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Revisiting Regulatory Negligence: The Ernst Fracking Litigation

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Cases Considered: *Ernst v. Alberta (Energy Resources Conservation Board),* 2014 ABCA 285

On September 15, 2014, the Alberta Court of Appeal released its decision in *Ernst v. Alberta (Energy Resources Conservation Board*). Ms. Ernst owns land near Rosebud, Alberta, and is suing EnCana Corporation, the ERCB (now the Alberta Energy Regulator) and Alberta Environment (now Alberta Environment and Sustainable Resources Development) for negligence in relation to the alleged contamination of her groundwater as a result of EnCana's hydraulic fracturing (fracking) activities in the area. The ERCB (but not Alberta Environment – a point further discussed below) applied to have the action against it struck. The case management judge, Chief Justice Wittmann, agreed that this particular negligence claim was not supported in law: he found that the ERCB owed no private law duty of care to Ms. Ernst and that, in any event, any claim was barred by s 43 of the ERCB's enabling legislation (see *Ernst v. EnCana Corporation*, 2013 ABQB 537). The Alberta Court of Appeal (Justices Côté, Watson and Slatter, writing as "The Court") dismissed Ms. Ernst's appeal. This post considers the regulatory negligence aspects of both the Queen's Bench and Court of Appeal decisions.

Canadian Negligence Law in a Nutshell

Under Canadian tort law, a plaintiff has to prove five elements in order to establish negligence: (1) that the defendant owed the plaintiff a duty of care; (2) that the defendant breached the applicable standard of care; (3) that the plaintiff suffered damages; (4) that these damages were the result of the defendant's breach (causation); and (5) that the resulting damages are not too remote.

The *Ernst* decisions are concerned only with the first and most challenging element (especially in the context of an action for regulatory negligence): whether the ERCB owed Ms. Ernst a duty of care. The applicable test is the *Anns/Cooper* test, which the Supreme Court of Canada described in *Cooper v. Hobbart,* 2001 SCC 79 as follows:

> [30] …At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability

> should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. [emphasis in original]

With respect to proximity, the Supreme Court has stated that this "may involve looking at expectations, representations, reliance, and the property or other interests involved" (*Cooper* at para 34). In the specific context of regulatory negligence, the Supreme Court has recently distinguished between two situations: (1) where the alleged duty of care is said to arise explicitly or by implication from the statutory scheme (which the Court admits will be rare); and (2) where the duty arises from interactions between the claimant and the regulatory authority (most relevant here) (see *R. v. Imperial Tobacco Canada Ltd*., 2011 SCC 42). In all cases, the driving determination is whether "it is just and fair having regard to that relationship [between plaintiff and defendant] to impose a duty of care in law upon the defendant" (*Cooper* at para 34).

As for the second, "residual policy considerations stage," the Supreme Court in *Hill* v. *Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 made clear that "even if a potential conflict could be posited, that would not automatically negate the *prima facie* duty of care… A *prima facie* duty of care will be negated only when the conflict, considered together with other relevant policy considerations, gives rise to a real potential for negative policy consequences… a duty of care in tort law should not be denied on speculative grounds" (at para 43).

The *Ernst* Decisions

Perhaps the most striking aspect of both decisions is how much space is devoted to an issue that is technically *obiter*. The analysis of the ERCB's duty of care seems unnecessary in light of both courts' conclusion that any claim against the ERCB was barred by s 43 of the *Energy Resources Conservation Act*, RSA 2000, c. E-10 in any event (since repealed and replaced with s 27 of the *Responsible Energy Development Act*, SA 2012, c. R-17.3).

There are, of course, numerous good reasons why a court might choose to address all of the issues in a case such as this one, not least of which is the fact that there is another regulator – Alberta Environment – being sued for negligence here, one which has *not* applied to have the action against it struck. Perhaps Chief Justice Wittmann and the Court of Appeal wanted to make clearer to counsel the framework within which the action against Alberta Environment will be assessed and give some sense of their predisposition to such actions. Along these lines, it is reasonable to suggest that the Court of Appeal's decision to state explicitly that which was *not* at issue before it, including "whether the pleading against the defendant Alberta could be struck as being frivolous or vexatious" (*Ernst v. Alberta* at para 9), reflects judicial scepticism.

As for the duty of care analysis, although the outcome is the same in both decisions the analysis is actually quite different. Chief Justice Wittmann begins and ends his analysis at

the first stage of the *Anns/Cooper* test, which as noted is concerned with foreseeability of harm and proximity. Situating Ms. Ernst's relationship with the ERCB as more like that between the unsuccessful investors and the Registrar of Mortgage Brokers in *Cooper* than the miners to whom government inspectors were held to owe a duty in *Fullowka v Pinkerton's of Canada Limited*, 2010 SCC 5 (CanLII), the Chief Justice concluded that there was "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" (*Ernst v. EnCana* at para 28). It was thus "unnecessary to determine whether the harm to Ernst was foreseeable. It [was] also unnecessary to consider the second part of the *Anns* test, that is, whether there would be any policy reason, assuming proximity, to [not] impose a private duty" (*ibid*, at para 29).

The Court of Appeal, for its part, seemed to jump immediately to the second, "residual policy considerations" stage, laying out a series of reasons reflected in the jurisprudence as to why any *prima facie* duty of care owed by regulators is usually negated. These include the difficulty of distinguishing between policy and operational decisions (the former being immune from liability), the potential for conflict between private and public duties, and indeterminacy problems (*Ernst v. Alberta* at para 17). In the Court of Appeal's view, many of these considerations were relevant to the case at bar:

> [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.

Bearing in mind the teaching from *Hill*, one might have expected the following paragraphs to elaborate on these otherwise fairly generic concerns. The Court of Appeal, however, switched gears entirely and simply concluded that Chief Justice Wittmann "correctly applied the test for determining whether the Board owed a private law duty of care to the appellant" (*Ernst v. Alberta* at para 19). This conclusion is jarring because, as noted, the Chief Justice did not even engage the second stage. Rather, he focused on proximity and, adopting what could be called the "spectrum" approach applied by Justice Cromwell in *Fullowka,* concluded that the interactions between Ms. Ernst and the ERCB were more like those of the unsuccessful plaintiffs in *Cooper* than those of the miners in *Fullowka*. The Court of Appeal actually dismissed *Fullowka* as an "anomaly" (*Ernst v. Alberta* at para 16), which if anything suggests that they didn't agree with the Chief Justice's approach at all.

Discussion

As noted by Professor Feldthusen, "[d]ecoding the law governing the negligence liability of statutory public authorities in Canada has always been a challenge" (see "Simplifying Canadian Negligence Actions Against Public Authorities – or Maybe

Not" (2012) Tort L Rev 176 at 176). Indeed, Professor Feldthusen suggests that it may be time to revisit the basis upon which liability for regulatory negligence will be founded (*ibid* at 184). Certainly, recent events like the Lac Megantic disaster and the Mount Polley spill do point to something rotten within the regulatory state (University of Ottawa Professor Jennifer Quaid provides a compelling explanation here) to which the common law could potentially respond.

The *Ernst* case may or may not be the right one for such a discussion. At the very least, however, it bears recalling that the Supreme Court's decision in *Cooper* is valued first and foremost for bringing some much needed transparency to the duty of care analysis. It would be preferable, then, for the courts to apply the *Anns/Cooper* test in a predictable, sequential manner – something that both the Chief Justice and the Court of Appeal failed to do here.

As noted above, the first step is to determine foreseeability of harm. Contrary to the Court of Appeal's assertion (*Ernst v. Alberta* at para 16), this is actually something that most regulatory negligence plaintiffs have very little difficulty establishing (see *e.g. Cooper* at para 42, *Hill* at para 32, *Imperial Tobacco* at para 57). It is precisely because foreseeability represents a relatively low bar that finding a *prima facie* duty of care requires both foreseeability *and* proximity. As in *Cooper*, then, it seems reasonably foreseeable that Ms. Ernst would suffer some harm if the ERCB were negligent in carrying out its duties, especially with respect to compliance and enforcement.

With respect to proximity and the second situation through which a duty of care may arise (*Imperial Tobacco*, above), the "spectrum of regulatory relationships" approach applied by Justice Cromwell in *Fullowka* and adopted by Chief Justice Wittmann may be a good place to start, but it also has the potential to mask important distinctions. For example, although there were differences in the relationship and interactions between the plaintiffs and the relevant public authorities in *Cooper* and *Hill* (where police officers were held to owe a duty of care to their suspects), a fair reading of *Hill* suggests that an equally important factor was the very significant personal interest (*i.e.* liberty) at stake (see *Hill* at paras 34 – 38). Arguably, Ms. Ernst's interest in the safety of her water supply is more like the interest in *Hill* than in *Cooper* – which was a case for pure economic loss – where "[p]roximity and foreseeability are heightened concerns" (*Imperial Tobacco* at para 42). Chief Justice Wittmann himself seems to recognize that further analysis is required when he states that a private duty cannot arise simply because an individual communicates with a regulator (*Ernst v. EnCana* at para 28).

Turning to the second, "residual policy considerations" stage, it is not obvious to me how owing a private law duty to those individuals particularly vulnerable or susceptible to a regulator's negligence would be unworkable or create indeterminacy problems. Generally speaking, regulators like the ERCB and Alberta Environment are not monolithic entities – they have branches or sectors that carry out specific functions, including a compliance and enforcement branch. When this branch is engaged, the problem of indeterminacy would seem to be largely resolved: compliance activities are concerned with specific incidents at discrete locations. The Supreme Court's approach in *Hill*, which affirmed the existence of a tort of negligent investigation but also recognized the role of the standard of care in mediating the spectre of liability (see paras 54, 58 and 67 – 73) seems perfectly suited for such situations. At the very least, however, counsel for the defendant should have to explain – and the courts should set out in their reasons – the overarching policy considerations that justify negating any *prima facie* duty of care in the specific instance before them.

The Court of Appeal is certainly correct that there are a number of reasons why a duty of care is not generally placed on a regulator (*Ernst v. Alberta* at para 17), but it is equally true that sometimes it is, and that regulatory negligence is a recognized tort in Canada.