Tottrup v. Lund, 2000 ABCA 121

Date:20000425
Docket: #9603-0180-AC

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MADAM JUSTICE CONRAD
THE HONOURABLE MADAM JUSTICE RUSSELL
THE HONOURABLE MR. JUSTICE BERGER

BETWEEN:

AAGE TOTTRUP

APPELLANT (PLAINTIFF)

- and -

TY LUND; BRIAN EVANS, former MINISTER OF ENVIRONMENT;
and RALPH KLEIN, former MINISTER OF ENVIRONMENT

RESPONDENTS (DEFENDANTS)

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA;
PARKLAND COUNTY; PARKLAND VILLAGE COMMUNITIES INC.;
THE CITY OF SPRUCE GROVE; THE TOWN OF STONY PLAIN;
ALBERTA ENVIRONMENTAL PROTECTION

NOT PARTIES TO APPEAL (DEFENDANTS)

Appeal from the Order of
THE HONOURABLE MR. JUSTICE E.A. MARSHALL
Dated the 12th day of January, 1996
Filed the 12th day of March, 1996

REASONS FOR JUDGMENT RESERVED

REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE CONRAD
REASONS FOR JUDGMENT OF THE HONOURABLE
MR. JUSTICE BERGER CONCURRING IN THE RESULT
DISSENTING REASONS FOR JUDGMENT OF THE HONOURABLE
MADAM JUSTICE RUSSELL

COUNSEL:

R.C. SECORD and J.T. KONDRO
For the Appellant (Plaintiff)

A.P. HNATIUK, Q.C.
For the Respondents (Defendants)
Ty Lund, Brian Evans and Ralph Klein

REASONS FOR JUDGMENT OF THE HONOURABLE
MADAM JUSTICE CONRAD

[1] I have had the opportunity of reading the judgments of Russell and Berger JJ.A. For the purpose of disposing with this appeal, I find it unnecessary to deal with the issue of whether liability for tortious acts of Ministers of the Crown attaches, not only to the Crown under the *Proceedings Against the Crown Act*, R.S.A. 1980, c. P-18, but personally to the Ministers as well. I do not read ***Fox-Hitchner v. Alberta*** (1977), 2 Alta. L.R. (2d) 379 as restrictively as my colleague, Russell J.A. However, accepting, without deciding, that Ministers can still be held personally liable for their tortious acts committed in office, I agree with Berger J.A. that in this case the pleadings do not disclose a viable cause of action against them. The Chambers Judge did not err in striking the claim as it relates to the respondents Ty Lund, Brian Evans and Ralph Klein. I would dismiss the appeal.

BACKGROUND

[2] This is an appeal from an order striking a statement of claim as it relates to former and current Ministers of the Crown. The appeal remains intact against the Crown and the remaining defendants. As the facts and relevant statutes have been extensively canvassed in the other judgments, I do not propose to repeat them here.

Standard of Review

[3] This Court has previously treated a determination on application to strike a claim as an exercise of discretion. The standard of review is therefore reasonableness, absent an error of law. See: ***Kvaerner Enviropower Inc. v. Tanar Industries Ltd.***(1998), 223 A.R. 348 (C.A.); ***Hermann v. Blomme*** (1993), 145 A.R. 16 (C.A.); ***Paragon Controls Ltd. v. Valtek International***, [1998] A.J. No. 58 (C.A.). However, the Federal Court applies a different standard. They found that the standard depends on whether the order appealed from has "precluded a hearing on the merits." Thus, if the application to strike out was successful, the standard of review is correctness; otherwise, the standard is unreasonableness. See: ***Canada v. Aqua-Gem Investments Ltd.***, [1993] 2 F.C. 425 (C.A.).

[4] I find that view attractive. However, it is unnecessary to decide because even if the correctness standard applies I would dismiss the appeal.

The Judgment Under Appeal

[5] In arriving at his decision, the Chambers Judge said, in part (A.B. 100-101):

> For the purpose of this application, it is assumed the allegations of fact in the Statement of Claim are true. In determining whether a cause of action exists, a Court must be satisfied that it is plain and obvious that no cause of action exists. A claim should be struck out where clear beyond reasonable doubt that no cause of action exists.
>
> I have reviewed the Statement of Claim carefully. It is evident that this is an action in negligence against the Ministers . . . Paragraph 23 of the Statement of Claim states that:
>
> Notwithstanding the knowledge of the defendants Alberta Environmental Protection and the Ministers of the Alberta Environmental Protection of the said flooding and pollution problems and the damage being caused to the plaintiff's land, these defendants were negligent by failing, (a) to fulfil their duty under the environmental statutes and at law; (b) permitting the discharge or release of contaminants; (c) failing to remediate the damage caused by the pollution and flooding of Atim Creek and Big Lake; (d) permitting the defendant municipalities to discharge excessive amounts of contamination into the creek; (e) failing to implement and enforce its own guidelines and standards for the construction or operation of sewage waste water and storm drainage systems; (f) failing to implement or enforce its own water quality objectives.
>
> It is clear from the Statement of Claim that this is not an action for declaratory relief. Within Fox and Hitchner (phonetic), I am satisfied that the claim against Lund, Evans and Klein must be struck out. The actions against the Ministers of the Department have no chance of success. The various statutes under which they operated disclose no mandatory duty to act to prevent breach of regulations by the respective Minister. Insofar as an individual member of the public is concerned, there is no cause of action against the Minister . . .

ANALYSIS

Principles on motions to strike

[6] Rule 129 is designed to protect litigants from various forms of abuse of process. Litigants should be shielded from exposure to litigation which is doomed to fail. Rule 129 reads:

> 129 (1) The court may at any stage of the proceedings order to be struck out or amended any pleading in the action, on the ground that
>
> (a) it discloses no cause of action or defence, as the case may be, or
> (b) it is scandalous, frivolous or vexatious, or
> (c) it may prejudice, embarrass or delay the fair trial of the action, or
> (d) it is otherwise an abuse of the process of the court,

and may order the action to be stayed or dismissed or judgment to be entered accordingly.

(2) No evidence shall be admissible on an application under clause (a) of subrule (1).

(3) This Rule, so far as applicable, applies to an originating notice and a petition.

[7] Under Rule 129 (1)(a) neither the plaintiff nor the defendant is entitled to rely on affidavit evidence. If a plaintiff has not alleged facts capable of supporting a cause of action, then a defendant ought not be put to the time, expense and consequences of further litigation. Conversely, if it is not plain and obvious that no cause of action exists, an application to strike must fail.

[8] The principles governing an application to strike a statement of claim for failure to disclose a cause of action are relatively settled. In brief, the Court must assume that the allegations of fact made by the plaintiff are true. The Court then determines whether those facts disclose a cause of action in law. The test set out by the Supreme Court in ***Hunt v. Carey Canada Inc.***, [1990] 2 S.C.R. 959 at 980 is whether it is " . . . 'plain and obvious' that the plaintiff's statement of claim discloses no reasonable cause of action." Caution is required before concluding that the plaintiff has no chance of success. The plaintiff is entitled to a broad reading of the pleadings. In my view, this is particularly important where a question arises as to the expiry of a limitation period. Subject to limitation questions, the Court may grant leave to include further facts if an application is made. In addition, a determination that there is no cause of action on one set of pleadings is generally no bar to framing a new action on different facts.

[9] Although the pleadings should be liberally interpreted, the Court has a duty to apply the Rule as it is intended. If the alleged facts, examined in light of the existing law, do not disclose a cause of action the claim should be struck. Needless litigation should be avoided.

[10] With respect, I do not agree with my colleague, Russell J.A., that the question raised in this case should wait until a summary judgment application before examining whether a duty could be found. She concludes that the Chambers Judge erred because, in basing his decision on the grounds that the statutes did not impose any mandatory duties on the Ministers, he failed to appreciate that the pleadings also alleged a duty "at law." She then concedes that had the pleadings alleged only a breach of duties or powers imposed by statute, then assuming no such duties existed, the claim should be struck. But, because of the bare allegation of a "duty at law," the claim cannot be struck. This suggests that although to plead a statutory duty is insufficient to establish a cause of action (where upon examination no such duty exists) merely alleging a duty at law will suffice, even though there are no facts pled upon which a court could conclude that such a duty at law was owing. With respect, I do not agree.

[11] In my view, it is not the allegation of a duty at law that is critical, but the facts alleged supporting such a duty. For example, a statement of claim alleging only that "A" breached a duty owed to "B" thereby causing damage does not, in my view, disclose a cause of action. Pleadings are allegations of fact and, in my view, where negligence is alleged, that allegation must be supported by facts capable of sustaining a determination that a duty was owed, that an act or omission occurred breaching that duty, and that damages resulted. On a motion to strike it is the allegations of fact that must be examined to determine whether a cause of action exists.

[12] There is no need to wait for an application for summary judgment. An application for summary judgment requires sworn evidence. Frequently, it involves extensive affidavits and cross-examinations. For the purposes of a R. 129(1)(a) application there is no need (in fact no opportunity) for sworn evidence. The plaintiff **receives the benefit of an assumption that all the facts which he or she has chosen to plead are true**. It is not necessary to wait for summary judgment to evaluate whether those facts, interpreted in light of the existing law, establish a cause of action.

[13] It is an appropriate function of the Court to consider and determine these questions of law on the basis of the alleged facts. The existence of a duty of care, for example, may depend on the facts of the case, but whether certain facts could sustain a finding of such a duty is a question of law. It is therefore proper, in the circumstances of this case, to ask whether a duty of care and a breach of that duty by these Ministers could be found on the facts alleged by the plaintiff. The Court ought not to refuse to strike solely on the grounds that the facts may, at some later stage, turn out to be different from those alleged.

[14] That it is appropriate to determine these questions now is clear from the fact that some of the most important negligence cases of the last century have been determined in the context of applications to strike, including both ***Donoghue v. Stevenson,*** [1932] A.C. 562 (H.L.) and ***Anns v. London Borough Council of Merton,*** [1978] A.C. 728 (H.L.).

[15] I agree with Berger J.A. that summary judgment should not be permitted as a fishing expedition. The plaintiff is entitled to frame his pleadings as he sees fit by alleging the facts necessary to constitute the cause of action. Not only does a plaintiff at this stage have the benefit of an assumption that the alleged facts are true without proof, he or she can apply to amend to include additional facts. Summary judgment is not intended as a means of discovering new facts to found a cause of action, and it is no answer to a R. 129 application that a cause of action may materialize during a summary judgment application.

[16] Finally, in light of the danger of a flood of litigation (against ministers) if general allegations suffice, it is important that the claim be analysed at an early stage to determine whether there is any possibility of a duty being found to exist under the relevant statutes, regulations, and facts alleged in the pleadings.

[17] The Chambers Judge fully appreciated that this was an action in tort against the Ministers personally. There is nothing in his reasons to indicate that he did not appreciate that they were being sued for tortious acts done in their official capacity. He reviewed the applicable statutes and concluded that there is no mandatory duty cast upon the Ministers by the statute. He considered that there were no other facts alleging a different duty. In my view, he did not err in law. He interpreted these pleadings as alleging a common law tort based on duties arising under statute, or subordinate legislation. He was correct to try and determine whether there is a viable cause of action at this stage of the proceedings. He applied the correct test, namely the "plain and obvious" test, and, for reasons that follow, his conclusion having regard to that test, including his assessment that the pleadings did not disclose a cause of action, is correct. If the lower standard of reasonableness applies, certainly his decision is reasonable.

Did the trial judge err in determining that there is no cause of action in this case?

[18] The pleadings and statutes have been canvassed extensively in the judgments of Russell and Berger JJ.A. and I do not propose to repeat them. In summary form, the plaintiff alleges that the Ministers had a duty pursuant to various statutes or at law to prevent, control, alleviate or stop the pollution and flooding of Atim Creek and Big Lake; to monitor and enforce compliance with permits and licenses issued pursuant to the environmental statutes; and to enforce the provisions of the said environmental statutes, and the regulations made pursuant to those statutes.

[19] The test of whether a duty of care is owed by public authorities is set out in ***Anns* v. *London Borough Council of Merton,*** *supra*, and applied in Canada by ***City of Kamloops* v. *Nielsen,*** [1984] 2 S.C.R. 2 at 10:

> (1) is there a sufficiently close relationship between the parties ... so that, in the reasonable contemplation of the authority, carelessness on its part might cause damage to that person? If so, (2) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

[20] An overriding consideration in applying the test to public authorities, and as part of the considerations in that test, is whether the matter falls within the "policy" or "operational" spheres of decision-making. Policy decisions and actions are not subject to a duty of care; operational decisions may be. The distinction was outlined in ***Anns***, but was more recently discussed in ***Just v. British Columbia***, [1989] 2 S.C.R. 1228, where the Supreme Court dealt with the duty of a province to maintain its highways. Cory J., speaking for a majority of the

Court, indicated that the division between policy and operation ought to be considered as part of the exclusionary considerations referred to in the ***Anns*** test. He stated (at p. 1242):

> The duty of care should apply to a public authority unless there is a valid basis for its exclusion. A true policy decision undertaken by a government agency constitutes such a valid basis for exclusion. What constitutes a policy decision may vary infinitely and may be made at different levels although usually at a high level.
>
> The decisions in ***Anns v. Merton London Borough Council*** and ***Kamloops v. Nielsen*** indicate that 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.
>
> For example, at a high level there may be a policy decision made concerning the inspection of lighthouses. If the policy decision is made that there is such a pressing need to maintain air safety by the construction of additional airport facilities with the result that no funds can be made available for lighthouse inspection, then this would constitute a *bona fide* exercise of discretion that would be unassailable. Should then a lighthouse beacon be extinguished as a result of the lack of inspection and a shipwreck ensue, no liability can be placed upon the government agency. The result would be the same if a policy decision were made to increase the funds for job retraining and reduce the funds for lighthouse inspection so that a beacon could only be inspected every second year and as a result the light was extinguished. Once again this would constitute the *bona fide* exercise of discretion. Thus, a decision either not to inspect at all or to reduce the number of inspections may be an unassailable policy decision. This is so provided it constitutes a reasonable exercise of *bona fide* discretion based, for example, upon the availability of funds.
>
> On the other hand, if a decision is made to inspect lighthouse facilities the system of inspections must be reasonable and they must be made properly: see ***Indian Towing Co.,*** 350 U.S. 61 (1955). Thus, once the policy decision to inspect has been made, the court may review the scheme of inspection to ensure it is reasonable and has been reasonably carried out in light of all the circumstances, including the availability of funds, to determine whether the government agency has met the requisite standard of care.
>
> At a lower level, government aircraft inspectors checking on the quality of manufactured aircraft parts at a factory may make a policy decision to make a spot check of manufactured items throughout the day as opposed to checking every item manufactured in the course of one hour of the day. Such a choice as to how the inspection was to be undertaken could well be necessitated by the lack of both trained personnel and funds to provide such inspection personnel. In those circumstances the policy decision that a spot-

> check inspection would be made could not be attacked: see ***United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines),*** 467 U.S. 797 (1984).
>
> Thus, a true policy decision may be made at a lower level provided that the government agency establishes that it was a reasonable decision in light of the surrounding circumstances.

[21] In considering whether a matter is one of policy or operational, all the factors of the case must be taken into account. A particularly important consideration is the degree of reliance by the public on the authority, and the degree to which that has been encouraged by the authority: ***Sutherland Shire Council v. Heyman*** (1985), 157 C.L.R. 424 (H.C.A.). The Court must also consider the degree to which the authority, through its actions in relation to the individual, has brought a duty of care upon itself. There may be a specific assumption of a duty of care in relation to a particular plaintiff, over and above a general duty which is not owed to any person in particular: ***Home Office v. Dorset Yacht Co,*** [1970] A.C. 1004 (H.L.); ***Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*** (1989), 58 D.L.R. (4th) 396 (Ont.H.C.J.), aff'd. (1990) 72 D.L.R. (4th) 580 (Ont.Div.Ct.), leave denied (1991) 1 O.R. (3d) 416 (note) (Ont.C.A.); ***Air India Flight 182 Disaster Claimants v. Air India*** (1987), 44 D.L.R. (4th) 317 (Ont. H.C.J.).

[22] Whether a duty of care can exist is a question of law to be examined in light of all the allegations contained in the statement of claim. In this case, the issue is whether there is a duty of care owing by these Ministers, or any one of them, to Tottrup.

[23] In both the pleadings and in argument counsel for the plaintiff relied on particular statutes as the basis of the duty of care. There is no independent tort of breach of statutory duty: ***R.* v. *Saskatchewan Wheat Pool,*** [1983] 1 S.C.R. 205 (S.C.C.). The provisions of the statute form part of the circumstances which may give rise to a duty of care. The reference in the pleadings to a duty owed under various statutes " . . . or at law" is consistent with the law that a duty of care on a public authority arises only at common law, though it may derive from powers and duties conferred on a public authority by statute. In this case, reliance was placed on the statutory duties.

[24] An examination of the pleadings leads me to conclude that the plaintiff seeks liability against the Ministers on two bases. First, the essence of plaintiff's claim is that the Ministers knew of contamination and flooding and did nothing, and thereby failed to enforce regulations and perform their duties under the statute. Secondly, the Ministers are being sued as vicariously responsible for the acts of their subordinates.

[25] The judgment of Berger J.A. sets out an example of the enforcement provisions contained in the *Clean Water Act*. I agree with him that the decision to enforce under all of the statutes is discretionary, and therefore involves decisions at the policy or planning stage. A public official

cannot be responsible for an error in judgment so long as he or she did not act irresponsibly or so carelessly or unreasonably that there has been no real exercise of the discretion at all.

[26] Professor Peter W. Hogg discusses the issue of liability for planning decisions and the policy reasons behind them in *Liability of the Crown*, 2nd ed., (Toronto: Carswell, 1989) where he says at 124:

> If a decision at the planning level were made in breach of procedural requirements, or in bad faith, or for an improper purpose, such a decision would be held to be invalid by a court. But it does not follow that damages should be available to a person injured by the decision. An award of damages would involve the court in moving beyond the infirmity of the actual decision and deciding what the "correct" decision should have been. As well, an award of damages at the planning level would often expose the public authority to a multiplicity of lawsuits, and intolerable financial burdens. These seem to be the reasons why no common law duty of care arises at the planning level: even an invalid decision at the planning level does not provide a cause of action in negligence.

[27] Moreover, even if it could be said that a duty to enforce generally does exist, there is still a question of proximity between the Ministers and Tottrup. There are no facts alleged in this case to bring Tottrup within the proximity required for any general duty that may exist for these Ministers.

[28] The leading case on the duty to enforce the law is ***Hill v. Chief Constable of West Yorkshire***, [1989] A.C. 53 (H.L.), which dealt with the discretion of the police to enforce the law. On an application to strike out, the House of Lords held that, while the Police are under a general duty to enforce the law, they did not owe a duty of care to the plaintiff to protect her from a known criminal.

[29] In the context of municipal bylaws, in ***Arsenault v. Charlottetown*** (1992), 100 Nfld & P.E.I.R. 204 (P.E.I.C.A.), the Court of Appeal of Prince Edward Island dealt with a case with some parallels to the present. The respondents, who lived next door to an auto mechanic, brought an action against the mechanic and the City alleging that they suffered injury to health and property as a result of the failure of the City to enforce bylaws relating to the conduct of the mechanic's business. The respondents had complained to the City and although the matter had been investigated by the City Police, no charges had been laid.

[30] The Court of Appeal held that there was no basis for the imposition of a mandatory obligation on the City nor the Police to enforce the bylaw. In particular, the Court relied on the fact that the Police have a wide discretion in determining whether to prosecute offences, and

that even though it was at an operational level, this discretion was a sufficient policy factor to preclude justiciability of the matter.

[31] An example of a duty of care arising at an operational level arose in ***City of Kamloops v. Nielsen,*** *supra*. In that case, the City had made the policy decision to enforce the bylaw and had established an inspection system to do so. The actual inspection of houses was within the operational sphere and could be subject to a duty of care.

[32] In the present case, the plaintiff alleges that the various Ministers were aware of the discharge of contaminants, sewage, waste water and storm water as well as the effects on Atim Creek and Big Lake and took no action. The allegation that the Ministers took no action to stop the flooding and enforce compliance of all regulations takes these pleadings to their highest level.

[33] There is no allegation that the Ministers acted irresponsibly or carelessly in the exercise of any discretionary decision, or failed to give due consideration to the exercise of their discretion. There is no assertion that these Ministers, or any of them, acted in any way with respect to Tottrup so as to create a duty to him. There is not even an allegation that the Ministers were directly involved in any decision made relating to enforcement of any statutory provisions as it affected Tottrup. Nor is it alleged that they were careless in any supervisory powers with respect to any subordinates and decisions made by them. There are no facts pled that could support a finding that a policy decision had been made, which resulted in any of these Ministers making an operational decision affecting the plaintiff. As noted by Berger J.A., the pleadings do not allege facts supporting any conclusion that the Ministers acted negligently in the execution of any policy or discretionary decision already taken. Finally, there is no allegation that any of these Ministers were guilty of the tort of misfeasance in office.

[34] I agree with the Chambers Judge that there is no mandatory statutory duty imposed on any of the Ministers to prevent flooding of the plaintiff's land, and there are no facts which, taken together with the statutory requirements, would create any common law duty. The pleadings do not allege any facts to support a duty owing to Tottrup by the Ministers.

[35] It was suggested that the case of ***Fullowka v. Whitford*** (1996), 147 D.L.R.(4th) 531 (N.W.T. C.A.), (application for leave to appeal dismissed [1997] S.C.C.A. No. 58) is on all fours with this case. I disagree. In ***Fullowka***, the plaintiff sued the Crown and its senior mine inspector on the grounds that they owed a duty of care because they regulated mine safety, and breach of that duty had resulted in damages arising from an explosion caused by a mine worker. An application to strike out was made on the grounds that neither a duty of care, nor facts to support one, were alleged. There are differences between this case and ***Fullowka***. First, ***Fullowka*** did not involve a claim against a minister for failing to act in a general way, but against the mine inspector with respect to a particularized incident. The Court was satisfied that there was a possibility of a duty on the senior mine inspector under the statute and the facts alleged. In this

case the Ministers did not have licensing and inspection duties. There is no proximity between the plaintiff and the Ministers. Moreover, in ***Fullowka*** the application was brought by the Crown and a number of defendants. In the present case, however, we are dealing with the action against the Ministers alone. The action is not struck out against the Crown or the other defendants.

[36] Finally, I must deal with the argument that the pleadings are broad enough to disclose that somebody, somewhere, might have failed to do something which could be construed as an operational decision. Even assuming this is so, there is no allegation which would bring liability home to these Ministers. There is no allegation that the Ministers were negligent in supervising whoever made that decision. Rather, the pleadings seek to make the Ministers responsible for the acts of their subordinates. I agree with Russell J.A. that the Ministers cannot be vicariously liable for the acts of others: ***Bainbridge v. Postmaster-General***, [1906] 1 K.B. 178 (Eng. C.A.); ***National Harbours Board v. Langelier,*** [1969] S.C.R.60 (S.C.C.). Rather, any liability they incur must arise from their own acts or omissions.

[37] I agree with Berger J.A. that the allegations are not sufficient to disclose a cause of action. I make no comment with respect to the validity of this claim against any of the other parties as that issue is not before the Court.

[38] I also make no comment with respect to the decision of this Court in ***Decock v. Alberta***, filed contemporaneously. Each case must be interpreted on its own pleadings by the panel hearing the appeal. The context of these cases involves diverse considerations and they ought not, and cannot, be easily compared. The allegations of fact were found capable of supporting a cause of action, whereas in this case I am of the view that they are not.

CONCLUSION

[39] In conclusion, the Chambers Judge evaluated the pleadings filed. He was correct to do so. He found that there was no mandatory statutory duty and that all of the alleged facts do not support a cause of action. The Chambers Judge correctly decided that this action was doomed to fail as against the three Ministers. Evaluating the allegations of fact, the relevant statutory duties, and the law as it relates to common law duties of public officials, there are insufficient facts pled to support an action personally against Ty Lund, Brian Evans and Ralph Klein.

[40] The appeal is dismissed.

APPEAL HEARD on May 5, 1998

REASONS FILED at EDMONTON, Alberta,
this 25th day of April, 2000

CONRAD J.A.

REASONS FOR JUDGMENT OF
THE HONOURABLE MR. JUSTICE BERGER

[41] I have had the advantage of reading in draft form the Reasons for Judgment of Russell, J.A. in the case at bar as well as her draft judgment in ***Decock v. Her Majesty the Queen in Right of Alberta*** (2000), Edmonton 17244/17245/17247/17275 (Alta. C.A.) released concurrently. At the heart of my colleague's reasoning is the proposition that s. 5 of the ***Proceedings Against the Crown Act*** R.S.A. 1980, c. P-18 does not immunize officers of the Crown from personal liability for tortious conduct while engaged in the performance of their duties. The ratio of Russell J.A.'s opinion in ***Decock***, ***supra***, is that because liability is, first and foremost, personal, and because there is no enactment or rule of Court precluding a suit against a Minister in his personal capacity, the application to strike the pleadings pursuant to Rule 129 must fail. I respectfully disagree.

[42] For ease of reference, I set out Rule 129 in its entirety:

> "129(1) The court may at any stage of the proceedings order to be struck out or amended any pleading in the action, on the ground that
>
> (a) it discloses no cause of action or defence, as the case may be, or
>
> (b) it is scandalous, frivolous or vexatious, or
>
> (c) it may prejudice, embarrass or delay the fair trial of the action, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly.
>
> (2) No evidence shall be admissible on an application under clause (a) of subrule (1).
>
> (3) This Rule, so far as applicable, applies to an originating notice and a petition."

[43] An application under Rule 129 is an attack on the sufficiency of pleadings - ***Hunt v. Carey Canada Inc.*** [1990] 2 S.C.R. 959. In ***German v. Major*** (1985) 39 Alta. L.R. (2d) 270, Kerans, J.A., speaking for the Court of Appeal, commented generally on the rule at pp. 273-74:

> "As is clear from the many cases cited in Stevenson and Côté, Annotation of the Alberta Rules of Court (Juriliber), several rules of law have been developed in the exercise of the power under the rule. Some cases tie specific rules to specific adjectives found in the rule, as, for example, that duplicate suits are "vexatious". Others say that the colourful adjectives in the rule are merely illustrative of the basic rule that the court must stop abuse of its process. The important point is that R. 129 indeed incorporates several very specific rules. These include, for example, the rule against multiple prosecution, where a new suit is brought while another is pending; the rule against serial prosecution, where a new suit is brought which raises an issue already decided against the suitor; the rule of mootness, where the relief sought would, in the circumstances, be valueless; and the rule against suits which disclose no cause of action known to law. This last is probably the most common circumstance where R. 129 applies."

[44] A number of preliminary observations are in order:

i) The pleadings in the case at bar contain absolutely no suggestion that the Ministers committed tortious acts outside the scope of their duties. Each and every one of the allegations speaks of an alleged failure on the part of the Ministers to perform their official functions in one way or another.

ii) Russell, J.A. acknowledges that whether or not a Minister is named as a defendant will not affect a plaintiff's right to examine the Minister for discovery if he or she is the person best informed on the issues at hand: ***Leeds v. Alta.***, [1989] 6 W.W.R. 559 (Alta. C.A.). See also ***Hamilton v. Alberta (Minister of Public Works, Supply & Services)*** [1991] 5 W.W.R. 232 (Alta. QB) at p. 246. It follows that there is no reason to name the Ministers in order to facilitate discovery.

iii) The dissenting opinion implies that **it may emerge** that the Ministers acted intentionally outside of any statutory powers provided to them, and outside the purpose of the statute in question, in bad faith, and for an improper motive. Apart from the absence of any pleading or argument to that effect, the adoption of

such a speculative foundation for joinder of a Minister as a party defendant, is to countenance fishing expeditions: ***Temilini v. Ontario Provincial Police (Commissioner)*** (1990) 73 O.R. (2d) 664 (C.A.) at p. 670.

iv) If the Ministers are arguably liable because of the negligent performance of their official duties, s. 5(3) of the ***Proceedings Against the Crown Act*** makes clear that the Crown will pay the judgment for damages. At no time during the course of argument or in his factum did the Appellant contend that if the motion to strike were successful, a viable remedy would be lost. No one would seriously contend that the Appellant expects to recover money damages from the Ministers. The Appellant does not suggest it.

ANALYSIS

[45] Russell, J.A. expressly declines to pronounce upon the Respondent's position that the statutes relied upon in this case do not impose mandatory duties upon the Ministers. The legislation relied upon by the plaintiff includes: the ***Environmental Protection and Enhancement Act***, S.A. 1992, c. E-13.3; the ***Canadian Environmental Protection Act***, R.S.C. 1985, c. C-15.3 as amended; the ***Clean Water Act***, R.S.A. 1980, c. C-13 (Repealed); the ***Department of Environment Act***, R.S.A. 1980, c. D-19 (Repealed); and the ***Water Resources Act***, R.S.A. 1980 c. W-5.1 (Repealed).

[46] It is interesting to note that the ***Environmental Protection and Enhancement Act*** provides a remedy to any person who has suffered, is suffering or is about to suffer loss or damage as a result of conduct that is contrary to the ***Act***. The remedy is not against the Crown. The aggrieved citizen may apply to the Court of Queen's Bench for an injunction ordering the person engaged in the conduct to refrain from doing so. In addition, an examination of the ***Environmental Protection and Enhancement Act*** reveals that employees of the government are protected from liability. No action for damages may be commenced against them for anything done or not done by those persons in good faith while carrying out their duties or exercising their powers under the ***Act***. The immunity extends to, and is not limited to, any failure to do something when those persons have discretionary authority to do something but do not do it. I do not suggest that a Minister of the Crown is properly characterized as an "employee" of the government and thereby immunized from liability pursuant to these provisions. It would, however, be curious indeed if protection from liability accorded by the ***Act*** to employees in the exercise of discretionary authority did not extend at law to Ministers of the Crown.

[47] Importantly, a review of the enforcement provisions of the Acts reveals that the relevant powers vested in the Ministers are also discretionary. By way of illustration, the ***Clean Water***

Act confers for enforcement purposes, discretionary powers upon the Minister. For example, s. 15(1) dealing with stop orders, reads as follows:

> "If the Minister is satisfied that a person
>
> (a) has contravened or is contravening this Act or a regulation or order under this Act,
>
> (b) has failed to comply with an order or direction of the Director of Pollution Control under this Act or under the regulations,
>
> (c) owns or operates any plant, structure or thing that is a source of water pollution that the Minister considers to be an immediate danger to human life or property of both, or
>
> (d) has contravened a term of condition of a licence,
>
> the Minister **may** issue a stop order to that person in accordance with subsection (2).
>
> (2) In a stop order, the Minister **may** require that the person to whom it is directed
>
> (a) cease the contravention specified in the order, and
>
> (b) stop any operation or shut down or stop the operation of a plant, equipment, structure or thing, either permanently or for a specified period,
>
> and the stop order shall contain the reasons for making it."
>
> [Emphasis added]

[48] The remaining enactments relied upon by the plaintiff and cited in the Statement of Claim are to a like effect.

[49] As Holland, J. made clear in ***Air India Flight 182 Disaster Claimants v. Air India*** (1987) 62 O.R. (2d) 130 (H.C.J.), it is well established that no duty of care arises in respect of acts or omissions involving a statutory discretion, so long as due consideration is given to the exercise of the discretion and the discretionary decision is made responsibly.

[50] In ***Home Office v. Dorset Yacht Co. Ltd***. [1970] A.C. 1004 (H.L.) at p. 1031, Lord Reid said:

> "Where Parliament confers a discretion ... there may, and almost certainly will, be errors of judgment in exercising such a discretion and Parliament cannot have intended that members of the public should be entitled to sue in respect of such errors. But there must come a stage when the discretion is exercised so carelessly or unreasonably that there has been no real exercise of the discretion which Parliament has conferred. The person purporting to exercise his discretion has acted in abuse or excess of his power. Parliament cannot be supposed to have granted immunity to persons who do that."

See also ***City of Kamloops v. Nielson*** [1984] 2 S.C.R. 2.

[51] Where, however, a government official is acting in execution of a policy or discretionary decision, i.e. in the operational area, a common law duty of care may arise more readily. It all depends on the circumstances: see ***Yuen Kun-yeu v. A.-G. Hong Kong*** [1987] 2 All E.R. 705 at pp. 710-12 (P.C.), and ***Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd.*** [1985] A.C. 210 (H.L.) at p. 240.

[52] In the case at bar, the plaintiff does not say that the alleged negligence on the part of the Ministers is attributable to their failure to give due consideration to the exercise of their discretion or, for that matter, that they acted irresponsibly in arriving at a discretionary decision. On the contrary, the pleading asserts that the Ministers failed in their statutory duties. That is the thrust of the allegations of negligence set out in para. 23(a) through (f) of the Statement of Claim. Nor is there any suggestion that the Ministers exercised their discretionary powers carelessly or that they exercised their discretion in abuse or excess of their powers. And, lest there be any doubt, I do not read the plaintiff's pleading to allege that the Ministers acted negligently in the execution of a policy or discretionary decision already taken.

[53] It follows that no reasonable cause of action is disclosed and the action against the Ministers must be struck.

[54] My colleague places considerable reliance upon the specific allegation of negligence set out in para. 23(a) of the Statement of Claim framed as follows:

> "... these Defendants were negligent by failing:
>
> (a) to fulfil their duty under the Environmental Statutes, and **at law**;"
>
> [Emphasis added]

[55] Because the action for negligence cannot be sustained against the Ministers in reliance upon a breach of statutory duty (see ***The Queen (Can.) v. Saskatchewan Wheat Pool*** [1983] 1 S.C.R 205 at 226-227), if the suit against the Ministers is not to be struck, there must exist a duty "at law" on the part of the Ministers and it must be a duty that does not flow from statute. With the exception of misfeasance in public office, which is not alleged, I know of no such duty that exists at large. My colleague writes: "... the appellant alleged that the Ministers' duties arose not only pursuant to statute but also 'at law'." With the greatest of respect, that is not how I read the pleading. The phrase "at law" is confined to the negligence set out in para. 23(a) of the Statement of Claim. The duties are not particularized. And it is not suggested that the particulars of negligence set out in para. 23(b) through 23(f) were breaches of duty "at law". One has the distinct impression that para. 23(a) of the Statement of Claim included the words "at law" accidentally or as a throw-away. The essence of the claim against the Ministers is breach of statutory duty.

[56] To this point in the analysis, I have assumed, without deciding that the test in ***Anns v. Merton London Borough Council*** [1978] A.C. 728 (H.L.) is made out. I now turn to a consideration of that question. The test laid down by Lord Wilberforce at pp. 751-752 was the following:

> "Through the trilogy of cases in this House – *Donoghue v. Stevenson* [1932] A.C. 562, *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465, and *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter – in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise: see *Dorset Yacht* case [1970] A.C. 1004, *per* Lord Reid at p. 1027."

Under the second step of the test, the court must examine the legislation which governs the public authority to determine whether a private law duty should be imposed in the circumstances. See ***Ryan v. Victoria (City)***, [1999] 1 S.C.R. 201; ***Ingles v. Tutkaluk Construction Ltd***., [2000] S.C.J. No. 13.

[57] Since the House of Lords' determination in ***Anns v. Merton London Borough Council***, ***supra***, that a public official may be subject to a private law duty of care, any proposed expansion of public liability has been met with the traditional "floodgates" argument. This argument is predicated upon the notion that the increased imposition of private law duties on public officials will result in an overwhelming amount of litigation and make government policies intolerably costly. This concern with respect to the involvement of public officials in ever-increasing amounts of litigation has been addressed by the Supreme Court of Canada in ***Kamloops v. Nielsen*** [1984] 2 S.C.R. 2 wherein Justice Wilson, speaking for the majority, held at pp. 25-26:

> "Before leaving the issue of the liability of public officials and moving on to the equally vexatious issue of recovery for pure economic loss, I should like to say a word of two about what has come to be known as the 'floodgates' argument. The floodgates argument would discourage a finding of private law duties owed by public officials on the ground that such a finding would open the floodgates and create an open season on municipalities. ...While I think this is an argument which cannot be dismissed lightly, **I believe that the decision in *Anns* contains its own built-in barriers against the flood. For example, the applicable legislation or the subordinate legislation enacted pursuant to it must impose a private law duty on the municipality or public official before the principle in *Anns* applies**. Further, the principle will not apply to purely policy decisions made in the bona fide exercise of discretion. This is, in my view, an extremely important feature of the *Anns* principle because it prevents the courts from usurping the proper authority of elected representatives and their officials. At the same time, however, the principle ensures that in the operational area, i.e. in implementing their policy decisions, public officials will be exposed to the same liability as other people if they fail in discharging their duty to take reasonable care to avoid injury to their neighbours. The only area, in my view, which leaves scope for honest concern is that difficult area identified by Lord Wilberforce where the operational subsumes what might be called secondary policy considerations, i.e., policy considerations at the secondary level."
>
> [Emphasis added]

[58] Justice Wilson was of the view that the decision in ***Anns v. Merton London Borough Council, supra***, [which has since been refined upon in cases such as ***Just v. B.C.*** [1990] 1

W.W.R. 385] established sufficient limits upon the private law liability of public officials that the "floodgates" argument should not pose a realistic concern.

[59] The limitations which are referred to in Justice Wilson's reasons for decision are two-fold. A public official cannot be held liable in tort unless: i) he or she is subject to a private law duty of care; and ii) the decision which is the subject of the claim falls within the official's "operational" sphere of activity. While it does appear that these two criteria will limit the quantity and types of claims which will proceed to trial, they do not act as an effective barrier to the commencement of such claims. An official may still be the subject of suit, however, the Court may strike the action on a Rule 129 or 159 application if it is determined that the ***Anns v. Merton London Borough Council, supra***, criteria have not been met. In this respect the criteria established simply allow the courts to consider the propriety of these claims at an earlier stage of the proceedings but do not actually limit the number of claims initiated. Accordingly, whether or not ***Anns v. Merton London Borough Council, supra***, is a complete answer to the "floodgates" problem, it is clear that "the applicable legislation or the subordinate legislation enacted pursuant to it **must impose a private law duty** on the municipality or public official before the principle in ***Anns***, ***supra***, applies." [Emphasis added]

[60] The question to be decided, accordingly, is whether the pleadings in the case at bar allege a breach of a private law duty by the Ministers. Paragraph 23 of the Statement of Claim sets out the allegations of negligence attributed to the Ministers:

> "Notwithstanding the knowledge of the defendants Alberta Environmental Protection and the Ministers of Alberta Environmental Protection of the said flooding and pollution problems and the damage being caused to the plaintiff's land, these defendants were negligent by failing, (a) to fulfil their duty under the environmental statutes and at law; (b) permitting the discharge or release of contaminants; (c) failing to remediate the damage caused by the pollution and flooding of Atim Creek and Big Lake; (d) permitting the defendant municipalities to discharge excessive amounts of contamination into the creek; (e) failing to implement and enforce its own guidelines and standards for the construction or operation of sewage waste water and storm drainage systems; (f) failing to implement or enforce its own water quality objectives."

[61] As I note earlier in this judgment, the legislation relied upon by the plaintiff includes: the ***Environmental Protection and Enhancement Act***, S.A. 1992, c. E-13.3; the ***Canadian Environmental Protection Act***, R.S.C. 1985, c. C-15.3 as amended; the ***Clean Water Act***, R.S.A. 1980, c. C-13 (Repealed); the ***Department of Environment Act***, R.S.A. 1980, c. D-19 (Repealed); and the ***Water Resources Act***, R.S.A. 1980 c. W-5.1 (Repealed).

[62] These Acts were created for the general protection of the environment itself, and to promote its enhancement and wise use. A review of the legislation reveals that it creates duties in respect of a wide variety of activities or operations which are likely to adversely affect any natural resource, while at the same time recognizing that such activities or operations can also be in the overall public interest and for the public good. The legislation also establishes certain rights which are available to operators dealing with natural resources. At the same time, the legislation gives powers to certain officials and employees of the Respondent Crown to allow for the regulation, but not the control, of those involved with activities and operations which could affect the environment.

[63] I am of the view that the legislation confers powers upon the Respondent Crown Ministers and employees to facilitate the general protection of the public at large but not so as to impose a complimentary co-existing private law duty upon any one individual. (See ***Yuen Kun-yeu, v. Attorney General of Hong Kong***, ***supra*** at 712 & 714; ***Birchard v. Alta. Securities Comm***. [1987] 6 W.W.R. 536, at 556 - 560). The Office of the Minister is given a wide discretion in which to be able to give recognition to and provide for competing interests of commerce and public protection when dealing with the environment. The legislated penal sanctions available as a means to ensure statutory observance do not, in my opinion, create any common law duty to the plaintiff on the part of the Ministers (see ***Orpen v. Roberts*** [1925] 1 S.C.R. 364). That aspect of the test in ***Anns v. Merton London Borough Council, supra,*** is not made out. On this basis also, the appeal must be dismissed.

[64] I would not, however, strike the allegations of negligence set out in para. 23 of the Statement of Claim. I would give the Appellant leave to amend his pleadings to properly name the Minister of the Environment as Defendant in a representative capacity. I agree with Russell, J.A. that the vicarious liability claims against the Ministers set out in para. 24 of the Appellant's Statement of Claim must be struck.

APPEAL HEARD on MAY 5, 1998

REASONS FILED at EDMONTON, Alberta,
this 25th day of APRIL, 2000

_____

BERGER, J.A.

REASONS FOR JUDGMENT OF
THE HONOURABLE MADAM JUSTICE RUSSELL

I. INTRODUCTION

[65] This is an appeal from the decision of a chambers judge to strike a statement of claim as against Ty Lund, Minister of Alberta Environmental Protection; Brian Evans, former Minister of Environment; and Ralph Klein, former Minister of Environment. For the reasons that follow, I would allow the appeal, in part.

II. BACKGROUND

[66] The appellant issued a claim against Ty Lund, Minister of Alberta Environmental Protection; Brian Evans, former Minister of Environment; and Ralph Klein, former Minister of Environment, ***inter alia***, claiming damages suffered as the result of the alleged misuse of his lands. The appellant claimed that the Ministers of the Environment and Alberta Environmental Protection (the "Ministers") negligently caused flooding and contamination of his lands such that they were rendered unfit for agricultural or recreational use. Further, the appellant claimed that the Ministers were responsible for the negligent acts and omissions of other individuals employed by Alberta Environmental Protection, and others, who caused damage to his lands.

[67] In a chambers application, Lund, Evans and Klein applied for an order striking the appellant's claims against them pursuant to Rule 129(1)(a) of the ***Alberta Rules of Court***. The chambers judge allowed the application and held:

> Within [Fox-Hitchner], I am satisfied that the claim against Lund, Evans and Klein must be struck out. The actions against the Ministers of the Department have no chance of success. The various statutes under which they operated disclose no mandatory duty to act to prevent breach of regulations by the respective Minister. Insofar as an individual member of the public is concerned, there is no cause of action against the Minister. [A.B. 101]

[68] The appellant submits that the chambers judge erred in using law relating to liability in contract to strike his claims against Lund, Evans and Klein. In addition, he claims that the chambers judge erred in finding that the various statutes governing the Ministers did not disclose any mandatory duties to prevent breaches of regulations and, therefore, that the claims against Lund, Evans and Klein should be struck.

[69] The respondents submit that the claims against Lund, Evans and Klein were properly struck because, although named personally as defendants, all of the allegations in the body of the

pleadings related to their actions as Ministers. In addition, the respondents claim that the Ministers did not owe the appellant a duty of care either pursuant to statute or at common law and, therefore, the claims against them could not be said to reveal a reasonable cause of action within the meaning of Rule 129(1)(a).

III. STANDARD OF REVIEW

[70] The scope for review of a chambers judge's decision to strike a claim under Rule 129 has been set out by this Court in ***Blomme* v. *Herman*** (1993), 145 A.R. 16 (C.A.) at 17-18:

> We agree with the respondent Blomme that the standard of review for the exercise of the discretion whether to grant summary judgment, or strike a claim, or to permit a matter to go to trial, is whether an error of law has been made or the decision is unreasonable in that no weight or insufficient weight has been given to relevant considerations.

See also: ***Kvaerner Enviropower Inc. v. Tanar Industries Ltd.*** (1998), 223 A.R. 348 (C.A.); ***Paragon Controls* v. *Valtek International***, [1998] A.J. No. 58 at para.2 (C.A.), online: QL (AJ); ***Hermann v. Blomme*** (1993), 145 A.R. 16 (C.A.); and ***Russell Food Equipment (Calgary) Ltd.* v. *Valleyfield Investments Ltd.*** (1962), 40 W.W.R. 292 (Alta. S.C.T.D.) at 293-295.

[71] There is some question whether an application pursuant to Rule 129 truly qualifies as a "discretionary" matter. See: ***Canada v. Aqua-Gem Investments Ltd.***, [1993] 2 F.C. 425 (C.A.). However, it is not necessary that I delve into an analysis of this issue given that, as in the related appeal of ***Decock* v. *Her Majesty the Queen in Right of Alberta*** (1999), Edmonton 17244-17247/17275 (Alta. C.A.), the appellant's submissions in this case are all directed towards whether the chambers judge committed an error of law. I leave the question of the discretionary nature of Rule 129 for another court to consider on another day.

IV. INTERPRETATION AND APPLICATION OF RULE 129(1)(a) OF THE *ALBERTA RULES OF COURT*

[72] The relevant portions of Rule 129 provide as follows:

> a. The court may at any stage of the proceedings order to be struck out or amended any pleading in the action, on the ground that
>
> (a) it discloses no cause of action or defence, as the case may be....
>
> b. No evidence shall be admissible on an application under clause (a) of subrule (1).

[73] In ***Decock, supra***, I set forth in some detail the factors which a court must consider in addressing a Rule 129 application. I do not propose to repeat those findings in the same detail here. Instead, I will provide a summary of the principal considerations relevant to this appeal.

[74] The Supreme Court of Canada in ***Hunt* v. *Carey Canada Inc.***, [1990] 2 S.C.R. 959 at 980 set forth the test which is to be applied when deciding whether to strike a statement of claim pursuant to Rule 129(1)(a) as revealing "no cause of action":

> Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia *Rules of Court* is the same as the one that governs an application under R.S.C., O.18, r.19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia *Rules of Court* should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a). [Emphasis added.]

Rule 19(24) of the ***British Columbia Rules of Court*** is "for all intents and purposes the same as r. 129(1)(a) of the **Alberta Rules of Court**": ***Alexander* v. *Pacific Trans-Ocean Resources Ltd.*** (1991), 115 A.R. 317 (Q.B.) at 319. See also: ***A.G. Can.* v. *Inuit Taparisat of Can.***, [1980] 2 S.C.R. 735.

[75] Accordingly, the test to be applied in determining whether to strike a claim pursuant to Rule 129(1)(a) is whether it is "plain and obvious" that the claim reveals no reasonable cause of action. This determination must be made on the face of the pleading itself as Rule 129(2) prohibits the admission of evidence on a Rule 129(1)(a) application. Moreover, the court should be generous in assessing whether the pleadings disclose a cause of action: ***Korte* v. *Deloitte, Haskins & Sells*** (1993), 8 Alta. L.R. (3d) 337 (C.A.), leave to appeal to the S.C.C. dismissed [1993] 3 S.C.R. v. The court must assume that the allegations contained in the pleadings are true and that the facts pleaded can be proven: ***Carey Canada Inc., supra; Inuit Taparisat of Can., supra; Boudreault* v. *Barrett*** (1995), 33 Alta. L.R. (3d) 60 (C.A.); and ***Galand Estate* v. *Stewart*** (1992), 6 Alta. L.R. (3d) 399 (C.A.).

[76] Bearing these considerations in mind, I now turn to address the specific submissions of the appellant.

V. DID THE CHAMBERS JUDGE ERR IN USING LAW RELATING TO CONTRACT TO STRIKE THE APPELLANT'S STATEMENT OF CLAIM?

[77] The chambers judge held that the claims against Lund, Evans and Klein should be struck pursuant to the court's findings in ***Fox-Hitchner* v. *Alberta*** (1977), 2 Alta. L.R. (2d) 379 (S.C.T.D.). In that case the court held as follows at 384:

> In my opinion this action as against the defendants James L. Foster and John C. Butt is defective. Essentially the action seeks damages for breach of contract directly from the Crown, and the declarations sought are simply part of that relief....The personal defendants are not parties to the contract claimed to have been breached. Moreover, even if the declarations were properly sought, the defendant would not be the Minister and the Medical Examiner in their personal capacities; rather each should be described by office.

The appellant submits that the chambers judge erred in his reliance upon ***Fox-Hitchner*** because that case involved allegations of breach of contract and not tort.

[78] In ***Decock, supra***, I determined that ***Fox-Hitchner*** stands as authority for the proposition that no cause of action lies against a minister personally for breach of contract. As tort liability, unlike contract, is predicated upon the notion of individual responsibility, the findings in ***Fox-Hitchner, supra***, have no application, nor relevance, to the within claims against Lund, Evans and Klein.

[79] Hence, I am of the view that the chambers judge erred in relying on ***Fox-Hitchner, supra***, as authority for the decision to strike all claims against Lund, Evans and Klein. However, this determination does not end matters. What remains to be considered is whether the chambers judge further erred in holding that the claims against Lund, Evans and Klein should be struck because the statutes governing the Ministers contained no mandatory duties.

IV. DID THE CHAMBERS JUDGE ERR IN DETERMINING THAT THE CLAIMS AGAINST LUND, EVANS AND KLEIN SHOULD BE STRUCK BECAUSE THE STATUTES GOVERNING THEIR ACTIONS DISCLOSED NO MANDATORY DUTIES?

[80] The necessary elements of a cause of action in negligence are as follows: a duty, breach of that duty and damages arising from the breach. In the instant case, the appellant alleged that the Ministers had a duty pursuant either to statute or at law to:

(i) prevent, control, alleviate or stop the pollution and flooding of Atim Creek and Big Lake;

(ii) to monitor and enforce compliance with permits and licenses issued pursuant to the Environmental Statutes; and

(iii) to enforce the provisions of the said Environmental Statutes, and the regulations made pursuant to those statutes.

The chambers judge held that the various statutes under which the Ministers operated disclosed no such mandatory duties, however, and struck all claims against them.

[81] However, the fact that the statutes relied upon in this case might not have revealed any mandatory duties on the part of the Ministers (and I make no finding on this point) is not determinative of the issue of whether the appellant's pleadings revealed a reasonable cause of action. That is because the appellant alleged that the Ministers' duties arose not only pursuant to statute but also "at law".

[82] If the appellant had alleged that the Ministers breached only those duties or powers imposed upon them by statute, then the claims against them might properly have been struck pursuant to Rule 129(1)(a) (assuming the statutes in question revealed no such duties or powers). As Justice Girgulis held in ***Kresic* v. *Alta. Securities Comm.*** (1985), 37 Alta. L.R. (2d) 342 (Q.B.) at 346:

> Since there is no specific breach of duty alleged against the minister in respect of any specific duty imposed upon or power given to the minister under the Securities Act, and a duty is not alleged otherwise, the minster [sic] should be struck as a party defendant and I so order.

But here the appellant pleaded that the duties alleged to have been breached existed either pursuant to statute or at law.

[83] In ***Fullowka* v. *Whitford*** (1996), 147 D.L.R. (4th) 531, application for leave to appeal dismissed [1997] S.C.C.A. No. 58, the court considered whether to strike a negligence claim against certain government officials stemming from an explosion caused by a mine worker. The plaintiff claimed that the Crown and its senior mine inspector were negligent because they regulated mine safety. The defendants argued that the claims against them should be struck as neither a duty of care nor facts creating one were pleaded. Nothing in either the statement of claim or in the governing legislation imposed a duty of care on the government or its officials. The court held (at 540) that not only could the duties have arisen pursuant to statute, given the broad wording of the governing legislation, but that:

> In any event, the government's argument assumes that any duty of care by the government or its officials must be limited to the statutory duties, and that such an official cannot have any common-law duties. That proposition is not clear enough to justify striking out a pleading: *Birchard* v. *Law Society of Alberta, supra,* at 224-25, 226.

[84] Pursuant to ***Fullowka, supra***, I find that the chambers judge erred in striking all of the claims against the Ministers simply on the basis that the legislation governing their actions disclosed no mandatory duties. The chambers judge appears to have overlooked the fact that the appellant alleged that the Ministers had duties pursuant either to statute or at law. Whether the Ministers' had any statutory duties was not determinative of whether the pleadings revealed a

reasonable cause of action. The Ministers may have owed the appellant a duty pursuant to the common law.

[85] The respondents submit that there was no error in the chambers judge's ultimate decision to strike all claims against the Ministers as they did not, in fact, owe the appellant a duty of care, either pursuant to statute or at common law. Prior to discussing this issue, I wish to address one related matter which was not raised in any of the written submissions but which is clearly tied to the question of whether the Ministers owed the appellant a duty of care in the circumstances. This is the fact that, as in ***Fullowka, supra***, the appellant in this case did not specifically allege in his statement of claim that the Ministers owed him a duty of care. He simply pleaded that the Ministers had a general duty, whether pursuant to statute or common law to, in short, prevent the pollution and flooding of Atim Creek and Big Lake.

[86] However, this deficiency in the appellant's pleadings should not prove fatal to his claims. There is no need to expressly allege a duty of care as long as sufficient facts are pleaded which, if proven, would give rise to a cause of action: ***Fullowka, supra*** and ***Mitran* v. *Southland Canada Inc.*** (1993), 140 A.R. 272 (Q.B.). The necessary elements of a cause of action in negligence are: a duty, breach of that duty and damages arising from the breach. In this case, the appellant claimed that he owned land contiguous to Big Lake and Atim Creek and, as a holder of riparian rights, was entitled to the water of the creek without significant alteration in its character or quality. He alleged that the Ministers had a duty to, in effect, prevent the pollution and flooding of Atim Creek and Big Lake which duty was breached causing him to suffer irreparable harm to his property and farming enterprise.

[87] Thus, it appears that the appellant properly pleaded all of the necessary elements of a cause of action against the Ministers in negligence. Whether a duty exists at common law is a question of fact and law and should not be determined on a Rule 129 application: ***Fullowka, supra*** and ***Kresic, supra***. Accordingly, as this matter would have to proceed to trial or to summary judgment in any event, I am disinclined to enter into an examination of the respondents' submissions with respect to statutory duty. As Master Waller stated in ***Murphy* v. *Kenting Drilling Co.*** (1996), 190 A.R. 77 at 79-80:

> The court should be loath to strike out a portion of a claim where the matter is to go to trial in any case.

[88] It might appear that the claims against the Ministers should be struck pursuant to Rule 129(1)(a) purely on the basis of proximity. It is difficult to conceive of how a Minister could be found to have a relationship of such proximity to any individual land owner that he could be found to owe him or her a duty of care at common law. But, as the court held in ***Fullowka, supra***, considerations such as remoteness or the duty of others might more properly be used as defences rather than indicators of an absence of a duty of care. And, a "good defence constitutes neither want of a cause of action, nor ground to strike out...". (at 540). Further, at 539:

> In any event, many of the reported cases refusing to strike out pleadings are about just such proximity or duty questions in negligence law. They say that the law of negligence in Canada is now fluid and being rebuilt, especially respecting the duty of care, and decisions are very sensitive to the facts of individual cases, so the court should not strike out a claim over such difficult or uncertain proximity or duty questions. [Emphasis added.]

[89] Assuming that the facts and allegations pleaded will be proven at trial, as it is not "plain and obvious" that the Ministers did not owe the appellant a duty of care either pursuant to statute or common law, the claims against the Ministers should not be struck as revealing no reasonable cause of action. Although the Ministers may not have owed the appellant a duty of care pursuant to statute, whether such a duty existed at common law must be addressed in light of all of the evidence and is not properly a determination made on a Rule 129(1)(a) application.

[90] I now turn to consider the respondents' submission that the claims against Lund, Evans and Klein should, nonetheless, have been struck because the pleadings reveal no reasonable cause of action against them in their personal capacities. The relevant portions of the pleadings provide as follows:

> 5. Ty Lund is currently the Minister of Alberta Environmental Protection and he has held that position since October 21, 1994. Brian Evans was Minister of the Department of Environment from December 15, 1992 to October 21, 1994. Ralph Klein was Minister of the Department of Environment from April 14, 1989 to December 15, 1992.
>
> 6. The Plaintiff's Land is contiguous to a large lake known as Big Lake, and a water course know as Atim Creek which flows into Big Lake, and as a riparian owner, the Plaintiff is entitled to the water of Atim Creek in its natural flow, without significant decrease or increase in that flow and without significant alteration in its character or quality.
>
> 11. Further, the release of untreated and partially treated sewage into the waters of Atim Creek and Big Lake is contrary to the Environmental Protection and Enhancement Act, S.A. 1992, c. E-13.3 and to the Canadian Environmental Protection Act, R.S.C. 1985, c. C-15.3. The Defendant Ministers of the Environment have not brought any proceedings to prevent the breach of these Acts or of the licences and approvals issued by Alberta Environmental Protection to the Defendant Municipalities or to the Defendant Parkland Village. The Plaintiff has suffered and continues to suffer damage as a result of conduct which is contrary to the provisions of these Acts.

20. At all material times since 1978, the Defendants, the Minister of Alberta Environmental Protection, Alberta Environmental Protection, its officers, employees and agents, were aware of the ongoing and increasing pollution and flooding problems at Atim Creek and Big Lake, and were aware of the discharge of contaminants, sewage, wastewater and storm water by the Defendant Municipalities, the Defendant, Parkland Village and others whose identity is known to Alberta Environmental Protection, into the Atim Creek drainage basin.

21. The Defendants, Alberta Environmental Protection and the Minister of Alberta Environmental Protection knew as early as 1978 and at all material times thereafter, that:

(a) Big Lake is an environmentally-sensitive area of provincial, national and international significance because of its water fowl habitat and the position of the lake in various North American water fowl migration pathways;

(b) area residents were and continue to be concerned over the water quality and quantity in the Atim Creek Basin;

(c) Atim Creek exhibits the poorest water quality in the Sturgeon water system;

(d) the dissolved oxygen, iron, total phosphorous and ammonia levels in Atim Creek and Big Lake significantly exceed Alberta Surface Water Quality Objectives as set by the Defendant Alberta Environmental Protection;

(e) the discharge of sewage and other waste water into Atim Creek and Big Lake has caused, and is continuing to cause, environmental damage, and

(f) storm water management is ineffective at the City of Spruce Grove, the Town of Stony Plain and Parkland County, and that storm water, drainage run-off and sewage discharge into Atim Creek should be modified to pre-development levels in order to protect Atim Creek and Big Lake.

22. At all material times, the Defendants, Alberta Environmental Protection and the Ministers of Alberta Environmental Protection

had a duty pursuant to the Alberta Environmental Protection Act, S.A. 1992 c. E-13.3, the Clean Water Act, R.S.A. 1980, c. C-13, the Department of Environment Act, R.S.A. 1980, c. D-19, the Water Resources Act, R.S.A. 1980 c. W-5.1, and the Canadian Environmental Protection Act, R.S.C. 1985, c. C-15.3 (the "Environmental Statutes") or at law:

(a) to prevent, control, alleviate or stop the pollution and flooding of Atim Creek and Big Lake;

(b) to monitor and enforce compliance with permits and licenses issued pursuant to the Environmental Statutes; and

(c) to enforce the provisions of the said Environmental Statutes, and the regulations made pursuant to those statutes.

23. Notwithstanding the knowledge of the Defendants Alberta Environmental Protection and the Ministers of Alberta Environmental Protection, of the said flooding and pollution problems, and the damage being caused to the Plaintiff's Lands, these Defendants were negligent by failing:

(a) to fulfil their duty under the Environmental Statutes, and at law;

(b) permitting the discharge or release of contaminants, contrary to the Environmental Statutes and regulations, into the Atim Creek drainage basin in amounts, concentration or levels which have caused, and are continuing to cause, a significantly adverse effect;

(c) failing to remediate the damage caused by the pollution and flooding of Atim Creek and Big Lake; and

(d) permitting the Defendant Municipalities, the Defendant Parkland Village and others known to the Defendant Alberta Environmental Protection to discharge excessive amounts of contamination and contaminated water into the Atim Creek drainage basin;

(e) failing to implement and enforce its own guidelines and standards for the construction and operation of sewage, wastewater and storm water drainage systems; and

(f) failing to implement or enforce its own water quality objectives.

24. As Ministers of Alberta Environmental Protection at the material times, the Defendants, Ty Lund, Brian Evans, and Ralph Klein, were and are responsible for the acts and omissions of the employees, officers and agents of Alberta Environmental Protection.

[91] Those pleadings reveal that although Lund, Evans and Klein are named personally as defendants, the claims target the "Minister(s) of Alberta Environmental Protection". It is this discrepancy which the respondents seize upon in arguing that the claims against Lund, Evans and Klein were properly struck by the chambers judge. The respondents submit that although Lund, Evans and Klein are named as personal defendants, the allegations relate to their "official" actions and reveal no reasonable cause of action against them in their personal capacities. In further support of this argument, the respondents submit that it is against public policy to allow personal actions to lie against individuals acting in a public capacity.

[92] The proper method for naming public officials in suit in tort as well as the proper framing of such claims is considered in some depth in ***Decock, supra***, which I do not propose to repeat in detail.

[93] Essentially, pursuant to the central tort principle of individual responsibility, all liability in tort is, firstly, personal. Therefore, no distinction should be drawn between an individual's "official" and "unofficial" actions: see Ghislain Otis, ***"Personal Liability of Public Officials for Constitutional Wrongdoing: A Neglected Issue of Charter Application"*** (1996) 24 Man. L.J. 23 at 26-27 and ***George* v. *Harris***, [1999] O.J. No. 639 at para. 33 (Gen. Div.), endorsed by the Ontario Superior Court of Justice, Divisional Court at [1999] O.J. No. 3011, online: QL (OJ). The fact that an official commits a tort during the performance of his or her authorized actions, will not relieve the individual of liability. In such a case, the Crown will bear vicarious liability pursuant to the provisions of the ***Proceedings Against the Crown Act*** R.S.A. 1980, c. P-18 (the ***"Act"***). See also: Hogg, ***Liability of the Crown***, 2nd ed. (Toronto: Carswell, 1989) at 141-142.

[94] Hence, there can be no error in naming an official as a defendant in his personal capacity nor in ascribing to him claims which appear to relate solely to his official role. Doubtless plaintiffs will name the Crown as an additional defendant in order to benefit from the vicarious liability provisions of the ***Act***. Accordingly, it cannot be said, in the instant case, that the claims against the Ministers should be struck because the pleadings reveal no reasonable cause of action against them in their personal capacities.

[95] There may be good policy reasons why public officials should be exempted from personal liability for their authorized actions. However, in order to exempt public officials from such claims, the boundaries of vicarious liability would need to be much more precisely defined. As noted in ***Decock***, the crafting of such an exemption is best left in the hands of the legislature.

[96] One further matter which I wish to address is the appellant's naming of Lund, Evans and Klein (as defendants) not only personally but also by office. As determined in ***Decock, supra***, the only possible reason for naming a defendant by his office or title would be to establish the liability of the Crown. Pursuant to Rule 87(b), the proper manner for framing such claims is to name the officer in his or her representative capacity (*i.e.* Her Majesty the Queen as represented by the Minister of Alberta Environmental Protection).

[97] In conclusion, I find that no distinction should be drawn between claims against an official in his or her "personal" versus "official" capacity. In either case, liability will fall firstly upon the individual. It cannot be said that the pleadings in the instant case reveal no reasonable cause of action against Lund, Evans and Klein personally, simply because all of the claims appear to relate to their public roles.

[98] I hasten to add that there is one specific portion of the appellant's pleading which was properly struck, albeit for different reasons. That is the allegation that Lund, Evans and Klein, as Ministers of Alberta Environmental Protection, were responsible for the acts and omissions of the employees, officers and agents of Alberta Environmental Protection (para. 24 of the appellant's statement of claim). As indicated in ***Decock, supra***, a Crown officer or agent cannot be vicariously liable for the actions of another Crown employee. It is the Crown which will bear the vicarious liability for their actions: see Hogg, ***Liability of the Crown***, 2nd ed. (Toronto: Carswell, 1989) at 141; ***Crown Trust* v. *Ontario*** (1988), 64 O.R. (2d) 774 (H.C.J.) and ***Kresic, supra***. Although my reasoning differs from that of the chambers judge, I find no error in his ultimate decision to strike the vicarious liability claims against Lund, Evans and Klein.

V. SUMMARY

[99] The chambers judge erred in ordering that all of the claims against Lund, Evans and Klein should be struck. In the absence of evidence, it cannot be definitively stated that they had no duty of care to the appellant, either pursuant to statute or at common law. Accordingly, it is not "plain and obvious" that the appellant's claims against them revealed no reasonable cause of action.

[100] As liability will always fall upon the individual tortfeasor, no distinction should be drawn between an individual's "official" and "unofficial" acts. Thus, there is no merit to the respondents' argument that the claims against Lund, Evans and Klein should be struck on the basis that although they are named personally as defendants, the claims relate to their actions as public officials. However, the appellant should be given leave to amend his pleadings to properly name the Ministers of the Environment as defendants in a representative capacity.

[101] The one claim which I find was properly struck pursuant to Rule 129(1)(a) was that alleging vicarious liability on the part of the Ministers for the actions of other employees of Alberta Environmental Protection. Officers and agents of the Crown cannot be vicariously liable for the actions of other Crown employees.

[102] As in ***Decock, supra,*** it is tempting to strike the claims against Lund, Evans and Klein on the basis that the claims against them clearly relate to decisions made in their policy-making roles for which they cannot be held liable: see ***R.* v. *Just***, [1989] 2 S.C.R. 1228. However, as noted in that case, a determination of whether an official is acting in a policy or operational role cannot be made in the absence of relevant evidence: ***Gauthier* v. *Alberta Recoveries & Rentals Ltd.*** (1990), 110 A.R. 260 (Q.B.) at 266-267 and ***Brown* v. *Alberta*** (1993), 146 A.R. 128 (Q.B.) at 133. In my view, these matters should proceed either to summary judgment or to trial at which point a determination can be made, on the basis of relevant evidence, as to whether there is merit to the appellant's claims.

VI. CONCLUSION

[103] I would allow the appeal, in part. All of the appellant's claims against Lund, Evans and Klein should be restored with the exception of the paragraph alleging that Lund, Evans and Klein as Ministers of Alberta Environmental Protection were responsible for the acts and omissions of the employees, officers and agents of Alberta Environmental Protection. In addition, the appellant should be granted leave to amend his pleadings to include the Minister of the Environment as a defendant as a representative of the Crown.

APPEAL HEARD on MAY 5, 1998

REASONS FILED at EDMONTON, Alberta,
this 25th day of APRIL, 2000

RUSSELL J.A.