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Regulatory Negligence Redux: Alberta Environment's Motion to Strike in Fracking Litigation Denied

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Case Commented On: *Ernst v EnCana Corporation,* 2014 ABQB 672

This post follows up on a previous one regarding Ms. Ernst's lawsuit against EnCana, the Energy Resources Conservation Board (ERCB, now the AER) and Alberta Environment for the alleged contamination of her groundwater as a result of EnCana's hydraulic fracturing activity (fracking) near Rosebud, Alberta. My first post considered the ERCB's application to have the action against it struck, with respect to which it was successful (*see* 2013 ABQB 537 (*Ernst I*), affirmed 2014 ABCA 285 (*Ernst II*)). On November 7, 2014, Chief Justice Wittmann released the most recent decision (*Ernst III*) in what is shaping up to be the legal saga of the decade. Like the ERCB before it, Alberta Environment sought to have the regulatory negligence action against it struck on the basis that it owed Ms. Ernst no private law "duty of care" and that, in any event, it enjoyed statutory immunity. In the alternative, Alberta sought summary judgment in its favor. In contrast to his earlier decision agreeing to strike the action against the ERCB, the Chief Justice dismissed both applications.

In my previous post, I noted some inconsistencies between *Ernst I* and *II* with respect to the duty of care analysis and suggested that courts should strive to apply the applicable test (the *Anns* test) in a predictable and sequential manner, the Supreme Court of Canada's decision in *Cooper v Hobbart,* 2001 SCC 79 (still the authority for the content of that test in Canada) being valued first and foremost for bringing some much needed transparency to the exercise. In this respect, the Chief Justice's most recent decision is exemplary. In this post, I highlight those aspects of the decision that help to explain the different result in this case, as well as those that in my view address some of the concerns I expressed in my previous post.

The Decision

The Chief Justice began his analysis by reference to his earlier decision (at para 34), which itself relied heavily on the Supreme Court of Canada's decision in *Fullowka v Pinkerton's of Canada Limited*, 2010 SCC 5 (CanLII). The Chief Justice went further, however, tracing the historical roots of what is now known as the two-part *Anns* test (at para 35; see my previous post for a description of the test) and providing some additional guidance from both *Cooper* and its companion case, *Edwards v Law Society of Upper Canada,* 2001 SCC 80 (at paras 36 – 37).

The first question to consider was whether the asserted duty fell within, or was closely analogous to, a category of relationships where a duty had already been recognized. Counsel for Ms. Ernst invoked those cases dealing with negligent investigation (*Hill v Hamilton Wentworth Regional Police Services Board*, 2007 SCC 41) and negligent inspection (*Kamloops v Nielsen*, 1984 CanLII 21 (SCC)) but the Chief Justice considered such a category "overly broad," noting that much of the analysis depends on the specific statutory provisions in play (at para 39). This meant that the two-part *Anns* test had to be applied.

The Chief Justice then proceeded to cite at length from *Cooper* and *Kamloops*, the latter case providing guidance on the distinction between government policy decisions, which are not subject to tort liability, and operational ones, which can be (at paras 41 – 45). Continuing with the spectrum approach to proximity that he first applied in *Ernst I*, the Chief Justice then set out a list of cases where a duty of care between a public authority or regulator and a plaintiff had been alleged, beginning with those where no proximity was found to those where it was found (at para 46).

Applying this framework to Ms. Ernst's allegations against Alberta Environment, the Chief Justice was satisfied that a *prima facie,* or first-stage, duty of care could be established. The difference between the ERCB and Alberta Environment was explained at para 50:

> [50] The ERCB and Alberta had different roles with respect to Ernst. Her allegations against the ERCB, which have been struck, related to the ERCB's administration of its regulatory regime and its communications with her. Ernst's allegations against Alberta include complaints about how it administered its regulatory regime, as well as allegations of a negligent investigation and inadequate response to her complaints about contamination of her well water. These allegations concern direct contact between Alberta and Ernst, and assert specific representations were made to Ernst. These facts, if proven at trial, could establish a sufficiently proximate relationship between Ernst and Alberta Environment. Further, if the allegations that her well water and the Rosebud aquifer have been contaminated as a result of hydraulic fracturing [are proven], Ernst could establish foreseeable harm. [emphasis added]

Having found that a *prima facie* duty was at least arguable, the Chief Justice turned to the second, "residual policy considerations" stage. Counsel for Alberta Environment appear to have borrowed directly from the Court of Appeal's decision in *Ernst II*, arguing that "a private duty of care in this case would conflict with the public interest" in the relevant statutes (here the *Environmental Protection and Enhancement Act,* RSA 2000, c E-12 (*EPEA*) and the *Water Act,* RSA 2000, c W-3), and also that it "would expose Alberta to indeterminate liability" (at para 52).

The Chief Justice disagreed. Turning first to the issue of indeterminacy, he agreed with counsel for Ms. Ernst that her claim involved a specific incident with respect to a specific well. Furthermore, in a passage which I discuss further below, the finding of a duty of care "does not necessarily lead to liability – there must be a breach of that duty and the breach must cause the damage complained of" (at para 54). As for any conflict between public and private duties, Chief Justice Wittmann also agreed that "it is difficult at the pleadings stage to fully evaluate the policy concerns identified by Alberta without evidence and before a statement of defense has been filed" (citing *Haskett v Trans Union of Canada Inc* (2003) 63 OR (3d) 577 at para 55).

This left the statutory immunity argument. Alberta Environment relied on section 220 of the *EPEA* and section 157 of the *Water Act*. Counsel for Ms. Ernst argued that these were inapplicable in light of the pleadings that Alberta Environment had acted in bad faith (these provisions explicitly limit immunity to acts or omissions taken in good faith). Although the Chief Justice acknowledged that this argument had some merit, the more determinative factor – and the key difference between the statutory immunity provisions relied upon by the ERCB and Alberta Environment – was that the immunity clause with respect to the former explicitly contemplated the regulator as an entity ("the Board or a member of the Board…") whereas the immunity provisions under the *Water Act* and the *EPEA* did not (referring only to "persons" in various capacities; see paras 62 – 71).

For all of these reasons, the Chief Justice concluded that the claim against Alberta Environment should not be struck. He also awarded Ms. Ernst her costs at triple the column she received back in September 2013 when the action against the ERCB was first struck:

> [99] Ernst was wholly successful in responding to this Application. Further, although the roles played by the ERCB and Alberta in this matter are alleged to be very different, Alberta sought, in this Application, to rely on the same successful arguments made by the ERCB in the September 2013 Decision. These arguments could have been raised as part of Alberta's first application, but were not. Ernst was put to the time and expense of two applications, not one. As I indicated in paragraph 23 above, whether this Application could have been brought previously is an issue for consideration in determining costs.

Discussion

As stated at the outset, this decision would seem to set a new standard for the transparent and thoughtful analysis of the duty of care. Substantively, and beginning with the first stage of the *Anns* test, I do have some concerns about the potential implications of an analysis that seems to hinge on whether a regulator or other agency puts actual boots on the ground (the key factual difference between the ERCB and Alberta Environment). As the Chief Justice observed in *Ernst I*, a private duty cannot arise simply because an individual communicates with a regulator (at para 28); the flip side of this is that a duty of care should not be avoidable simply by refusing to show up. In my view, there are other relevant factors that can support or negate a conclusion of sufficient proximity. For instance, it seems relevant that in Alberta landowners cannot refuse oil and gas activities on their lands and are therefore entirely dependent on the regulators to ensure that such activities are conducted in a safe and environmentally sound manner.

With respect to the second stage, the Chief Justice was right to not blindly accept Alberta Environment's arguments about potential conflict between private and public duties and indeterminacy. As I noted in my previous post, the Supreme Court has been clear that the "residual policy consideration" stage is not the place for speculation and generalizations (see *e.g. Hill*). The Chief Justice was also correct, in my view, to remind government counsel that finding a duty of care is not dispositive of the negligence action – a plaintiff must still prove that the

defendant breached the applicable standard of care and that this breach caused the plaintiff's damage. This is a complete response to those who argue that such litigation imposes undue hardship on government regulators.

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