Appeal Number: 1301-0346AC

IN THE COURT OF APPEAL OF ALBERTA

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)

Appeal from the Order of
The Honourable Mr. Chief Justice Neil Wittmann
Dated the 13th day of November, 2013
Filed the 2nd day of December, 2013

APPELLANT'S FACTUM

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PART I: STATEMENT OF FACTS

The Action

1. Jessica Ernst ("Ernst" or the "Appellant") is a landowner who resides on an acreage near Rosebud, Alberta. Her rural property is supplied with fresh water by a private well that draws from the Rosebud Aquifer.[1]

2. Between 2001 and 2006, the defendant EnCana Corporation ("EnCana") engaged in a new and untested program of drilling for methane gas from shallow coal beds at over 190 gas wells located adjacent to Ernst's property. This program included a technique known as hydraulic fracturing or "fraccing" at shallow depths underground. Shortly thereafter, Ernst's well water became severely contaminated with hazardous and flammable levels of methane and other toxic chemicals.[2]

3. Ernst has brought claims against the defendants EnCana Corporation ("EnCana"), the Energy Resources Conservation Board ("ERCB")[3] and Her Majesty the Queen in Right of Alberta ("Alberta") regarding the severe contamination of her well water and other harms. The lawsuit claims against EnCana (for negligence, nuisance and other torts);[4] the ERCB (for breaches of Ms. Ernst's fundamental freedoms under the *Charter of Rights and Freedoms* and for the negligent failure to implement the ERCB's inspection scheme); [5] and Alberta (for among other things, negligent investigation).[6]

4. The present appeal is concerned solely with the claims pleaded against the ERCB.

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[1] Fresh Statement of Claim, dated June 25, 2012 at paras 1 & 5 ("Statement of Claim") [Appeal Record at P2-P3].
[2] Statement of Claim at paras 6-14 & 29 [Appeal Record at P3-P4 & P9].
[3] The ERCB has since been succeeded by the Alberta Energy Regulator through the *Responsible Energy Development Act,* SA2012, c R-17.3. Under s. 83(3)(c) of the Act, "an existing cause of action, claim or liability to prosecution of, by or against the former Board is unaffected by the coming into force of this section and may be continued by or against the Regulator". For the purposes of this factum the energy regulator will be referred to as the ERCB.
[4] Statement of Claim at paras 5-23 [Appeal Record at P2-P7].
[5] Statement of Claim at paras 24-58 [Appeal Record at P8-P15].
[6] Statement of Claim at paras 59-80 [Appeal Record at P16-P22].

Facts alleged regarding the ERCB

5. At the relevant time, the ERCB was the government agency responsible for overseeing and regulating the oil and gas industry. Importantly, the ERCB was tasked with protecting groundwater from contamination due to oil and gas development. While part of the ERCB's general function is adjudicative in nature, a large portion of the ERCB's responsibilities and day-to-day work is operational and administrative in nature. The ERCB carried out this operational work through its Operations Division and its numerous on-the-ground Field Offices located throughout Alberta.[7] This appeal deals solely with the ERCB's operational and administrative functions as carried out by the Operations Division.

6. The ERCB established a detailed Compliance Assurance Enforcement Scheme which included defined procedures for receiving and investigating public complaints. This scheme was operationalized by both the Compliance, Enforcement and Operations Branch, and the Public Safety / Field Surveillance Branch.[8]

7. Between 2001 and 2006, EnCana conducted shallow fraccing operations at dozens of EnCana Wells in close proximity to Ernst's private property. The ERCB was aware of these operations. It licensed the relevant EnCana wells despite knowledge that EnCana intended to engage in new, risky and untested fraccing activities at shallow depths underground and located at the same depths as freshwater aquifers used for drinking water. By March 2006, the ERCB knew that EnCana had fracced directly into the Rosebud Aquifer. These shallow fraccing activities caused the severe contamination of Ernst's well water with hazardous and flammable levels of methane and other toxic chemicals.[9]

8. In 2005 and 2006, Ernst attempted to engage with the ERCB to register concerns regarding water contamination at her property. Ernst personally interacted with several ERCB employees including, among others, Jim Reid (manager of the ERCB's Compliance and Enforcement branch); Richard McKee (a senior ERCB lawyer); and Neil McCrank (then Chairman of the ERCB). As a result of this direct and personal interaction between Ernst and the ERCB, the ERCB knew that there were serious and substantiated concerns regarding the severe

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[7] Statement of Claim at paras 24 & 26 [Appeal Record at P8].
[8] Statement of Claim at para 26 [Appeal Record at P8].
[9] Statement of Claim at paras 13-15, 29, 30 & 34 [Appeal Record at P4-P5 & P9-P10].

contamination of Ernst's well water; knew that there was good reason to believe that this contamination was caused by EnCana's drilling program; and knew that EnCana had breached various water protection laws in the drilling of wells near Ernst's property.[10]

9. By 2006, the ERCB knew that Alberta Environment tests on Ernst's water well showed that her water was contaminated with various chemicals and contained a very high level of methane.[11]

10. Despite knowledge of potentially serious industry-related water contamination and knowledge of breaches of ERCB's water protection laws, the ERCB arbitrarily and without reason failed to implement its own standard investigation and enforcement process. In other words, the ERCB did nothing to respond to Ernst's severely contaminated water.[12]

11. At around the same time, Ernst began to speak publicly about her concerns regarding oil and gas development, and the failure of the ERCB to adequately address these concerns. Ernst was a vocal and effective critic of the ERCB. Her public criticism brought unwanted public attention to the ERCB and caused embarrassment within the organization.[13]

12. The ERCB responded to this unwanted public criticism by severely restricting Ernst's communication with the ERCB and vindictively and arbitrarily prohibiting Ernst from communicating with the Compliance and Enforcement Branch of the ERCB. Richard McKee, a senior lawyer with the ERCB, confirmed that the ERCB had decided to stop communication with Ernst and would not re-open communication until Ernst agreed to stop voicing her concerns publicly and agreed to raise her concerns only to the ERCB. The pleadings state that the decision to stop communication with Ernst was taken specifically as a means to punish Ernst for her past public criticism of the ERCB, to marginalize her concerns, and to deny her access to the ERCB complaints mechanism.[14]

Causes of action against the ERCB

13. The Appellant's Statement of Claim outlines two causes of action against the ERCB:

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[10] Statement of Claim at paras 32-34 [Appeal Record at P10].
[11] Statement of Claim at para 35 [Appeal Record at P10].
[12] Statement of Claim at paras 36 & 39 [Appeal Record at P11].
[13] Statement of Claim at paras 45 & 46 [Appeal Record at P13].
[14] Statement of Claim at paras 47, 48, 52 & 55 [Appeal Record at P13-15].

a) a *Charter* claim alleging that the ERCB breached the plaintiff's right to freedom of expression as guaranteed by the *Charter of Rights and Freedoms* (the "*Charter*") by (i) punishing her for publicly criticizing the ERCB and by (ii) arbitrarily preventing Ernst from speaking to key offices within the ERCB;[15] and

b) a claim based in negligence, alleging that the ERCB negligently and arbitrarily failed to implement its own inspection and enforcement scheme.[16]

Proceedings below

14. The Defendant ERCB brought an application seeking to strike out the claims, or, in the alternative, seeking summary judgment in favour of the ERCB. The grounds asserted by the ERCB in support of both remedies were the same: first, that the ERCB purportedly did not owe a private duty of care to Ernst, and second, that the ERCB is immune from claims because of the statutory immunity provided by section 43 of the *Energy Resources Conservation Act* ("*ERCA*").[17]

15. The original application was heard by Veldhuis J on January 18, 2013. On February 8, 2013, Veldhuis J was appointed as a justice of the Court of Appeal of Alberta, and was therefore unable to render a decision in this matter. Wittmann CJ volunteered to make himself available to replace Veldhuis J as Case Management Judge. Counsel for all parties agreed that Wittmann CJ would decide the applications based on written briefs and other materials filed and on the transcript of oral argument made before Veldhuis J on January 18, 2013.[18]

16. On September 16, 2013 Wittmann CJ rendered his judgment in the above application, striking both the Plaintiff's *Charter* claim and negligence claim against the ERCB. With regard to the *Charter* claim, Wittmann CJ concluded that "the *Charter* claim of Ernst against the ERCB is valid". However, His Honour concluded that the *Charter* claim was barred by the statutory immunity clause contained within section 43 of the *ERCA*.[19]

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[15] Statement of Claim at paras 42-58 [Appeal Record at P12-P15].
[16] Statement of Claim at paras 24-41 [Appeal Record at P8-P12] .
[17] Reasons for Judgment of the Honourable Chief Justice Neil Wittmann, dated Sept 16, 2013 ("Reasons of Wittmann CJ") at paras 6 & 12 [Appeal Record at F4-F5].
[18] Reasons of Wittmann CJ at paras 5 & 8 [Appeal Record at F3-F4].
[19] Reasons of Wittmann CJ at paras 88 & 130 [Appeal Record at F29 & F39]; Order of the Honourable Chief Justice Neil Wittmann pronounced Nov 13, 2013 at para 2 ("Order") [Appeal Record at F 42].

17. With regard to the negligence claim, Wittmann CJ concluded that a) it is plain and obvious that the ERCB does not owe a private duty of care to Ernst, and b) the negligence claim is barred by the statutory immunity clause contained within section 43 of the *ERCA*.[20]

18. Contemporaneously with the ERCB's application, Alberta brought an application under r. 3.68 to strike particular paragraphs of the Statement of Claim as being "frivolous, irrelevant and improper". Wittmann CJ dismissed Alberta's application in its entirety.[21] This portion of Wittmann CJ's judgment is not under appeal.

19. Despite having already brought an unsuccessful application to strike the pleadings, Alberta served Ernst with notice of another application to strike out the pleadings on January 31, 2014, this time on the grounds that Alberta does not owe a private duty of care to Ernst. This application is currently scheduled to be heard in front of Wittmann CJ on April 16, 2014.

PART II: GROUNDS OF APPEAL

20. The present appeal raises three key issues/grounds of appeal:

Issue #1: Did the Court err in finding that the statutory immunity clause contained within section 43 of the *Energy Resources Conservation Act* bars an otherwise valid *Charter* claim made pursuant to the *Canadian Charter of Rights and Freedoms*?

Issue #2: Did the Court err in finding that it is "plain and obvious" that the ERCB does not owe a private duty of care to Ernst?

Issue #3: Did the Court err in finding that the statutory immunity clause contained within section 43 of the *Energy Resources Conservation Act* bars Ernst's claim against the ERCB for negligent omissions?[22]

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[20] Reasons of Wittmann CJ at paras 28, 58 & 130 [Appeal Record F14, F23 & F39]; Order at para 1[Appeal Record at F41].
[21] Reasons of Wittmann CJ at paras 101, 130 & 132 [Appeal Record at F34 & F38-F39].
[22] Civil Notice of Appeal at 2 [Appeal Record, F44].

PART III: POINTS OF LAW

The standard of review for all issues in this appeal is correctness

21. All three grounds of appeal identified above involve solely questions of law. His Honour was asked to determine, as purely legal matters a) whether s. 43 of the *ERCA* can grant the ERCB immunity from *Charter* claims, b) whether it is possible that the pleadings disclose a cause of action in negligence, and c) whether s. 43 of the *ERCA* should be interpreted to include negligent omissions despite the fact that the words of the statute include only an "act or thing done". Because the appeal involves only questions of law, the standard of review for all questions on this appeal is correctness.[23]

***GROUND OF APPEAL #1: The Court erred in finding that a provincial statutory immunity clause can bar a valid claim made pursuant to the* Canadian Charter of Rights and Freedoms**

22. As discussed above, the Statement of Claim pleads that Ernst was an outspoken and effective critic of the ERCB. The ERCB responded to this unwanted and embarrassing criticism by arbitrarily and without legal authority discontinuing discussions with Ernst and prohibiting her from speaking with the Compliance Branch of the ERCB.[24]

23. Ernst has alleged that the ERCB breached her s. 2(b) *Charter* right to freedom of expression in two ways:

a) First, the ERCB punished Ernst by arbitrarily excluding her from the ERCB's processes in retaliation for her effective criticism of the ERCB.

b) Second, the ERCB unreasonably restricted Ernst's speech by arbitrarily preventing her from speaking with key offices within the ERCB that were established specifically to accept public concerns and complaints about the oil and gas industry.[25]

24. Ernst has specifically pleaded that the ERCB's actions, including its restriction of her right speak with the ERCB, were a means to punish her for past public criticisms of the ERCB,

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[23] *Housen v. Nikolaisen*, 2002 SCC 33 at paras 8-9 (cited to WL); see also, *Arcelormittal Tubular Products Roman S.A. v. Fluor Canada Ltd.*, 2013 ABCA 279 at para 11 ("*Arcelormittal*" cited to CanLII): "[w]hether a pleading discloses a cause of action is a question of law reviewable on a correctness standard."
[24] Statement of Claim at paras 45-47 & 52 [Appeal Record at P13-P14].
[25] Statement of Claim at para 58 [Appeal Record at P15].

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.[26]

25. Ernst is seeking a remedy under s. 24(1) of the *Charter* for these violations of her s. 2(b) right to freedom of expression.[27]

Findings of Wittmann CJ related to Ernst's Charter *claim*

26. Wittmann CJ agreed that the Statement of Claim properly pleads a cause of action regarding a breach of s. 2(b) of the *Charter*. Having analyzed the *Charter* claim and the general test on an application to strike, Justice Wittmann held that:

> [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 a 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.[28]

27. Wittmann CJ therefore concluded that the "*Charter* claim of Ernst against the ERCB is valid."[29]

28. Despite having found that the pleadings disclosed a valid *Charter* claim, Wittmann CJ went on to find that this *Charter* claim was absolutely barred by the immunity provided by s. 43 of the *Energy Resources Conservation Act*.[30] Section 43 reads:

> 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.[31]

29. This is an error in law. For the reasons below, a statutory immunity clause cannot provide immunity from valid *Charter* claims. The *Charter* guarantees not only fundamental freedoms, but crucially, also guarantees the right of Canadians to seek a remedy when these

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[26] Statement of Claim at para 55 [Appeal Record at P15].
[27] Statement of Claim at para 87(e) [Appeal Record at P24-P25].
[28] Reasons of Wittman CJ at para 42 [Appeal Record at F19].
[29] Reasons of Wittmann CJ at para 130(b) [Appeal Record at F39].
[30] Reasons of Wittman CJ at paras 82 & 88 [Appeal Record at F28-F29].
[31] *Energy Resources Conservation Act*, RSA 2000, c E-10, s. 43.

fundamental *Charter* rights and freedoms are violated. These constitutional rights cannot be taken away by a mere statutory enactment purporting to grant immunity to the ERCB.

Ernst's right to pursue a Charter *remedy is guaranteed by section 24(1) of the* Canadian Charter of Rights and Freedoms *and cannot be taken away by a provincial statute*

30. It is difficult to overstate the importance of the *Canadian Charter of Rights and Freedoms* in the Canadian legal system. The *Charter* enshrines the fundamental freedoms of all Canadians, and, along with other parts of our Constitution, forms the supreme law of Canada.[32]

31. The *Charter* serves as a vital bulwark protecting the individual against the state. As repeatedly emphasized by the Supreme Court, the "primary purpose" of the *Charter* is to restrain government action and to protect individuals, like Ernst, from unconstitutional actions taken by government agencies, such as the ERCB. As noted by La Forest J, "the *Charter* is essentially an instrument for checking the powers of government over the individual".[33]

32. Crucially, the *Charter* itself not only guarantees the fundamental freedoms of Canadians, but also guarantees a right to a remedy for breaches of those fundamental freedoms.[34] Section 24(1) of the *Charter* specifically provides remedies for *unconstitutional government acts*. [35] In other words, the *right to a remedy is itself a constitutional right.*

33. Importantly for the present case, McLachlin CJ notes that that section 24(1) "provides a *personal remedy* against unconstitutional government action" [emphasis added].[36] In other words, the entire purpose of s. 24(1) of the *Charter* is to provide individuals like Ernst an avenue to seek a *personal remedy* against government agencies when that individual's fundamental *Charter* freedoms have been violated. S. 24(1) of the *Charter* reads as follows:

> 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

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[32] *The Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s. 52(1).
[33] *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 SCR 157 at paras 55-57 ("*Canadian Egg Marketing*" cited to QL); see also eg *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 at 356-357 ("*New Brunswick*"); *McKinney v University of Guelph*, [1990] 3 S.C.R. 229 at para 21 ("*McKinney*" cited to QL).
[34] *R v 974649 Ontario Inc*, 2001 SCC 81 at para 14 ("*R v 974649 Ontario*" cited to QL) [Appellant's Book of Authorities ("Appellant's Authorities"), Tab 1].
[35] *R v Ferguson*, 2008 SCC 6, at paras 59-61 ("*Ferguson*" cited to QL) [Appellant's Authorities, Tab 2].
[36] *Ferguson* at para 61 [Appellant's Authorities, Tab 2].

> such remedy as the court considers appropriate and just in the circumstances.[37]

34. Again, the right to seek a *personal remedy* for breaches of the *Charter is itself a constitutional right*. In the words of Iaccobucci and Arbour JJ, "[s]ection 24(1) entrenches in the Constitution a remedial jurisdiction for infringements or denials of *Charter* rights and freedoms."[38]

35. The Supreme Court is clear that because s. 24(1) is part of the supreme law of Canada, the power of a superior court to grant a remedy under s. 24(1) cannot be limited by statute:

> The power of the superior courts under s. 24(1) to make appropriate and just orders to remedy infringements or denials of *Charter* rights is part of **the supreme law of Canada**. It follows that this remedial power cannot be strictly limited by statutes or rules of the common law.[39]
>
> ... superior courts' powers to craft *Charter* remedies **may not be constrained by statutory or common law limits**.[40] [Emphasis added]

36. Specifically, this means that a statutory immunity clause cannot act to bar a claimant from seeking a *Charter* remedy; to the extent that it purports to do so, the immunity clause is of no force and effect.[41] Relying heavily on the Supreme Court's reasoning in the case of *Nelles v Ontario*, the Court of Appeal for Ontario specifically considered whether the statutory immunity clause contained within the *Proceedings Against the Crown Act* could bar a claim made against the Crown. The Court specifically found that "absolute immunity from *Charter* relief cannot be afforded by less than constitutional enactments".[42]

> The reasons of Lamer J, standing alone are strongly persuasive that a statutory enactment cannot stand in the way of a constitutional entitlement. Section 32(1)(b) of the *Charter* provides that the *Charter* applies to the legislature and government of each province. **The remedy section of the *Charter* would be emasculated if the provincial government, as one of the very powers that the *Charter* seeks to control, could declare itself immune.**[43]

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[37] *Canadian Charter of Rights and Freedoms*, s. 24 (1).
[38] *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 41 ("*Doucet-Boudreau*" cited to QL) [Appellant's Authorities, Tab 3].
[39] *Doucet-Boudreau* at para 51 [Appellant's Authorities, Tab 3].
[40] *Doucet-Boudreau* at para 105 [Appellant's Authorities, Tab 3].
[41] *The Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s. 52(1).
[42] *Prete v Ontario*, 16 OR (3d) 161 (CA) at para 10 ("*Prete*" cited to QL) [Appellant's Authorities, Tab 4].
[43] *Prete* at para 7-8 [Appellant's Authorities, Tab 4].

37. The Supreme Court has repeatedly and forcefully emphasized the supreme importance of providing full, effective and meaningful personal remedies under s. 24(1). Breaches of the *Charter* "cannot be countenanced", and therefore "[a] court which has found a violation of a *Charter* right *has a duty to provide an effective remedy*".[44] According to Lamer J, "access to a court of competent jurisdiction to seek a remedy is essential for the vindication of a constitutional wrong. To create a right without a remedy is antithetical to one of the purposes of the *Charter* which surely is to allow courts to fashion remedies when constitutional infringements occur".[45]

38. McLachlin CJ, echoing the words of previous Supreme Court judgments, put it in the following terms:

> S. 24(1) "establishes the right to a remedy as the foundation stone for the effective enforcement of *Charter* rights". Through the provision of an enforcement mechanism, s. 24(1) "above all else ensures that the *Charter* will be a vibrant and vigorous instrument for the protection of the rights and freedoms of Canadians". Section 24(1)'s interpretation necessarily resonates across all *Charter* rights, since a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach.[46]

39. The authority of the Court to craft an appropriate *Charter* remedy under s. 24(1) is expansive, and includes damages for a breach of a claimant's *Charter* rights under s. 24(1) in appropriate circumstances.[47]

40. Returning to the pleadings, Ernst is seeking a remedy under s. 24(1) of the *Charter* for a violation of her fundamental *Charter* right to freedom of expression.[48] As noted above, because the remedial provision that provides access to a *Charter* remedy is itself a protected constitutional right, Ernst's claim for a *Charter* remedy pursuant to s. 24(1) cannot be blocked by a mere statutory immunity clause contained within a provincial statute such as the *ERCA*. In other words, Ms. Ernst is constitutionally guaranteed the right to apply to a court to seek a remedy for the ERCB's breaches of her *Charter* right to freedom of expression.

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[44] *Ferguson* at para 34 [Appellant's Authorities, Tab 2].
[45] *Nelles v Ontario*, [1989] 2 SCR 170 at para 50 ("*Nelles*"cited to QL) [Appellant's Authorities, Tab 5].
[46] *R v 974649 Ontario* at paras 19-20 [Appellant's Authorities, Tab 1].
[47] *R v 974649 Ontario* at paras 18-19 [Appellant's Authorities, Tab 1]; *Vancouver (City) v Ward*, 2010 SCC 27 at paras 17, 21 & 25 ("*Ward*" cited to QL) [Appellant's Authorities, Tab 6].
[48] Statement of Claim at para 87(e) [Appeal Record at P25].

Wittmann CJ's reasons regarding statutory immunity and the Charter *are misplaced*

41. As discussed above, Wittmann CJ found that "the *Charter* claim of Ernst against the ERCB is valid". Nonetheless, His Honour found that this valid *Charter* claim was barred by section 43 of the ERCA.[49]

42. Wittmann CJ provides two primary reasons to justify this finding. First, Wittmann CJ reasons that statutory immunity clauses are similar to limitation period clauses in that they both sometimes prevent otherwise meritorious claims from being pursued. His Honour notes that limitation periods of general application apply to *Charter* claims, and therefore statutory immunity clauses should also apply to *Charter* claims for similar reasons.[50]

43. Second, Wittmann CJ raises the policy concern that litigants will improperly attempt to "circumvent a statutory immunity clause by alleging a *Charter* breach", and accordingly, "[p]arties would come to the litigation process dressed in their *Charter* clothes whenever possible."[51] This reasoning appears to be motivated by a desire to protect the courts from a flood of meritless claims for *Charter* damages that may result if government could not immunize itself from *Charter* claims. For the reasons discussed below, both of these concerns are misplaced.

Statutory immunity provisions are not analogous to limitation period provisions

44. Immunity clauses are fundamentally different from limitation periods and serve entirely different purposes. Importantly, limitation periods are not adopted for the purpose of barring a claim outright; instead, limitation periods simply provide rules regarding how promptly a claim must be made.[52] Statutory immunity clauses, on the other hand, act as an absolute bar to bringing a claim. In other words, rather than merely controlling how the right to make a claim must be exercised, statutory immunity clauses serve to destroy that right entirely.

45. Importantly, the policy reasons underlying limitation statutes are wholly different from those underlying statutory immunity clauses. According to the Supreme Court, the purpose of

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[49] Reasons of Wittmann CJ at para 130(b) [Appeal Record at F39].
[50] Reasons of Wittmann CJ at paras 74 & 82 [Appeal Record at F26 & F28].
[51] Reasons of Wittmann CJ at para 81 & 87 [Appeal Record, F28-F29].
[52] *Kingstreet Investments Ltd. v New Brunswick (Finance)* 2007 SCC 1 at para 60 ("*Kingstreet*" cited to QL) [Appellant's Authorities, Tab 7].

limitation statutes (including those that apply to *Charter* claims)[53] include (1) defining a time at which the potential defendant is free of ancient obligations; (2) preventing the bringing of claims based on stale evidence; and (3) providing an incentive for plaintiffs to bring claims in a timely fashion.[54]

46. Statutory immunity clauses do not share any of the policy considerations that underpin statutes of limitation. Rather, statutory immunity clauses are generally intended to shield certain government action from legal challenge in the courts. While this may be valid a consideration in the passing of general statutory immunity clauses, these considerations have no place when the claim in question is made pursuant to the *Charter*. Indeed, as discussed above, the very purpose of the *Charter* is to restrain government action, to protect the fundamental rights and freedoms of individuals, and to provide citizens with access to a court of competent jurisdiction to obtain a remedy when those rights have been breached.[55] Courts are given a special role as the guarantors of the *Charter* and the overseers of our constitutional system; this role cannot be usurped by a statutory immunity clause purporting to free government from judicial scrutiny.[56]

Meritorious Charter *claims should not be barred on the ground that others may bring future meritless claims*

47. Wittmann CJ's second concern is that a flood of meritless claims for *Charter* damages would result if the statutory immunity clause were not employed in this instance. The argument is, in effect, that because *some* litigants *might* bring *Charter* claims that are, in fact, meritless, all *Charter* claims, *including meritorious Charter claims* (such as Ernst's), should be absolutely barred. The danger in this approach is obvious – it sacrifices the fundamental constitutional rights of citizens to address vague concerns regarding judicial economy and government protection from lawsuits.

48. A better solution already exists within our legal system. The *Alberta Rules of Court* already have extensive mechanisms for dealing with situations where a litigant has brought a

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[53] *Ravndahl v Saskachewan*, 2009 SCC 7 at para 17 (cited to QL).
[54] *Novak v Bond* [1999] 1 SCR 808 at para. 67 ("*Novak*" cited to QL) [Appellant's Authorities, Tab 8].
[55] *Charter of Rights and Freedoms*, s 24(1); see also *Canadian Egg Marketing* at para 55-57; *New Brunswick* at 356-357.
[56] *Re Manitoba Language Rights*, [1985] 1 SCR 721 at 745.

claim that is meritless, or is improperly "dressed up" as a *Charter* claim.[57] For example, a defendant can seek to strike the claim under r. 3.68 on the grounds that the pleading discloses no reasonable claim. Similarly, if there is no merit to a claim, a defendant can seek summary judgment under s. 7.2. Rules 7.1 (trial of particular questions) and 7.5 (summary trials) also provide a means to deal with meritless claims at a summary stage.[58] These rules are far better for weeding out unmeritorious *Charter* claims than a blanket and overbroad rule barring all litigants from making any claim for a personal remedy under the *Charter* whether valid or not.[59]

Conclusion regarding Ernst's Charter *claim*

49. In sum, a statutory immunity clause cannot provide immunity to a government from valid *Charter* claims. The *Charter* guarantees not only fundamental rights and freedoms, but crucially, also guarantees the right for Canadians to seek a remedy when these fundamental *Charter* rights and freedoms are violated. These constitutional rights cannot be taken away by statutory immunity in a provincial statute. It would defeat the very purpose of the *Charter* (and in particular its remedial provisions) if the very government in question could simply legislate itself out of the enforcement of the *Charter*. Ernst's *Charter* claim must be allowed to proceed.

GROUND OF APPEAL #2: It is not "plain and obvious" that the ERCB cannot owe a duty of care to Ernst

50. Ernst's second cause of action against the ERCB is based in negligence. Ernst has alleged that the ERCB owed a duty of care to her which was breached when the ERCB failed to implement its own specific and published investigation and enforcement scheme and failed to conduct any form of investigation into the contamination of Ernst's water well, thereby causing harm to Ernst.[60]

51. In order to determine whether the ERCB owed a duty of care to Ernst as alleged, the court below was required to apply the two-part *Cooper/Anns* test. Under the *Cooper/Anns* test, the court asks:

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[57] *Nelles* at para 52 [Appellant's Authorities, Tab 5].
[58] *Alberta Rules of Court*, Alta Reg 124/2010, rr. 3.68, 7.1, 7.2, 7.3 & 7.5.
[59] *Nelles* at para 52 [Appellant's Authorities, Tab 5].
[60] Statement of Claim at paras 38-40 [Appeal Record at P11-P12].

a) whether the ERCB is in a relationship of sufficient proximity and foreseeability with the plaintiff that a *prima facie* duty of care is owed; and

b) if so, whether there are any overriding policy considerations that justify negating or limiting the duty of care.[61]

52. Wittmann CJ found that "the necessary relationship of proximity between Ernst and the ERCB is absent", concluded that the ERCB did not owe Ernst a private duty of care in the circumstances, and therefore struck the allegations of negligence against the ERCB.[62] Because of his conclusion that there was no relationship of sufficient proximity, Wittmann CJ did not consider whether the harm to Ernst was foreseeable, or whether there was any policy reason to negate a duty of care.[63]

53. With respect, and for the reasons below, Wittmann CJ's finding that it is "plain and obvious" that the pleadings do not disclose a relationship of sufficient proximity to ground a duty of care owed by the ERCB to Ernst is an error in law.

Test on an Application to Strike

54. It should be remembered that the test on an application to strike is a very difficult test to meet.[64] The defendants bear the "extremely high" onus of "proving that the Plaintiff's action is bound to fail".[65] A court should only strike out a pleading if it is "plain and obvious or beyond reasonable doubt" that the facts, taken as proved, do not disclose a reasonable cause of action.[66] The Plaintiff is entitled to a broad and generous reading of the pleadings. Neither the novelty of the cause of action nor the potential for the defendant to mount a strong defence should prevent the claim from proceeding. "Only if the action is certain to fail because it contains a radical defect" should the claim be struck out.[67]

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[61] *Hill v Hamilton-Wentworth Regional Police Services Board*, [2007] 3 SCR 129 at para 20 ("*Hill*" cited to QL) [Appellant's Authorities, Tab 9].
[62] Reasons of Wittmann CJ at paras 27, 30 [Appeal Record at F14-F15].
[63] Reasons of Wittmann CJ at para 29 [Appeal Record at F14].
[64] There was agreement amongst all parties and the Court regarding the strict test on an application to strike out a claim, see Reasons of Wittmann CJ at paras 14-16 [Appeal Record at F5-F6].
[65] *Alberta Adolescent Recovery Centre v Canadian Broadcasting Corporation*, 2012 ABQB 48 at para 29 ("*Alberta Adolescent Recovery Centre*" cited to QL).
[66] *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at 980 ("*Hunt*" cited to SCR).
[67] *Hunt* at 980.

55. As noted above, "whether a pleading discloses a cause of action is a question of law reviewable on a correctness standard."[68] This Honourable Court must therefore determine whether Wittmann CJ was correct in his determination that the claim against ERCB in negligence is "certain to fail" because it is "plain and obvious" that the pleadings do not disclose a relationship of sufficient proximity to ground a duty of care.

When will a government actor owe a private duty of care?

56. This Appeal deals with the difficult question of when a government agency, such as the ERCB, will be in a relationship of sufficient proximity with a plaintiff, such as Ernst, to ground a private law duty of care. In answering this question in the case of *R v Imperial Tobacco Ltd*, the Supreme Court differentiates between two situations. The first kind of situation is where the alleged duty of care is said to arise explicitly or implicitly from the statutory scheme. In other words, the *only* source of proximity is the statute itself.[69]

57. The second kind of situation, and the situation relevant for this appeal, is where the duty of care is alleged to arise from *interactions between the claimant and the government*, and this potential duty of care is not negated by the statute. In other words, the source of proximity is not the statute alone, but is also founded other factors derived from the nature of the specific relationship between the claimant and the government agency.[70] The Supreme Court explained the second scenario in the following terms:

> The second situation is where the proximity essential to the private duty of care is alleged to arise from a series of specific interactions between the government and the claimant. **The argument in these cases is that the government has, through its conduct, entered into a special relationship with the plaintiff sufficient to establish the necessary proximity for a duty of care.** In these cases, the governing statutes are still relevant to the analysis. For instance, if a finding of proximity would conflict with the state's general public duty established by the statute, the court may hold that no proximity arises. However, the **factor that gives rise to a duty of care in these types of cases is the specific interactions between the government actor and the claimant.**[71] [Emphasis added]

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[68] *Arcelormittal* at para 11.
[69] *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at paras 43-44 ("*Imperial Tobacco*" cited to QL) [Appellant's Authorities, Tab 10].
[70] *Imperial Tobacco* at paras 43 & 45 [Appellant's Authorities, Tab 10].
[71] *Imperial Tobacco* at para 45 [Appellant's Authorities, Tab 10].

58. In the case at bar, the Plaintiff is *not* basing her claim only on the statutory scheme. Rather, the allegations against the ERCB in the present Statement of Claim are firmly in the second category established by McLachlin CJ in *Imperial Tobacco*. In other words, Ernst is asserting that the ERCB has "through its conduct, entered into a special relationship with the plaintiff sufficient to establish the necessary proximity for a duty of care", based in large part on various specific interactions between Ernst and the ERCB.

59. Crucially, when the duty of care alleged is based on specific interactions between the government actor and the claimant, as it is in this case, the Supreme Court notes that it will be difficult to strike a claim at the pleadings stage:

> Since this is a motion to strike, the question before us is simply whether, assuming the facts pleaded to be true, there is any reasonable prospect of successfully establishing proximity, on the basis of a statute or otherwise. . . . **[W]here the asserted basis for proximity is grounded in specific conduct and interactions, ruling a claim out at the proximity stage may be difficult. So long as there is a reasonable prospect that the asserted interactions could, if true, result in a finding of sufficient proximity, and the statute does not exclude that possibility, the matter must be allowed to proceed to trial,** subject to any policy considerations that may negate the prima facie duty of care at the second stage of the analysis.[72] [Emphasis added, citations omitted]

The pleadings disclose a proximate relationship between the ERCB and Ernst

60. The factors which can satisfy the requirement of proximity are "diverse and depend on the circumstances of the case". In addition to personal contact between the parties, other indicia of proximity can include the "expectations, representations, reliance and property or other interests involved".[73]

61. Ernst's pleadings outline four factors which ground a relationship of sufficient proximity:

a) continued interaction and personal contact between Ernst and specific individuals at the ERCB;[74]

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[72] *Imperial Tobacco* at para 47 [Appellant's Authorities, Tab 10].
[73] *Hill* at para 24. [Appellant's Authorities, Tab 9].
[74] Statement of Claim at paras. 32-35 [Appeal Record at P10].

b) representations made by the ERCB which encouraged Ernst to rely on its investigation/enforcement scheme to protect her vital interests;[75]

c) the establishment of a specific and operationalized investigation/enforcement scheme directed at protecting landowners like Ernst from water contamination;[76] and

d) the nature of Ernst's interests.

Each will be considered in turn below.

a) Specific interaction between the ERCB and Jessica Ernst

62. Specific interaction or personal contact between the plaintiff and members of the government agency is a key factor in establishing a relationship of sufficient proximity. [77] "In considering whether the relationship in question is close and direct, the existence, or absence, of personal contact is significant."[78]

63. While Wittmann CJ noted that there was indeed "direct contact" between Ernst and the ERCB, he does not appear to have given any weight to this direct contact in his proximity analysis. Instead, Wittmann CJ found that the relationship between the ERCB and Ernst was much like the relationship of the plaintiffs to the regulators in *Edwards v Law Society of Upper Canada* and *Cooper v Hobart*, and therefore not proximate.[79]

64. With respect, this finding ignores the importance given by the Supreme Court to "direct contact" or "specific interaction" as a *significant* factor in support of a finding of proximity. Moreover, the finding does not account for the fact that the direct and repeated personal contact between Ernst and the regulator is in stark contrast with the complete lack of any contact between the numerous claimants and the regulator in *Edwards* and in *Cooper*.

65. Importantly, both *Edwards* and *Cooper* were proposed class-actions where large groups of investors or clients were attempting to sue regulators (the class in *Cooper* consisted of over

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[75] Statement of Claim at paras. 27-28 [Appeal Record at P8-P9].
[76] Statement of Claim at paras. 24-26 [Appeal Record at P8].
[77] *Imperial Tobacco* at paras 45 & 47 [Appellant's Authorities, Tab 10].
[78] *Fullowka v Pinkerton's of Canada Ltd.*, 2010 SCC 5 at para 44 ("*Fullowka*" cited to QL) [Appellant's Authorities, Tab 11].
[79] Reasons of Wittmann CJ at para 28 [Appeal Record at F14].

3,000 members).[80] In these cases, it was not and could not be alleged that there was *any* direct contact or interaction between the alleged proposed members of the class and the government agencies.[81] Instead, the pleaded relationship in both *Edwards* and *Cooper* was between the regulator and an unknown and "undifferentiated multitude" of the regulated public.[82]

66. In contrast, Ernst was not an undifferentiated and unknown member of the public. Ernst repeatedly engaged with various individuals at the operational branch of the ERCB over a period of years and raised specific and well-documented concerns regarding various issues including the severe contamination of her well water with hazardous and explosive levels of methane. This was not a one-off complaint, but rather direct and repeated personal contact with various individual employees of the ERCB including Mr. Jim Reid, Manager of the ERCB's Compliance and Operations Branch; Mr. Richard McKee, a senior lawyer at the ERCB; Mr. Neil McCrank, the then-Chairman of the ERCB; and many others within the Operations Branch.[83]

67. Importantly, not only was the ERCB well aware of Ernst's complaints regarding her well water, but the ERCB also specifically knew that EnCana had perforated and fractured directly into the Rosebud Aquifer, and knew that Alberta Environment had conducted tests on Ernst's well water that indicated that her water contained very high levels of methane.[84]

68. This direct and continuous personal interaction between Ernst and various individuals at the ERCB regarding water contamination at Ernst's property and regarding specific EnCana gas wells is strongly indicative of a substantial proximity between the ERCB and Ernst.

b) Representations made by the ERCB to landowners and the reliance placed on them

69. Representations and reliance are also important considerations in the proximity analysis.[85] As noted by this Honourable Court in *Tottrup v Alberta (Ministry of Environmental Protection)*, a "particularly important consideration is the degree of reliance by the public on the

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[80] *Cooper v Hobart*, 2001 SCC 79 at para 5-6 ("*Cooper*" cited to QL) [Appellant's Authorities, Tab 12]; *Edwards v Law Society of Upper Canada*, 2001 SCC 80 at para 2 ("*Edwards*" cited to SCR) [Appellant's Authorities, Tab 13].
[81] *Edwards* at paras 2-3 [Appellant's Authorities, Tab 13]; *Cooper* at paras 3-5 [Appellant's Authorities, Tab 12].
[82] *Fullowka* at para 44 [Appellant's Authorities, Tab 11].
[83] Statement of Claim at paras 32-36 [Appeal Record at P10].
[84] Statement of Claim at paras 34-35 [Appeal Record at P10].
[85] See eg *Taylor v Canada (Attorney General)* 2012 ONCA 479 at para 118 ("*Taylor*" cited to QL): "general representations and reliance on those representations can, in combination with other factors, create a relationship between the regulator and the plaintiff that is sufficiently close and direct" to ground a private duty of care [Appellant's Authorities, Tab 14].

authority, and the degree to which that has been encouraged by the authority".[86] Where a government agency has encouraged reliance on it by repeatedly asserting that it is protecting specific classes of individuals from harm, as occurred in this case, such representations will ground a finding of proximity.

70. Wittmann CJ does not appear to have given any weight to the numerous public representations made by the ERCB or the reliance put upon them by Ernst. The Statement of Claim specifically pleads that the ERCB repeatedly represented to rural landowners that the ERCB was protecting ground water from contamination caused by the oil and gas industry. 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.[87] [Emphasis added]

71. The Statement of Claim specifically pleads that the representations made by the ERCB had the effect of and were intended to foster landowner reliance on the ERCB. Ernst in particular relied on the ERCB to prevent the contamination of water caused by oil and gas development, to respond reasonably to complaints regarding water contamination, and to take prompt and reasonable enforcement and remedial action when breaches of the ERCB's water protection laws were discovered.[88]

72. These representations, and the reliance placed on them, are important indicia of proximity, and demonstrate that the ERCB was in a relationship of sufficient proximity with Ernst.

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[86] *Tottrup v Alberta (Ministry of Environmental Protection)*, 2000 ABCA 121 at para 21 (cited to QL) [Appellant's Authorities, Tab 15].
[87] Statement of Claim at para 27 [Appeal Record at P8-P9].
[88] Statement of Claim at para 28 [Appeal Record at P9].

c) Operationalized scheme directed at protecting the interests of rural landowners

73. The ERCB was the primary and specialized government agency responsible for overseeing and regulating the drilling and operating of every oil and gas well and facility located in the province of Alberta. The statutory purposes with which the ERCB was entrusted with implementing included, among others, "to secure the observance of safe and efficient practices in . . . operations for the production of oil and gas" and "to control pollution above, at, or below the surface in the drilling of wells and in operations for the production of oil and gas". [89]

74. The ERCB established a detailed and publicized Compliance Assurance and Enforcement Scheme to ensure that the ERCB's rules and regulations (including those aimed at protecting aquifers containing potable water from contamination) were followed. This scheme included detailed procedures for receiving and investigating public complaints. The Compliance Assurance and Enforcement scheme was carried out by the Compliance Branch of the ERCB and its various Field Offices located throughout Alberta.[90]

75. Crucially, this scheme was *operational* and *administrative* in nature. In other words, the ERCB's Compliance Branch was tasked with "carrying out proscribed duties" and "excut[ing] [and] carry[ing] out policy" rather than making "core policy government decisions".[91] This is important because, as this Honourable Court has recently held, a government agency may owe a duty of care when that agency acts in an administrative or operational role rather than in a legislative or adjudicative one.[92]

76. When Ernst attempted to avail herself of the ERCB's services by requesting that the ERCB respond to her legitimate complaints in accordance with that established and publicized investigation and enforcement mechanism, the government authority arbitrarily and negligently failed to carry out its proscribed duties in accordance with established procedure.[93]

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[89] *The Oil and Gas Conservation Act*, RSA 2000, c O-6, ss 4(b) & 4(f); see also *Energy Resources Conservation Act*, s 2(e.1).
[90] Statement of Claim at paras 24-26 [Appeal Record at P8].
[91] *Elder Advocates of Alberta Society v Alberta*, 2012 ABCA at para 21 ("*Elder Advocates*" cited to CanLII) [Appellant's Authorities, Tab 16].
[92] *Elder Advocates* at para 24, [Appellant's Authorities, Tab 16].
[93] Statement of Claim at paras 37 & 39-40 [Appeal Record at P11-P12].

77. There is a close parallel between the duty of care alleged here and the duty of care found in the Supreme Court's numerous "negligent implementation of an inspection regime" cases. In these cases, the Supreme Court has repeatedly held that once a government agency, such as the ERCB, has established an investigation or inspection mechanism at an operations level, it will owe a duty of care to carry out that inspection without negligence, failing which the authority can be held liable. The Supreme Court has explained this concept in the following terms:

> [A] government agency in reaching a decision pertaining to inspection must act in a reasonable manner which constitutes a *bona fide* exercise of discretion. **To do so they must specifically consider whether to inspect and if so, the system of inspection must be a reasonable one in all the circumstances.**[94] [Emphasis added]

78. There are numerous examples of cases where the Supreme Court has found a duty of care to reasonably implement an established investigation and inspection scheme in circumstances similar to this case. In *Fullowka v Pinkerton's of Canada Ltd.*, the Supreme Court found a duty of care owed by the government regulator of mines to mine workers to reasonably inspect the mine pursuant to the statutory framework, and to order cessation of work if unsafe.[95]

79. The cases of *Kamloops (City of) v Nielsen*,[96] *Ingles v Tukaluk Construction Ltd*,[97] and *Rothfield v Manolakos*[98] deal with the regulatory duties to inspect and enforce provisions of a building code. In these cases, the Supreme Court found that when a municipality had established a scheme for inspecting construction, the municipality owes a duty of care to current property owners, future property owners and to third parties to implement that scheme reasonably.[99] Importantly, the Supreme Court held that the municipality can be found negligent if it "ignored its own scheme and chose not to inspect".[100] This is precisely what is alleged by Ernst.

80. In *Just v British Columbia*, the provincial government was found to owe a duty of care to establish a reasonable system of road inspection and, in accordance with that system, to carry out

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[94] *Just v British Columbia*, [1989] 2 SCR 1228 at para 21 ("*Just*" cited to QL) [Appellant's Authorities, Tab 17].
[95] *Fullowka* [Appellant's Authorities, Tab 11].
[96] *Kamloops (City of) v Nielsen*, [1984] 2 SCR 2.
[97] *Ingles v Tukaluk Construction Ltd*, 2000 SCC 12 at para 21 ("*Ingles*" cited to QL) [Appellant's Authorities, Tab 18].
[98] *Rothfield v Manolakos*, [1989] 2 SCR 1259 at paras 4-8 ("*Rothfield*" cited to QL).
[99] *Fullowka* at paras 46-51 explaining *Kamloops, Ingles* and *Rothfield* [Appellant's Authorities, Tab 11].
[100] *Ingles* at para 25 [Appellant's Authorities, Tab 18].

inspections of roads adequately and reasonably.[101] Similarly, in *Adams v Borrel*, the New Brunswick Court of Appeal found that Agriculture Canada owed a duty of care to farmers with respect to an investigation into a potato virus. The court held that this case fell within the recognized category of "negligent inspection" in which government agencies will owe a duty of care once they have made the policy decision to establish an investigation scheme.[102]

81. The present Action is highly analogous to the above cases where a *prima facie* duty of care is owed by government agencies that have established inspection and investigation schemes, and then failed to execute the schemes reasonably. As this Honourable Court recently found, "while it is inappropriate for courts to impose liability for the consequences of a particular policy decision, 'a government actor may be liable in negligence for the manner in which it carries out the policy.'"[103]

82. As discussed above, and outlined in the pleadings, the ERCB is responsible for ensuring that oil and gas operations do not contaminate potable ground water. The ERCB established an inspection and enforcement scheme in part to protect potable groundwater. The ERCB encouraged Ernst and other landowners to rely on this scheme by representing that it "protects all freshwater aquifers". And yet, when faced with complaints that Ernst's water well was contaminated with flammable levels of methane, the ERCB arbitrary and without reason failed to implement its own inspection and enforcement scheme and failed to conduct any form of investigation into the causes of the severe contamination of Ernst's well water.

d) Important private property and safety interests of Ernst

83. The nature of the interests of the claimant is also a significant factor in the proximity analysis.[104] In this case, the plaintiff's interests are serious. Contamination and leaks at oil and gas operations can have catastrophic impacts on landowners, including damage to private property, personal injury and even death. In this case, not only was Ernst's water contaminated with hazardous and flammable levels of methane and other toxic chemicals, but her very home

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[101] *Just* [Appellant's Authorities, Tab 17].
[102] *Adams v Borrel*, 2008 NBCA 62 at paras 41-42 ("*Adams*" cited to QL) [Appellant's Authorities, Tab 19].
[103] *Elder Advocates* at paras 19-21 [Appellant's Authorities, Tab 16].
[104] *Hill* at para 34 [Appellant's Authorities, Tab 9].

was at risk of exploding because of the high levels methane that had migrated from her water into the air in her house.[105]

84. Ernst, like all rural landowners who live near oil and gas development, has little say in where oil and gas operations are located or how such activities are conducted. She has no ability to inspect operations, or to make sure that the operations are conducted in a safe manner, and only a limited ability to respond to protect herself or her property when something goes terribly wrong. In this case, Ernst was completely reliant on the ERCB to protect her and her property from adverse impacts caused by negligent oil and gas activities. Where citizens have no means to protect themselves from a real danger, they should be entitled to rely on government agencies tasked with inspection and enforcement.[106]

Foreseeability

85. As noted above, Wittmann CJ did not consider the issue of foreseeability. However, in its application to strike, the ERCB did not contest that it was foreseeable that harm could have been suffered by Ernst if the ERCB failed to exercise reasonable care in implementing its inspection and enforcement scheme. This makes sense – the ERCB regulates an inherently dangerous industry and is charged with both controlling pollution and ensuring safe operations at oil and gas sites in Alberta. Indeed, the ERCB represented to the public that it specifically protects all freshwater aquifers from contamination caused by oil and gas activities. This clearly indicates an understanding that if the ERCB failed in its mandate, freshwater aquifers, which supply household water, could be contaminated.[107]

There are no "conflicting duties" sufficient to negate a duty of care

86. The second stage of the *Cooper/Anns* test involves an analysis of whether there are "any overriding policy considerations that justify negating or limiting the duty of care."[108] As noted above, Wittmann CJ did not consider the issue of whether there are any conflicting duties sufficient to justify striking the claim at a pleadings stage.[109]

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[105] Statement of Claim at paras 13-15 & 82(d) [Appeal Record at P4-P5 & P23].
[106] *Rothfield* at para 5.
[107] Statement of Claim at para 27 [Appeal Record at P8-P9].
[108] *Hill* at para 20 [Appellant's Authorities, Tab 9].
[109] Reasons of Wittman CJ at para 29 [Appeal Record at F14].

87. In its application, the ERCB raised the spectre of "conflicting duties", arguing that since the ERCB's governing statutes involve some duties to the public it therefore cannot owe any private duty of care to Ernst.

88. This concern is misplaced. Courts have repeatedly held that public authorities can owe private duties of care, even when those public authorities owe significant duties to the public. Moreover, even if there were some conflict between the ERCB's public duties and a private duty of care, this conflict will not necessarily be enough to trump a private duty of care: in order for conflict to trump a *prima facie* duty of care, the conflict must cause "a real potential for negative consequences."[110]

89. Here, the possible conflicting duties are the duty owed by the ERCB to the public and the duty to follow its established compliance and enforcement mechanism owed to a specifically identified complainant. These duties do not conflict. Notably, no such concern about conflicting duties was found in the building inspector cases.[111] As pointed out by the Court of Appeal for Ontario, "[t]he complaint is that Ontario failed to follow its own policy, and I fail to see how Ontario can claim that following its own policy would 'pose a real potential for negative policy consequences'".[112]

90. Finally, appellate courts have cautioned against determining at the pleadings stage that residual policy considerations make it plain and obvious that policy reasons should trump a *prima facie* duty of care. Defendants bear the *evidentiary burden* of showing that there are countervailing policy considerations sufficient to negate a *prima facie* duty of care, and therefore courts should be "circumspect in using those policy concerns to determine, without a Statement of Defence and without any evidence, that it is plain and obvious that there is no cause of action".[113] At this time, there is no evidence that there is a "real potential for negative policy consequences"; accordingly a "duty of care in tort law should not be denied on speculative grounds".[114]

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[110] *Hill* at paras 40-43 [Appellant's Authorities, Tab 9].
[111] *Fullowka* at para 72 [Appellant's Authorities, Tab 11].
[112] *Heaslip Estate v Mansfield Ski Club Inc.* 2009 ONCA 594 at para 28 (cited to QL) [Appellant's Authorities, Tab 20].
[113] *Haskett v Equifax Canada Inc.*, 63 OR (3d) 577 at para 24 (CA) ("*Haskett*" cited to QL) [Appellant's Authorities, Tab 21].
[114] *Hill* at para 43 [Appellant's Authorities, Tab 9].

Conclusion regarding the duty of care owed by the ERCB to Ernst

91. With respect, Wittmann CJ erred in finding that it is "plain and obvious" that the ERCB is not in a relationship of sufficient proximity with Ernst to possibly ground a duty of care. Ernst has pleaded important indicia of proximity, including repeated personal contact between her and various ERCB employees, representations made by the ERCB that were relied upon by Ernst, a specific operational inspection and enforcement scheme, and the importance of Ernst's interests. It cannot be said that Ernst's claim is "doomed to fail". Ernst's claim in negligence must be allowed to proceed to trial.

Ground of Appeal #3: The statutory immunity clause cannot bar Ernst's claim against the ERCB for negligent omissions

92. With respect, the Court erred in finding that the statutory immunity clause contained within section 43 of the *Energy Resources Conservation Act* bars Ernst's claim against the ERCB for *negligent omissions*.

93. Ernst's claim against the ERCB is for "negligent omission", or "nonfeasance". Broadly speaking, the Statement of Claim alleges that the ERCB negligently failed to implement its own specific Compliance Assurance and Enforcement scheme and negligently failed to conduct any form of investigation, resulting in the initial and continued contamination of Ernst's well water.[115]

94. While the ERCB enjoys a statutory immunity clause under s. 43 of the *ERCA*, the words of that clause on their face do not cover claims for "negligent omission", and therefore do not include claims for the negligent and arbitrary failure to implement the ERCB's own Compliance Assurance and Enforcement scheme. S. 43 of the ERCA reads:

> **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.[116] [Emphasis added]

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[115] Statement of Claim at paras 39-40 [Appeal Record at P11-P12].
[116] *Energy Resources Conservation Act*, s 43.

95. Wittmann CJ found that despite the lack of words "omission" and "any thing not done" in s. 43, the section nonetheless bars "any actions or proceedings against the ERCB, in terms of both its decisions to act. . . and its decision not to act".[117]

96. With respect, Wittmann CJ's decision and reasons conflict with the rules of statutory interpretation as established by the Supreme Court of Canada. These rules are discussed below.

The statute is clear on its face: the immunity applies to actions only

97. The statutory immunity clause is clear on its face: it bars any "action or proceeding in respect of *any act or thing done or purported to be done*". No mention is made of "any omission or thing not done". The court must give effect to the wording of the statute. On a plain reading, the words "any act or thing done" cannot be reasonably interpreted as also including "any omission or thing not done".

98. The legislature is presumed to be a competent and careful user of language and a skillful drafter. As pointed out by the Supreme Court in *Morguard Properties Ltd. v. Winnipeg (City)*:

> [T]he Legislature is guided and assisted by a well-staffed and ordinarily very articulate Executive. The resources at hand in the preparation and enactment of legislation are such that a **court must be slow to presume oversight or inarticulate intentions when the rights of citizens are involved.** The Legislature has complete control of the process of legislation, and where it has not for any reason clearly expressed itself, it has all the resources available to correct that inadequacy of expression. This is more true today than ever before in the history of parliamentary rule.[118] [Emphasis added]

Statutes which limit rights of action must be strictly construed

99. It is settled law that statues that purport to restrict or otherwise take away rights of action of the citizen attract a strict interpretation, and any ambiguity should be resolved in favour of the person whose rights are being truncated.[119] "Before a person should be deprived of his or her cause of action, the language in the limiting statute should be clear and unambiguous."[120] If the legislature intended to grant total immunity to a government agency that has such an important

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[117] Reasons of Wittmann CJ at para 57 [Appeal Record at F22-F23].
[118] *Morguard Properties Ltd v Winnipeg (City)*, [1983] 2 SCR 493 at 12 ("*Morguard*" cited to QL) [Appellant's Authorities, Tab 22].
[119] *Berardinelli v Ontario Housing Corp*, [1979] 1 SCR 275 at para 10 (cited to WL) [Appellant's Authorities, Tab 23].
[120] *Fang v Campbell Estate*, 1994 ABCA 247 at para 10 (cited to CanLII).

role in the lives of rural Albertans, it must do so specifically, and with clear wording. In this case, it has not. The legislature has specifically *not* included omissions. It is inappropriate to "read in" words that are not in the statute to give the government increased protection that it failed to give itself.

Statutes are presumed not to have "surplusage"

100. A review of over a dozen Alberta statutes clearly demonstrates that when the Alberta Legislature intends to include "omissions" or "things not done" in statutory immunity clauses for various government agencies, it does so expressly and with clear language.[121] For example, the following statutory immunity clause for the Alberta Utilities Commission includes explicit wording specifying both "any act omitted to be done" in addition to "any act or thing done":

> 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).[122] [Emphasis added]

101. Of particular note, since this litigation was launched, the Alberta Legislature has passed the *Responsible Energy Development Act* which created a new agency to replace the ERCB. This *Act* contains a modified "protection from action" clause, which reads:

> 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.[123] [Emphasis added]

102. The wording chosen by the Legislature in the most recent statutory immunity clause applicable to the government regulator of the oil and gas industry clearly demonstrates that the Legislature was alive to the distinction between an "act or thing done" and an "act or thing

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[121] Excerpts from other Alberta Statutes Re: Statutory Immunity [Appellant's Authorities, Tab 24] e.g. *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 RSS, 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 Act*, RSA 2000, c R-13, s 95(1); *Safety Codes Act*, RSA 2000, c S-1, s 12(1); and *Securities Act,* RSA 2000, c S-4, s 222(1).

[122] *Alberta Utilities Commission Act*, SA 2007, c A-37.2, s 69.

[123] *Responsible Energy Development Act*, SA 2012, c R-17.3, s 27.

omitted to be done", and considered the difference significant enough to expressly include both categories in this *Act*.

103. Wittmann CJ does not place any weight on the clear differences in wording between s. 43 of *ERCA* on the one hand, and the wording chosen by the legislature in over a dozen other statutes on the other. According to Wittmann CJ, "to the extent that the other statutes 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."[124]

104. With respect, Wittmann CJ's conclusion that the words "anything omitted to be done" are "mere surplusage" is an error of law that directly violates the "well accepted principle of statutory interpretation" repeatedly applied by both the Supreme Court and this Honourable Court that "*no legislative provision should be interpreted so as to render it mere surplusage.*"[125] According to this Honourable Court, "[e]very word in a statute is presumed to make sense and to have a specific role to play in advancing the legislated purpose".[126] "[T]he legislature does not put in mere surplusage with no purpose."[127]

*The Supreme Court has held that the phrase "any action taken" **does not** include negligent omissions*

105. Wittman CJ's finding that the phrase "act or thing done" can include "things not done" directly conflicts with the Supreme Court's finding in *Mercure v A Marquette & Fils Inc.* In this case, the Supreme Court specifically considered whether the phrase "any action taken" could be construed to include negligent omissions, and concluded that it could not. According to the Supreme Court, because the legislator used restrictive wording, this section applied only to actions, and not to the negligent failure to act.[128] Critically, and in contrast to Wittmann CJ, the Supreme Court did not find any absurdity or irrationality in a statutory provision that made it easier to sue for omissions than it did for actions.

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[124] Reasons of Wittmann CJ at para 57 [Appeal Record at F22-F23].
[125] *R v Proulx*, 2000 SCC 5 at para 28 (cited to SCR). The principle is applied by the Alberta Court of Appeal in various cases including, eg, *Brick Protection Corporation v Alberta (Provincial Treasurer)*, 2011 ABCA 214 at paras 75-76 ("*Brick Protection*" cited to CanLII) [Appellant's Authorities, Tab 25]; and *Walsh v Mobil Oil Canada*, 2008 ABCA 268 at para 74 ("*Walsh*" cited to CanLII).
[126] *Brick Protection* at paras 75-76 [Appellant's Authorities, Tab 25].
[127] *Walsh* at para 74.
[128] *Mercure v A Marquette & Fils Inc*, [1977] 2 SCR 547 (QL) at 5 [Appellant's Authorities, Tab 26].

"Omissions" are different than "actions"

106. Finally, Wittmann CJ implicitly calls into question the difference between "omissions" and "actions", suggesting that omissions are better understood as positive "decisions not to act".[129] With respect, the Statement of Claim does not assert that the ERCB made a positive discretionary decision not to act. This is not a case where the ERCB considered and specifically decided whether or not to act. Instead, the pleadings focus on numerous negligent failures to act, including, for example, the negligent failure to conduct any form of investigation, the negligent failure to implement the ERCB's own specific and published investigation and enforcement scheme, and the negligent failure to promptly inform Ernst of risks associated with the potential contamination of her well water.[130] This understanding accords with Black's Law Dictionary definition of "Omission": "failure to do something; esp. a neglect of duty".[131] This is precisely what Ernst has pleaded.

Conclusion regarding statutory interpretation of the ERCB's statutory immunity clause

107. Since the legislature failed to employ specific and clear language in s. 43 of the *Energy Resources Conservation Act* to include negligent omissions, the ERCB cannot rely on this section to immunize it from claims based in nonfeasance, or the negligent failure to act, including the specific omissions pleaded in the Statement of Claim. Accordingly, Ernst's claim for negligent omission must be allowed to proceed to trial.

PART IV: NATURE OF RELIEF DESIRED

108. The Appellant respectfully requests that this Honourable Court:

a) set aside Wittmann CJ's orders i) striking the claim against the Energy Resources Conservation Board in negligence and ii) striking/dismissing the *Charter* claim against the Energy Resources Conservation Board; and

b) award the Appellant's costs for the within appeal and the proceedings below.

ESTIMATED TIME FOR ARGUMENT: 45 minutes

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[129] Reasons of Wittmann CJ at para 57 [Appeal Record at F22-F23].
[130] Statement of Claim at paras 39-40 [Appeal Record at P11-P12].
[131] *Black's Law Dictionary*, 8th ed. (St. Paul: West, 2004), "omission" [Appellant's Authorities, Tab 27].