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Ernst v Alberta (Energy Resources Conservation Board): The gatekeeper is alive and well

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

This comment adds to the earlier post by Martin Olszynski (here) on the *Ernst* litigation against Alberta Environment, the Alberta Energy Regulator/Energy Resources Conservation Board (AER/ERCB) and Encana Corporation concerning allegations of groundwater contamination from hydraulic fracturing. Readers interested in more details on the substance of the litigation will find it here. My focus in this comment is on whether the Alberta Court of Appeal has correctly applied the law on a motion to strike under Rule 3.68 of the *Alberta Rules of Court*, Alta Reg 124/2010 (the *Rules*). I argue the Court of Appeal has erred by applying the test too restrictively.

Simply put, Ernst alleges that Alberta Environment and the AER/ERCB owe her a duty of care and are negligent by failing to meet that duty. This is a question of regulatory negligence, and the parameters of the law on this question have been summarized by Professor Olszynski. The AER/ERCB applied to the Court to strike Ernst's claim for failing to disclose a reasonable cause of action, and for summary judgment. In the first instance, Chief Justice Wittman granted the request to strike back in September 2013 (*Ernst v Encana Corporation*, 2013 ABQB 537).

The legal issue here is whether the AER/ERCB has met the test to strike under rule 3.68 of the *Rules*. The rule provides, in part, that the Court may strike any part of a claim where the pleading discloses no reasonable cause of action. It is this particular aspect of rule 3.68 that is at issue here. The AER/ERCB seeks to have the allegations of regulatory negligence struck (as well as a *Charter* argument) on the basis that it owes no private duty of care to Ernst and that the AER/ERCB is immune from liability for any acts done in the circumstances by reason of the statutory provisions of section 43 in the *Energy Resources Conservation Act*, RSA 2000, c E-10 (now repealed but in force at the relevant time). The onus or burden of proof lies on the AER/ERCB to establish that Ernst has failed to disclose a reasonable cause of action against it.

Rule 3.68 (and its predecessor) has attracted its share of commentary from Alberta courts over the years, no doubt in part because the consequences of its application can be severe. Judge Fradsham provides a good summary of the case law in his *Annotated Rules of Court* (Carswell, 2012) at pages 171 to 199. The overall sense of the jurisprudence – the guiding rules if you like –

is that the test to be met by an applicant in a motion to strike for want of a cause of action is high, onerous and stringent. A court hearing a motion to strike should read the impugned pleadings generously and exercise caution. A claim should not be struck unless it is hopeless. Only those actions where are certain to fail should be struck. Pleadings should not be struck unless it is beyond a reasonable doubt that the plaintiff cannot succeed. The motion to strike is not the appropriate venue to decide difficult or novel questions of law.

In *Ernst* the Court of Appeal does not cite any of these Alberta cases, but rather points to the 2011 Supreme Court of Canada decision in *R v Imperial Tobacco Canada Limited*, 2011 SCC 42, where at paras 17 to 26 the Supreme Court sets out the test to be met for a motion to strike claims for the failure to disclose a reasonable cause of action. Surprisingly in *Ernst* the Court of Appeal only cites paragraphs 19 to 21 from *Imperial Tobacco*. I say surprisingly because the Supreme Court lays out the test in paragraph 17 of *Imperial Tobacco*:

> This Court has reiterated the test on many occasions. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v. Woodhouse*, 2003 SCC 69 (CanLII), [2003] 3 S.C.R. 263, at para. 15; *Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959, at p. 980. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38 (CanLII), [2007] 3 S.C.R. 83; *Odhavji Estate*; *Hunt*; *Attorney General of Canada v. Inuit Tapirisat of Canada*, 1980 CanLII 21 (SCC), [1980] 2 S.C.R. 735.

At paragraph 14 in the *Ernst* decision, the Court of Appeal recites paragraphs 19 to 21 of *Imperial Tobacco* which read more like the underlying policy to me than the actual test. More problematically I think, the Court goes from these policy considerations to declaring that the test to strike a claim for failing to disclose a reasonable cause of action under rule 3.68 has evolved from its earlier iterations (at para 15) to now being "whether there is any reasonable prospect that the claim will succeed, erring on the side of generosity in permitting novel claims to proceed" (at para 14).

The Court of Appeal seems to rely on *Imperial Tobacco* to suggest the test to strike has evolved and that it is no longer helpful to ask whether it is beyond a reasonable doubt that the plaintiff cannot succeed, that perhaps the test is not as onerous and stringent as it used to be. I don't read paragraphs 17 to 26 in *Imperial Tobacco* to have changed the law on this point, and certainly not in any substantive way.

It seems to me the Court of Appeal did not require the AER/ERCB to meet a high and onerous test, and thus has erred in its application of the law under rule 3.68. There would appear to be a number of arguable points in the *Ernst* claim – regulatory negligence under the common law being one of them. The Court may be skeptical about the claim, but that is not a lawful basis upon which to strike it. With respect, I think both Alberta courts which have heard this application have focused too much attention on the merits of the *Ernst* claim rather than on whether the AER/ERCB has satisfied the test to strike under rule 3.68.