**Paron v. Alberta (Minister of Alberta Environmental Protection), 2000 ABQB 464**

Date: 20000707
Action No. 9803-22875

**IN THE COURT OF QUEEN'S BENCH OF ALBERTA**
**JUDICIAL DISTRICT OF EDMONTON**



Between:

JAMES PARON, BLAIR CARMICHAEL and FRASER CARMICHAEL,
GARY C. GYLYTIUK, NICK ZON and DWAYNE ZON

Plaintiffs

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA AS REPRESENTED
BY THE MINISTER OF ALBERTA ENVIRONMENTAL PROTECTION
and TRANSALTA UTILITIES CORPORATION

Defendants

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**MEMORANDUM OF DECISION**
**of the**
**HONOURABLE MR. JUSTICE STERLING SANDERMAN**

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APPEARANCES:

Richard C. Secord
for the Plaintiffs

Arthur P. Hnatiuk, Q.C.
for the Defendants

[1] One of the Defendants in this action, Her Majesty the Queen in Right of Alberta as represented by the Minister of Alberta Environmental Protection, brings an application pursuant to Rule 129(1)(a) of the *Rules of Court***.** Rule 129 states:

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).

[2] In the recent case of ***Decock v. Alberta***, a decision rendered on April 25, 2000, our Court of Appeal reviewed the factors that have to be taken into consideration when an application is made pursuant to Rule 129. At para 61, Russell, J.A. stated:

> ... it is essential to bear in mind the considerations which are relevant to a Rule 129 application which were described in ***Cerny* v. *Canadian Industries Ltd.***, [1972] 6 W.W.R. 88 (Alta. S.C.A.D.) at 95:
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> > It is clear from these decisions that a court should not strike out a pleading or part thereof as disclosing no cause of action or as being frivolous or vexatious or as being an abuse of the process of the court, which in most cases would have the effect of dismissing an action or denying a party a right to defend, unless the question is beyond doubt and there is no reasonable cause of action....
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> > . . .
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> > This power of the court certainly should not be exercised to strike out a pleading or to strike out a party from an action where there
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> > is a serious point of law to be considered which cannot be said to be clear. How can such a pleading be an abuse of the process of the court or frivolous or vexatious?

See also: ***Hunt* v. *Carey Canada Inc.***, [1990] 2 S.C.R. 959 and ***Canada Deposit Insurance Corp.* v. *Prisco*** (1994), 158 A.R. 305 (Q.B.) at 309-310.

The caution against striking a claim unless it is "beyond doubt" that it does not disclose a reasonable cause of action, is reinforced in Justices Stevenson and Côté's comments with respect to Rule 129 in the ***Alberta Civil Procedure Handbook*** (Edmonton: Juriliber, 1998) at 85-86:

> [R]arely is there a fatal flaw which falls within R.129. There are some rare types of abuse of process discussed below, falling under para. (d) of R. 129(1). Even if a motion to strike out a pleading is based on its being frivolous, vexatious, embarrassing or an abuse of process, rather than on absence of a cause of action, nevertheless the plaintiff can still plead anything arguably relevant, and the court should still be cautious and only strike out in a clear case.
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> . . .
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> Paragraphs (b) and (c) are not really independent grounds of attack, because it is probably impossible to have any relevant pleading disclosing a cause of action (or defence) which would fit within (b) or (c). What is more, even when attacks under (b) or (c) succeed, they usually only remove or amend a short passage in the impugned pleading, and that does little to help the party attacking the pleading.
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> . . .
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> The Supreme Court of Canada and all other courts in the country have said repeatedly that a pleading cannot be struck out if there is the faintest chance that it may succeed at trial. Furthermore, no one seems to notice the words "or amended" in line 2 of R. 129(1). If the pleading impugned will not hold water as it is, the court is not to discard it, if it can patch it up enough to hold some water. R. 129 is merely permissive, and never requires the court to strike out. [ Footnotes omitted.]

Whether a claim has a chance of success or should, conversely, be struck pursuant to Rule 129, essentially comes down to a determination of whether the pleadings reveal a reasonable cause of action. Without deciding the point, it is

difficult to conceive of how such a claim might be considered scandalous, frivolous, vexatious, embarrassing or an abuse of process.

[3] Russell, J.A. continued at para. 67:

The test to be applied in determining whether a Statement of Claim reveals a cause of action within the meaning of Rule 129(1)(a), has been articulated by the Supreme Court of Canada in ***Carey Canada Inc., supra*** at 980:

> 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).

Note that "r. 19(24)(a) of the British Columbia Supreme 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.

Therefore, in determining whether to strike a claim pursuant to Rule 129(1)(a) the issue which the court must address is whether it is "plain and obvious" that the impugned pleading does not disclose a reasonable cause of action. In making this determination, the allegations contained within the Statement of Claim must be taken as true and the court must assume the facts pleaded can be proven: ***Carey Canada Inc., supra; Inuit Tapirasat of Can., supra; Boudreault* v. *Barrett*** (1995), 33 Alta. L.R. (3d) 60 (C.A.) at 65; and ***Galand Estate* v. *Stewart*** (1992), 6 Alta. L.R. (3d) 399 (C.A.) at 408.

Defences on the merits or contested facts do not preclude liability at this juncture. As this Court held in ***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, at 340:

> In considering the attacks made by Deloitte and Cormie the court should not strike out the statement of claim unless it is plain and obvious or beyond a reasonable doubt that Korte cannot succeed. Further, the court must assume that the allegations in the statement of claim are true and capable of proof at trial. The court should also allow for some generosity in assessing whether the statement of claim discloses a cause of action, and it is not always necessary to plead specific words or specific legal conclusions providing that the essence of the action is out-lined in the pleadings.



[4] These are the principles that must be applied in this application brought by one of the Defendants.

[5] The Plaintiffs have filed an Amended Statement of Claim. A demand for particulars was served upon them by the Defendant Her Majesty the Queen in Right of Alberta. They replied to the demand for particulars. It should be read in conjunction with the Amended Statement of Claim in a generous fashion.

[6] The Plaintiffs in this matter are a group of cottage owners residing on land located on Wabamum Lake situated west of the City of Edmonton in the Province of Alberta. They are suing on behalf of themselves and all other members of the class of persons owning land contiguous of the lake. There are two Defendants. The first is the Government of Alberta as represented by the Minister of Alberta Environmental Protection and the second is TransAlta Utilities Corporation. The second Defendant operates two power plants on the lake. One of them draws water from the lake to use in its operation. It returns this water in a heated condition to the lake. TransAlta operates this plant with the permission of the Government of Alberta. Licences and approvals have been granted to TransAlta to engage in this endeavour. The Plaintiffs claim that the operation of this plant in this fashion has interfered with the historic water levels of the lake and that the discharges of heated water by the plant has increased the temperature of the water in the lake causing an increased growth in algae and weeds.

[7] The Plaintiffs claim that this has resulted in an interference with their enjoyment and use of the lake contrary to the ***Environmental Protection and Enhancement Act***, 1992, c. E-13.3 (the E.P.E.A.) and the ***Environmental Protection Act***, R.S.C. 1985, c. C-15.3 (the E.P.A.). Furthermore, the Plaintiffs claim that the Government of Alberta has not taken any action to prevent the continued breach of these acts or to properly regulate TransAlta Utilities.

[8] In 1948 the Federal Department of Public Works and the Alberta Government constructed a weir at the east end of the lake. This weir was constructed in order to maintain the level of the lake. The weir was rebuilt in 1965 and the Government of Alberta assumed responsibility for its operation and maintenance at that time. In 1982 the weir was damaged. In 1988 the Plaintiffs were assured by representatives of the Government of Alberta that the weir

would be repaired. Those repairs have yet to be made. Instead, in 1990 the Government of Alberta built a roadway across a creek leaving the east end of the lake approximately 18 inches below the level of the weir. The Plaintiff alleges that this further lowered the water level in the lake.



[9] The Plaintiffs claim that the Government of Alberta had a specific duty under various statutes, and at law, to monitor the actions of TransAlta Utilities, to maintain the original water levels by repairing the weir and generally to enforce the applicable environmental statutes. The Plaintiffs assert that the Government of Alberta has failed to carry out a clearly defined duty. The Plaintiffs assert that the Government of Alberta's acts, omissions, nuisance and negligence have caused considerable interference with their riparian and littoral rights.

[10] In its brief filed on this application, the Defendant bringing the application, states that this action cannot succeed for the following reasons:

A. An action cannot be brought or maintained as against the Defendant Crown in the circumstances at bar;

B. No wrong occurred;

C. The relationship between the Defendant Crown and the Plaintiff is not sufficiently proximate, so as to create a duty by the Defendant Crown or the Public Trustee towards the Plaintiff;

D. No actionable breach of contract occurred at bar; and

E. The action in nuisance cannot stand as plead.

[11] In deciding whether to strike this pleading pursuant to Rule 129(1)(a), I must determine whether it is plain and obvious, or alternatively whether it is beyond a doubt that the pleading, generously read in favour of the Plaintiff does not disclose a reasonable cause of action. That is the exercise that must be undertaken. Only the pleadings of the Plaintiff can be considered. No evidence is admissible on such an application.

[12] It is clear that public authorities may, in certain cases, owe a duty of care to the public or to individual persons. The ***City of Kamloops v. Nielson*** [1984] 2 S.C.R. 2 and ***Just v. British Columbia*** [1989] 2 S.C.R. 1228 are authority for this proposition. In this matter, the Plaintiffs have framed their action in negligence and nuisance. A negligence claim involves allegations of a breach of statutory duty and duties at common-law. The action framed in nuisance encompasses the two general forms of nuisance actions; a public nuisance and a private nuisance. The test to determine whether a duty of care is owed by a public authority in any given situation was outlined in ***Anns v. London Borough Council of Merton*** [1978] A.C. 728 (House of Lords) and applied by the Supreme Court of Canada in the ***City of Kamloops, supra***. A two step analysis is required in order to determine whether or not the test has been met.

[13] The first branch of the test requires a court to determine if there is 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. The second branch of the test requires a determination of whether there are considerations which ought to negative or limit the scope of the duty or to whom it may be owed. There is a consideration of damages in this second branch which is not applicable in regards to this application.

[14] The test for proximity was set out by Cory, J. in ***Just, supra*** at p. 1235. He stated:

> ... 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 comprehension of the former, carelessness on his part may be likely to cause damage to the latter - in which 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 persons to whom it is owed or the damages to which a breach of it may give rise: ...

[15] Before the traditional test is applied, consideration must be given to whether the matter being examined falls within the policy or operational sphere of decision making authority by the public body. In ***Just, supra,*** Cory, J. 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.
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> 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.

[16] Different approaches come from different courts in relation to whether this operational/policy analysis should be considered in light of the second branch of the ***Anns*** test or as an independent initial analysis. In *Just*, Cory, J. felt that due consideration must be given as to whether a duty was owed by a public authority and that no statutory or policy making exemption came into existence until the traditional tort analysis was conducted. In ***Tottrup v. Lund*** [2000]

A.J. 435 (Alta. C.A.) Conrad, J.A. felt that the analysis of policy/ operational decision making ought to be considered part of the exclusionary consideration found in the second branch of the ***Anns*** test. Conversely, the British Columbia Court of Appeal seems to suggest that this analysis should precede any ***Anns*** analysis (***Cooper v. British Columbia***) [2000] D.C.J. 426 (B.C.C.A.). Regardless of when this analysis is made, it seems clear that where the action or inaction complained of involves a decision found to be within the realm of policy making by the public authority, liability will not follow.

[17] As a general rule, policy decisions and actions are not subject to a duty of care and are not compensable while losses caused in the implementation of policy decisions will be. In ***Just, supra***, the Supreme Court discussed the distinction between operational and policy decisions. They held that a public body is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints. Valid policy decisions are unassailable and result in exclusions from liability. Operational decisions differ from policy decisions in that they flow from the latter.

[18] In ***Anns, supra***, Lord Wilberforce stated that the decisions made by government are neither purely policy nor purely operational and that the difference is probably one of degree. Courts have attempted to classify decisions made by government authorities into one of these categories by examining different factors.

[19] The approach taken by the courts was set out by Conrad, J.A. in ***Tottrup, supra***, at para 21. She stated:

> 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.).
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> 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. ...

[20] In this case there is insufficient information pleaded on behalf of either party in relation to the nature of the obligations imposed upon the Government of Alberta. There is no material which indicates whether decisions were made to monitor the lake given its added role as a supplier of water to a power producing facility and what the obligations were between the two levels of government in relation to the weir at the east end of the lake.

[21] Indeed, discussions with the cottage owners may indeed be indicia of government policy in operation and may have led to reliance in some manner by the cottage owners. At a minimum, it appears as though a decision was made and communicated to the Plaintiffs with regard to the weir, its repair and maintenance. It appears that these issues should be decided at trial or upon a summary judgment application where proper evidence could be considered rather than have this matter decided on the basis of a Rule 129(1)(a) application.

[22] The Plaintiffs claim that the first branch of the ***Anns*** test has been met. They claim that there is a nexus between them and this Defendant which could create a duty of care. They claim that the Government of Alberta had a duty imposed pursuant to legislation and at law. In Canada, although there is no independent tort of breach of a statutory duty, a breach of a statute may be given in evidence as proof of negligence and may as well provide a specific standard of reasonable conduct. ***Saskatchewan Wheat Pool v. Canada*** [1983] 1 S.C.R. 205 is authority for this proposition.

[23] The Plaintiffs claim that the Government of Alberta had a duty pursuant to the E.P.A., the E.P.E.A., the ***Clean Water Act***, RSA 1980, c. C-12, repealed, and the ***Department of Environmental Act***, RSA 1980, c. 2-19, repealed, to generally monitor and enforce provisions of these statutes in relation to Wabamum Lake. These acts received consideration in ***Tottrup, supra***, when the Court considered the nature of the duties imposed under them. The Alberta Court of Appeal failed to find a statutory basis for the imposition of a duty given the wording of the legislation and the wide discretion given to the Ministry. The Court of Appeal held that individual Ministers could not be held to have private law duties of care owing to any one individual. The Court did not make any finding with regard to the validity of the claim against any other parties, such as the Government of Alberta, as that issue was not before the Court. ***Tottrup, supra***, is not a full answer for this Defendant in bringing this application to the Court. Reliance upon this authority does not carry the day.

[24] The Plaintiffs in this action have also pleaded that a duty existed at common-law. In ***Tottrup, supra***, Berger, J.A. held that an action founded in negligence might proceed where the Minister of Environment was named in a representative capacity for Her Majesty the Queen. The Plaintiffs in this case took care to frame their action in a manner which has been approved by the Alberta Court of Appeal.

[25] This Defendant claims that the environmental statutes relied upon by the Plaintiffs do not create or allow for the required nexus to create a duty of care and in such a situation, the Defendant argues that no such duty can possibly exist. However, there is authority for the proposition that an argument which presupposes that a duty of care held by a public authority or

body must be limited to one found in statute and where there can be no corresponding common-law duty, is not clear enough to justify striking out a pleading. That authority is ***Fullowka v. Whitford*** (1996) 147 D.L.R. (4th) 531 (NWTCA). Leave to appeal to the Supreme Court of Canada was dismissed in 1997. In ***Fullowka, supra***, the Court stated that whether a duty exists at common-law is a question of fact and law and should not be determined on a Rule 129(1)(a) type application.

[26] As noted earlier, the Plaintiffs have also framed their action in nuisance. This Defendant emphasizes the fact that pursuant to the ***Water Act,*** RSA 1996, c. W-3.5, s. 3(2) that all bodies of water in the province belong to the Government of Alberta. Consequently, as this body of water is not the property of the Plaintiffs, they have no standing to bring an action for nuisance. This Defendant claims that the water in the lake is the property of the Government of Alberta and can be used in any fashion the government deems appropriate. This argument involves different considerations.

[27] Of the two general forms of nuisance actions, it is likely that the Plaintiffs might have a possibility of sustaining an action in the public realm. A public nuisance action is generally brought by a public authority on behalf of the "common good". However, a private citizen is entitled to sue for public nuisance by way of a civil action in tort if it causes him special damage over and above the general suffering or inconvenience to the public. The authority for this is found in ***Fleming, The Law of Torts (6th ed. 1983)*** at p. 380. Here the Plaintiffs may have pleaded sufficiently to at least allow the possibility of a public nuisance to proceed to trial for a determination of its merits. There is certainly an arguable issue as to whether special damages can include amounts for economic depreciation of land value. Although certain American authorities in this area seem to suggest that depreciation is recoverable, Canadian case law is not as supportive. There is some Canadian case law that seems to suggest that Canadian courts may be moving in this direction ever so slowly. Authorities for this proposition are ***Danforth Glebe Estates Ltd. v. Harris & Company*** (1918) 15 O.W.N. 21 and ***Culp and Hart v. Township of East York*** [1956] O.R. 983 (Ont. High Crt.). Merely because a cause of action is novel is not, by itself, sufficient grounds for striking out a pleading. This Defendant makes that concession. It is not plain and obvious to me that such a claim is necessarily doomed to failure.

[28] In relation to private nuisance, it seems to be accepted that there must be ownership of the land in question to bring an action. ***Fleming, supra***, at p. 500 makes this point. However it is not claimed in this application as to whether any riparian or littoral rights of the Plaintiffs have been extinguished and to what extent ownership of private land extends. It may be necessary to call evidence in relation to these matters before a proper determination could be made.

[29] This Defendant has argued that if TransAlta Utilities have created a nuisance through the operation of one of their power plants, the mere granting of approvals to operate that plant does not render this Defendant responsible for that action. This Defendant has argued that the granting of the approvals do not "continue or adopt or otherwise make liable" the Defendant's ground for any nuisance created by the plant. This Defendant relies upon the authority of ***Tate v. Lyle Industries Ltd. and Greater London Council*** [1983] 2 A.C. 509 (House of Lords).

[30] I am not prepared to accept that the law in this area is that clear. That particular pronouncement by Lord Templeman was particular to that case. It may not have applicability to this one.

[31] There is contrary authority to that cited by this Defendant. An argument can be made that if a third party, in this case this Defendant, knew of TransAlta Utilities alleged pollution of the lake and they had sufficient knowledge of it to be regarded as adopting this activity, an action may be sustained against them. Authority for this proposition can be found in ***Billson, B. The Canadian Law of Nuisance*** (Saskatoon, 1991) at p. 118 and ***Sampson and Hodson Presinger*** [1983] 3 All E.R. 710 (C.A.) The elements indicating sufficient knowledge would have to be determined at trial. They cannot be determined on this type of application.

[32] As indicated earlier, this Defendant stated that this action could not succeed for a number of reasons. Some of those reasons were overlapping. I have examined two of them critically. I have examined the relationship between these parties to determine whether the requisite nexus exists and I have examined the proposed action in nuisance. The conclusion that I come to is that the test of whether it is plain and obvious that the pleadings disclose no reasonable cause of action is not met. It is apparent to me that there are a number of issues in existence in this case that warrant a trial on their merits or some further critical examination. At this time, it would be premature to grant this application. When further evidence is available, this matter might be dealt with prior to trial.

[33] At this time the test for relief pursuant to Rule 129(1)(a) is not met. As Russell, J.A. stated in ***Decock, supra***, at para. 92:

> ... However, as Justices Stevenson and Côté indicate in their ***Alberta Civil Procedure Handbook, supra*** at 88:
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> > [T]he most common misuse of R. 129 is trying to strike out claims which are only probably bad, not certainly bad.

[34] This application is dismissed. Costs will be in the cause.

DATED At Edmonton this 7th day of July 2000

J.C.Q.B.A.