tab 7 at 109|**.
[26] ABQB Reasons at paras 6 & 12 **|Tab 2 at 7-8|**.

19. Wittmann CJ made two key findings. First, Wittmann CJ found that "the *Charter* claim of Ernst against the ERCB is valid". Second, Wittmann CJ found that the general "protection from action" clause contained within section 43 of the *Energy Resources Conservation Act* barred the *Charter* claim, stating:[27]

> **I conclude that statutory immunity clauses apply to claims for personal remedies pursuant to the *Charter*.** I reach this conclusion for two reasons. Firstly, it is my view that the reasons why limitation periods apply to claims for personal remedies under the *Charter* also apply to statutory immunity clauses because statutory immunity clauses and limitation periods are both legislated bars to what may otherwise be a meritorious claim.
>
> Secondly, there are strong policy reasons for the application of immunity clauses for claims for personal remedies under the *Charter*. Policy considerations are given effect when the merits of a claim for a *Charter* breach are examined. In my view, these policy considerations also apply when determining whether a statutory immunity clause applies.[28] [Emphasis added]

20. Ms. Ernst appealed to the Court of Appeal of Alberta, asserting among other things, that the Court below had erred in holding that section 43 of the *Energy Resources Conservation Act* bars *Charter* claims for a remedy under s. 24(1) of the *Charter*. On September 15, 2014, the Court of Appeal of Alberta dismissed the appeal, holding:

> Protecting administrative tribunals and their members from liability for damages is constitutionally legitimate. Just as there is nothing illegitimate about time limits to seek constitutional remedies, so too is there nothing constitutionally illegitimate about provisions like s. 43. . . . **the conclusion of the case management judge that s. 43 bars the appellant's *Charter* claim discloses no reviewable error.**[29] [Emphasis Added]

21. The Court of Appeal did not, however, disturb Wittmann CJ's finding that "the *Charter* claim of Ernst against the ERCB is valid". The Court of Appeal specifically noted that the question of whether the pleadings disclosed a sustainable claim for a breach of the *Charter* was not appealed and was not before it.[30]

22. In coming to its conclusion, the Court of Appeal appears to conflate two issues: first, the issue of whether s. 43 of the *Energy Resources Conservation Act* is a compete bar to a

[27] ABQB Reasons at paras 88 & 130 **|Tab 2 at 33 & 42|**; Order of the Honourable Chief Justice Neil Wittmann, pronounced November 13, 2013 at para 2 **|Tab 3 at 46|**.
[28] ABQB Reasons at paras 82-83 **|Tab 2 at 32|**.
[29] ABCA Reasons at paras 29-30 **|Tab 4 at 56|**.
[30] ABCA Reasons at para 9 **|Tab 4 at 49-50|**.

Charter claim brought pursuant to s. 24(1) of the *Charter*, and second, the related but distinct issue of whether legislatures have the power to define what remedies are available under s. 24(1) of the *Charter*, for example, by legislatively removing *Charter* damages as an available remedy. It is important to point out that while the second issue appears to play a significant role in the Court of Appeal's reasoning,[31] the question of whether legislatures have the power to define available *Charter* remedies was not specifically at issue in this case. Instead, the issue was limited to whether s. 43 of the *Energy Resources Conservation Act*, which reads "no action or proceeding may be brought against the board", prevents Ms. Ernst from bringing an action for *any* remedy under s. 24(1) of the *Charter*. With respect to their operative findings, both the Court of Queen's Bench of Alberta and the Court of Appeal of Alberta found that s. 43 of the *Energy Resources Conservation Act* acts is an absolute bar to *Charter* claims for personal remedies brought by individual citizens.

23. The present Application deals solely with the Ms. Ernst's *Charter* claim; the Applicant is not seeking leave to appeal other aspects of the Court of Appeal of Alberta's decision.

PART II – QUESTIONS IN ISSUE

24. The Applicant submits that the following issues warrant review by the Supreme Court of Canada under s. 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26:

Issue #1: Can a general "protection from action" clause contained within legislation bar a *Charter* claim for a personal remedy made pursuant s. 24(1) of the *Canadian Charter of Rights and Freedoms*?

Issue #2: Can legislation constrain what is considered to be a "just and appropriate" remedy under s. 24(1) of the *Charter*?

PART III – STATEMENT OF ARGUMENT

This case raises key issues of national and public importance

25. The Applicant respectfully submits that the constitutional issues raised by this case are of fundamental importance, and are deserving of the Supreme Court's attention. The Applicant

[31] ABCA Reasons at paras 28-29 **[Tab 4 at 55-56]**.

seeks leave to appeal in this case so that the Court may consider the boundaries between the rights of Canadians to seek remedies for breaches of their *Charter* rights, and the ability of both federal and provincial legislatures to eliminate those rights.

The Court of Appeal decision in this case is in conflict with the jurisprudence of other Courts of Appeal

26. There is a clear conflict between the Court of Appeal of Alberta and the Court of Appeal for Ontario on the question of whether a general "protection from action" clause contained within a statue passed by a provincial legislature can bar an otherwise valid *Charter* claim for a personal remedy made pursuant s. 24(1) of the *Charter*. In particular, the Ontario decision of *Prete v Ontario* stands in direct conflict with the Court of Appeal of Alberta in the case at bar.

27. In *Prete v Ontario*, a case regarding malicious prosecution, the plaintiff brought a *Charter* claim against the Attorney General of Ontario for infringement of his s. 7 rights, and sought damages as a remedy under s. 24(1) of the *Charter*. The Ontario Court of Appeal was asked to determine whether the "protection from action" clause contained within s. 5(6) of the *Proceedings Against the Crown Act* could provide statutory immunity from *Charter* claims to Crown prosecutors.[32] The Court found that it could not:

> The reasons of [the Supreme Court] standing alone are strongly persuasive that a statutory enactment cannot stand in the way of a constitutional entitlement. Section 32(1)(b) of the *Charter* provides that the *Charter* applies to the legislature and government of each province. The remedy section of the *Charter* would be emasculated if the provincial government, as one of the very powers the *Charter* seeks to control, could declare itself immune.
>
> Therefore, s 5(6) of the *Proceedings Against the Crown Act*. . . cannot infringe upon a s. 24(1) *Charter* remedy.[33]

28. In contrast to *Prete*, the Alberta Court of Appeal held in the case at bar that the "protection from action" clause contained within s. 43 of the *Energy Resources Conservation Act can and does* bar a *Charter* claim, noting that "[p]rotecting administrative tribunals and their members from [*Charter*] damages is constitutionally legitimate".[34]

[32] *Prete, supra* note 9 at paras 1 & 5 **[Tab 8 at 112-113]**.
[33] *Prete, supra* note 9 at paras 7-8 **[Tab 8 at 114-115]**.
[34] ABCA Reasons at paras 29-30 **[Tab 4 at 56]**.

29. The Applicant respectfully submits that the Supreme Court's guidance is required to resolve the conflict between the Courts of Appeal of Alberta and Ontario.

This case raises issues of interpretation of "protection from action" clauses in every province in Canada

30. General "protection from action" clauses similar to s. 43 of the *Energy Resources Conservation Act* are found in dozens of statutes across Canada. A non-exhaustive survey reveals examples of nearly identical general "protection from action" clauses in the statute books of Canada, British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, Nova Scotia, Newfoundland and Labrador, and Prince Edward Island.[35] The question directly raised by this case is whether each of these dozens of statutes provide immunity to their respective government agencies for remedies under s. 24(1) of the *Charter*.

31. Examples from every Canadian jurisdiction are provided below and were selected to cover both wide geographical scope and to demonstrate that the general "protection from action" clauses at issue cover a wide range of government actors and government actions. These are only examples of the dozens of statutes found in a brief survey of each jurisdiction's statute books.

> **ALBERTA**
>
> *Alberta Health Act*, SA 2010, c A-19.5
>
> Liability
>
> 11. No action lies against the Minister, the Crown in right of Alberta, the Health Advocate or any employee or agent of any of them for anything done or omitted to be done by that person in good faith while carrying out that person's duties or exercising that person's powers under this Act or the regulations.

> **SASKATCHEWAN**
>
> *The Oil and Gas Conservation Act*, RSS 1978, c O-2
>
> Non-liability of board
>
> 7.9 No action lies or shall be instituted against the board, a member of the board or an officer, employee or agent of the board for any loss or damage suffered by a person by reason of anything in good faith done, caused, permitted or authorized to be done, attempted to be done or omitted to be done, by any of them, pursuant to or in the exercise of or supposed exercise of any power conferred by this Act or the regulations or in the carrying out or supposed carrying out of any order made pursuant to this Act or any duty imposed by this Act or the regulations.

[35] A non-exhaustive list of examples of similar "protection from action" clauses are provided below.

MANITOBA

The Correctional Services Act, CCSM c C230

No liability

58(1) No action lies against the government, the minister or the commissioner, or any staff member, contractor, volunteer or other person acting under the direction of the commissioner, for anything done or omitted to be done in good faith in the administration of this Act or in the discharge of any powers or duties that under this Act are intended or authorized to be executed or performed.

ONTARIO

Civil Remedies Act, 2001, SO 2001, c 28

Protection from liability

20(1) No action or other proceeding may be commenced against the Attorney General, the Crown in right of Ontario or any person acting on behalf of, assisting or providing information to the Attorney General or the Crown in right of Ontario in respect of the commencement or conduct in good faith of a proceeding under this Act or in respect of the enforcement in good faith of an order made under this Act.

QUEBEC

Securities Act, CQLR c V-1.1

283. No proceeding may be brought against the Authority, a member of its personnel, its appointed agent or any person exercising a delegated power, for official acts done in good faith in the exercise of their functions.

BRITISH COLUMBIA

Nisga'a Final Agreement Act, RSBC 1999, c 2, Chapter 20

24. No action lies or may be instituted against the Enrolment Appeal Board, or any member of the Enrolment Appeal Board, for anything said or done, or omitted to be said or done, in good faith in the performance, or intended performance, of a duty or in the exercise or intended exercise of a power under this Chapter.

NEW BRUNSWICK

Pension Benefits Act, SNB 1987, c P-5.1

100.1(5) No action for damages or other proceedings shall be taken against the Province, the Minister, or a person designated to act on behalf of the Minister with respect to anything done or purported to be done, or with respect to anything omitted in respect of a regulation with retroactive effect, either before or after the coming into force of this section.

NOVA SCOTIA

Building Code Act, RSNS 1989, c 46

No action

27. No action or proceeding lies against the Crown, a municipality or a servant or agent thereof for any matter or thing done or omitted to be done by them in good faith and with reasonable care in exercising their powers or carrying out their duties under this Act or the regulations. R.S., c. 46, s. 27.

PRINCE EDWARD ISLAND

Community Care Facilities and Nursing Homes Act, RSPEI 1988, c C-13

Liability

6. (2) No action lies against the Board or its members for anything done in good faith in exercise of its functions.

NEWFOUNDLAND AND LABRADOR

Public Utilities Act, RSNL 1990, c P-47

6. (13) An action or other proceeding does not lie against the board or a member, officer or employee of the board for anything done or omitted to be done in good faith in the course of carrying out its or his or her duties under this Act.

CANADA

Bank of Canada Act, RSC 1985, c B-2

No liability if in good faith

30.1 No action lies against Her Majesty, the Minister, any officer, employee or director of the Bank or any person acting under the direction of the Governor for anything done or omitted to be done in good faith in the administration or discharge of any powers or duties that under this Act are intended or authorized to be executed or performed.

32. The Applicant submits that the Supreme Court's guidance is needed to clarify what limits, if any, these dozens of general "protection from action" clauses place on the right of Canadians to seek a remedy for a *Charter* breach under s. 24(1).

The key constitutional questions raised by this case have not been directly considered by the Supreme Court

33. While the *Charter* has been extensively litigated over the past 32 years, the fundamental question of whether legislation can bar *Charter* claims for personal remedies made pursuant to s. 24(1) of the *Charter* (Question in Issue #1), has not been squarely considered by the Supreme Court. This case provides an excellent opportunity to directly address this key constitutional issue.

34. The Supreme Court addressed but did not decide this issue in the case of *Nelles v Ontario*, where Lamer J. provided general comments on constitutional principles in *obiter dicta*. Lamer J. however, specifically left this key issue open for future consideration, stating "[w]hether or not a common law or statutory rule can constitutionally have the effect of excluding the courts

from granting the just and appropriate remedy, their most meaningful function under the Charter, does not have to be decided in this appeal."[36]

35. Similarly, the Supreme Court has only indirectly considered the question of whether a legislature can determine what is a "just and appropriate" remedy under s. 24(1) of the *Charter* (Question in Issue #2). The case of *Doucet-Boudreau v Nova Scotia (Minister of Education)* involved the nature of remedies available under s. 24(1) of the *Charter* for the realization of minority language rights protected by s. 23 of the *Charter*, and specifically the question of whether the particular remedy ordered by the court (which in that case involved the court assuming an ongoing supervisory role) was "appropriate and just" in accordance with s. 24(1).[37] The Supreme Court was not required to and did not specifically consider whether a legislature can pass legislation which restricts the remedies available under s. 24(1). Instead, the focus was on describing the powers of the courts to grant appropriate and just remedies. These principles include the following:

> The power of the superior courts under s. 24(1) to make appropriate and just orders to remedy infringements or denials of *Charter* rights is part of the supreme law of Canada. It follows that this remedial power cannot be strictly limited by statutes or rules of the common law. We note however, that statues and the common law may be helpful to a court choosing a remedy under s. 24(1) insofar are the statutory provisions or common law rules express principles that are relevant to determining what is "appropriate and just in the circumstances".
>
> What, then, is meant in s 24(1) by the words "appropriate and just in the circumstances"? Clearly, the task of giving these words meaning in particular cases will fall to the courts ordering the remedies since s. 24(1) specifies that the remedy should be such as the court considers appropriate and just.[38]
> [Emphasis in the original]

36. The Supreme Court's discussion of the general principles governing s. 24(1) of the *Charter* appear to contradict the reasoning of the Court of Appeal of Alberta in the present case. In contrast, the Court of Appeal of Alberta found that there are strong policy reasons that suggest that legislatures should and in fact do have the power to define the remedies available under s. 24(1) of the *Charter*:

[36] *Nelles, supra* note 6 at 196.
[37] *Doucet-Boudreau, supra* note 8 at paras 1 & 52.
[38] *Doucet-Boudreau, supra* note 8 at paras 51-52.

> The legislatures have a legitimate role in specifying the broad parameters of remedies that are available. **Having well established statutory rules about the availability of remedies is much more desirable than leaving the decision to the discretion of individual judges. Any such *ad hoc* regime would be so fraught with unpredictability as to be constitutionally undesirable.**[39] [Emphasis added]
>
> Protecting administrative tribunals and their members from liability for damages is constitutionally legitimate. Just as there is nothing illegitimate about time limits to seek constitutional remedies, so too there is nothing constitutionally illegitimate about provisions like s. 43. . . . The conclusion of the case management judge that s. 43 bars the appellant's *Charter* claim discloses no reviewable error.[40]

37. The Appellant seeks the Supreme Court's guidance in resolving the question of whether it is the legislature or the courts that have the power to determine what is considered a "just and appropriate remedy" under s. 24(1) of the *Charter*.

There is very good reason to doubt the correctness of the Court of Appeal's decision

38. Finally, leave to appeal should be granted because there is very good reason to doubt the correctness of the Court of Appeal of Alberta's decision. With respect, the finding by the Court of Appeal of Alberta that a "protection from action" clause contained within a provincial statute can provide immunity for valid *Charter* claims is not in keeping with the legal principle of constitutional supremacy, and is in urgent need of correction. The *Charter* guarantees not only fundamental freedoms, but also guarantees the right of Canadians to seek a remedy when these fundamental *Charter* rights and freedoms are violated. These constitutional rights cannot be taken away by legislation purporting to grant general immunity to the ERCB from any and all legal action.

39. It is difficult to overstate the importance of the *Canadian Charter of Rights and Freedoms* in the Canadian legal system. The *Charter* enshrines the fundamental freedoms of all Canadians, and, along with other parts of our Constitution, forms the supreme law of Canada.[41]

40. The *Charter* serves as a vital bulwark protecting the individual against the state. As repeatedly emphasized by the Supreme Court, the "primary purpose" of the *Charter* is to restrain

[39] ABCA Reasons at para 28 **|Tab 4 at 55|**.
[40] ABCA Reasons at paras 29-30 **|Tab 4 at 56|**.
[41] *Canadian Charter of Rights and Freedoms*, *supra* note 2, s. 52(1).

government action and to protect individuals, like Ms. Ernst, from unconstitutional actions taken by government agencies, such as the ERCB. As noted by this Court, "the *Charter* is essentially an instrument for checking the powers of government over the individual".[42]

41. Crucially, the *Charter* itself not only guarantees the fundamental freedoms of Canadians, but also guarantees a right to a remedy for breaches of those fundamental freedoms.[43] Section 24(1) of the *Charter* specifically provides remedies for *unconstitutional government acts*.[44] In other words, the *right to a remedy is itself a constitutional right*. In the words of Iaccobucci and Arbour JJ, "[s]ection 24(1) entrenches in the Constitution a remedial jurisdiction for infringements or denials of *Charter* rights and freedoms."[45]

42. Importantly for the present case, McLachlin CJ notes that section 24(1) "provides a *personal remedy* against unconstitutional government action" [emphasis added].[46] In other words, the entire purpose of s. 24(1) of the *Charter* is to provide individuals like Ms. Ernst an avenue to seek a *personal remedy* against government agencies when that individual's fundamental *Charter* freedoms have been violated.

43. Because s. 24(1) is part of the supreme law of Canada, the power of a superior court to grant a remedy under s. 24(1) cannot be limited by statute:

> The power of the superior courts under s. 24(1) to make appropriate and just orders to remedy infringements or denials of *Charter* rights is part of **the supreme law of Canada.** It follows that this remedial power cannot be strictly limited by statutes or rules of the common law.[47]
>
> ... superior courts' powers to craft *Charter* remedies **may not be constrained by statutory or common law limits.**[48] [Emphasis added]

44. Specifically, this means that a statutory immunity clause cannot act to bar a claimant from seeking a *Charter* remedy; to the extent that it purports to do so, the immunity clause is of no force and effect.[49]

[42] *McKinney v University of Guelph*, [1990] 3 SCR 229 at 261-262.
[43] *R v 974649 Ontario Inc*, 2001 SCC 81, [2001] 3 SCR 575 at para 14 ("*R v 974649 Ontario*").
[44] *R v Ferguson*, 2008 SCC 6, [2008] 1 SCR 96 at paras 59-61 ("*Ferguson*").
[45] *Doucet-Boudreau, supra* note 8 at para 41.
[46] *Ferguson, supra* note 44 at para 61.
[47] *Doucet-Boudreau, supra* note 8 at para 51.
[48] *Doucet-Boudreau, supra* note 8 at para 105.
[49] *Canadian Charter of Rights and Freedoms, supra* note 2, s. 52(1).

45. The Supreme Court has repeatedly and forcefully emphasized the supreme importance of providing full, effective and meaningful personal remedies under s. 24(1). Breaches of the *Charter* "cannot be countenanced", and therefore "[a] court which has found a violation of a *Charter* right *has a duty to provide an effective remedy*" [emphasis added].[50] According to Lamer J, "access to a court of competent jurisdiction to seek a remedy is essential for the vindication of a constitutional wrong. To create a right without a remedy is antithetical to one of the purposes of the *Charter* which surely is to allow courts to fashion remedies when constitutional infringements occur". [51]

46. McLachlin CJ, echoing the words of previous Supreme Court judgments, put it in the following terms:

> S. 24(1) "establishes the right to a remedy as the foundation stone for the effective enforcement of *Charter* rights". Through the provision of an enforcement mechanism, s. 24(1) "above all else ensures that the *Charter* will be a vibrant and vigorous instrument for the protection of the rights and freedoms of Canadians". Section 24(1)'s interpretation necessarily resonates across all *Charter* rights, since a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach.[52]

47. The authority of the Court to craft an appropriate *Charter* remedy under s. 24(1) is expansive. As emphasized by the Supreme Court, "it is difficult to imagine language which could give the court a wider and less fettered discretion".[53] The Court's discretion to grant an "appropriate and just" remedy includes the ability to award damages for a breach of a claimant's *Charter* rights under s. 24(1) in appropriate circumstances.[54]

48. Ms. Ernst is seeking a remedy under s. 24(1) of the *Charter* for a violation of her fundamental *Charter* right to freedom of expression. As noted above, because the remedial provision that provides access to a *Charter* remedy is itself a protected constitutional right, Ms. Ernst's claim for a *Charter* remedy pursuant to s. 24(1) cannot be blocked by a general "protection from action" clause contained within provincial legislation such as the *Energy Resources Conservation Act*. In other words, Ms. Ernst is constitutionally guaranteed the right

[50] *Ferguson, supra* note 44 at para 34.
[51] *Nelles, supra* note 6 at 196.
[52] *R v 974649 Ontario, supra* 43 at paras 19-20.
[53] *Doucet-Boudreau, supra* note 8 at para 52.
[54] *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 SCR 28 at paras 16-22.

to apply to a court to seek a remedy for the ERCB's breaches of her *Charter* right to freedom of expression.

Summary

49. The Applicant respectfully submits that this case raises key issues of such national and public importance that leave to appeal to the Supreme Court should be granted. In particular, leave to appeal should be granted because:

a. The decision of the Court of Appeal of Alberta in this case puts the law in Alberta in conflict with appellate law in Ontario.

b. General "protection from action" clauses similar to s. 43 of the *Energy Resources Conservation Act* are found in dozens of statutes across Canada. The Supreme Court's guidance on whether such statues can bar actions brought pursuant s. 24(1) of the *Charter* will benefit all Canadians.

c. The fundamental questions of whether a legislature can bar or otherwise restrict *Charter* claims for personal remedies made pursuant to s. 24(1) of the *Charter* through a general "protection from action" clause has not been squarely considered by the Supreme Court.

d. There are very good reasons to doubt the correctness of the decisions below. This appeal provides a very good opportunity to correct the law on a fundamental constitutional question.

PART IV – COSTS SUBMISSIONS

50. Ms. Ernst seeks costs of this application, and ultimately of the appeal here and throughout the courts below.

PART V – ORDER SOUGHT

51. Ms. Ernst respectfully seeks an Order granting her leave to Appeal to the Supreme Court of Canada from the decision of the Court of Appeal dated September 15, 2014, with costs.

All of which is respectfully submitted this 12th day of November, 2014.

Murray Klippenstein

W. Cory Wanless

Lawyers for the Applicant, Jessica Ernst

PART VI – TABLE OF AUTHORITIES

Authority	Paragraph(s)
Doucet-Boudreau v Nova Scotia (Minister of Education), 2003 SCC 62, [2003] 3 SCR 3 http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2096/index.do	6, 35, 41, 43, 47
McKinney v University of Guelph, [1990] 3 SCR 229 http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/687/index.do	40
Nelles v Ontario, [1989] 2 SCR 170 http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/499/index.do	5, 34, 45
Prete v. Ontario (Attorney-General), 1993 CanLII 3386 (ON CA), 16 OR (3d) 161 [Tab 8]	7, 27
R v 974649 Ontario Inc, 2001 SCC 81, [2001] 3 SCR 575 http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1922/index.do	41, 46
R v Ferguson, 2008 SCC 6, [2008] 1 SCR 96 http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1841/index.do	41, 42, 45
Vancouver (City) v. Ward, 2010 SCC 27, [2010] 2 SCR 28 http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7868/index.do	47

PART VII – STATUES AND REGULATIONS RELIED UPON

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

***The Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982.**

Rights and freedoms in Canada

Guarantee of Rights and Freedoms

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association.

....

Enforcement

Enforcement of guaranteed

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or

LA CHARTE CANADIENNE DES DROIT ET LIBERTÉS

***Loi constitutionnelle de 1982* (R-U), constituant l'annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 11.**

Garantie des droits et libertés

Droits et libertés au Canada

1. La Charte canadienne des droits et libertés garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

Libertés fondamentales

Libertés fondamentales

2. Chacun a les libertés fondamentales suivantes :

(a) liberté de conscience et de religion;

(b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;

(c) liberté de réunion pacifique;

(d) liberté d'association.

....

Recours

Recours en cas d'atteinte

24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la

rights and freedoms	denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
....	

Application of Charter

Application of Charter	**32. (1)** This Charter applies (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

General

Primacy of Constitution of Canada	**52. (1)** The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

aux droits et libertés	présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.
....	

Application de la charte

Application de la charte	**32. (1)** La présente charte s'applique: (a) au Parlement et au gouvernement du Canada, pour tous les domaines relevant du Parlement, y compris ceux qui concernent le territoire du Yukon et les territoires du Nord-Ouest; (b) à la législature et au gouvernement de chaque province, pour tous les domaines relevant de cette législature.

Disposition Générales

Primauté de la Constitution du Canada	**52. (1)** La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

ENERGY RESOURCES CONSERVATION ACT, RSA 2000, C E-10.

Protection from action

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.

***ALBERTA RULES OF COURT*, ALTA REG 124/2010.**

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;
(b) that a commencement document or pleading be amended or set aside;
(c) that judgment or an order be entered;
(d) that an action, an application or a proceeding be stayed.

(2) The conditions for the order are one or more of the following:

(a) the Court has no jurisdiction;
(b) a commencement document or pleading discloses no reasonable claim or defence to a claim;
(c) a commencement document or pleading is frivolous, irrelevant or improper;
(d) a commencement document or pleading constitutes an abuse of process;
(e) an irregularity in a commencement document or pleading is so prejudicial to the claim that it is sufficient to defeat the claim.

(3) No evidence may be submitted on an application made on the basis of the condition set out in subrule (2)(b).

....

7.3(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:

(a) there is no defence to a claim or part of it;
(b) there is no merit to a claim or part of it;
(c) the only real issue is the amount to be awarded.

(2) The application 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.

(3) If the application is successful the Court may, with respect to all or part of a claim, and whether or not the claim is for a single and undivided debt, do one or more of the following:

(a) dismiss one or more claims in the action or give judgment for or in respect of all or part of the claim or for a lesser amount;
(b) if the only real issue to be tried is the amount of the award, determine the amount or refer the amount for determination by a referee;
(c) if judgment is given for part of a claim, refer the balance of the claim to trial or for determination by a referee, as the circumstances require.

***RESPONSIBLE ENERGY DEVELOPMENT ACT*, SA 2012, C R-17.3.**

Protection from action

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

Transitional provisions

83(1) In this section,
(a) "former Act" means the *Energy Resources Conservation Act*, RSA 2000 cE-10;
(b) "former Board" means the Energy Resources Conservation Board.

(2) On the coming into force of this section, any approval issued or any order, direction or declaration made or issued by the former Board before the coming into force of this section continues to have effect according to its terms until it expires or is amended or terminated by the Regulator under this Act or any other enactment.

(3) On the coming into force of this section, the following applies:
(a) the property, assets, rights and benefits of the former Board become the property, assets, rights and benefits of the Regulator;
(b) the Regulator is liable for the obligations and liabilities of the former Board;
(c) an existing cause of action, claim or liability to prosecution of, by or against the former Board is unaffected by the coming into force of this section and may be continued by or against the Regulator;
(d) a civil, criminal or administrative action or proceeding pending by or against the former Board may be continued by or against the Regulator;
(e) a ruling, order or judgment in favour of or against the former Board may be enforced by or against the Regulator.

TAB 7

0702-00120 ✓ PH

~~1202-000449~~ ✓ PH

Court File No. ~~0702-00120~~ ✓ PH PH

IN THE COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE OF DRUMHELLER

JUDICIAL CENTRE OF DRUMHELLER FILED JUN 25 2012 Clerk of the Court

BETWEEN:

JESSICA ERNST

Plaintiff

and

**ENCANA CORPORATION,
ENERGY RESOURCES CONSERVATION BOARD and
HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA**

Defendants

FRESH STATEMENT OF CLAIM

(Filed and served in accordance with the Order of the Honourable Justice Veldhuis, dated April 26, 2012)

June 25, 2012

Murray Klippenstein
W. Cory Wanless
Klippensteins Barristers & Solicitors
160 John Street, Suite 300
Toronto, ON M5V 2E5
Tel.: (416) 598-0288
Fax: (416) 598-9520

Solicitors for the Plaintiff &
Address for Service

NOTICE TO DEFENDANT(S)

You are being sued. You are a Defendant.

Go to the end of this document to see what you can do and when you must do it.

I. PARTIES

1. **The Plaintiff Jessica Ernst ("Ernst")** resides near Rosebud, Alberta, and is the fee simple owner of, and resides on, the land legally described as Plan 9813427, Block 2 located in SE 13-27-22-W4M in Horseshoe Canyon in Wheatland County (the "Ernst Property" or the "Property"), which she purchased in 1998.

2. **The Defendant EnCana Corporation ("EnCana")**, headquartered in Calgary, Alberta, is a North American oil and gas company incorporated pursuant to the *Canada Business Corporations Act*. EnCana has engaged in drilling gas wells in Wheatland County adjacent to the Ernst Property in order to recover methane gas from coalbed and other formations using a technique known as "hydraulic fracturing".

3. **The Defendant Energy Resources Conservation Board ("ERCB")** is a government agency established by statute for the purposes of regulating the oil and gas industry, including the regulation of coalbed methane and hydraulic fracturing. At all material times, the ERCB was known as the Alberta Energy Utilities Board. For the purposes of this Statement of Claim, this entity will be referred to as the "ERCB".

4. **The Defendant Her Majesty the Queen in right of Alberta (hereinafter the "Provincial Crown")** is responsible in law for the tortious actions and omissions of the officers and agents of the Government of Alberta. Alberta Environment is the provincial ministry responsible for overseeing the environmental protection of Alberta's water, including groundwater. Hereinafter, "Alberta Environment" will refer to the officers and agents of the Provincial Crown that constitute the ministry of Alberta Environment.

II. LEGAL CLAIMS

A. Claims against the Defendant EnCana

5. The Ernst Property is supplied with freshwater by a private well owned by Ms. Ernst and located on the Ernst Property (the "Ernst Water Well"). The Ernst Water Well is drilled into and draws water from geological formations that comprise an aquifer, or series of

aquifers, located underneath the Ernst Property (the "Rosebud Aquifer"). The Rosebud Aquifer supplies fresh water to a number of private homes located near Rosebud, Alberta including Ms. Ernst's home, and to the community of Rosebud.

6. Between 2001 and 2006, EnCana engaged in a program of shallow drilling for the extraction of methane gas from coalbeds and other formations from the Horseshoe Canyon geological formation located underneath Wheatland County, Alberta. As part of this drilling program, EnCana engaged in various activities including construction, drilling, perforating, hydraulic fracturing, operating, servicing as well as reclamation and remediation activities (henceforth "CBM Activities") at dozens of gas wells located adjacent to the Ernst Property.

7. EnCana's CBM Activities included hydraulic fracturing of underground formations located near and/or under the Ernst Property. Hydraulic fracturing undertaken by EnCana near and/or under the Ernst Property involved drilling into the coalbed and other formations and injecting large quantities of fracturing fluids into the coal seam and other formations at high rates and high pressure in order to enlarge fractures in the coal and rock, and to create new fractures. In conducting hydraulic fracturing operations in the Rosebud Area, it was EnCana's specific goal to create lengthy underground pathways and connect man-made fractures with natural cleats in the coal in the subsurface formation to liberate as much methane and ethane as possible, and to promote the underground migration of methane and ethane.

8. Between 2001 and April 1, 2006, EnCana hydraulically fractured coal seams and other underground formations which were located above the Base of Groundwater Protection, as defined by the *Water Act*, at over 190 gas wells within an approximately 6 mile radius of the Ernst Property (hereinafter referred to as the "EnCana Wells"). At over 60 of these EnCana Wells, EnCana perforated and fractured coal seams and other formations located less than 200 metres beneath the surface.

9. In particular, EnCana directly targeted and hydraulically fractured the geological formations that comprise the Rosebud Aquifer at a minimum of two of the EnCana

Wells. In 2001, EnCana perforated the wellbore of well 02/06-04-27-22-W4M ("Well 06-04") at depths starting at 100.5 meters below ground in preparation for hydraulic fracturing. In 2004, EnCana perforated the wellbore of well 00/05-14-027-22W4M ("Well 05-14") starting at a depth of 121.5 metres below ground and hydraulically fractured into formations at multiple depths, including repeatedly into the Rosebud Aquifer. In both cases, EnCana knew or should have known that it was perforating and fracturing in-use aquifers that provided potable water to the Ernst Water Well.

10. As part of EnCana's CBM Activities at the EnCana Wells, EnCana used hazardous chemicals during construction, drilling, hydraulic fracturing, production, remediation and reclamation operations. In particular, EnCana used hazardous and toxic chemicals in its hydraulic fracturing fluid.

11. Further, EnCana applied a number of chemical "treatments" to EnCana Well 05-14 in an attempt to repair and remediate poorly producing coal seams. These "treatments" involved pumping toxic and hazardous chemicals into targeted coal seams, including the Rosebud Aquifer.

12. EnCana completed CBM Activities at the EnCana Wells without taking necessary precautions to protect in-use aquifers or water wells from chemical contamination, or from methane and ethane contamination.

13. EnCana's CBM Activities at the EnCana Wells have caused the severe contamination of Ms. Ernst's well water.

14. In particular, EnCana's CBM Activities at the EnCana wells have caused the release and migration of previously fixed and immobile dissolved and gaseous methane and ethane into the Rosebud Aquifer and the Ernst Water Well, thereby contaminating Ms. Ernst's well water with hazardous and flammable levels of dissolved and gaseous methane and ethane.

15. EnCana's CBM Activities at the EnCana Wells have caused the contamination of Ms. Ernst well water with chemicals used by EnCana during its CBM Activities. These chemicals include: petroleum hydrocarbons, 2-Probanol 2- Methyl, Bis (2-eythhexyl) phthalate, chromium, barium, and other chemicals, particulars of which will be provided during the course of this proceeding.

16. EnCana's CBM Activities at the EnCana Wells breached various legislative and regulatory measures designed specifically to protect groundwater. The legislative and regulatory measures breached by EnCana include: ss. 3.060, 6.050 and 6.080(2) of the *Oil and Gas Conservation Regulations*; ss. 4.4, 7.9.9, 7.9.13, 7.10.7.2, and 7.10.11.3 of *Guide 56* "Energy Development Applications and Schedules"; *Informational Letter* IL 91-11; *Guide G-8*; ss. 36(1) and 49(1) of the *Water Act*; s. 1.03(b) and 2.8, of the *Groundwater Evaluation Guideline (Information Required when Submitting an Application under the Water Act)*; the *Alberta Environment Guidelines for Groundwater Diversion*; and ss. 109 and 110(1) of the *Environment Protection and Enhancement Act.*

i. Negligence

17. At all material times, EnCana owed a duty to the Plaintiff to exercise a reasonable standard of care, skill and diligence to ensure that EnCana's CBM Activities did not cause water contamination or other harm to the Plaintiff or her property.

18. EnCana breached this duty, and continues to breach this duty, by causing water contamination and permitting methane, ethane and other hazardous chemicals to remain on the Plaintiff's Property, in the ground beneath the surface of her property, and in her water supply.

19. Particulars of EnCana's negligence include:

    a. Conducting CBM Activities at the EnCana Wells without taking proper precautions to ensure the protection of in-use aquifers and the Plaintiff's well water;

    b. Perforating and fracturing the coal seams that comprise the Rosebud Aquifer;

c. Perforating and fracturing coal seams and other formations at shallow depths at the EnCana Wells without taking necessary precautions to protect in-use aquifers and water wells;

d. Commingling water and fluids from various methane gas production zones;

e. Perforating and fracturing coal seams and other formations at the EnCana Wells using toxic, hazardous or otherwise harmful fracture fluids;

f. Inadequate or faulty cementing of the wellbores at the EnCana Wells;

g. Installing inadequate or faulty surface casing at the EnCana Wells;

h. Drilling, perforating and fracturing above the Base of Groundwater Protection level as defined by the *Water Act*;

i. Completely closing off and sealing Well 06-04 and Well 05-14 thereby causing increased methane and ethane migration into the Plaintiff's well, and making investigation of Well 06-04 and Well 05-14 far more difficult;

j. Pumping, diverting or otherwise causing large quantities of water to be removed from the Rosebud Aquifer, thereby causing the release of substantial quantities of methane from the aquifer coal seams into the Ernst Water Well;

k. Failing to conduct adequate and reasonable groundwater testing and monitoring before, during and after conducting CBM Activities;

l. Failing to investigate impacts of its CBM Activities at the EnCana Wells on the Rosebud Aquifer;

m. Failing to promptly notify the Plaintiff on becoming aware of potential contamination of the Rosebud Aquifer;

n. On becoming aware of potential contamination of the Rosebud Aquifer, failing to act in a prudent and reasonable manner, including by failing to take all reasonable steps to control, mitigate and remediate the contamination; and

o. Failing to comply with its statutory duties under applicable legislation and regulation, as noted above.

ii. Nuisance

20. EnCana, in contaminating Ms. Ernst's water supply, as detailed above, has caused or permitted a nuisance which has substantially diminished the enjoyment, value and beneficial use of Ms. Ernst's property, land and home.

21. The nuisance was created by and continues because of the acts and omissions of EnCana, and/or its agents, servants or employees. Therefore, EnCana is liable to the Plaintiff for damage caused to her property, land and home.

iii. The Rule in *Rylands v. Fletcher*

22. The methane, ethane and other chemicals which have or will escape into the Ernst Property, including underneath the Property and into groundwater aquifers, are environmentally dangerous. EnCana's CBM Activities, including hydraulic fracturing, constitute a non-natural use of land under EnCana's control, and EnCana has failed to prevent the escape of methane, ethane and other chemicals from land under EnCana's control. EnCana is therefore strictly liable for the damages sustained by the Plaintiff as a result of the escape and migration of methane, ethane and other contaminants onto the Ernst Property, including underneath the Ernst Property and into the groundwater aquifer.

iv. Trespass

23. The migration of methane, ethane and other chemicals used in or resulting from EnCana's CBM Activities at the EnCana wells into Ms. Ernst's groundwater and land through fractures deliberately caused by EnCana amounts to a trespass on Ms. Ernst's land.

B. Claims against the Defendant ERCB

i. Negligent administration of a regulatory regime

24. The ERCB is the government agency responsible for overseeing and regulating the oil and gas industry, including all aspects of CBM development. In particular, the ERCB is exclusively tasked with licensing gas wells, and enforcing significant legislative and regulatory provisions that are intended to protect the quality and quantity of groundwater supply from interference or contamination due to oil and gas development, including CBM Activities.

25. These legislative and regulatory provisions are contained in, among other sources, *Oil and Gas Conservation Regulations*, Alta. Reg. 151/1971; *Guide 65: Resources Applications for Conventional Oil and Gas Reservoirs* (2003); *Guide G-8: Surface Casing Depth - Minimum Requirements* (1997); *Guide 9: Casing Cement, Minimum Requirements*; *Guide 56: Energy Development Application Schedules* (2003); and *Informational Letter IL 91-11: Coalbed Methane Regulation* (1991).

26. In or before 1999, the ERCB used its statutory powers to establish a detailed Compliance Assurance Enforcement Scheme, which included set procedures for receiving and investigating public complaints, inspecting oil and gas operations to ensure that licenses were in compliance with all applicable rules, and taking appropriate enforcement and remedial action against oil and gas companies when non-compliance occurred. This scheme was operationalized through the Operations Division of the ERCB, and specifically both through the ERCB's Compliance, Environment and Operations Branch, and its Public Safety / Field Surveillance Branch. The ERCB's Operations Division operates numerous Field Offices located throughout Alberta.

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

a. the ERCB ensures that water and agricultural lands are protected from adverse impacts caused by oil and gas activities;

b. the ERCB specifically protects all freshwater aquifers from adverse impacts caused by oil and gas activities;

c. ERCB Field Offices are responsible for, and do in fact, inspect oil and gas operations to ensure compliance with all applicable standards, specifications and approval conditions;

d. ERCB field staff investigate and respond to all public complaints to ensure that appropriate action is taken; and

e. when non-compliance is identified, the ERCB triggers an established policy for ERCB enforcement action.

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

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

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

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

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

33. As a result of Ms. Ernst's direct interaction with the ERCB, the ERCB knew that Ms. Ernst had serious and substantiated concerns regarding her water and oil and gas development including that:

    a. the quality of her well water had suddenly radically worsened in 2005 and 2006;

    b. there was good reason to believe that the radical change in her water was specifically linked to EnCana's CBM Activities at the EnCana Wells; and

    c. EnCana had breached ERCB requirements while conducting CBM activities at the nearby EnCana Wells.

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

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

36. Despite clear knowledge of potentially serious industry-related water contamination and knowledge of potential breaches of ERCB requirements, the ERCB failed to respond reasonably or in accordance with its specific published investigation and enforcement process. Instead, the ERCB either completely ignored Ms. Ernst and her concerns, or directed her to the ERCB's legal counsel, Mr. McKee, who in turn refused to deal with her complaints.

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

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

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

40. Particulars of the ERCB's negligence include:

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

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

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

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

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

f. failing to conduct adequate groundwater testing and monitoring;

g. failing to investigate potential long-term impacts of CBM Activities on the Rosebud Aquifer; and

h. failing to promptly inform the Plaintiff of potential contamination of the Rosebud Aquifer and of the potential risks posed by such contamination to the Plaintiff's health, safety and property.

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

ii. Breach of s. 2(b) of the Canadian *Charter of Rights and Freedoms*

42. In its role as the government agency responsible for regulating all aspects of the oil and gas industry, the ERCB has established a specific forum and process for communicating with the public and hearing public complaints and concerns regarding the oil and gas industry.

43. The ERCB, as a public body, invited and encouraged public participation and communication in the regulatory process, including through both its Compliance and Operations Branch, and its Field Surveillance Branch. In particular, in communications directly with landowners located adjacent to oil and gas developments, the ERCB

emphasizes the importance of public involvement in the regulation of oil and gas development in Alberta and strongly encourages such public participation.

44. The ERCB further frequently represented to such landowners that it is responsible for responding to and addressing all public complaints, including by investigating all such complaints.

45. Throughout 2004 and 2005, Ms. Ernst frequently voiced her concerns regarding negative impacts caused by oil and gas development near her home both through contact with the ERCB's compliance, investigation and enforcement offices, and through other modes of public expression, including through the press and through communication with institutions and fellow landowners and citizens.

46. Ms. Ernst was a vocal and effective critic of the ERCB. Her public criticisms brought public attention to the ERCB in a way that was unwanted by the ERCB and caused embarrassment within the organization.

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

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

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

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

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

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

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

54. On March 20, 2007, 16 months after the original letter restricting Ms. Ernst's participation in ERCB processes, Mr. McCrank informed Ms. Ernst that she was again free to communicate with any ERCB staff.

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

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

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

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

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

b. arbitrarily removing Ms. Ernst from a public forum of communication with a government agency that had been established to accept public concerns and complaints about oil and gas industry activity, thereby blocking her and preventing her from speaking in a public forum that the ERCB itself had specifically established to facilitate free speech.

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 caused 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.

D. Disgorgement of profits wrongfully obtained

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

IV. REMEDY SOUGHT

86. The Plaintiff Jessica Ernst claims from the Defendant EnCana Corporation:

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. restitutionary damages in the amount of $1,000,000.00;

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

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

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

h. costs; and

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

87. The Plaintiff Jessica Ernst claims from the Defendant Energy Resources Conservation Board:

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. damages in the amount of $50,000.00 under section 24(1) of the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act* 1982(U.K.), 1982, c.11;

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

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

h. costs; and

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

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.

89. The Plaintiff proposes that the trial of this action take place at the court house in Drumheller, Alberta.

90. The Plaintiff's solicitors are of the opinion that this action will likely take more than 25 days to try.

NOTICE TO DEFENDANT(S)

You only have a short time to do something to defend yourself against this claim:

20 days if you are served in Alberta

1 month if you are served outside Alberta but in Canada

2 months if you are served outside Canada

You can respond by filing a statement of defence or a demand for notice in the office of the clerk of the Court of Queen's Bench at Drumheller, Alberta AND serving your statement of defence or a demand notice on the plaintiffs(s') address for service.

WARNING

If you do not file and serve a statement of defence or a demand for notice within your time period, you risk losing the lawsuit automatically. If you do not file, or do not serve, or are late in doing either of these things, a court may give a judgment to the plaintiff(s) against you.

TAB 8

Indexed as:

Prete v. Ontario

Prete v. The Queen in right of Ontario et al.

[1993] O.J. No. 2794

16 O.R. (3d) 161

110 D.L.R. (4th) 94

68 O.A.C. 1

1993 CarswellOnt 810

86 C.C.C. (3d) 442

18 C.C.L.T. (2d) 54

18 C.R.R. (2d) 291 p

45 A.C.W.S. (3d) 235

22 W.C.B. (2d) 157

Action No. C9963

Court of Appeal for Ontario,

McKinlay, Carthy and Weiler JJ.A.

November 25, 1993

Counsel:

Peter C. Wardle and Andrew K. Lokan, for appellant.

Thomas C. Marshall, Q.C., and Robert E. Charney, for respondents, Her Majesty the Queen in right of Ontario, Attorney General of Ontario, Eric Libman and David Fisher.

George S. Monteith, for respondents, William McCormack, Robert Clarke, James Crowley and Robert Montrose.

---

1 **CARTHY J.A.** (MCKINLAY J.A. concurring): -- This appeal has its origins in motions by the defendants to dismiss the appellant's action as being limitation-barred, as statute-barred on the basis of Crown immunity, and as being frivolous and vexatious. Alternatively, particulars were sought. The appellant was found not guilty of first degree murder by jury and 18 months later commenced this action for damages as a remedy under s. 24(1) of the Canadian Charter of Rights and Freedoms for an infringement of the appellant's rights under s. 7 of the Charter. In particular, the appellant alleges that the Attorney-General of Ontario arbitrarily, capriciously and without reasonable grounds preferred a direct indictment of a charge of murder against him, that the defendants Libman and Fisher, as Crown attorneys, advised and recommended this action, and that they were assisted and encouraged by the police officer defendants Clarke, Crowley and Montrose. Police Chief McCormack is named a defendant as the person responsible for the conduct of the police officers. The statement of claim also complains that the prosecution of the indictment was conducted maliciously, breaching the appellant's rights under s. 7 of the Charter and that the appellant was discriminated against on the basis of his ethnic origin contrary to s. 15 of the Charter.

2 After hearing argument on all points, Carruthers J. found it necessary to deal with only one, and dismissed the action as statute-barred by s. 11(1) of the Public Authorities Protection Act, R.S.O. 1980, c. 406, now R.S.O. 1990, c. P.38, s. 7(1).

3 Section 11(1) reads:

> 11(1) No action, prosecution or other proceeding lies or shall be instituted against any person for an act done in pursuance or execution or intended execution of any statutory or other public duty or authority, or in respect of any alleged neglect or default in the execution of any such duty or authority, unless it is commenced within six months next after the cause of action arose, or, in case of continuance of injury or damage, within six months after the ceasing thereof.

4 A short excerpt from the reasons of Carruthers J., released February 21, 1990, indicates the basis of his decision. At p. 6 he says:

> For present purposes, it is my view that there is no difference between what the plaintiff describes his cause of action to be, that is, a breach of provisions of the Charter, and one for malicious prosecution. And, in any event, regardless of how one labels the cause of action, it is, as counsel for the plaintiff concedes, based upon "an act done in pursuance or execution or intended execution of any

> statutory or other public duty or authority" on the part of each and every defendant.
>
> It has been recognized by the Supreme Court of Canada that in dealing with the Charter the existing framework within which justice is to be administered, whether predominantly provincial in nature, is to be recognized. In the absence of some constitutionally valid provision, either in the Charter or elsewhere, I cannot accept that a remedy sought under s. 24(1) of the Charter can be pursued on a timeless basis[bj964]

5 The comprehensive issue before this court is whether s. 11 of the Public Authorities Protection Act has any application to an action in which a remedy under s. 24(1) of the Charter is sought. If s. 11 does not stand in the way of the action, the court must consider whether the Crown is protected from suit by s. 5(6) of the Proceedings Against the Crown Act, R.S.O. 1990, c. P.27. For reasons which will become clear as the discussion develops I will deal first with the Proceedings Against the Crown Act. Section 5(1) and (6) of that Act read as follows:

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

6 My analysis commences with the reasons in Nelles v. Ontario, [1989] 2 S.C.R. 170, 42 C.R.R. 1. In that case the plaintiff claimed damages from the Crown, the Attorney General, and some police officers for the common law tort of malicious prosecution with respect to murder charges. The incident pre-dated the Charter and the issue before the court was whether the Crown and the

Attorney General had immunity from suit. It was held that the Crown does enjoy immunity by reason of s. 5(6) of the Proceedings Against the Crown Act, R.S.O. 1980, c. 393, now R.S.O. 1990, c. P.27, but the court was careful to observe that the constitutionality of that section remained "an open question" (see per Lamer J. at p. 178). A majority of the court held that the Attorney General was not protected by that section and enjoyed no immunity at common law.

7 The importance of Nelles to the present consideration of statutory limitations to be imposed on a Charter remedy is that Lamer J., writing for three of the six judges who participated in the judgment, placed heavy emphasis upon the availability of Charter remedies in his analysis of whether there is immunity from a common law cause of action. He states at pp. 195-96:

> As I have stated earlier, the plaintiff in a malicious prosecution suit bears a formidable burden of proof and in those cases where a case can be made out, the plaintiff's Charter rights may have been infringed as well. Granting an absolute immunity to prosecutors is akin to granting a license to subvert individual rights. Not only does absolute immunity negate a private right of action, but in addition, it seems to me, it may be that it would effectively bar the seeking of a remedy pursuant to s. 24(1) of the Charter. It seems clear that in using his office to maliciously prosecute an accused, the prosecutor would be depriving an individual of the right to liberty and security of the person in a manner that does not accord with the principles of fundamental justice. Such an individual would normally have the right under s. 24(1) of the Charter to apply to a court of competent jurisdiction to obtain a remedy that the court considers appropriate and just if he can establish that one of his Charter rights has been infringed. The question arises then, whether s. 24(1) of the Charter confers a right to an individual to seek a remedy from a competent court. In my view it does. When a person can demonstrate that one of his Charter rights has been infringed, access to a court of competent jurisdiction to seek a remedy is essential for the vindication of a constitutional wrong. To create a right without a remedy is antithetical to one of the purposes of the Charter which surely is to allow courts to fashion remedies when constitutional infringements occur. Whether or not a common law or statutory rule can constitutionally have the effect of excluding the courts from granting the just and appropriate remedy, their most meaningful function under the Charter, does not have to be decided in this appeal. It is, in any case, clear that such a result is undesirable and provides a compelling underlying reason for finding that the common law itself does not mandate absolute immunity.

and at pp. 198-99:

> And as has already been noted, it is quite discomforting to realize that the existence of absolute immunity may bar a person whose Charter rights have been

infringed from applying to a competent court for a just and appropriate remedy in the form of damages.

III. Conclusion

A review of the authorities on the issue of prosecutorial immunity reveals that the matter ultimately boils down to a question of policy. For the reasons I have stated above I am of the view that absolute immunity for the Attorney General and his agents, the Crown Attorneys, is not justified in the interests of public policy. We must be mindful that an absolute immunity has the effect of negating a private right of action and in some cases may bar a remedy under the Charter. As such, the existence of absolute immunity is a threat to the individual rights of citizens who have been wrongly and maliciously prosecuted.

8 The reasons of Lamer J., standing alone, are strongly persuasive that a statutory enactment cannot stand in the way of a constitutional entitlement. Section 32(1)(b) of the Charter provides that the Charter applies to the legislature and government of each province. The remedy section of the Charter would be emasculated if the provincial government, as one of the very powers the Charter seeks to control, could declare itself immune.

9 Therefore, s. 5(6) of the Proceedings Against the Crown Act must be construed as limited to the causes of action that are permitted against the Crown under s. 5(1) of that Act, and cannot infringe upon a s. 24(1) Charter remedy.

10 This discussion of the application of s. 5(6) of the Proceedings Against the Crown Act to the Charter may appear to have been a digression from a consideration of the findings of Carruthers J. as to the statutory limitation period, but it is really a step along the way. The next issue to consider is, if absolute immunity from Charter relief cannot be afforded by less than constitutional enactments, can immunity be imposed after a period of time as set out in s. 11 of the Public Authorities Protection Act?

11 It is argued that the absence of a limitation period in the Charter implies that, in actions seeking a Charter remedy, the provincial and federal limitation statutes would be applied along with the network of procedural rules governing all actions. In R. v. Mills, [1986] 1 S.C.R. 863 at p. 953, 29 D.L.R. (4th) 161 at p. 172, McIntyre J. said:

> The task of the court will simply be to fit the application into the existing jurisdictional scheme of the courts in an effort to provide a direct remedy, as contemplated in s. 24(1). It is important, in my view, that this be borne in mind. The absence of jurisdictional provisions and directions in the Charter confirms the view that the Charter was not intended to turn the Canadian legal system

> upside down. What is required rather is that it be fitted into the existing scheme of Canadian legal procedure. There is no need for special procedures and rules to give it full and adequate effect.

12 The argument of the respondents proceeds to point out that many of our rules of practice permit the court to dismiss a claim for failure to comply with time requirements and the effect of a limitation period is simply a statutory provision to the same effect. It is true that in conflict of law jurisprudence, limitation periods have been considered procedural rather than substantive. However, in the context of the Charter, limitation periods are very different from the rules of procedure which effect a dismissal for failure to meet time requirements. First and foremost, the rules are subject to the discretion of the court, whereas the statute is not. In practice, a meritorious claim will be permitted to proceed, perhaps on terms, despite a breach of the rules. In the few cases where relief is denied, it is being denied by a court of competent jurisdiction to deal with s. 24(1) relief. The court is simply saying that in the circumstances presented this is not a case for a hearing and s. 24(1) relief is denied.

13 In M. (K.) v. M. (H.), [1992] 3 S.C.R. 6 at pp. 29-30, 96 D.L.R. (4th) 289, La Forest J. describes the historic purposes of limitation periods as providing a time when prospective defendants can be secure that they will not be held to account for ancient obligations, foreclosing claims based on stale evidence, permitting destruction of documents, and assuring that plaintiffs do not sleep on their rights. Those purposes are best served, when Charter remedies are sought, by the court refusing relief on the basis of laches, in appropriate cases. The purpose of the Charter, in so far as it controls excesses by governments, is not at all served by permitting those same governments to decide when they would like to be free of those controls and put their houses in order without further threat of complaint.

14 Put in this Charter context, I see no valid comparison between procedural rules of court and statutory limitation periods. I do see identity between statutes granting immunity and those imposing limitation periods after the time when the limitation arises. Having found that immunity is not available under the Proceedings Against the Crown Act from a claim for Charter remedy, it therefore follows that in my opinion s. 11 of the Public Authorities Protection Act should be read as not applying to relief claimed under s. 24(1) of the Charter.

15 Nor does it avail the respondents to argue that the claim asserted is one for the tort of malicious prosecution hidden in the clothing of the Charter. M. (K.) v. M. (H.), supra, is clear authority for the appellant's right to pursue a claim for relief which is not limitation-barred despite the fact that an alternative head for the same claim is statute-barred.

16 It is now necessary to deal with the alternative argument of the respondents that the statement of claim should be struck under Rule 21 or Rule 25 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194. The factual information and judicial decisions in the earlier criminal proceedings have been fully canvassed in the reasons of Weiler J.A. and I will not repeat them herein. I do not agree

with her disposition of this issue because, in my view, at this stage of the proceedings, the facts alleged in the statement of claim should be taken as true for the purpose of determining whether the claim discloses a reasonable cause of action. To do otherwise is to effectively conduct a summary judgment proceeding under Rule 20 without having the sworn evidence of the parties to this litigation as a basis for determining whether there is a genuine issue for trial.

17 The core paragraphs in the statement of claim read:

> 17. At all material times the prosecution of the direct indictment against the plaintiff was conducted by the defendants Libman and Fisher, assisted and encouraged by the defendants Clarke, Crowley and Montrose.
> 18. The preferral of the direct indictment was made arbitrarily, capriciously and without reasonable and probable grounds and therefore constituted an abuse of process and an infringement of the plaintiff's rights under Section 7 of the Canadian Charter of Rights and Freedoms.
> 19. The subsequent prosecution of the direct indictment was conducted maliciously and without reasonable and probable cause and therefore also breached the plaintiff's rights under Section 7 of the Charter.
> 20. Furthermore, in preferring the indictment and subsequently prosecuting the plaintiff the defendants discriminated against the plaintiff on the basis of his ethnic origin and therefore breached his rights under Section 15 of the Charter.

18 Not much attention was paid to para. 20 in the argument and, for my purposes, it can be ignored. One of the arguments put by the respondents is that the earlier judicial determinations in the criminal proceedings represent res judicata against the appellant of the issues raised in paras. 17 to 19 and that, as such, they can be looked at to determine if it is plain and obvious that the action cannot succeed. There is more than one reason that this argument cannot prevail. For one, res judicata is an appropriate pleading by way of defence but is not a basis for striking out a pleading which otherwise describes a proper cause of action. More fundamentally, the earlier determinations involved very different questions than that presented in this statement of claim. In one instance it was bail pending trial which involves much more than the likelihood of success in the prosecution of the charge. In the other, it was a question of whether the evidence against the co-accused at trial was sufficient to be put to the jury for a verdict. The fact that the appellant stood by and did not make such an application on his own behalf may be very telling evidence against him at a trial of the present action, but is not an issue estoppel as to all of the elements of the allegations in paras. 17 to 19 of the statement of claim. To the extent that these allegations may be likened to a claim of malicious prosecution, they must be treated as involving both subjective and objective elements (see Nelles, supra, per Lamer J. at p. 193). If the respondents knew that the appellant was not guilty and withheld evidence that was exculpatory, the fact that they presented evidence giving the appearance of reasonable and probable grounds for the prosecution would not assist them in this action.

19 In Nelles Lamer J. emphasized the difficulty facing a plaintiff seeking to meet the burden of

establishing, in effect, that the Attorney General or Crown attorney perpetrated a fraud on the process of criminal justice. Lamer J. put aside concerns expressed by other courts that such actions have an intimidating effect upon those who administer justice, observing that there are safeguards in the rules for the early disposition of spurious claims. It is easy to infer from these comments that the court should, at the earliest stage of an action of this type, assess the reality of success and eliminate those cases that lack promise of success. In the present case, I have no hesitation in concluding that, on the basis of the entire record presented to us, the action is not likely to succeed. In fact, there is nothing to indicate that it will succeed, except the allegations in the pleading. But that is a very significant exception, and we should not depart from the rule that the pleadings must be taken as factually true simply because the allegations are serious and the case appears hopeless.

20 Do the pleadings disclose a reasonable cause of action? To the extent that the allegations rely on malice, rule 25.06(8) provides that this may be alleged as a fact without pleading the circumstances from which it is to be inferred. This means that a court cannot treat this as a bald allegation and must assume that there is substance behind the allegation for purposes of testing the pleading. The allegation that the prosecution was conducted arbitrarily, capriciously, and without reasonable and probable grounds, may want for particulars, but if supported by evidence, clearly presents a triable issue. I would, therefore, not strike this pleading under Rule 21.

21 Weiler J.A. has concluded that rule 25.11(c) which provides for striking out a pleading which is "an abuse of the process of the court" permits the court to look beyond the pleading and determine if the action has any chance of success. She finds support for that approach in German v. Major (1985), 20 D.L.R. (4th) 703, 24 C.C.L.T. 257 (Alta. C.A.). It is my opinion that you cannot escape Rule 21 in this case by looking at rule 25.11(c) because if you consider this statement of claim to be an abuse of the process of the court it can only be because it discloses no reasonable cause of action. If that is the true complaint then it must be tested under the specific language of rule 21.01(1)(b) and, as stipulated in that same rule, no evidence is admissible on the motion.

22 Further, the rules were different in Alberta when German v. Major was decided, as noted by Kerans J.A. at p. 706 of the reasons:

> There are few reported decisions where hopeless-fact cases are struck. A plaintiff could and perhaps should move for summary judgment if faced with such a defence; in Alberta, however, a defendant cannot. He must rely on Rule 129.

23 In Ontario we have Rule 20 providing for summary judgment after delivery of the statement of defence and supported by affidavits of persons having knowledge of the contested facts. Judgment may be granted against the plaintiff if it is demonstrated that there is no genuine issue for trial. There is no difference that I can see between the Rule 20 test of no genuine issue for trial and the test suggested by Weiler J.A. of "no chance of success" or "plain and obvious that the action cannot succeed". Applying those tests under Rule 21 to a pleading undermines the purpose of Rule

20, and also avoids the safeguards under Rule 20 of having sworn testimony from both sides to assure the court that there truly is no issue for trial. In the present case that would include testimony from the defence to demonstrate that the defendants had no knowledge which could constitute a basis for an allegation that they improperly advanced the prosecution. I would therefore permit the pleading to stand.

24 The respondents asked that if the pleading is to stand that particulars be ordered of the allegations in paras. 17 to 20. As stated earlier, rule 25.06(8) provides that malice, intent or knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred. That being so, the pleading as it stands can be taken as embracing the circumstance of the Crown holding back exculpatory evidence, which would feed the other allegations. Particulars of para. 20 have been given and it is my view that the rule permits the other two paragraphs to stand. In any event, there would not be much purpose in an order for particulars because if there is any substance in the appellant's claim it will come from production and discovery as to the subjective knowledge of the respondents and is thus not available to the appellant at this time.

25 I would therefore set aside the two orders of Carruthers J. of February 21, 1990 and in their place order that the two motions before Carruthers J. be dismissed without costs. Carruthers J. made no order as to costs in dismissing the action and reciprocal disposition seems appropriate. The appellant shall have his costs of the appeal.

WEILER J.A. (dissenting): --

I BACKGROUND

26 Approximately sixteen months after the appellant and his co- accused Turchiaro were acquitted of the charge of first degree murder by a jury, the appellant gave notice of his claim for damages for the alleged violation of his rights pursuant to ss. 7 and 15 of the Canadian Charter of Rights and Freedoms. The respondents, who are alleged to have violated the appellant's rights, are William McCormack, Chief of Police of the Metropolitan Toronto Police Force, Crowley, Montrose and Clarke, police officers with the Metropolitan Toronto Police force (the "police defendants") and Libman and Fisher, assistant Crown attorneys appointed by the Lieutenant-Governor in Council (the "prosecutors"). In addition, Her Majesty The Queen in right of Ontario and the Attorney General of Ontario have been named as defendants.

27 Carruthers J. struck the appellant's statement of claim as being statute-barred due to the application of s. 7 of the Public Authorities Protection Act, R.S.O. 1990, c. P.38 (the "Act"), which has a six-month limitation period. For the reasons given by Carthy J.A., I agree that the respondent is not barred from proceeding with a claim for a Charter remedy.

II THE SECOND ISSUE

28 In view of his conclusions that the action was statute- barred, Carruthers J. did not deal with

the second issue raised by the respondents, namely, that the statement of claim should be struck: (a) because it disclosed no reasonable cause of action; and (b) because it is plain and obvious that the action cannot succeed. In the alternative, the respondents requested particulars of the allegations in paras. 18, 19 and 20 of the statement of claim.

III RELEVANT PORTIONS OF STATEMENT OF CLAIM

29 The relevant portions of the statement of claim are as follows:

> 18. The preferral of the direct indictment was made arbitrarily, capriciously and without reasonable and probable grounds and therefore constituted an abuse of process and an infringement of the plaintiff's rights under section 7 of the Canadian Charter of Rights and Freedoms.
> 19. The subsequent prosecution of the direct indictment was conducted maliciously and without reasonable and probable cause and therefore also breached the plaintiff's rights under Section 7 of the Charter.
> 20. Furthermore, in preferring the indictment and subsequently prosecuting the plaintiff the defendants discriminated against the plaintiff on the basis of his ethnic origin and therefore breached his rights under Section 15 of the Charter.
> 21. By reason of the preferral and prosecution of the direct indictment, the plaintiff was imprisoned for a period of approximately 13 months, was unable to work or to support his family, suffered mental and bodily pain and anguish, and was also greatly injured in his credit, character and reputation, and has thereby suffered damage.

(Emphasis mine)

IV RELEVANT PORTIONS OF RULES AND COMMENTARY

30 For ease of reference, the relevant portions of rules 21.01 and 25.11 are reproduced below:

> 21.01 (1)A party may move before a judge,
>
> . . . . .
>
> (b)to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,
>
> and the judge may make an order or grant judgment accordingly.

(2) No evidence is admissible on a motion,

. . . . .

(b)under clause (1)(b).

(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

. . . . .

(d)the action is frivolous or vexatious or is otherwise an abuse of the process of the court,

and the judge may make an order or grant judgment accordingly.

. . . . .

25.11 The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,

(a) may prejudice or delay the fair trial of the action;
(b) is scandalous, frivolous or vexatious; or
(c) is an abuse of the process of the court.

31 In a motion to strike out a pleading on the basis that it discloses no reasonable cause of action, no evidence is admissible, since the only issue is the sufficiency in law of the pleading attacked. The facts alleged in the statement of claim must be taken as proved. The transcripts of the prior proceedings are therefore irrelevant and cannot be relied upon by the respondents in support of the relief sought under this part of the rule. The test pursuant to rule 21.01(1)(b) is, assuming that the facts alleged in the claim are true, do they disclose a cause of action known to law?

32 In a motion for judgment by the defence to dismiss the action or have it stayed, or to strike the pleadings as being frivolous, vexatious or an abuse of process, pursuant to rule 21.01(3)(d), evidence is admissible. Here, the test is, is it plain and obvious that the action cannot succeed?

33 Frequently, both rule 21.01(1)(b) and 21.01(3)(d) are considered together, without differentiation. In such circumstances, no evidence is considered and the facts pleaded are taken as true. It has happened, however, that a court has proceeded to consider the matter solely on the basis that the action could not possibly succeed and is therefore an abuse of process. After considering the

evidence, it has struck the claim: see, for example, Foy v. Foy (1978), 20 O.R. (2d) 747, 88 D.L.R. (3d) 761 (C.A.); German v. Major (1985), 20 D.L.R. (4th) 703, 34 C.C.L.T. 257 (Alta. C.A.); Savarin Ltd. v. Fasken & Calvin, Ontario High Court of Justice, March 21, 1990 [summarized 19 A.C.W.S. (3d) 1378], affirmed Ontario Court of Appeal March 1, 1993 [summarized 38 A.C.W.S. (3d) 1013], leave to appeal to the Supreme Court dismissed October 1993 ;ns23571.

34 The distinction between the two branches of the rules has been succinctly set forth by Côté J.A. in Zurich Investments Ltd. v. Excelsior Life Insurance Co. (1988), 59 Alta. L.R. (2d) 209 (C.A.) at p. 211, 89 A.R. 14 at p. 15:

> The Alberta Court of Appeal in German v. Major stressed that where the defendant suggests that there is no such cause of action known to the law, i.e., that the plaintiff's lawsuit is bad in law or the defendant has a clear legal defence, then the court must assume the truth of the facts in the statement of claim. But the Court of Appeal said it was different where the defendants contend that the lawsuit is hopeless factually, and thus frivolous and vexatious. The test is whether it is "plain and obvious that the action cannot succeed".

35 The decision in German v. Major, supra, was approved by the Supreme Court in Nelles v. Ontario, [1989] 2 S.C.R. 170, 42 C.R.R. 1.

36 Accordingly, I will first deal with the question of whether the action should be struck as disclosing no cause of action, having regard only to the pleadings. Secondly, I will consider whether the defence is entitled to judgment or to have the statement of claim struck in whole or in part on the basis that the action is frivolous, vexatious or an abuse of process, having regard to the transcripts of judgments in other proceedings that have been filed.

V DOES THE STATEMENT OF CLAIM DISCLOSE A CAUSE OF ACTION?

(a) Elements required for this cause of action: No reasonable and probable cause to proceed against the appellant

37 The four necessary elements which must be proved for a plaintiff to succeed in an action for malicious prosecution, as recognized by the Supreme Court in Nelles v. Ontario, per Lamer J. at pp. 192-93 are:

a) the proceedings must have been initiated by the defendant;
b) the proceedings must have terminated in favour of the plaintiff;
c) the absence of reasonable and probable cause;
d) malice, or a primary purpose other than that of carrying the law into effect.

38 Lamer J. stated at p. 193 that:

> The existence of reasonable and probable cause is a matter for the judge to decide as opposed to the jury. . . . To succeed in the action for malicious prosecution against the Attorney General or Crown Attorney, the plaintiff would have to prove both the absence of reasonable and probable cause in commencing the prosecution [su1]and[xu malice in the form of a deliberate and improper use of the office of the Attorney General or Crown Attorney . . .

39 Section 7 of the Charter states:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

40 It is not necessary for me to decide whether all four of the requirements of an action for malicious prosecution must be met in order to bring an action for civil damages under s. 7 of the Charter. Suffice it to say that, having regard to the manner in which this action has been pleaded, lack of reasonable and probable cause to proceed against the appellant is an essential element of the cause of action.

41 It is helpful to recall the definition of reasonable and probable cause articulated by Lamer J. in Nelles, at p. 193:

> Reasonable and probable cause has been defined as "an honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed" (Hicks v. Faulkner (1878), 8 Q.B.D. 167, at p. 171, Hawkins J.).
>
> This test contains both a subjective and objective element. There must be both actual belief on the part of the prosecutor and that belief must be reasonable in the circumstances.

(b) Does the statement of claim plead the necessary facts?

42 After indicating who the parties are, all that is stated in the statement of claim, prior to para. 18, is that the appellant was charged with murder; a preliminary inquiry was held; the appellant was discharged; a direct indictment was preferred; the appellant was rearrested and held in custody until

acquitted. The prosecution was conducted by the prosecutors assisted by the police defendants.

43 There is no allegation of misconduct by the police defendants of a breach of Charter rights for any act prior to the preferral of the direct indictment. It is not alleged that the police officers embarked on the investigation of the appellant without reasonable grounds, continued the investigation of the appellant when they knew it was without merit and disclosed no evidence of criminal conduct on his part, or that, when the original information charging the appellant with murder was sworn, those doing so knew it was without merit.

44 The appellant asserts, in para. 18, that "the preferral of the direct indictment was made arbitrarily, capriciously and without reasonable and probable grounds, and therefore constituted an abuse of process and an infringement of the plaintiff's rights under s. 7 of the Canadian Charter of Rights and Freedoms". No malice is alleged in this paragraph.

45 The mere preferment of a direct indictment against an accused, notwithstanding that he has been discharged following a preliminary inquiry, does not result in a deprivation of fundamental justice contrary to s. 7 of the Charter: R. v. Ertel (1987), 35 C.C.C. (3d) 398, 30 C.R.R. 209 (Ont. C.A.).

46 Paragraph 19 states that: "The subsequent prosecution of the direct indictment was conducted maliciously and without reasonable and probable cause and therefore also breached the plaintiff's rights under s. 7 of the Charter."

47 Whether or not there was reasonable or probable cause for the laying of the charge or its prosecution is a question of law. The malice alleged in para. 19 is a question of fact and no particulars need be pleaded. Even in deciding the question of malice, however, a jury is not at liberty to decide for themselves that there is a want of reasonable and probable cause; they must take the judge's ruling upon that issue: Williams v. Webb, [1961] O.R. 353 at p. 362, 130 C.C.C. 25 (C.A.).

48 Paragraphs 18 and 19 merely repeat, rephrase, or restate part of the law relating to the tort. No other portion of the statement of claim touches upon the substance of these paragraphs.

49 Rule 25.06(1) and (2) states:

> 25.06(1) Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved.
>
> (2) A party may raise any point of law in a pleading, but conclusions of law may be pleaded only if the material facts supporting them are pleaded.

50 Subrule (2) makes it clear that stating a conclusion of law is not acceptable as a substitute for a statement of material facts. The paragraphs quoted above contain positive assertions which must be affirmatively proven by the respondent. In Caterpillar Tractor Co. v. Babcock Allatt Ltd. (1982), 67 C.P.R. (2d) 135, [1983] 1 F.C. 487 (T.D.), appeal to the Federal Court of Appeal dismissed (1983), 72 C.P.R. (2d) 286, Addy J. stated at pp. 138-39:

> Rule 419 [of the Federal Court Rules] specifically provides that the court may "at any stage of an action order any pleading or anything in any pleading to be struck out" on, among other grounds, the grounds that it is frivolous or vexatious or may prejudice or embarrass a fair trial or may otherwise constitute an abuse of the court. If a party has no grounds for making an allegation in a pleading, then, there is no basis for maintaining the allegation. It is not an answer to an application to strike out, for the party to say that, if he had unrestricted discovery of his opponent, he might then be in a position to sustain the allegation.
>
> . . . . .
>
> A court proceeding is not a speculative exercise and actions are not to be launched or continued nor are defences to be allowed to stand where it is clear that the person making the allegation has no evidence to support it and where the onus of proof rests on that person.

51 Addy J. then proceeded to strike the impugned paragraphs on the basis that they were frivolous and vexatious and constituted an abuse of process of the court.

52 Inasmuch as no objection is taken to the original decision to prosecute on the basis of lack of reasonable and probable grounds, a statement of fact as to why the subsequent decision to prosecute by direct indictment is without reasonable and probable grounds, is required. It is not, for example, alleged that, after the preliminary inquiry, the respondents discovered exculpatory evidence which they withheld. Nor is it alleged that any such discovery was made at trial.

53 This case is readily distinguished from Temilini v. Ontario Provincial Police (Commissioner) (1990), 73 O.R. (2d) 664, 38 O.A.C. 270 (C.A.), a case relied on by the appellants. In that case, Grange J.A. found that facts were alleged which, if proved, might result in the action for malicious prosecution and conspiracy succeeding. Here, no facts other than a conclusion in law is alleged with respect to a necessary element of the action.

54 Paragraph 20 of the statement of claim alleges that the defendants discriminated against Mr. Prete on the basis of his ethnic origin. No separate argument was addressed in respect of this pleading. Discrimination is also a conclusion. No facts in support of the conclusion have been pleaded.

55 In the result, the statement of claim does not plead facts which, if true, would satisfy a

necessary element of the cause of action.

VI IS THE ACTION FRIVOLOUS, VEXATIOUS OR AN ABUSE OF PROCESS?

56 For the purposes of my decision on this aspect of the rule, I will assess the evidence before the court to determine, as a matter of law, whether preferment of the indictment and the subsequent prosecution were justified. If so, the action by the appellant is doomed to failure and cannot possibly succeed.

(a) The evidence at the preliminary inquiry

57 A summary of some of the evidence at the preliminary hearing contained in the evidence before the court is as follows.

58 The deceased, Aldo Citton, was shot twice in the head at close range on a dead end street, Reading Court, in the area of the Skyline Hotel in Toronto on July 19, 1985. On the body were found expensive jewellery and $400 in cash. Near the body, on the road, the police found two .22 calibre CCI make spent cases. A car leased by the deceased was found near Lloyd Manor Plaza. There is no dispute that a crime was committed. Nor is there any dispute that the homicide squad of the Metropolitan Toronto Police force was the appropriate police force to investigate the crime.

59 The deceased, Citton, had been acting as an intermediary between the appellant and his wife, Franca Prete, when they were having matrimonial difficulties. The appellant suspected that his wife was having an affair with a man named Rizzo. It was the Crown's position that, while acting as the trusted intermediary, Citton had started an affair with Franca Prete.

60 On May 18, 1985, Franca Prete left the matrimonial home, leaving the appellant and their two teen-aged children at that address. At a meeting at Citton's house she told him and Frank Emmanuel, her employer's husband, of the affair with Rizzo. Emmanuel went back and told the appellant of the affair. About this time, Franca Prete hired Stanley Sherr as her matrimonial lawyer and the appellant hired Antoni Graci as his matrimonial lawyer. The appellant's position with respect to the division of the matrimonial assets was that he should keep everything and that Franca Prete was to get nothing.

61 On May 25, 1985, the appellant, his brother-in-law, Turchiaro, and his father-in-law, surrounded Rizzo at the Lloyd Manor Plaza and accused him of breaking up the Prete household. They said that Rizzo should pay half of the value of Prete's house, namely, $50,000. Rizzo denied the affair with Prete's wife.

62 Rizzo told Harrison, his superior at work, that he had been taken to a dead end street and that he had denied the affair with Franca Prete, but had pointed to a wealthy businessman. At the

preliminary hearing, Harrison testified that Rizzo told him that he, Rizzo, had pointed to Aldo Citton as the wealthy businessman who was having an affair with Franca Prete.

63 About two months prior to the May meeting, Citton's wife had left him. Mrs. Citton testified at the preliminary hearing that she left her husband because she suspected that he and Franca Prete were having an affair.

64 Howard "Mugsy" Dean testified at the preliminary inquiry that the appellant had approached him in May or June 1985, and that he wanted Dean to kill Rizzo. Franca Prete was to be beaten if she was found with Rizzo. Then, a few weeks later, the appellant returned and told him, "I've got the wrong guy. I will look after it myself."

65 Mr. Sherr, the matrimonial lawyer for Franca Prete, testified at the preliminary hearing that on July 19, 1985, the day of the killing, he had a telephone conversation with the accused's matrimonial lawyer Graci, in which Graci told him that he and his client, the appellant, believed that Citton was having an affair with Franca Prete. Graci was also reported to have told Sherr that the appellant Prete believed that Citton needed money and that the reason Franca Prete wanted a lump sum property settlement was so that she could hand over the money to Citton. At the preliminary hearing, Graci denied ever having had such a conversation with Sherr.

66 In the early evening of July 19, Citton and Franca Prete were at a restaurant, after which they each apparently went to their respective residences. Graci went to the home of the appellant.

67 In a written statement to police on July 21, 1985, the appellant said that, after Graci left, Citton came to his home and was at his home as late as 10:30-11:00 p.m. on July 19. The appellant said that they talked and drank wine and that Citton had to leave because he had an appointment with a German man with regard to clocks. (Citton's partner was a German man who had a clock company. This man said that Citton had been told not to do any business until he returned from Germany and that was not until three days after the murder.) The appellant said that, after Citton left his house, he telephoned his cousin and was invited over to his cousin's place and had gone there. The cousin testified that Prete arrived unexpectedly at 11:15 p.m. that night, but that there had been no prior telephone call.

68 On the same day that he spoke with the police, the appellant Prete attended upon the widow Citton, brought her flowers, expressed condolences and said that he had not seen the deceased since Thursday night, that is, the night before his death.

69 The appellant Prete was subject to police surveillance and intercepts by wiretap both before and after his arrest. After his arrest on January 15, 1986, the appellant Prete is alleged to have said to the police in response to a question by Montrose:

> Montrose: Tony, Franca your wife has told us about little bullets you had around the house.

> Prete: You can search the house. I got no .22 bullets, no .22 rifle, no .22 nothing, never.

70 A search warrant was executed and a .22 calibre, long rifle, CCI manufactured bullet was found in the garage; in the house of the accused, a partial box of .22 calibre CCI make bullets was found on top of the water heater. It will be recalled that, at the scene when the body was found, two .22 long rifle, CCI manufactured spent cartridges were found on the road. No. 22 rifle was found.

71 Angela Prete, the daughter of the appellant, gave several statements to the police. In the first interview on July 22, 1985, she said that the last time she saw Aldo Citton was on Tuesday, the night of the murder, at her residence. After the interviewing officers returned to their office, they received a telephone call from Angela Prete correcting her evidence, saying Friday was really the last time that she saw Aldo Citton. On April 30th, she acknowledged that, when initially interviewed, she had told the police that she saw Aldo Citton in a car with a man whom she thought was her father. Later, she changed her mind and said that she did not think the person was her father because her father did not have "shocking" white hair like the person in the car, and also because her father would not have driven off when she went towards the car, but would have spoken to her.

72 The Crown also had intercepted conversations which it contended showed, on the part of the appellant, guilty knowledge of the crime. The position of the defence was that a different interpretation should be put on these intercepts and that they were taken out of context.

(b) The decision to discharge the appellant

73 The preliminary inquiry judge concluded that:

> . . . the evidence of the excerpted segments of the intercepts could lead to two inferences: a positive and a negative. Applying the logic embraced within the rule in Hodge's Case, but not applying that rule per se, at best, when taken in context, the evidence could only be capable of supporting a neutral inference. A jury would have to be so instructed. I intend to go no further in any analysis of the intercepted communications.

74 In Garton v. Whelan (1984), 47 O.R. (2d) 672, 14 C.C.C. (3d) 449 (H.C.J.), Evans C.J.H.C. held that the same judge erred in law in applying the rule in Hodge's Case (1838), 2 Lewin 227, 168 E.R. 1136, to a preliminary inquiry. Whether or not there is sufficient evidence to bind an accused over for trial following a preliminary inquiry is a question of law. The test to be applied by the judge presiding over the preliminary inquiry is as set out in United States v. Shephard, [1977] 2 S.C.R. 1067 at p. 1080, 30 C.C.C. (2d) 424. It is whether or not there is any evidence upon which a reasonable jury, properly instructed, could return a verdict of guilty. Although the preliminary inquiry judge correctly stated the Shephard test and purported to follow it, in effect he did not do so.

In concluding that he was entitled to "assess" the evidence and to apply the logic in the rule in Hodge's Case namely, that in a case of circumstantial evidence the guilt of the accused must be the only rational conclusion, and in finding that the positive and negative inferences balanced each other and created a neutral inference, the preliminary inquiry judge erred in law. Even in circumstantial cases, the law now is that any determination as to compliance with the rule in Hodge's Case is to be left to the jury: see R. v. Paul (1975), [1977] 1 S.C.R. 181, 27 C.C.C. (2d) 1; R. v. Monteleone, [1987] 2 S.C.R. 154 at p. 161, 35 C.C.C. (3d) 193 at p. 198. Based on my review of the preliminary judge's reasons and the summary of the evidence at the preliminary inquiry, I believe that I am entitled to take judicial notice that his dismissal of the indictment against the appellant was not related to the evidence tendered at the preliminary inquiry. It was a failure to follow the injunction of this court that he must not engage in weighing the evidence. The Attorney General chose not to appeal the preliminary judge's decision. A direct indictment was preferred.

(c) Judicial notice may be taken of reasons for preferring a direct indictment

75 In R. v. Ertel, supra, Lacourcière J.A. observed at pp. 422-23:

> There are many reasons why direct indictments can be justified for the necessary protection of society. In Del Buono, Criminal Procedure in Canada (1982), p. 323, Bruce MacFarlane and Judith Webster give the following reasons as justification for direct indictments:
>
> (1) circumstances may be such that the security of the Crown's witnesses or the preservation of the Crown's case requires that the matter be brought to trial forthwith; the alleged offence may be so controversial or notorious that, in the interests of the public, the matter must be heard and determined as soon as possible;
> (2) the preferring of the direct indictment may be the only way to remedy an unconscionable delay in bringing the matter to trial, and
> (3) the holding of a second preliminary inquiry (even if it was permissible) might cause unnecessary and unjustifiable delay and expense. For example, when a committal for trial is quashed on technical grounds not related to the evidence tendered at the preliminary inquiry[bj9640]
>
> In my view, the court can take judicial notice of the above reasons, which are not an exhaustive list of the reasons that may justify a direct indictment[bj964]It certainly cannot be said in considering its constitutionality, that the direct indictment permitted . . . in circumstances which may have been rationally contemplated by Parliament, is fundamentally unfair.

(Emphasis mine)

(d) Judicial notice of reasons for preferring a direct indictment in this case

(i) At the bail hearing following the appellant's arrest after the direct indictment was preferred, there was evidence before O'Driscoll J., which he accepted as credible, that the appellant had threatened at least one of the Crown's witnesses after his original arrest. In the circumstances, judicial notice may be taken that the security of the Crown's witnesses required the matter to be brought to trial forthwith.

(ii) Almost two years had elapsed between the date when Citton was killed and the end of the preliminary inquiry. Preferment of the direct indictment avoided the delay inherent in appealing the preliminary judge's decision -- an appeal which was certain to succeed.

(iii) There had already been a full and complete preliminary inquiry. Preferment of the direct indictment avoided the unnecessary delay and expense of holding a second preliminary inquiry.

76 As a matter of law, therefore, preferment of the indictment was justified.

77 By way of summary:

(a) It is not alleged that there was a lack of reasonable and probable cause to initiate the original proceedings. Indeed, my review of the evidence led at the preliminary inquiry confirms that there was reasonable and probable cause.
(b) There was evidence before the judge conducting the preliminary inquiry which met the Sheppard test and the judge erred in discharging the appellant.
(c) Judicial notice may be taken that it was reasonable for the Crown to prefer the direct indictment in order to protect the Crown's witnesses and to avoid the delay inherent in an appeal which was certain to succeed. Full disclosure of the Crown's case had been made at the previous preliminary inquiry and there was no suggestion that the Crown's case was not the same.
(d) The prosecution and trial followed as a result of the direct indictment and there are no facts alleged as to why this should not have been the case.

VII STRIKING VERSUS GRANTING JUDGMENT

78 I have already found that the statement of claim discloses no facts with respect to an essential element of the cause of action and, as well, that any action could not possibly succeed. Should the court grant leave to amend or should it grant judgment in favour of the respondent and dismiss the action?

79 In his criminal trial, Mr. Prete did not bring a motion to quash the direct indictment on the basis of any alleged prosecutorial misconduct being a violation of his rights under s. 7, nor for abuse of process, despite the fact that he was detained in custody, and that, if successful, such a motion would have afforded a complete defence to the charge: see R. v. Jewitt, [1985] 2 S.C.R. 128, 47 C.R. (3d) 193, 21 C.C.C. (3d) 7; R. v. Scott, [1990] 3 S.C.R. 979, 2 C.R. (4th) 153; R. v. Keyowski, [1988] 1 S.C.R. 657, 32 C.R.R. 269, and R. v. Potvin, [1993] 2 S.C.R. 880, 83 C.C.C. (3d) 97.

80 The sole reason that the s. 7 issue before this court was not determined in the criminal proceeding is that the appellant did not raise it during his trial. No explanation was proffered as to why this was so. This is a circumstance which goes to the bona fides of the action and militates against the exercise of the court's discretion to grant leave to amend. I would accordingly dismiss the action against the respondents.

81 Carruthers J. made no order as to costs in dismissing the action. I would also propose that there be no order as to costs.

Appeal allowed.