

COURT FILE NUMBER 0702-00120

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE DRUMHELLER

PLAINTIFF(S) JESSICA ERNST

DEFENDANT(S) ENCANA CORPORATION, and HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA

DOCUMENT **REPLY TO DEFENCE OF HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA**

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**This is the Reply of JESSICA ERNST, PLAINTIFF, to the Statement of Defence filed by HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA, ON JANUARY 30, 2015.**

**Statement of facts relied on:**

1. This reply ("Reply") adopts the definitions as set out in the Plaintiff's Fresh Statement of Claim, filed on June 25, 2012, including particularly the definitions of "EnCana Wells", "CBM Activities", "Well 06-04", "Well 05-14" and the "Ernst Water Well".
2. Unless otherwise stated in this Reply, the Plaintiff denies every fact the Defendant Her Majesty the Queen in Right of Alberta ("Alberta Environment") has stated in its Statement of Defence, and puts Alberta Environment to the strict proof thereof.

3. In reply to paragraph 10 of the Statement of Defence of Alberta Environment, and in particular, Alberta Environment's denial that it made "any specific representations to the Plaintiff", the Plaintiff pleads and relies on paragraphs 63 and 64 of the Fresh Statement of Claim, and further pleads the following particulars:

- a. In 2005, Alberta Environment Manager Nga de la Cruz represented to Ms. Ernst that the Alberta Environmental Guidelines for Groundwater Diversion for Coalbed Methane/Natural Gas in Coal Development, April 2004 and the *Water Act* were strictly enforced, notably in relation to any CBM developments. Ms. de la Cruz sent Ms. Ernst a link to the Alberta Environmental Guidelines, which specifically state:

Mitigation

**Conditions also require the authorization holder to investigate and resolve any allegations of impact on any existing water supply.** Measures to resolve any impact may include lowering the pump, deepening the impacted well, providing water supply to the well owner for his current water needs, and drilling a new water well. [Emphasis added].

- b. On February 28, 2006, the Honourable Ralph Klein, the then Premier of Alberta, committed to intervening on behalf of Ms. Ernst and others. He gave his personal guarantee that the concerns of Ms. Ernst and others would be addressed, stating "I am willing to extend that to the fullest extent. Whatever is necessary to be done, will be done."
- c. On or around February 28, 2006, in a debate in the Legislative Assembly of Alberta, the then Alberta Environment Minister the Honourable Guy Boutilier stated:

Mr. Speaker, let me reiterate to the hon. member and to the families [specifically including Ms. Ernst] that are here today: it is a very serious issue. As Alberta Environment [sic] I will use every fibre of energy in my body to assist this family relative to safe drinking water now and into the future. . . . I can assure you that we are working with them and we will continue to work with them because this is a very important issue to this family and to many other families that have been impacted, be it by the natural flow or because of what is being asserted relative to what is taking place in the water supply. . . . I'm using my energy to get these people safe drinking water. We will do everything in our power to get them that, and then we can come to conclusive evidence in terms of: is it naturally flowing, or is it the result of drilling? I don't have that answer as of yet, but it's a very important question that we are committed to getting the answer to very quickly....

- d. On March 3, 2006, Alberta Environment employees, Darren Bourget (inspector), Al Straus (water tester), and Leslie Miller (trainee) met with Ms. Ernst at her property to test her contaminated water. During this meeting, Alberta Environment employees promised that Alberta Environment would provide permanent deliveries of safe alternate water to Ms. Ernst and her neighbours, and promised to conduct water testing on the municipal water wells that belong to Wheatland Country and that supply the Hamlet of Rosebud with drinking water. This representation was in addition to an earlier representation made by Mr. Bourget that Alberta Environment was going to supply Ms. Ernst with water tanks and start deliveries as soon as the water tanks were installed.
- e. On March 6, 2006, Environment Minister Boutilier and Deputy Minister of the Environment, C. Peter Watson, met with Ms. Ernst and others to discuss their water contamination concerns. During this meeting, the Minister promised an investigation into what was causing the contamination, and agreed to deliver safe water to Ms. Ernst's home.
- f. On or around April 24, 2006, Leslie Miller, a staff member at Alberta Environment, wrote to Ms. Ernst stating that "Alberta Environment is committed to responding to your concerns about the potential impacts of CBM activities on local aquifers."
- g. On June 20, 2006, Minister Boutilier wrote in a letter to Ms. Ernst that "[w]e have been working with you and several other landowners across the Province to determine the sources of methane or gas in private water wells, and to ensure all Albertans have access to safe, secure drinking water." The letter goes on to say, in relation to a similar water contamination complaint, "I assure you, if we do find any contraventions under our strict guidelines, action will be taken."
- h. On March 8, 2007, the Deputy Minister of the Environment, C. Peter Watson, wrote to Ms. Ernst, "Alberta Environment is committed to working with landowners concerned about their water supply."

- i. Throughout the material time, Ms. Ernst and her neighbours continued to request that Alberta Environment conduct a responsible and comprehensive investigation of the water contamination cases in the Rosebud area. In particular, Ms. Ernst and her neighbours specifically requested that Alberta Environment sample, test and investigate CBM gas wells to determine if they had caused the contamination to groundwater supplies in the Rosebud area. On April 19, 2007, Deputy Minister Watson wrote to Ms. Ernst to offer her and two of her neighbours “the comprehensive sampling you have requested.” Mr. Watson wrote that this sampling would ensure that Alberta Environment is “better able to respond to your concerns and any groundwater impacts in Rosebud and Redland.”
- j. On April 17, 2008, the Minister of Environment the Honourable Rob Renner stated in the Legislative Assembly of Alberta in response to specific questions regarding water contamination in the Rosebud area, “Mr. Speaker, the issue of safe groundwater is a priority for Alberta Environment. . . . [W]e [the Government of Alberta] have the responsibility to ensure that the groundwater that Albertans access is safe.”

4. In reply to paragraph 18-19 of the Statement of Defence, and in particular the assertion that Alberta Environment commenced its own investigation in November 2005, the Plaintiff pleads and relies on paragraphs 67 and 69 of the Fresh Statement of Claim, and further pleads the following particulars:

- a. The Plaintiff first raised concerns regarding problems with her water well with EnCana in August 2005. EnCana did not respond to Ms. Ernst’s concerns.
- b. In the autumn of 2005, Ms. Ernst telephoned Alberta Environment’s emergency 1-800 number to report concerns about the impact of CBM drilling on well water in the Rosebud area. Around the same time, Ms. Ernst spoke to Nga de la Cruz, Alberta Environment’s CBM expert, on the telephone to register her concerns about CBM development and its impact on groundwater. Alberta Environment failed to take any action regarding Ms. Ernst’s concerns at this time.

- c. Owing to Alberta Environment's lack of response to the complaints of several Rosebud area landowners, Ms. Ernst and other landowners began to speak publically about their concerns in late 2005 and early 2006, including by holding a press conference on February 28, 2006, to draw attention to water contamination possibly caused by CBM activities. It was only after the press conference that Alberta Environment initiated an investigation in March 2006.

5. In reply to paragraph 20 of the Statement of Defence, and specifically the statement that "sampling had been conducted by an independent laboratory", the Plaintiff pleads and relies on paragraphs 69-72 of the Fresh Statement of Claim, and specifically pleads that all sampling of water wells as part of the Alberta Environment investigations was completed by Alberta Environment employees, not an "independent laboratory". Many of the samples were collected by inexperienced employees who had never conducted gas sampling in water before, and who committed various sampling errors including by using unsterilized equipment and bare unwashed hands. Once the samples were collected by Alberta Environment, they were sent to third party laboratories for testing and analysis.

6. In reply to paragraph 20 and 24 of the Statement of Defence, and in particular the statements that the "conclusion was reached that isotope values indicated that methane levels in water wells were not sourced from any of the EnCana deep gas and CBM wells that had been tested" and "no testing conducted to date of either the Plaintiff's water supply, or other water supplies in the Rosebud area, had concluded that CBM activity had impacted those water supplies", the Plaintiff pleads and relies on paragraphs 69-72 of the Fresh Statement of Claim, and further pleads the following particulars:

- a. In April 2006, as part of Alberta Environment's investigation, Alberta Environment received results of isotopic fingerprinting tests from Dr. Karlis Muehlenbachs and Maxxam labs indicating that the ethane signatures from three Rosebud water wells matched the signatures of nearby EnCana Wells, indicating contamination caused by oil and gas industry activity.
- b. Isotopic fingerprinting tests commissioned by Alberta Environment as part of their investigation also confirmed that butane and propane signatures from two local water

wells matched the signatures from nearby EnCana Wells, indicating contamination caused by oil and gas industry activity.

- c. The isotopic signatures of the methane contained in the Rosebud waterworks system indicated contamination from oil and gas industry activity.

7. In reply to paragraphs 21-23 of the Statement of Defence, and specifically the allegation that the province worked with the Plaintiff on issues such as sampling methodology and testing, the Plaintiff pleads and relies on paragraphs 73 and 74 of the Fresh Statement of Claim, and further pleads that Alberta Environment failed to work with the Plaintiff and refused to accept her requests to ensure that the testing and investigation would be conducted in a scientifically rational and defensible manner. In particular, despite the repeated specific requests of the Plaintiff, Alberta Environment:

- a. failed to test or investigate gas wells that were specifically identified by the Plaintiff as a potential cause of water contamination, including, in particular, Well 05-14 and other EnCana Wells that were fractured at less than 200 metres below ground;
- b. failed to agree on, provide or follow a sampling protocol when sampling water wells;
- c. refused to test for nitrogen and other relevant substances that are indicative of industry contamination;
- d. refused to investigate what chemicals Encana had injected into Rosebud Aquifers or on any of the about 190 EnCana Wells fractured above the base of ground water protection around Rosebud, thereby preventing Alberta Environment or anyone else from knowing for which chemicals to test;
- e. failed to provide the Plaintiff with data on the Encana wells that Alberta Environment had sampled; and
- f. failed to complete isotopic fingerprinting on various samples.

8. In reply to paragraph 21, and particular the pleading that the Province worked with EnCana to provide further information and input into the investigative process, the Plaintiff

agrees that Alberta Environment specifically worked with EnCana during Alberta Environment's investigative process, and further pleads that during the early stages of its investigation before Alberta Environment was in a position to reach conclusions regarding the cause of contamination, Alberta Environment specifically worked with EnCana to seek out information which could be used by Alberta to justify prematurely and wrongfully dismiss the complaints received by Alberta Environment.

9. In reply to paragraphs 21-23 and 25-26, and in particular the suggestion that the Plaintiff was responsible for delaying testing on her well, the Plaintiff pleads that any delays regarding testing were the result of Alberta Environment refusing to agree to 1) conduct a comprehensive investigation, including by refusing to take gas samples for isotopic fingerprinting on an adequate sample of EnCana Wells, fractured at varying depths; 2) a rational and defensible investigation plan that would include, for example, a protocol for sampling to ensure that such samples were properly collected, stored and transported, and not contaminated with bacteria, and 3) provide a safety protocol.

10. In reply to paragraph 26, and specifically the allegation that Ms. Ernst did not respond to EnCana's request to attend her property to conduct testing, the Plaintiff states that she has explicitly agreed to allow EnCana to conduct water tests on the Ernst Water Well on numerous occasions both prior to and after the Ernst Water Well became contaminated. In 2003, prior to issues with the Ernst Water Well, EnCana did in fact conduct a water test of the Ernst Water Well at Ms. Ernst's request. In the time after the Ernst Water Well was contaminated, the Plaintiff specifically accepted EnCana's offer of further water tests on the Ernst Water Well. EnCana frustrated the water testing process by:

- a. refusing to first disclose the chemicals that it had injected and would in future inject into the ground during EnCana's CBM Activities, making it impossible to know for which substances to test the water; and
- b. in the fall of 2006, sending an offer to test Ms. Ernst's water well which "expired" before the letter was even sent. The letter containing the offer was not sent by EnCana until October 30, 2006, and was not delivered to Ms. Ernst until October 31, 2006. The letter, which was dated September 22, 2006 stated, "if we are not

contacted via telephone fax or email within 10 days of the date of this letter we will consider it a refusal to participate in the water well test offer.” In other words, the letter was not even sent by EnCana until four weeks after the offer to test had expired.

11. In reply to paragraph 27, and in particular the allegation that the “Province provided its entire investigation file to ARC to facilitate this independent analysis and did not withhold any documentation”, the Plaintiff pleads and relies on paragraphs 75-77 of the Fresh Statement of Claim, and further pleads that a substantial amount of highly relevant data and analysis was not provided to ARC, in particular, isotopic fingerprinting analysis conducted by Dr. Karlis Muehlenbachs and Maxxam labs which indicated that methane, ethane, butane and propane signature found in the Rosebud Hamlet water and other water wells matched the signatures of nearby EnCana Wells, and a report commissioned by EnCana which clearly showed that EnCana had perforated and fractured directly into at least two of the aquifers that make up the Rosebud Aquifer.

12. In reply to paragraph 27 of the Statement of Defence, and in particular the allegation that the “ARC arrived at its own conclusions in this regarding as said conclusions were not influenced by, nor directed by, input from the Province”, the Plaintiff pleads and relies on paragraphs 75-77, and further pleads that in addition to ongoing input by the Alberta Environment throughout the review, drafts of the ARC report were reviewed and edited by Alberta Environment employees before being released to citizens with contaminated water. Many of these edits were substantial, and included changing the conclusions of the report. The ARC report was also influenced by EnCana, as ARC relied on the gas well perforation and fracturing data selected and provided by EnCana. This violated the ARC’s terms of reference, which stated that ARC could only rely on records sent to it by Alberta Environment. As a result of ARC’s reliance on data provided by EnCana, the shallowest perforations and fractures (including those at “Well 05-14”) were excluded from ARC’s review of Alberta Environment’s investigation.

13. In reply to paragraph 27 of the Statement of Defence, and in particular the allegation that “analytical results from ARC were provided by the Province to the Plaintiff”, the Plaintiff pleads



and relies on paragraph 74(d) & (e), and further pleads that the province has refused repeated requests by the Plaintiff dating back to March 19, 2008 to disclose the data that was relied on as part of the ARC review, including data on the gas and water wells in the areas of reported contamination. The Plaintiff has attempted to access this data through access to information requests, and has obtained some records, but the most important data has been withheld by the ARC. The Office of the Information and Privacy Commissioner of Alberta ordered ARC to provide the records requested, but ARC has responded by saying that they no longer have the records in question as they returned them to Alberta Environment. Alberta Environment, for its part, has refused to release the documents, claiming that they are privileged based on the existence of this litigation. As a result of Alberta Environment's refusal to disclose the data on which the ARC review was based, Alberta Environment has made it impossible for the ARC reports to be subject to peer review and other independent analysis.

14. In reply to paragraph 33(e) of the Statement of Defence, the Plaintiff denies that there was a failure to mitigate damages, and puts Alberta Environment to the strict proof thereof. On the contrary, Ms. Ernst did take reasonable and adequate steps to mitigate her damages and has taken great care to ensure that the danger and harm to her property, herself and others has been minimized. As a result of the contamination of the Ernst Water Well, Ms. Ernst disconnected the Ernst Water Well from her home water supply and handling system in 2006 and has not used the contaminated water for any domestic purpose since. Ms. Ernst now must purchase clean water from elsewhere in order to meet her daily household water needs. As part of this process, Ms. Ernst must drive 45 minutes one-way to Rosedale to purchase clean water, haul the clean water in a tank on her truck and transfer the clean water into water-holding tanks that were installed in her basement for this purpose in 2006. Ms. Ernst has also been greatly conserving the amount of water that she uses in order to minimize the costs and inconvenience associated with having to haul clean water from elsewhere.