



## Alberta Court Rules Novel Fracking Claim Against Province Has Reasonable Prospect of Success

By [John Georgakopoulos](#), Partner, with the assistance of Mark Youden, Student-at-Law. © Willms & Shier Environmental Lawyers LLP.

November 18, 2014

*On November 7, 2014, a [decision](#) by the Court of Queen's Bench of Alberta dismissed the Government of Alberta's application to strike portions of Jessica Ernst's claim against Alberta for allegedly failing to protect her water supply. The Court also dismissed Alberta's application for summary judgment.*

In 2007, Ms. Ernst brought claims against EnCana Corporation, Alberta's Energy Resource Conservation Board (ERCB) and the Government of Alberta. Ms. Ernst sued EnCana for damages to her water supply allegedly caused by Encana's hydraulic fracturing (fracking) activity. Ms. Ernst also sued the Government of Alberta for allegedly failing to protect her water supply. In 2013, Ms. Ernst's claims against the ERCB for failing to respond to her concerns about her well water were struck and dismissed. This decision was upheld by [Alberta's Court of Appeal in September 2014](#). Ms. Ernst is appealing the Court of Appeal's decision to the Supreme Court of Canada.

Only the Government of Alberta participated in the recent application to strike Ms. Ernst's claim on the basis that she failed to disclose a reasonable cause of action. In the alternative, Alberta requested summary judgment dismissing the action. Alberta argued that Ms. Ernst's claim should be dismissed on the basis that the statutory regimes applicable to Alberta establish only a duty of care to the public at large, and not a private duty of care to Ms. Ernst. Alberta also relied on the statutory immunity provisions contained in Alberta's *Environmental Protection and Enhancement Act* and Alberta's *Water Act*. Alberta argued that the statutory immunity clauses protect the province from lawsuits by individuals affected by the administration of legislation.

Justice Neil Wittmann held that "while this is a novel claim, I find there is a reasonable prospect Ernst will succeed in establishing that Alberta owed her a *prima facie* duty of care". Justice Wittmann further held, "there is also a reasonable prospect that Ernst will succeed in defeating Alberta's statutory immunity claims on the basis that the provisions Alberta relies upon do not protect it, or, in the alternative, that Alberta acted in bad faith, resulting in no protection".

The Court dismissed Alberta's application for summary judgment, finding that Alberta was unable to establish that there was no genuine issue requiring trial. The Court also held that Alberta was unable to establish Ms. Ernst's claim had no merit.

[John Georgakopoulos](#) is a partner at Willms & Shier Environmental Lawyers LLP. He can be reached at 416-862-4826 or at [jgeorgakopoulos@willmsshier.com](mailto:jgeorgakopoulos@willmsshier.com).

*The information and comments herein are for the general information of the reader only and do not constitute legal advice or opinion. The reader should seek specific legal advice for particular applications of the law to specific situations.*