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## ***Ernst v Alberta Environment: The Gatekeeper Refuses to Strike or Grant Summary Judgment***

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**Case Commented On:** *Ernst v Alberta Environment*, [2014 ABQB 672](#)

This short comment adds to the recent posts on ABlawg by Professor Martin Olszynski ([here and here](#)) and myself ([here](#)) on the Ernst litigation against Alberta Environment, the Alberta Energy Regulator (AER) 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 how Chief Justice Neil Wittmann applies the law on a motion to strike under Rule 3.68 and for summary judgment under Rule 7.3 of the *Alberta Rules of Court*, [Alta Reg 124/2010](#) (the *Rules*) to dismiss Alberta's application. I also ask how we reconcile this decision from the motion to strike initiated by the AER/ERCB and the decision by Alberta courts to grant that application.

Recall that Ernst alleges that Alberta Environment and the AER owe her a duty of care and were negligent by failing to meet that duty. The AER successfully applied to have the Ernst proceedings struck for failing to disclose a reasonable cause of action (*Ernst v Alberta (Energy Resources Conservation Board)*, [2014 ABCA 285 \(Ernst II\)](#)). Ernst has applied to the Supreme Court of Canada for leave to appeal this Court of Appeal decision (See [here](#)).

I provided some commentary on the legal test to strike under rule 3.68 of the *Rules* in my October 2014 post on *Ernst* ([here](#)). The Chief Justice summarizes the law in this decision in paragraphs 24 to 30, and he concludes the test requires the Court to read Ernst's claim against Alberta Environment generously, taking the alleged facts as true, and to decipher whether there is any reasonable prospect that the claim will succeed (at para 30). This reading of the test to strike aligns with how the Court of Appeal explains it in *Ernst II* (at para 14). The Chief Justice dismisses Alberta's application, holding there is a reasonable prospect of success for Ernst against Alberta Environment on regulatory negligence as summarized by Professor Olszynski in his November 14 post.

The Chief Justice also dismisses Alberta's application for summary judgment under rule 7.3 of the *Rules* on the basis Alberta failed to establish there is no merit to the Ernst claim. One issue here was that Alberta did not file affidavit evidence in support of its application for summary judgment, relying solely on legal argument. The rule itself states "[t]he application must be supported by an affidavit swearing positively that one or more of the grounds described in subrule (1) have been met or by other evidence to the effect that the grounds have been met."

What constitutes ‘other evidence’ is somewhat uncertain in the case law. The Chief Justice canvasses the cases placed before him in this case (at paras 72 – 81), and concludes:

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

The Chief Justice goes on to find that even notwithstanding this issue of evidence, Alberta failed to meet the legal test for summary judgment. The motion to strike a claim and an application for summary judgment are very similar. Indeed arguments advanced by an applicant are likely to be very similar or identical in both cases. The Chief Justice does highlight one important distinction between a motion to strike a claim and for summary judgment, and that is in relation to their legal effect as to the dispute between the parties. A summary judgment determines the dispute between the parties, whereas a successful motion to strike by the defendant does not preclude a fresh claim by the plaintiff against the defendant subject to applicable limitation rules (at para 84).

The Chief Justice canvasses recent articulations of the law on summary judgment at paragraphs 86-92. Simply put, the applicant for summary judgment must establish there is no genuine issue for trial (See *Hryniak v Mauldin*, [2014 SCC 7](#) at paras 47-49). Alberta failed to establish this here.

So how do we reconcile granting the AER its application to strike the Ernst claim as disclosing no reasonable cause of action and refusing the same application by Alberta Environment here? The obvious explanation is that the applicable legislation and the facts are different in the two cases, and thus applying the test to strike produces different outcomes. That is the explanation provided by the Chief Justice.

In his November 14 post, Professor Olszynski comments on how the Chief Justice describes the different roles for Alberta Environment and the AER with respect to Ernst. Professor Olszynski observes the key factual difference for Alberta courts in this litigation seems to be that there is an arguable case against Alberta Environment because it ‘puts boots to the ground’ and likewise there is no arguable case against the AER because it does not ‘put boots to the ground’. Like Professor Olszynski, I question that distinction here.

In my view, these decisions arguably suggest that Alberta Environment has a more direct role than the AER in regulating how an energy company explores for and recovers oil and gas resources to ensure such activity is performed in a safe and environmentally responsible manner. This message couldn't be farther from reality, and it is an understatement to say this message sends a distorted view of how the energy industry has been regulated in Alberta. These agencies traditionally shared responsibility in some respects, but ultimately it has been the AER who determines how resource exploration and recovery takes place. This is even more certain now as the AER becomes the single regulator overseeing the recovery and development of energy resources in Alberta (For an accessible description of this AER authority see the Alberta Energy Regulator Brochure [here](#)).

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