

PH ✓ 0702-00120
~~1202-00049~~ ✓ PH
Court File No. 0702-00120 ✓
PH ✓ PH ✓

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF DRUMHELLER



BETWEEN:

JESSICA ERNST

Plaintiff

and

ENCANA CORPORATION,
ENERGY RESOURCES CONSERVATION BOARD and
HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA

Defendants

FRESH STATEMENT OF CLAIM
(Filed and served in accordance with the Order of the
Honourable Justice Veldhuis, dated April 26, 2012)

June 25, 2012

Murray Klippenstein
W. Cory Wanless
Klippensteins Barristers & Solicitors
160 John Street, Suite 300
Toronto, ON M5V 2E5
Tel.: (416) 598-0288
Fax: (416) 598-9520

Solicitors for the Plaintiff &
Address for Service

NOTICE TO DEFENDANT(S)

You are being sued. You are a Defendant.

Go to the end of this document to see what you can do and when you must do it.

I. PARTIES

1. **The Plaintiff Jessica Ernst (“Ernst”)** resides near Rosebud, Alberta, and is the fee simple owner of, and resides on, the land legally described as Plan 9813427, Block 2 located in SE 13-27-22-W4M in Horseshoe Canyon in Wheatland County (the “Ernst Property” or the “Property”), which she purchased in 1998.
2. **The Defendant EnCana Corporation (“EnCana”)**, headquartered in Calgary, Alberta, is a North American oil and gas company incorporated pursuant to the *Canada Business Corporations Act*. EnCana has engaged in drilling gas wells in Wheatland County adjacent to the Ernst Property in order to recover methane gas from coalbed and other formations using a technique known as “hydraulic fracturing”.
3. **The Defendant Energy Resources Conservation Board (“ERCB”)** is a government agency established by statute for the purposes of regulating the oil and gas industry, including the regulation of coalbed methane and hydraulic fracturing. At all material times, the ERCB was known as the Alberta Energy Utilities Board. For the purposes of this Statement of Claim, this entity will be referred to as the “ERCB”.
4. **The Defendant Her Majesty the Queen in right of Alberta (hereinafter the “Provincial Crown”)** is responsible in law for the tortious actions and omissions of the officers and agents of the Government of Alberta. Alberta Environment is the provincial ministry responsible for overseeing the environmental protection of Alberta’s water, including groundwater. Hereinafter, “Alberta Environment” will refer to the officers and agents of the Provincial Crown that constitute the ministry of Alberta Environment.

II. LEGAL CLAIMS

A. *Claims against the Defendant EnCana*

5. The Ernst Property is supplied with freshwater by a private well owned by Ms. Ernst and located on the Ernst Property (the “Ernst Water Well”). The Ernst Water Well is drilled into and draws water from geological formations that comprise an aquifer, or series of

aquifers, located underneath the Ernst Property (the "Rosebud Aquifer"). The Rosebud Aquifer supplies fresh water to a number of private homes located near Rosebud, Alberta including Ms. Ernst's home, and to the community of Rosebud.

6. Between 2001 and 2006, EnCana engaged in a program of shallow drilling for the extraction of methane gas from coalbeds and other formations from the Horseshoe Canyon geological formation located underneath Wheatland County, Alberta. As part of this drilling program, EnCana engaged in various activities including construction, drilling, perforating, hydraulic fracturing, operating, servicing as well as reclamation and remediation activities (henceforth "CBM Activities") at dozens of gas wells located adjacent to the Ernst Property.
7. EnCana's CBM Activities included hydraulic fracturing of underground formations located near and/or under the Ernst Property. Hydraulic fracturing undertaken by EnCana near and/or under the Ernst Property involved drilling into the coalbed and other formations and injecting large quantities of fracturing fluids into the coal seam and other formations at high rates and high pressure in order to enlarge fractures in the coal and rock, and to create new fractures. In conducting hydraulic fracturing operations in the Rosebud Area, it was EnCana's specific goal to create lengthy underground pathways and connect man-made fractures with natural cleats in the coal in the subsurface formation to liberate as much methane and ethane as possible, and to promote the underground migration of methane and ethane.
8. Between 2001 and April 1, 2006, EnCana hydraulically fractured coal seams and other underground formations which were located above the Base of Groundwater Protection, as defined by the *Water Act*, at over 190 gas wells within an approximately 6 mile radius of the Ernst Property (hereinafter referred to as the "EnCana Wells"). At over 60 of these EnCana Wells, EnCana perforated and fractured coal seams and other formations located less than 200 metres beneath the surface.
9. In particular, EnCana directly targeted and hydraulically fractured the geological formations that comprise the Rosebud Aquifer at a minimum of two of the EnCana

Wells. In 2001, EnCana perforated the wellbore of well 02/06-04-27-22-W4M (“Well 06-04”) at depths starting at 100.5 meters below ground in preparation for hydraulic fracturing. In 2004, EnCana perforated the wellbore of well 00/05-14-027-22W4M (“Well 05-14”) starting at a depth of 121.5 metres below ground and hydraulically fractured into formations at multiple depths, including repeatedly into the Rosebud Aquifer. In both cases, EnCana knew or should have known that it was perforating and fracturing in-use aquifers that provided potable water to the Ernst Water Well.

10. As part of EnCana’s CBM Activities at the EnCana Wells, EnCana used hazardous chemicals during construction, drilling, hydraulic fracturing, production, remediation and reclamation operations. In particular, EnCana used hazardous and toxic chemicals in its hydraulic fracturing fluid.
11. Further, EnCana applied a number of chemical “treatments” to EnCana Well 05-14 in an attempt to repair and remediate poorly producing coal seams. These “treatments” involved pumping toxic and hazardous chemicals into targeted coal seams, including the Rosebud Aquifer.
12. EnCana completed CBM Activities at the EnCana Wells without taking necessary precautions to protect in-use aquifers or water wells from chemical contamination, or from methane and ethane contamination.
13. EnCana’s CBM Activities at the EnCana Wells have caused the severe contamination of Ms. Ernst’s well water.
14. In particular, EnCana’s CBM Activities at the EnCana wells have caused the release and migration of previously fixed and immobile dissolved and gaseous methane and ethane into the Rosebud Aquifer and the Ernst Water Well, thereby contaminating Ms. Ernst’s well water with hazardous and flammable levels of dissolved and gaseous methane and ethane.

15. EnCana's CBM Activities at the EnCana Wells have caused the contamination of Ms. Ernst well water with chemicals used by EnCana during its CBM Activities. These chemicals include: petroleum hydrocarbons, 2-Propanol 2- Methyl, Bis (2-ethylhexyl) phthalate, chromium, barium, and other chemicals, particulars of which will be provided during the course of this proceeding.
16. EnCana's CBM Activities at the EnCana Wells breached various legislative and regulatory measures designed specifically to protect groundwater. The legislative and regulatory measures breached by EnCana include: ss. 3.060, 6.050 and 6.080(2) of the *Oil and Gas Conservation Regulations*; ss. 4.4, 7.9.9, 7.9.13, 7.10.7.2, and 7.10.11.3 of *Guide 56 "Energy Development Applications and Schedules"*; *Informational Letter IL 91-11*; *Guide G-8*; ss. 36(1) and 49(1) of the *Water Act*; s. 1.03(b) and 2.8, of the *Groundwater Evaluation Guideline (Information Required when Submitting an Application under the Water Act)*; the *Alberta Environment Guidelines for Groundwater Diversion*; and ss. 109 and 110(1) of the *Environment Protection and Enhancement Act*.

i. Negligence

17. At all material times, EnCana owed a duty to the Plaintiff to exercise a reasonable standard of care, skill and diligence to ensure that EnCana's CBM Activities did not cause water contamination or other harm to the Plaintiff or her property.
18. EnCana breached this duty, and continues to breach this duty, by causing water contamination and permitting methane, ethane and other hazardous chemicals to remain on the Plaintiff's Property, in the ground beneath the surface of her property, and in her water supply.
19. Particulars of EnCana's negligence include:
 - a. Conducting CBM Activities at the EnCana Wells without taking proper precautions to ensure the protection of in-use aquifers and the Plaintiff's well water;
 - b. Perforating and fracturing the coal seams that comprise the Rosebud Aquifer;

- c. Perforating and fracturing coal seams and other formations at shallow depths at the EnCana Wells without taking necessary precautions to protect in-use aquifers and water wells;
- d. Commingling water and fluids from various methane gas production zones;
- e. Perforating and fracturing coal seams and other formations at the EnCana Wells using toxic, hazardous or otherwise harmful fracture fluids;
- f. Inadequate or faulty cementing of the wellbores at the EnCana Wells;
- g. Installing inadequate or faulty surface casing at the EnCana Wells;
- h. Drilling, perforating and fracturing above the Base of Groundwater Protection level as defined by the *Water Act*;
- i. Completely closing off and sealing Well 06-04 and Well 05-14 thereby causing increased methane and ethane migration into the Plaintiff's well, and making investigation of Well 06-04 and Well 05-14 far more difficult;
- j. Pumping, diverting or otherwise causing large quantities of water to be removed from the Rosebud Aquifer, thereby causing the release of substantial quantities of methane from the aquifer coal seams into the Ernst Water Well;
- k. Failing to conduct adequate and reasonable groundwater testing and monitoring before, during and after conducting CBM Activities;
- l. Failing to investigate impacts of its CBM Activities at the EnCana Wells on the Rosebud Aquifer;
- m. Failing to promptly notify the Plaintiff on becoming aware of potential contamination of the Rosebud Aquifer;
- n. On becoming aware of potential contamination of the Rosebud Aquifer, failing to act in a prudent and reasonable manner, including by failing to take all reasonable steps to control, mitigate and remediate the contamination; and

- o. Failing to comply with its statutory duties under applicable legislation and regulation, as noted above.

ii. Nuisance

- 20. EnCana, in contaminating Ms. Ernst's water supply, as detailed above, has caused or permitted a nuisance which has substantially diminished the enjoyment, value and beneficial use of Ms. Ernst's property, land and home.
- 21. The nuisance was created by and continues because of the acts and omissions of EnCana, and/or its agents, servants or employees. Therefore, EnCana is liable to the Plaintiff for damage caused to her property, land and home.

iii. The Rule in *Rylands v. Fletcher*

- 22. The methane, ethane and other chemicals which have or will escape into the Ernst Property, including underneath the Property and into groundwater aquifers, are environmentally dangerous. EnCana's CBM Activities, including hydraulic fracturing, constitute a non-natural use of land under EnCana's control, and EnCana has failed to prevent the escape of methane, ethane and other chemicals from land under EnCana's control. EnCana is therefore strictly liable for the damages sustained by the Plaintiff as a result of the escape and migration of methane, ethane and other contaminants onto the Ernst Property, including underneath the Ernst Property and into the groundwater aquifer.

iv. Trespass

- 23. The migration of methane, ethane and other chemicals used in or resulting from EnCana's CBM Activities at the EnCana wells into Ms. Ernst's groundwater and land through fractures deliberately caused by EnCana amounts to a trespass on Ms. Ernst's land.

B. Claims against the Defendant ERCB

i. Negligent administration of a regulatory regime

24. The ERCB is the government agency responsible for overseeing and regulating the oil and gas industry, including all aspects of CBM development. In particular, the ERCB is exclusively tasked with licensing gas wells, and enforcing significant legislative and regulatory provisions that are intended to protect the quality and quantity of groundwater supply from interference or contamination due to oil and gas development, including CBM Activities.
25. These legislative and regulatory provisions are contained in, among other sources, *Oil and Gas Conservation Regulations*, Alta. Reg. 151/1971; *Guide 65: Resources Applications for Conventional Oil and Gas Reservoirs* (2003); *Guide G-8: Surface Casing Depth – Minimum Requirements* (1997); *Guide 9: Casing Cement, Minimum Requirements*; *Guide 56: Energy Development Application Schedules* (2003); and *Informational Letter IL 91-11: Coalbed Methane Regulation* (1991).
26. In or before 1999, the ERCB used its statutory powers to establish a detailed Compliance Assurance Enforcement Scheme, which included set procedures for receiving and investigating public complaints, inspecting oil and gas operations to ensure that licenses were in compliance with all applicable rules, and taking appropriate enforcement and remedial action against oil and gas companies when non-compliance occurred. This scheme was operationalized through the Operations Division of the ERCB, and specifically both through the ERCB's Compliance, Environment and Operations Branch, and its Public Safety / Field Surveillance Branch. The ERCB's Operations Division operates numerous Field Offices located throughout Alberta.
27. The ERCB made numerous public representations regarding what individuals adversely impacted by oil and gas activities could expect from the ERCB's enforcement branches and field offices and from its published investigation and enforcement compliance mechanisms. 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.
28. These representations had the effect of, and were intended to, encourage and foster reliance on the ERCB by Ms. Ernst and other landowners. In particular, Ms. Ernst relied on the ERCB to prevent negative impacts on groundwater caused by oil and gas development; to respond promptly and reasonably to her complaints regarding impacts on her well water potentially caused by CBM Activities; and to take prompt and reasonable enforcement and remedial action when breaches of regulations or other requirements were identified.
29. Prior to engaging in CBM activities, EnCana submitted to the ERCB license applications for the EnCana Wells. The ERCB knew that EnCana intended to engage in new and untested CBM Activities at the EnCana Wells at shallow depths underground located at the same depths as in-use freshwater aquifers, including the Rosebud Aquifer. Despite this knowledge, the ERCB licensed the EnCana Wells without taking adequate steps to ensure that EnCana would take proper precautions to protect freshwater aquifers from contamination caused by shallow CBM Activities.
30. Between 2001 and April 1, 2006, with the knowledge of the ERCB, EnCana conducted shallow CBM Activities at dozens of EnCana Wells in close proximity to the Rosebud Aquifer and the Ernst Water Well, as detailed above.

31. On or before January 2005, the ERCB knew that various landowners who rely and depend upon the Rosebud Aquifer had made several complaints regarding possible contamination of well water supplied by the Rosebud Aquifer. These complaints also raised concerns about possible connections between potential water contamination and local oil and gas activities.
32. In or around late 2005 and throughout 2006, Ms. Ernst attempted to engage in direct and personal interactions with the ERCB on the specific issue of water contamination at her property and to register her concerns regarding specific EnCana wells. During this period, Ms. Ernst attempted to use ERCB's publicized compliance and enforcement mechanisms. Ms. Ernst specifically interacted with various employees of the ERCB including, among others, Mr. Neil McCrank, the then-Chairman of the ERCB; Mr. Richard McKee, a senior lawyer at the ERCB; and Mr. Jim Reid, Manager of the ERCB's Compliance and Operations Branch.
33. As a result of Ms. Ernst's direct interaction with the ERCB, the ERCB knew that Ms. Ernst had serious and substantiated concerns regarding her water and oil and gas development including that:
 - a. the quality of her well water had suddenly radically worsened in 2005 and 2006;
 - b. there was good reason to believe that the radical change in her water was specifically linked to EnCana's CBM Activities at the EnCana Wells; and
 - c. EnCana had breached ERCB requirements while conducting CBM activities at the nearby EnCana Wells.
34. On or before March 2006, the ERCB knew that EnCana had perforated and fractured directly into the Rosebud Aquifer.
35. In or around 2006, the ERCB knew that Alberta Environment had conducted tests on Ms. Ernst's well water indicating that her water was contaminated with various chemical contaminants, and contained very high levels of methane.

36. Despite clear knowledge of potentially serious industry-related water contamination and knowledge of potential breaches of ERCB requirements, the ERCB failed to respond reasonably or in accordance with its specific published investigation and enforcement process. Instead, the ERCB either completely ignored Ms. Ernst and her concerns, or directed her to the ERCB's legal counsel, Mr. McKee, who in turn refused to deal with her complaints.
37. Despite serious water contamination necessitating truck deliveries of safe water to the Plaintiff's household and to other landowners who also depend upon the Rosebud Aquifer, the ERCB did not conduct any form of investigation into the causes of contamination of Ms. Ernst's well water or the Rosebud Aquifer.
38. At all material times, the ERCB owed a duty to the Plaintiff to exercise a reasonable standard of care, skill and diligence in taking reasonable and adequate steps to protect her well water from foreseeable contamination caused by drilling for shallow methane gas; to conduct a reasonable investigation after contamination of her water was reported; and to take remedial steps to correct the damage caused.
39. The ERCB breached this duty, and continues to breach this duty, by failing to implement the ERCB's own specific and published investigation and enforcement scheme; failing to conduct any form of investigation; and arbitrarily preventing the Plaintiff from participating in the usual regulatory scheme.
40. Particulars of the ERCB's negligence include:
 - a. failing to take reasonable steps to ensure that the EnCana Wells licensed by the ERCB would not pose a serious risk of contamination to the Plaintiff's underground freshwater sources, including the Rosebud Aquifer;
 - b. failing to adequately inspect and investigate known and/or credible allegations of water contamination of Plaintiff's underground freshwater sources, including the Rosebud Aquifer, and of the possible link between such contamination and the EnCana Wells licensed by the ERCB;

- c. failing to adequately inspect and investigate known and/or credible allegations of breaches of oil and gas requirements under the jurisdiction of the ERCB at the EnCana Wells;
 - d. failing to use available enforcement powers to stop CBM Activities that were causing contamination of the Plaintiff's underground freshwater sources, including the Rosebud Aquifer and to remediate water contamination and other harms caused by oil and gas industry activity that had already occurred;
 - e. failing to implement the ERCB's established and publicized enforcement and investigation scheme;
 - f. failing to conduct adequate groundwater testing and monitoring;
 - g. failing to investigate potential long-term impacts of CBM Activities on the Rosebud Aquifer; and
 - h. failing to promptly inform the Plaintiff of potential contamination of the Rosebud Aquifer and of the potential risks posed by such contamination to the Plaintiff's health, safety and property.
41. The ERCB's various omissions as listed above were taken in bad faith.

ii. Breach of s. 2(b) of the Canadian *Charter of Rights and Freedoms*

42. In its role as the government agency responsible for regulating all aspects of the oil and gas industry, the ERCB has established a specific forum and process for communicating with the public and hearing public complaints and concerns regarding the oil and gas industry.
43. The ERCB, as a public body, invited and encouraged public participation and communication in the regulatory process, including through both its Compliance and Operations Branch, and its Field Surveillance Branch. In particular, in communications directly with landowners located adjacent to oil and gas developments, the ERCB

emphasizes the importance of public involvement in the regulation of oil and gas development in Alberta and strongly encourages such public participation.

44. The ERCB further frequently represented to such landowners that it is responsible for responding to and addressing all public complaints, including by investigating all such complaints.
45. Throughout 2004 and 2005, Ms. Ernst frequently voiced her concerns regarding negative impacts caused by oil and gas development near her home both through contact with the ERCB's compliance, investigation and enforcement offices, and through other modes of public expression, including through the press and through communication with institutions and fellow landowners and citizens.
46. Ms. Ernst was a vocal and effective critic of the ERCB. Her public criticisms brought public attention to the ERCB in a way that was unwanted by the ERCB and caused embarrassment within the organization.
47. Ms. Ernst pleads that as a result of, and in response to, her public criticisms, the ERCB seized on an offhand reference to Weibo Ludwig made by Ms. Ernst and used it as an excuse to restrict her speech by prohibiting her from communicating with the ERCB through the usual channels for public communication with the ERCB. These serious restrictions greatly limited her ability to lodge complaints, register concerns and to participate in the ERCB compliance and enforcement process. As a result, Ms. Ernst was unable to adequately register her serious and well-founded concerns that CBM Activities were adversely impacting the Rosebud Aquifer, and her groundwater supply.
48. In particular, in a letter dated November 24, 2005, Mr. Jim Reid, the Manager of the Compliance Branch of the ERCB, informed Ms. Ernst that he had instructed all staff at the Compliance Branch of the ERCB to avoid any further contact with her. Mr. Reid also notified Ms. Ernst that he had reported her to the Attorney General of Alberta, the RCMP and the ERCB Field Surveillance Branch.

49. On December 6, 2005, Ms. Ernst wrote to the ERCB to seek clarification of what was meant by Mr. Reid's comments, and what restrictions she faced when attempting to communicate with at the ERCB. This letter was returned unopened.
50. On December 14, 2005, Ms. Ernst wrote to Mr. Neil McCrank, the then-Chairman of the ERCB, to seek further clarification. Ms. Ernst did not receive a response.
51. On January 11, 2006, Ms. Ernst again wrote to Mr. McCrank and again asked for clarification. Mr. McCrank failed to provide any further clarification or explanation regarding the restriction of communication. Instead, Mr. McCrank directed Ms. Ernst to Mr. Richard McKee of the ERCB's legal branch. Mr. McKee continued to ignore, deflect and dismiss Ms. Ernst's request for an explanation regarding her exclusion from effective participation in the ERCB public complaints process and her request for the reinstatement of her right to communicate with the ERCB through the usual channels.
52. In his communications with Ms. Ernst, Mr. McKee, on behalf of the ERCB, confirmed that the ERCB took a decision in 2005 to discontinue further discussion with Ms. Ernst, and that the ERCB would not re-open regular communication until Ms. Ernst agreed to raise her concerns only with the ERCB and not publicly through the media or through communications with other citizens.
53. On October 22, 2006, Ms. Ernst again wrote to Mr. McCrank to request that she be permitted to communicate unhindered with the ERCB like any other member of the public. Specifically, Ms. Ernst requested the right to be able to file a formal objection to oil and gas development under the usual ERCB regulatory process for receiving such objections. Mr. McCrank did not respond to this request.
54. On March 20, 2007, 16 months after the original letter restricting Ms. Ernst's participation in ERCB processes, Mr. McCrank informed Ms. Ernst that she was again free to communicate with any ERCB staff.

55. Ms. Ernst pleads that Mr. Reid's letter and the subsequent restriction of communication were a means to punish Ms. Ernst for past public criticisms of the ERCB, 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, including, most importantly, its complaints mechanism.
56. Ms. Ernst pleads that the decision to restrict her communication with the ERCB, and the decision to continue such restriction, was made arbitrarily, and without legal authority.
57. Throughout this time, Ms. Ernst was prevented from raising legitimate and credible concerns regarding oil and gas related water contamination with the very regulator mandated by the government to investigate and remediate such contamination and at the very time that the ERCB was most needed. Her exclusion from the ERCB's specific and publicized investigation and enforcement process prevented her from raising concerns with the ERCB regarding its failure to enforce requirements under its jurisdiction, including those aimed at protecting groundwater quantity and quality.
58. The ERCB's arbitrary decision to restrict Ms. Ernst's communication with the ERCB, specifically by prohibiting her from communicating with the enforcement arm of the ERCB, breached Ms. Ernst's rights contained in s. 2(b) of the Canadian *Charter of Rights and Freedoms* by:
 - a. punitively excluding Ms. Ernst from the ERCB's own complaints, investigation and enforcement process in retaliation for her vocal criticism of the ERCB, thereby punishing her for exercising her right to free speech; and
 - b. arbitrarily removing Ms. Ernst from a public forum of communication with a government agency that had been established to accept public concerns and complaints about oil and gas industry activity, thereby blocking her and preventing her from speaking in a public forum that the ERCB itself had specifically established to facilitate free speech.

C. Claims against the Defendant Alberta Environment

i. Negligent administration of a regulatory regime

59. Alberta Environment is the government ministry responsible for environmental protection, including the protection of both the quality and quantity of groundwater supply for the benefit of household users of that groundwater. Alberta Environment is tasked with enforcing significant legislative and regulatory provisions that are directed towards protecting water, including groundwater.
60. These legislative and regulatory provisions are contained in, among other sources, *Water (Ministerial) Regulation*, Alta Reg. 205/1998; *Alberta Environment Guidelines for Groundwater Diversion: For Coalbed Methane/Natural Gas in Coal Development* (2004); and *Groundwater Evaluation Guideline (Information Required when Submitting an Application under the Water Act)* (2003).
61. In or before 2000, Alberta Environment established a detailed and specific “Compliance Assurance Program” with the stated goal of ensuring compliance with the laws, regulations and legal requirements under the jurisdiction of Alberta Environment. The Compliance Assurance Program included procedures for receiving and investigating public complaints; for conducting inspections of alleged breaches of legal requirements; and for conducting enforcement procedures to ensure appropriate enforcement and remedial action when noncompliance occurred. The Compliance Assurance Program was operationalized through the Regional Services Division of Alberta Environment. The compliance branch of Alberta Environment included inspectors and investigators who were responsible for, among other things, investigating specific complaints made by the public.
62. Alberta Environment made numerous public representations regarding what landowners with concerns about water contamination could expect from Alberta Environment’s Compliance Assurance Program. In particular, Alberta Environment represented that:

- a. Alberta Environment's Compliance Assurance Program ensured that third parties complied with all regulatory requirements under the mandate of Alberta Environment;
 - b. Alberta Environment would respond quickly and appropriately to each complaint received from the public, including by conducting reasonable investigations when required; and
 - c. Alberta Environment staff would carry out any investigation competently, professionally and safely.
63. Further, between February 2006 and April 17, 2008, government ministers and Alberta Environment staff made numerous specific representations to Ms. Ernst regarding her specific concerns about the contamination of her well water. Alberta Environment represented that:
- a. Alberta Environment would fully address Ms. Ernst's concerns regarding water contamination;
 - b. Alberta Environment would conduct a full and scientifically rigorous investigation into the causes of contamination of Ms. Ernst's water well;
 - c. Alberta Environment would deliver alternative safe drinking water to the Ernst Property;
 - d. Alberta Environment would conduct comprehensive sampling of the Ernst Water Well, and nearby EnCana Wells, as requested by Ms. Ernst; and
 - e. Alberta Environment would ensure that groundwater used by Ms. Ernst was safe.
64. Alberta Environment's representations had the effect of, and were intended to, encourage and foster reliance on Alberta Environment by Ms. Ernst. In particular, Ms. Ernst relied on Alberta Environment to protect underground water supplies; to respond promptly and reasonably to any complaints raised by her or other landowners; and to undertake a prompt and adequate investigation into the causes of water contamination once identified.

65. By October 2004, Alberta Environment knew that EnCana was diverting fresh water from underground aquifers without the required diversion permits from Alberta Environment.
66. By mid 2005, Alberta Environment knew that a number of landowners had made complaints regarding suspected contamination of the Rosebud Aquifer potentially caused by oil and gas development. At that time, despite repeated complaints, Alberta Environment did not conduct an investigation or take any steps to respond to reported contamination of the Rosebud Aquifer.
67. In late 2005, Ms. Ernst contacted Alberta Environment to report concerns regarding her well water, and to register concerns regarding potential impacts on groundwater caused by EnCana's CBM Activities. Alberta Environment failed to take any action regarding Ms. Ernst's concerns at that time.
68. By February 2005, Alberta Environment knew that EnCana had targeted, perforated and fractured the Rosebud Aquifer at an EnCana CBM well.
69. On March 3, 2006, several months after concerns were initially raised by Ms. Ernst, Alberta Environment began an investigation into possible contamination of numerous water wells in the Rosebud region, including the Ernst Well. Tests conducted on these water wells showed the presence of hazardous chemicals and petroleum pollutants in water drawn from the Rosebud Aquifer. These tests also indicated high concentrations of methane in water drawn from the Rosebud Aquifer.
70. Alberta Environment specifically tested the Ernst Water Well. Tests conducted on the Ernst Water Well revealed that Ms. Ernst's water contained very high and hazardous levels of methane. Alberta Environment tests also indicated that Ms. Ernst's well water was contaminated with F-2 hydrocarbons, 2-Propanol 2-Methyl and Bis (2-ethyhexyl) phalate; that levels of Strontium, Barium and Potassium in her water had doubled; and that her well water contained greatly elevated levels of Chromium.
71. Alberta Environment knew that additional independent tests also indicated that water from the Ernst Water Well was contaminated with very high levels of methane.

72. Alberta Environment knew that contaminants found in Ms. Ernst's water and in water drawn from elsewhere in the Rosebud Aquifer were related to and indicative of contamination caused by oil and gas development.
73. The Plaintiff pleads that Alberta Environment's investigation into contamination of the Ernst Water Well was conducted negligently and in bad faith. In particular, Alberta Environment:
- a. conducted the investigation in an *ad hoc*, arbitrary and scientifically irrational manner, including without the benefit of a plan or protocol;
 - b. did not follow a sampling protocol when sampling water wells;
 - c. used unsterilized equipment when taking the samples;
 - d. committed sampling errors when collecting samples;
 - e. lost, destroyed or otherwise disposed of data collected by Alberta Environment investigators;
 - f. submitted samples for analysis that were contaminated or otherwise unusable;
 - g. failed to test water wells for various substances that could be indicative of industry contamination;
 - h. failed to complete isotopic fingerprinting on relevant methane and ethane samples;
 - i. failed to test or investigate specifically identified gas wells that potentially caused water contamination, in particular Well 05-14;
 - j. failed to investigate numerous CBM wells in the vicinity of the Ernst Property where EnCana had hydraulically fractured at shallow depths located in close proximity to the Rosebud Aquifer;
 - k. failed to obtain from EnCana a list of all chemicals used in CBM Activities so that Alberta Environment could undertake proper and adequate testing for such chemicals in the Ernst Water Well; and
 - l. failed to conduct tests and collect data that were needed to complete an adequate and responsible investigation.

74. Throughout the material time, Alberta Environment and its lead investigator, Mr. Kevin Pilger, dealt with Ms. Ernst in bad faith. In particular:
- a. Mr. Pilger concluded, before any investigation had begun, that the water wells he was responsible for investigating were not impacted by CBM development;
 - b. Mr. Pilger repeatedly accused Ms. Ernst of being responsible for the contamination of her well water before conducting any investigations;
 - c. Mr. Pilger falsely and recklessly accused Ms. Ernst of fabricating and forging a hydrogeologist's report that indicated EnCana had fractured and perforated into the Rosebud Aquifer;
 - d. Alberta Environment stonewalled and otherwise blocked all of Ms. Ernst's attempts to gain access to relevant information regarding the contamination of her well and local CBM development; and
 - e. Alberta Environment shared information collected as part of the investigation with EnCana, while refusing to release this information to Ms. Ernst, her neighbours or to the general public.
75. In November 2007, almost two years after the original complaint, Alberta Environment contracted the Alberta Research Council to complete a "Scientific and Technical Review" of the information gathered regarding Ms. Ernst's complaints to determine possible causes of water contamination. Alberta Environment in fact prevented an adequate review from taking place by radically restricting the scope of the review by instructing the ARC to review only the limited information provided by Alberta Environment. As a result, the ARC review failed to consider relevant data and information as part of its review.
76. Alberta Environment then negligently and unreasonably relied on the conclusions contained within the Ernst Review, despite having knowledge of serious and legitimate concerns that the Ernst Review was inadequate. In particular, Alberta Environment knew that the Ernst Review:

- a. was based on an inadequate and negligently completed investigation, as detailed above;
 - b. failed to include or consider crucial data that was available, or could have been available if appropriate samples were taken;
 - c. included factually incorrect information;
 - d. relied excessively on abstract theoretical models due to lack of data;
 - e. failed to consider, account for, or explain the presence of indicators of potential oil and gas industry contamination; and
 - f. made conclusions that were not supportable on the available data.
77. Despite knowledge of breaches of legal requirements under its jurisdiction at the EnCana Wells, despite continued serious water contamination, and despite significant and legitimate unanswered questions regarding CBM Activities at the EnCana Wells and potential impacts on the Rosebud Aquifer, Alberta Environment closed the investigation into Ms. Ernst's contaminated water on January 16, 2008, and stopped delivering safe, drinkable water to her home in April 2008.
78. At all material times, Alberta Environment owed a duty to the Plaintiff to exercise a reasonable standard of care, skill and diligence in taking reasonable and adequate steps to protect her well water from foreseeable contamination caused by drilling for shallow methane gas; to conduct a reasonable investigation after contamination of her water was reported; and to take remedial steps to correct the damage caused.
79. Alberta Environment breached this duty, and continues to breach this duty, by negligently implementing Alberta Environment's own specific and published investigation and enforcement scheme. In particular, Alberta Environment:
- a. Conducted a negligent investigation into the contamination of the Ernst Water Well, as detailed above;
 - b. Unduly and negligently restricted the scope of both the Alberta Environment investigation and the ARC review;

- c. negligently relied on an incomplete and inadequate review of the investigation, as detailed above;
- d. failed to promptly inform the Plaintiff of potential contamination of the Rosebud Aquifer and potential risks to the Plaintiff's health, safety and property;
- e. failed to investigate identified breaches of the *Water Act*, including EnCana's dewatering of the Rosebud Aquifer without approval or a permit, despite having specific evidence that such a breach had occurred;
- f. failed to report specific breaches of the *Water Act* and the *Environmental Protection and Enhancement Act* and related regulations to the Compliance Manager;
- g. failed to recommend to the Compliance Manager that enforcement action be taken;
- h. failed to use available enforcement powers to stop CBM Activities that were causing contamination of the Rosebud Aquifer and the Plaintiff's water well and to remediate water contamination and other harms caused by oil and gas industry activity that had already occurred; and
- i. failed to investigate potential long-term impacts of CBM Activities on the Rosebud Aquifer.

80. Alberta Environment's various acts and omissions as listed above were committed in bad faith.

III. DAMAGES

81. The Plaintiff suffered damages as a result of the Defendant EnCana's negligence, creation of a nuisance, breach of the rule in *Rylands v. Fletcher*, and trespass; as a result of the Defendant ERCB's negligence and breach of the Plaintiff's *Charter* rights; and as a result of the Defendant Alberta Environment's negligence as described above.

A. General and aggravated damages

82. For greater clarity, general damages suffered by the Plaintiff include but are not limited to:

- a. substantial reduction in the value of the Ernst Property due to the initial and continuing contamination of the Property's water supply and the corresponding loss of use of the Property's water well;
- b. loss of use of the Property and loss of amenity associated with the Property including that caused by the initial and continuing contamination of the Property's water supply;
- c. environmental damage to Property that the Plaintiff, owing to her strongly held environmental beliefs, particularly values for its natural environmental qualities; and
- d. mental and emotional distress and worry caused by living in a house that is at risk of exploding, and caused by the knowledge and reasonable concern that the Plaintiff, her family and her friends had, unbeknownst to them, consumed and bathed in water containing unknown and likely dangerous contaminants with unknown potential health effects.

B. Special damages

83. For greater clarity, special damages include but are not limited to:
- a. disbursements associated with securing replacement water sources;
 - b. disbursements associated with research and investigation into the Plaintiff's water contamination issues, including costs associated with travel, scientific testing, 'Access to Information' requests, and hydrogeologists' reports.

C. Punitive and exemplary damages

84. The actions of EnCana, the ERCB and Alberta Environment, as detailed above, amount to high-handed, malicious and oppressive behaviour that justifies punitive damages. In relation to the Defendant EnCana, it is appropriate, just and necessary for the Court to assess large punitive damages to act as a deterrent to offset the large financial gains that EnCana derived from reckless and destructive resource development practices in the Rosebud region.

D. Disgorgement of profits wrongfully obtained

85. In the alternative to the Plaintiff's claims for compensatory remedies from EnCana, the Plaintiff claims the restitutionary remedy of disgorgement based on the doctrine of 'waiver of tort'. As detailed above, EnCana's shallow and dangerous drilling of natural gas wells in the Rosebud area shows a cynical disregard for the environment and for the rights of the public and the Plaintiff. By negligently conducting CBM activities, including perforation and fracturing of coal seams at dangerously shallow depths at CBM wells located near the Plaintiff's home, EnCana gained access to natural gas that would have remained inaccessible but for its negligent conduct. The Plaintiff asserts that EnCana is liable to disgorge the profits gained through the sale of this wrongfully obtained natural gas.

IV. REMEDY SOUGHT

86. The Plaintiff Jessica Ernst claims from the Defendant EnCana Corporation:
- a. general damages in the amount of \$500,000.00;
 - b. special damages in the amount of \$100,000.00;
 - c. aggravated damages in the amount of \$100,000.00;
 - d. restitutionary damages in the amount of \$1,000,000.00;
 - e. punitive and exemplary damages in the amount of \$10,000,000.00;
 - f. prejudgment interest pursuant to the *Judgment Interest Act*, R.S.A. 2000, c. J-1 and amendments thereto;
 - g. postjudgment interest pursuant to the *Judgment Interest Act*, R.S.A. 2000, c. J-1 and amendments thereto;
 - h. costs; and
 - i. such further and other relief as seems just to this Honourable Court.
87. The Plaintiff Jessica Ernst claims from the Defendant Energy Resources Conservation Board:

- a. general damages in the amount of \$500,000.00;
 - b. special damages in the amount of \$100,000.00;
 - c. aggravated damages in the amount of \$100,000.00;
 - d. punitive and exemplary damages in the amount of \$10,000,000.00;
 - e. damages in the amount of \$50,000.00 under section 24(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982(U.K.)*, 1982, c.11;
 - f. prejudgment interest pursuant to the *Judgment Interest Act*, R.S.A. 2000, c. J-1 and amendments thereto;
 - g. postjudgment interest pursuant to the *Judgment Interest Act*, R.S.A. 2000, c. J-1 and amendments thereto;
 - h. costs; and
 - i. such further and other relief as seems just to this Honourable Court.
88. The Plaintiff Jessica Ernst claims from the Defendant Her Majesty the Queen in Right of Alberta (as represented by the Ministry of the Environment):
- a. general damages in the amount of \$500,000.00;
 - b. special damages in the amount of \$100,000.00;
 - c. aggravated damages in the amount of \$100,000.00;
 - d. punitive and exemplary damages in the amount of \$10,000,000.00;
 - e. prejudgment interest pursuant to the *Judgment Interest Act*, R.S.A. 2000, c. J-1 and amendments thereto;
 - f. postjudgment interest pursuant to the *Judgment Interest Act*, R.S.A. 2000, c. J-1 and amendments thereto;
 - g. costs; and
 - h. such further and other relief as seems just to this Honourable Court.

89. The Plaintiff proposes that the trial of this action take place at the court house in Drumheller, Alberta.
90. The Plaintiff's solicitors are of the opinion that this action will likely take more than 25 days to try.

NOTICE TO DEFENDANT(S)

You only have a short time to do something to defend yourself against this claim:

20 days if you are served in Alberta

1 month if you are served outside Alberta but in Canada

2 months if you are served outside Canada

You can respond by filing a statement of defence or a demand for notice in the office of the clerk of the Court of Queen's Bench at Drumheller, Alberta AND serving your statement of defence or a demand notice on the plaintiffs(s') address for service.

WARNING

If you do not file and serve a statement of defence or a demand for notice within your time period, you risk losing the lawsuit automatically. If you do not file, or do not serve, or are late in doing either of these things, a court may give a judgment to the plaintiff(s) against you.