

LexisNexis® Agricultural Law *NetLetter*

A twice-monthly current awareness service reviewing recent cases on land use, marketing boards, environmental issues, creditor rights, animals, grain, import/export and other matters in an agricultural context.

Friday, November 21, 2014 - Issue 312

Issues added on the 7th and 21st of every month.

**** HIGHLIGHTS ****

- * The Chief Justice of the Alberta Court of Queen's Bench has dismissed an application by Alberta Environment to strike out a claim on the grounds that Alberta Environment does not owe a private law duty of care to investigate and remediate alleged contamination of water wells resulting from hazardous and toxic chemicals used for hydraulic fracturing. The Plaintiff alleged her water well, other water wells, and the Rosebud Aquifer had been contaminated as a result of hydraulic fracturing activities carried on by EnCana Corporation, and that Alberta Environment had failed to follow its "Compliance Assurance Program" by investigating, enforcing and requiring remedial action with respect to potential violations of the Environmental Protection and Enhancement Act (Alberta). EnCana was not involved in the Court application. (*Ernst v. EnCana Corporation*, [CALN/2014-035](#), [2014] A.J. No. 1259, Alberta Court of Queen's Bench)
- * A Justice of the British Columbia Supreme Court has imputed additional income to a 58 year old farmer who worked on his 80 year old father's dairy farm, in order to determine his annual income and the amount of child and spousal support due to his wife. Income was imputed for a house, utilities, fuel and cull dairy calves which were given to the farmer who pastured and sold them. (*Schilter v. Schilter*, [CALN/2014-036](#), [2014] B.C.J. No. 2827, British Columbia Supreme Court)

**** NEW CASE LAW ****

Ernst v. EnCana Corporation; [CALN/2014-035](#), Full text: [\[2014\] A.J. No. 1259](#); [2014 ABOB 672](#), Alberta Court of Queen's Bench, N.C. Wittmann C.J.Q.B., November 7, 2014.

Liability of Environmental Regulators -- Contamination of Water Wells -- Hydraulic Fracturing.

The Plaintiff, Jessica Ernst ("Ernst") of Rosebud, Alberta brought an action against EnCana Corporation ("EnCana"), the Energy Resources Conservation Board (the "ERCB") and Her Majesty the Queen in Right of Alberta (Alberta Sustainable and Resource Development) ("Alberta Environment") claiming that EnCana contaminated her

water well and the Rosebud aquifer, which is the source of fresh water for her home. Ernst claimed EnCana caused this damage through contamination from hazardous and toxic chemicals used for hydraulic fracturing between 2001 to 2006. Her claim against EnCana was based on negligence, nuisance, the rule in *Rylands v. Fletcher*, and trespass.

Ernst's claims against the ERCB and Alberta Environment were that they failed to properly investigate and remediate the contamination.

Ernst's claims against the ERCB were struck in a decision dated September 16, 2013.

Ernst alleged that Alberta Environment was negligent in its administration of the environmental statutory regime and that, among other things, Alberta Environment failed to properly monitor and regulate EnCana's activities and conducted a negligent investigation into the contamination of her water well during a period in which herself and other landowners complained of suspected water contamination.

Alberta Environment brought an application to strike out portions of a fresh Statement of Claim on the grounds that they failed to disclose a reasonable cause of action. Alberta Environment also brought a summary judgment application.

Ernst filed a fresh claim which alleged that Alberta Environment had established a detailed and specific "Compliance Assurance Program" with the stated goal of ensuring compliance with the laws, regulations and regulatory requirements within the jurisdiction of Alberta Environment. The Program included procedures for receiving and investigating complaints, conducting inspections of alleged breaches, enforcement and remedial action when non-compliance occurred.

Ernst also alleged that between February, 2006 and April, 2008 Alberta Environment staff made specific representations to her regarding her concerns about the contamination of her water well and that following investigations, Alberta Environment stopped delivering water to her home in April of 2008.

Alberta Environment applied to strike the allegations of negligent administration of a regulatory regime on the grounds that Ernst had no reasonable claim against it because Alberta Environment does not owe a private duty of care to Ernst and that Alberta Environment has statutory immunity as a result of provisions of the Water Act, RSA 200, c. W-3 (the "Water Act") and the Environmental Protection and Enhancement Act, RSA 2000, c. E-12 (the "EPEA").

Decision: Wittmann, C.J. dismissed Alberta Environment's application to strike Ernst's claim, as well as Alberta Environment's application for summary judgment [at para. 97].

Wittmann, C.J. reviewed the law with respect to whether or not Alberta Environment owed a private duty of care at para. 32 to 47 and summarized a number of cases which considered the degree of proximity between public authorities, regulators and plaintiffs at para. 46.

Wittmann, C.J. concluded, at para. 48 to 54 as follows:

[48] The first stage of the Anns test is whether there is reasonably foreseeable harm and a sufficiently proximate relationship to establish a prima facie duty of care. For the purpose of this application, I must determine whether there is any reasonable prospect that Ernst can establish that she had a close, direct relationship with Alberta Environment, and that the harm to her was reasonably foreseeable, such that a duty of care could be recognized.

[49] As stated earlier, the allegations of Ernst in the Fresh Claim must be accepted as proven facts for the purpose of this application. Therefore, I accept that Alberta Environment staff and provincial government ministers made specific representations to Ernst regarding her concerns about contamination of her well water from February 2006 to April 2008: Fresh Claim, para. 63. Alberta Environment attended at her property to conduct tests specifically on her well water: Fresh Claim, para. 69. Alberta Environment received other individual complaints but did not investigate possible contamination of numerous water wells, including the Ernst well: Fresh Claim, para. 66- 67. Alberta Environment contracts the Alberta Research Council in November 2007 to review the information gathered about Ernst's complaints, and ultimately closed their investigation into her well water in January 2008: Fresh Claim, paras. 75, 77.

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

[51] The second stage of the Anns test is whether there are any residual policy considerations which would limit any prima facie duty of care ought to negate or limit that duty of care. The issue on this Application is whether there is any reasonable prospect that Ernst can overcome any residual policy considerations raised by Alberta.

[52] Alberta argues that a private duty of care in this case would conflict with the public interest inherent in the EPEA and the Water Act. Further, Alberta argues that to find a duty of care in this case would expose Alberta to indeterminate liability.

[53] Ernst argues that these concerns are misplaced. She argues that her primary complaint is regarding the conduct of a specific investigation carried out by Alberta Environment on her specific water well. Further, she argues that this court should be circumspect in determining residual policy considerations at the pleadings stage.

[54] I agree with Ernst's submissions. First, if, at trial, a court finds Alberta owes Ernst a private duty of care, such a finding will be based on the facts and evidence of her specific case to establish proximity and foreseeability sufficient to establish a duty of care. In addition, a finding that there is a duty of care does not necessarily lead to liability - there must be a breach of that duty and the breach must cause the damage complained of.

Wittmann, C.J. rejected Alberta's submission that it could rely on statutory immunity by virtue of the provisions of section 220 of the EPEA and section 157 of the Water Act as these sections only protected individuals acting pursuant to the EPEA and the Water Act and did not extend to any actions or proceedings brought against the Government of Alberta [at para. 70].

Wittmann, C.J. also held that the immunity provisions did not protect Alberta against allegations of bad faith [at para. 71].

Wittmann, C.J. dismissed Alberta's application for summary judgment on the grounds that it was obliged to file Affidavit evidence under Alberta's Rules of Court [at para. 81].

Schilter v. Schilter; [CALN/2014-036](#), Full text: [\[2014\] B.C.J. No. 2827](#); [2014 BCSC 2149](#), British Columbia Supreme Court, Hyslop J., November 18, 2014.

Matrimonial Support Payments -- Calculation of a Farmer's Income -- Imputed Income for Housing, Cattle and Fuel Provided by Parents.

Rita Schilter ("Mrs. Schilter") brought an application for interim child and spousal support against her 58 year old husband, Alois Carl Schilter ("Mr. Schilter"). The Schilters had been married for 22 years. They resided on Mr. Schilter's parents' dairy farm near Lumby, British Columbia. Mr. Schilter's father is in his 80's.

The dairy farm consists of 350 acres. Mr. Schilter worked in excess of 10 hour days on the farm and was paid by his parents to do so.

Mrs. Schilter alleged that Mr. Schilter was not only paid a salary, but that he also received a number of untaxed benefits including a residence, cull cattle from the dairy operation (which Mr. Schilter pastured and sold), farm fuel and food.

Mr. Schilter had argued that his salary was \$43,200.00 a year and that the only other income which should be imputed to him was the benefit of the family home.

Decision: Hyslop, J. [at para. 58] imputed income to Mr. Schilter as a result of the home, gas for his vehicle and the beef operation and directed that he pay both interim spousal and child support.

Hyslop, J. agreed that Mr. Schilter received some personal benefit from the use of "purple" gas, but concluded that the personal benefit was not that great, because he worked most of the time. She fixed the imputed benefit at \$150.00 per month [at para 39].

Hyslop, J. concluded that Mr. Schilter continued to benefit from receipt of cull calves from the dairy operation, as well as the pasture provided at no charge by the dairy operation. She imputed an annual income of \$10,725.00 based on the sales information in the tax returns the parties had filed [at para. 43].

Hyslop, J. refused to impute any income for food, as Mrs. Schilter and the children were no longer residing in the family home, and as food consumption was now significantly reduced [at para. 40].

**** CREDITS ****

This NetLetter is prepared by Brian P. Kalien, Q.C. of Miller Thomson LLP, Edmonton, Alberta.



For more information about the LexisNexis® Quicklaw® service, call 1-800-387-0899 or email service@lexisnexis.ca.

For more information about LexisNexis products or services, visit www.lexisnexis.ca.

Design and compilation © 2014 LexisNexis Canada Inc. All rights reserved. Unless otherwise stated, copyright in the content rests with the author(s). LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under licence. Quicklaw is a registered trademark and NetLetter is a trademark of LexisNexis Canada Inc. Other products or services may be trademarks, registered trademarks or service marks of their respective companies. Use of this NetLetter is subject to the LexisNexis Canada Inc. Terms and Conditions of Data File Usage.