SCC Court File No.: 36167

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

B E T W E E N:

JESSICA ERNST

Appellant

-and-

ALBERTA ENERGY REGULATOR

Respondent

-and-

ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL FOR SASKATCHEWAN, and ATTORNEY GENERAL OF QUEBEC

Interveners

APPELLANT'S RECORD – PART I

(Pursuant to Rule 38 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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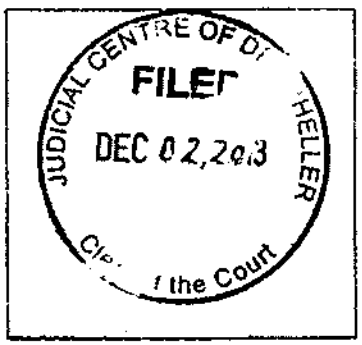
TAB 1

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**



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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 2

Court of Queen's Bench of Alberta

Citation: Ernst v. EnCana Corporation, 2013 ABQB 537

Date:
Docket: 0702 00120
Registry: Hanna/Drumheller

Between:

Jessica Ernst

Plaintiff

- and -

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

Defendants

Reasons for Judgment of the Honourable Chief Justice Neil Wittmann

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I. Introduction

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

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

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

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

II. Background

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

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

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

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

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

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

III. The ERCB Application

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

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

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

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

A. Striking the Fresh Claim

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

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

> 3.68(1) If the circumstances warrant and a condition under subrule (2) applies, the Court may order one or more of the following:
>
> (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.

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

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

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

b. Constitutional Argument

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> 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.

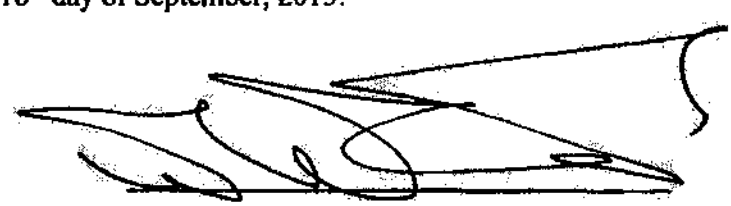
C. Alberta's Application

[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 OF APPEAL OF ALBERTA

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:

Klippensteins

Per: _____
Murray Klippenstein
Solicitors for Jessica Ernst

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

_____
Clerk of the Court

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 precludes 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: ***Mlazgar 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

SCC Court File No.: 36167

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

B E T W E E N:

JESSICA ERNST

Appellant

-and-

ALBERTA ENERGY REGULATOR

Respondent

-and-

ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL FOR SASKATCHEWAN,
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Interveners

APPELLANT'S RECORD – PART I

(Pursuant to Rule 38 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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SCC Court File No.: 36167

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

B E T W E E N:

JESSICA ERNST

Appellant

-and-

ALBERTA ENERGY REGULATOR

Respondent

-and-

ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL FOR SASKATCHEWAN, and ATTORNEY GENERAL OF QUEBEC

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TAB 5

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

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Court File No. ~~0702-00120~~

IN THE COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE OF DRUMHELLER

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

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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.

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 6

Supreme Court of Canada | Cour suprême du Canada

[redacted]

No. 36167

April 30, 2015

Coram: Abella, Karakatsanis and Côté JJ.

BETWEEN:

Jessica Ernst

Applicant

- and -

Alberta Energy Regulator

Respondent

JUDGMENT

The application for leave to appeal from the judgment of the Court of Appeal of Alberta (Calgary), Number 1301-0346-AC, 2014 ABCA 285, dated September 15, 2014, is granted with costs in the cause.

Le 30 avril 2015

Coram : Les juges Abella, Karakatsanis et Côté

ENTRE :

Jessica Ernst

Demanderesse

- et -

Alberta Energy Regulator

Intimé

JUGEMENT

La demande d'autorisation d'appel de l'arrêt de la Cour d'appel de l'Alberta (Calgary), numéro 1301-0346-AC, 2014 ABCA 285, daté du 15 septembre 2014, est accueillie avec dépens selon l'issue de la cause.

Suzanne Côté

J.S.C.C.
J.C.S.C.

TAB 7

Supreme Court of Canada Cour suprême du Canada

June 25, 2015 le 25 juin 2015

ORDER **ORDONNANCE**
MOTION **REQUÊTE**

JESSICA ERNST v. ALBERTA ENERGY REGULATOR
(Alta.) (36167)

THE CHIEF JUSTICE:

UPON APPLICATION by the appellant for an order stating constitutional questions in the above appeal;

AND THE MATERIAL FILED having been read;

IT IS HEREBY ORDERED THAT THE CONSTITUTIONAL QUESTION BE STATED AS FOLLOWS:

1. Is s. 43 of the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, constitutionally inapplicable or inoperable to the extent that it bars a claim against the regulator for a breach of s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* and an application for a remedy under s. 24(1) of the *Canadian Charter of Rights and Freedoms*?

Any attorney general who intervenes pursuant to par. 61(4) of the *Rules of the Supreme Court of Canada* shall pay the appellant and respondent the costs of any additional disbursements they incur as a result of the intervention.

IT IS HEREBY FURTHER ORDERED THAT:

1. Any attorney general wishing to intervene pursuant to par. 61(4) of the *Rules of the Supreme Court of Canada* shall serve and file their factum and book of authorities on or before December 23, 2015.

2. Any interveners granted leave to intervene under Rule 59 of the *Rules of the Supreme Court of Canada* shall file and serve their factums and books of authorities on or before December 23, 2015.

À LA SUITE DE LA DEMANDE de l'appelante visant à obtenir la formulation de questions constitutionnelles dans l'appel susmentionné;

ET APRÈS AVOIR LU la documentation déposée,

LA QUESTION CONSTITUTIONNELLE SUIVANTE EST FORMULÉE :

1. L'article 43 de la loi intitulée *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, est-il inapplicable ou inopérant du point de vue constitutionnel en ce qu'il fait obstacle à la présentation d'une action contre l'organisme de réglementation pour violation de l'al. 2*b*) de la *Charte*

canadienne des droits et libertés, ainsi qu'à la présentation d'une demande de réparation fondée sur le par. 24(1) de la *Charte canadienne des droits et libertés*?

Tout procureur général qui interviendra en vertu du par. 61(4) des *Règles de la Cour suprême du Canada* sera tenu de payer à l'appelante et à l'intimé les dépens supplémentaires résultant de son intervention.

IL EST EN OUTRE ORDONNÉ CE QUI SUIT :

1. Tout procureur général qui interviendra en vertu du par. 61(4) des *Règles de la Cour suprême du Canada* devra signifier et déposer son mémoire et son recueil de sources au plus tard le 23 décembre 2015.

2. Les intervenants qui seront autorisés à intervenir en application de l'art. 59 des *Règles de la Cour suprême du Canada* devront signifier et déposer leurs mémoires et recueils de sources au plus tard le 23 décembre 2015.

C.J.C.
J.C.C.

SCC Court File No.: 36167

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

B E T W E E N:

JESSICA ERNST

Appellant

-and-

ALBERTA ENERGY REGULATOR

Respondent

-and-

ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL FOR SASKATCHEWAN,
and ATTORNEY GENERAL OF QUEBEC

Interveners

APPELLANT'S RECORD – PART I I

(Pursuant to Rule 38 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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