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JUDICIAL CENTRE	DRUMHELLER
PLAINTIFF (RESPONDENT)	**JESSICA ERNST**
DEFENDANTS (APPLICANTS)	ENCANA CORPORATION, **ENERGY RESOURCES CONSERVATION BOARD** and HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA
DOCUMENT	**BRIEF OF ARGUMENT OF THE RESPONDENT JESSICA ERNST IN RESPONSE TO THE APPLICATION OF THE ENERGY RESOURCES CONSERVATION BOARD TO BE HEARD ON JANUARY 18, 2013**
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PART I: BACKGROUND

The Action

1. The Plaintiff has brought claims against the Defendants EnCana Corporation ("EnCana"), the Energy Resources Conservation Board ("ERCB") and Her Majesty the Queen in Right of Alberta ("Alberta") regarding alleged serious contamination of the Plaintiff's well water.

2. The Fresh Statement of Claim (the "Statement of Claim"), filed on June 25, 2012 pursuant to a Court Order, alleges that the Plaintiff's well water became contaminated after the Defendant EnCana negligently drilled for shallow coalbed methane gas at dozens of wells surrounding the Plaintiff Ms. Ernst's private property near Rosebud, Alberta. In addition, the Statement of Claim alleges that Alberta was negligent in the administration of a regulatory regime.

3. Ms. Ernst has also brought two claims against the ERCB that are the subject of the present Application. The first is that the ERCB was negligent in failing to take reasonable steps to protect her and her property from water contamination and other impacts caused by the oil and gas industry, including by negligently failing to conduct an adequate investigation and inspection in accordance with the ERCB's published inspection and enforcement scheme. The second claim is that the ERCB breached Ms. Ernst's right to freedom of expression as guaranteed by the *Canadian Charter of Rights and Freedoms* by (a) punishing her for publicly expressing views that were critical of the ERCB and by (b) arbitrarily preventing Ms. Ernst from speaking to key offices within the ERCB.

4. The lawsuit remains in the early stages of litigation. No Statements of Defence have been filed by any of the Defendants.

Issues raised on this Application

5. The Defendant ERCB has brought an Application which (a) seeks to strike out the claims against it under Rule 3.68 of the *Alberta Rules of Court*, arguing that the pleadings fail to disclose any cause of action in law, and (b) seeks summary judgment under Rule 7.2 on the grounds that there is "no merit" to the claims against the ERCB.

6. The main issues raised by the ERCB's Application are as follows:

ISSUE #1: *Is it plain and obvious and beyond doubt that the ERCB cannot owe a duty of care in negligence to the Plaintiff?*

ISSUE #2: *Is it plain and obvious and beyond doubt that the ERCB is statutorily protected from the Plaintiff's claim for negligent omissions?*

ISSUE #3: *Is it plain and obvious and beyond doubt that there is no legal basis for the Plaintiff's claim that the ERCB breached her right to freedom of expression under s. 2(b) of the* Canadian Charter of Rights and Freedoms*?*

PART II: LAW AND ARGUMENT

Legal test for summary judgment

7. The ERCB's Application purports to be *both* an application to strike out the Statement of Claim on the grounds that it is plain and obvious that the pleading "does not disclose a cause of action", *as well as* a motion for summary judgment on the grounds that there is "no merit" to the claim. These are two distinct procedures under the *Alberta Rules of Court*, each with different requirements and legal tests.

8. The Rule for summary judgment is as follows:

> 7.2 On application, the Court may at any time in an action give judgment or an order to which an applicant is entitled when
>
> (a) admissions of fact are made in a pleading or otherwise, or;
>
> (b) the only evidence consists of records and an affidavit is sufficient to prove the authenticity of the records in which the evidence is contained.
>
> 7.3 (1) A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds: …
>
> (b) there is no merit to a claim or part of it…
>
> (2) The application must be supported by an affidavit swearing positively that one or more of the grounds described in subrule (1) have been met or by other evidence to the effect that the grounds have been met. [Emphasis added].
>
> ***Alberta Rules of Court*, r 7.2 -7.3 [Plaintiff's Book of Authorities, Vol. 1, Tab 1].**

9. The bar on an application for summary judgment is high. It must be "plain and obvious that the action cannot succeed", the action is "bound to fail" or the action has "no prospect of

success." The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial" [emphasis added]. According to the Supreme Court, the defendant must prove this with evidence; it cannot only rely on mere allegations or the pleadings.

> ***Canada (Attorney General) v Lameman*, [2008] 1 SCR 372 (QL) at para 11 [Plaintiff's Book of Authorities, Vol. 1, Tab 2].**
> ***Kwan v Superfly Inc*, 2011 ABQB 343 (QL) at para 23 [Plaintiff's Book of Authorities, Vol. 1, Tab 3].**

10. Despite the requirement for evidence, the ERCB has chosen not to submit any affidavit evidence in support of its summary judgment application. Instead the only "evidence" on which the ERCB relies are (a) the pleadings; (b) legislation and regulations (which are law, not evidence); and (c) a number of tangentially-related ERCB documents (referred to by the ERCB as "public documents") which set out some of the requirements imposed by the ERCB on oil and gas operators. Leaving aside for the moment the question of whether these "public documents" meet evidentiary requirements that allow them to be properly before the court as evidence[1] (they do not), these documents are unhelpful in answering any of the fundamental questions raised by the lawsuit.

> **ERCB Brief at paras 34, 36.**
> **ERCB Book of Authorities, Vols 3-4, at Tabs 48-56.**

11. The ERCB fails to explain the specific relevance of those documents or how those documents in any way support the proposition that it is "plain and obvious" that the claim cannot succeed. Instead, these documents are either referenced baldly in a general manner for what they purportedly do not say (e.g. the ERCB states that there is nothing in these documents that specifically would ground a private duty of care), or in an attempt to characterize what the plaintiff's evidence and argument might be if the claim were to proceed (e.g. the ERCB states, without foundation, that the representations on which the plaintiff seeks to rely are "presumably" found in these public documents).

> **See eg ERCB Brief at paras 96, 105, 120 & 130.**

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[1] The ERCB cites the *Alberta Evidence Act* as authority grounding the right to include these "public documents" as evidence without a supporting affidavit. With respect, none of the sections of the *Alberta Evidence Act* grant such a right. See *Alberta Evidence Act* [ERCB Book of Authorities, Vol. 2, Tab 40].

12. It is unclear how the pleadings, legislation and "public documents" could possibly be a complete answer to any of the Plaintiff's claims. Take, for example, the key issue of whether the ERCB owes the Plaintiff a duty of care (discussed more fully below). The Plaintiff has pleaded that the ERCB owes her a duty of care as a result of a) her specific interactions with the ERCB; b) the specific inspection and enforcement scheme established and operationalized by the ERCB; and c) the specific representations made by the ERCB. The ERCB has put no evidence before the Court regarding any of these issues. Without evidence regarding the factual context of the relationship between the ERCB and the Plaintiff, the court cannot determine whether, as an evidentiary matter, it is "plain and obvious" that the claim cannot succeed.

Statement of Claim at paras 24-41.

13. Similarly, the Plaintiff has alleged that the ERCB has breached her right to freedom of expression under section 2(b) of the *Charter*. The ERCB has put no evidence before the Court about any aspect of that claim. In particular, the ERCB has not put forward any evidence regarding the content of the expression; the context in which the expression was made; how the comments were understood by the ERCB; the response of the ERCB to that expression; or any possible justification by the ERCB for infringing on the Plaintiff's rights. Again, without evidence, the court cannot determine as an evidentiary matter that it is "plain and obvious" that the *Charter* claim cannot succeed.

Statement of Claim at paras 42-58.

14. As a result of a complete lack of an evidentiary record, the Plaintiff submits that the only issue which is properly before the Court at this time is whether there are valid causes of action pleaded against the ERCB in this Action as a matter of law – a matter much better suited to an application to strike out the pleadings than an application for summary judgment.

15. In any event, the test for summary judgment is stringent. As described below, even if the test applies, it cannot be said that it is "plain and obvious" that there is no merit to the claims against the ERCB. The ERCB has not, and cannot, meet this threshold for any of the issues raised in its Brief.

Legal test to strike out a statement of claim

16. On an application to strike out a statement of claim, the defendants bear the "extremely high" onus of "proving that the Plaintiff's action is bound to fail". Pursuant to Rule 3.68, a court should only strike out a pleading if it is "plain and obvious or beyond reasonable doubt" that the facts, taken as proved, do not disclose a reasonable cause of action. "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." The Plaintiff is entitled to a broad and generous reading of the pleadings. Neither the novelty of the cause of action nor the potential for the defendant to mount a strong defence should prevent the claim from proceeding. "Only if the action is certain to fail because it contains a radical defect" should the claim be struck out.

> ***Alberta Rules of Court*, r. 3.68 [Plaintiff's Book of Authorities, Vol. 1, Tab 1].**
>
> ***Hunt v Carey Canada Inc*, [1990] 2 SCR 959 (QL) at paras 32-33 [Plaintiff's Book of Authorities, Vol. 1, Tab 4].**
>
> ***Alberta Adolescent Recovery Centre v Canadian Broadcasting Corporation*, 2012 ABQB 48 (QL) at paras 27 & 29 [Plaintiff's Book of Authorities, Vol. 1, Tab 5].**

ISSUE #1: It is not "plain and obvious" that the ERCB cannot owe a duty of care to the Plaintiff

17. The Plaintiff alleges that the ERCB owed a duty of care to the Plaintiff, which was breached when the ERCB failed to implement its own specific and published investigation and enforcement scheme and failed to conduct any form of investigation.

> **Statement of Claim at paras 38-39.**

18. In particular, the pleadings allege that the ERCB, as the government agency entrusted with overseeing and regulating the oil and gas industry:

(a) **Established a detailed regulatory regime:** the ERCB used the powers granted to it by statute to establish a detailed Compliance Assurance and Enforcement scheme, which included procedures for receiving and investigating individual complaints from landowners, inspecting oil and gas operations to ensure that licenses were in compliance with all applicable laws and regulations, and taking

appropriate enforcement and remedial action against oil and gas companies when noncompliance occurred;

Statement of Claim at paras 24-26.

(b) **Encouraged landowners to rely on the regulatory regime:** the ERCB encouraged Ms. Ernst to rely on this scheme by frequently representing to her and other rural landowners that the ERCB was adequately overseeing oil and gas activities to prevent pollution and to protect local water sources, and that the ERCB would rigorously enforce the legal requirements imposed on oil and gas operators through the ERCB enforcement branch;

Statement of Claim at paras 27-28.

(c) **Engaged in specific interactions with Ms. Ernst.** The ERCB specifically interacted with Ms. Ernst through numerous ERCB staff members, including, among others, the Manager of Compliance and Operations Branch, the Chairman of the Board, and a senior ERCB lawyer, through which the ERCB was made aware of both serious contamination of the Plaintiff's water well, and of specific concerns regarding EnCana's risky and illegal CBM practices at several gas wells adjacent to the Plaintiff's home; and

Statement of Claim at paras 32 – 35.

(d) **Failed to implement its own regime:** despite the above, the ERCB negligently and arbitrarily failed to implement its own specific and published investigation and enforcement process, failed to conduct any form of investigation, and negligently and arbitrarily prevented the Plaintiff from participating in the usual regulatory scheme. Further particulars of the ERCB's negligence are included at para. 40 of the Statement of Claim.

Statement of Claim at paras 36, 39-40.

The ERCB owes a duty of care to Ms. Ernst

19. The ERCB asserts that there is no private duty of care between Ms. Ernst and ERCB, and therefore the pleadings do not disclose a cause of action in negligence. On both a motion to

strike out and a motion for summary judgment, the test is whether, on the facts as pleaded, it is "plain and obvious or beyond reasonable doubt" that the ERCB cannot owe a duty of care to the Plaintiff, and therefore the action is "bound to fail". The ERCB cannot and has not met this stringent standard.

20. For the purposes of this Application, to determine whether a duty of care may exist in a particular circumstance, the Court must first consider whether the duty of care pleaded potentially belongs within an established or analogous category of negligence. If it does, for the purposes of a motion to strike, a *prima facie* duty of care is established. If the duty of care alleged does not belong within an established or analogous category of negligence (i.e. the duty alleged is "novel") the Court must apply the full two-part *Cooper/Anns* test (described in more detail below).

> ***Adams v Borrel* (2008), 2008 NBCA 62 (QL) at para 36 [Plaintiff's Book of Authorities, Vol. 1, Tab 6].**

There is a* prima facie *duty of care based on pre-existing legal categories

21. The Plaintiff asserts that this case falls within, or is analogous to, a category where courts have previously recognized a duty of care in law, and therefore the pleadings disclose a *prima facie* duty of care based on pre-existing legal categories. On the facts as pleaded, the duty of care alleged is analogous to the duty of care found by the Supreme Court in numerous "negligent implementation of an inspection scheme" cases.

22. Courts have frequently held that once a government agency, such as the ERCB, has established an investigation or inspection mechanism at an operations level, it will owe a duty of care. The investigation or inspection mechanism must be carried out reasonably and without negligence, or the authority can be held liable. The Supreme Court has explained this concept in the following terms:

> [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. (Emphasis added)
>
> ***Just v British Columbia*, [1989] 2 SCR 1228 (QL) at para 21 [Plaintiff's Book of Authorities, Vol. 1, Tab 7].**

23. Examples where appellate courts, including the Supreme Court of Canada, have found a duty of care to reasonably implement an established investigation and inspection scheme in circumstances similar to this case include:

(a) A duty of care owed by the government regulator of mines to mine workers to reasonably inspect the mine, and order cessation of work if unsafe;

***Fullowka v Pinkerton's of Canada Ltd*, [2010] 1 SCR 132 (QL) [Plaintiff's Book of Authorities, Vol. 1, Tab 8].**

(b) A duty of care owed by municipalities to current and future property owners to reasonably inspect construction in cases where the municipality had established a scheme for doing so. Importantly, the municipality can be found negligent if it "ignored its own scheme and chose not to inspect";

***Ingles v Tutkaluk Construction Ltd*, [2000] 1 SCR 298 (QL) at para 25 [Plaintiff's Book of Authorities, Vol. 1, Tab 9].**
***Rothfield v Manolakos*, [1989] 2 SCR 1259 (QL) [Plaintiff's Book of Authorities, Vol. 1, Tab 10].**

(c) A duty of care owed by a provincial government to establish a reasonable system of road inspection and to carry out inspections of roads adequately once the decision to implement an inspection system has been made;

***Just, supra* [Plaintiff's Book of Authorities, Tab 7].**

(d) A government agency may be held liable for "negligent failure to comply with an established government policy" where the government allegedly failed to follow established policy in the provision of air ambulances in response to a medical emergency; and

***Heaslip Estate v Ontario*, 2009 ONCA 594 (QL) at para 21 [Plaintiff's Book of Authorities, Vol. 1, Tab 11].**

(e) Agriculture Canada owed a duty of care to farmers with respect to an investigation into a potato virus. The court held that this case fell within the recognized category of "negligent inspection" in which government agencies will owe a duty of care once they have made the policy decision to establish an investigation scheme.

***Adams, supra* at paras 41-43 [Plaintiff's Book of Authorities, Vol. 1, Tab 6].**

24. The case of *Heaslip* is particularly helpful in defining the established category of negligence applicable to a public authority. In that case, the court stated that there is an "established category of a public authority's negligent failure to act in accordance with an established policy where it is reasonably foreseeable that failure to do so will cause physical harm to the plaintiff."

***Heaslip, supra* at para 21 [Plaintiff's Book of Authorities, Vol. 1, Tab 11].**

25. The present Action is highly analogous to the above cases where a *prima facie* duty of care is owed by government agencies that have established inspection and investigation schemes, and then failed to execute the schemes reasonably.

26. The ERCB is tasked with regulating to prevent pollution and to ensure that oil and gas operations take place safely. The pleadings (which must be taken as proved) state that the ERCB used the powers granted to it by statute to establish a detailed Compliance Assurance and Enforcement scheme. The ERCB then encouraged Ms. Ernst to rely on this scheme by frequently representing that the ERCB was adequately overseeing oil and gas activities to prevent pollution and to protect water for the benefit of Ms. Ernst and other landowners. The ERCB engaged in a series of specific interactions with Ms. Ernst through which they learned of specific and serious issues regarding Ms. Ernst's well water. And yet, despite all of the above, the ERCB negligently and arbitrarily failed to implement its own specific published Compliance Assurance and Enforcement scheme in the Plaintiff's case, and failed to conduct any form of investigation.

Statement of Claim at paras 24-41.

27. On the facts as pleaded, it is manifest that the ERCB cannot meet the "extremely high" onus of "proving that the Plaintiff's action is bound to fail". Rather, the duty of care alleged fits squarely within the established category of "negligent implementation of an inspection scheme" and should be permitted to proceed.

The ERCB is in a proximate relationship with the Plaintiff

28. In the alternative, if the duty of care alleged is not found to fall within a pre-existing or analogous category of negligence, the court must apply the two-part *Cooper/Anns* test to

determine if it is "plain, obvious and beyond doubt" that a duty of care could not exist on the facts as pleaded. Under the *Cooper/Anns* test, the court asks:

(a) whether the ERCB is in a relationship of sufficient proximity and foreseeability with the plaintiff that a *prima facie* duty of care is owed; and

(b) if so, whether there are any overriding policy considerations that justify negating or limiting the duty of care.

***Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 SCR 129 (QL) at para 20 [Plaintiff's Book of Authorities, Vol. 1, Tab 12].**

29. The Statement of Claim clearly discloses material facts sufficient to ground a relationship of sufficient foreseeability and proximity under the *Cooper/Anns* test. It is certainly not the case that it is plain and obvious that there cannot be a relationship of sufficient foreseeability and proximity between Ms. Ernst and the ERCB.

30. The ERCB does not contest that it was foreseeable that harm could have been suffered by the Plaintiff if the ERCB failed to exercise reasonable care in engaging in the implementation of its inspection and enforcement scheme. This makes sense – the ERCB regulates an inherently dangerous industry and is charged with both controlling pollution and ensuring safe operations at oil and gas sites in Alberta. Indeed, the ERCB's representations to the public include that it specifically protects all freshwater aquifers from adverse impacts caused by oil and gas activities, clearly indicating an understanding that if the ERCB did not engage in appropriate regulation, or if regulations were breached, freshwater aquifers, which supply household water, could be harmed.

See Statement of Claim at para 27.

31. Instead, the ERCB incorrectly asserts that the ERCB is not in a relationship of sufficient proximity with Ms. Ernst.

32. The ERCB rightly notes that the Supreme Court has recently clarified the role that legislation should play when determining whether a government actor is in a proximate relationship to a particular claimant. Two scenarios can be distinguished:

(a) The first is the situation where the alleged duty of care is said to arise explicitly or by implication from the statutory scheme. In other words, the *only* source of proximity is the statute itself.

(b) The second is the situation where the duty of care is alleged to arise from interactions between the claimant and the government, and is not negated by the statute. In other words, the source of proximity is not the statute, but other factors deriving from the nature of the relationship between the claimant and the government agency.

The Court also notes that it is possible for a claim to be asserted where proximity is based both on interactions between the parties as well as the government's statutory duties.

> ***R v Imperial Tobacco Canada Ltd,* [2011] 3 SCR 45 (QL) at paras 43, 46 [Plaintiff's Book of Authorities, Vol. 1, Tab 13].**

33. For clarity, in the case at bar, the Plaintiff is not basing her claim on what the Supreme Court called the first scenario, i.e. where the alleged duty of care is said to arise explicitly or by implication from the statutory scheme alone. Rather, the Plaintiff asserts that her claim is firmly within the second scenario, i.e. she is asserting that the duty of care owed to her arises from a number of specific factors unique to her case, including, importantly, specific interactions between her and the ERCB.

34. The Supreme Court explained the second scenario in the following terms:

> The second situation is where the proximity essential to the private duty of care is alleged to arise from a series of specific interactions between the government and the claimant. The argument in these cases is that the government has, through its conduct, entered into a special relationship with the plaintiff sufficient to establish the necessary proximity for a duty of care. In these cases, the governing statutes are still relevant to the analysis. For instance, if a finding of proximity would conflict with the state's general public duty established by the statute, the court may hold that no proximity arises. However, the factor that gives rise to a duty of care in these types of cases is the specific interactions between the government actor and the claimant. (Emphasis added)
>
> ***Imperial Tobacco, supra* at paras 43-47 [Plaintiff's Book of Authorities, Vol. 1, Tab 13].**

35. It is without dispute that, in this second scenario, important indicia of proximity between the parties, such as "expectations, representations, reliance and property or other interests involved" will serve to ground a duty of care, as was the case in both *Hill v. Hamilton Wentworth* and in *Fullowka v. Pinkerton's of Canada Ltd.*

> ***Hill, supra* at paras 23-24 [Plaintiff's Book of Authorities, Vol. 1, Tab 12].**

***Fullowka, supra* at paras 43-45 [Plaintiff's Book of Authorities, Vol. 1, Tab 8].**

36. Finally, and importantly, the Supreme Court has held that when the duty of care alleged is based on specific interactions between the government actor and the claimant, as here, it will be difficult to strike a claim at the pleadings stage:

> Since this is a motion to strike, the question before us is simply whether, assuming the facts pleaded to be true, there is any reasonable prospect of successfully establishing proximity, on the basis of a statute or otherwise. . . . [W]here the asserted basis for proximity is grounded in specific conduct and interactions, ruling a claim out at the proximity stage may be difficult. So long as there is a reasonable prospect that the asserted interactions could, if true, result in a finding of sufficient proximity, and the statute does not exclude that possibility, the matter must be allowed to proceed to trial, subject to any policy considerations that may negate the prima facie duty of care at the second stage of the analysis. (Emphasis added, citations omitted)

***Imperial Tobacco, supra* at para 47 [Plaintiff's Book of Authorities, Vol. 1, Tab 13].**

37. The allegations against the ERCB in the present Statement of Claim are firmly in the second category established by McLachlin C.J. in *Imperial Tobacco*. In other words, Ms. Ernst is asserting that the ERCB has "through its conduct, entered into a special relationship with the plaintiff sufficient to establish the necessary proximity for a duty of care", based in large part on various specific interactions between Ms. Ernst and the ERCB.

38. In this case, there are four factors which are pleaded and which ground a relationship of sufficient proximity:

(a) the specific and continued interaction between Ms. Ernst and the ERCB;

(b) representations made by the ERCB which encouraged reliance by rural landowners on its investigation/enforcement scheme;

(c) the nature of the involved interests of rural landowners; and

(d) the establishment of a specific and operationalized investigation/enforcement scheme under the ERCB's statute directed at protecting the rights of rural landowners.

Each will be considered in turn below.

Specific interactions between the ERCB and Jessica Ernst

39. The Supreme Court has repeatedly held that specific interaction between the plaintiff and the defendant is an important factor in establishing a relationship of sufficient proximity between a government agency and a plaintiff. This specific interaction will often be sufficient in itself to establish the requisite proximity.

> ***Imperial Tobacco, supra* at para 45 [Plaintiff's Book of Authorities, Vol. 1, Tab 13].**
> ***Fullowka, supra* at para 44 [Plaintiff's Book of Authorities, Vol. 1, Tab 8].**

40. In this case, Jessica Ernst had a personal and direct relationship with the ERCB spanning several months of contact on the specific issue of both water contamination at her property and concerns regarding specific EnCana wells. This close relationship including direct interactions with various employees of the ERCB including Mr. Neil McCrank, the then-Chairman of the ERCB; Mr. Richard McKee, a senior lawyer at the ERCB; Mr. Jim Reid, Manager of the ERCB's Compliance and Operations Branch; and many others.

> **Statement of Claim at paras 31-36.**

41. Much of this direct interaction confirmed that the Plaintiff and the ERCB were in an ongoing and close relationship. Ms. Ernst was not an undifferentiated and unknown member of the public, but rather was specifically known to the ERCB as an impacted landowner who had repeatedly engaged with the ERCB on an individual basis with both specific and well-documented concerns regarding contamination of her well-water and property and with substantiated allegations that ERCB's safety and water protection regulations had been breached at a number of nearby EnCana CBM wells.

> **Statement of Claim at paras 31-36.**

42. This direct and continuous personal interaction between the Plaintiff and the ERCB on the specific issue of water contamination at her property (as well as concerns regarding specific coalbed methane wells) is strongly indicative of the proximity between the Defendant and the Plaintiff on the facts pleaded, and places this claim firmly in the second category of cases as established by the Supreme Court in *Imperial Tobacco,* where a relationship of sufficient proximity is based, in significant part, on specific interactions between the government agency and the Plaintiff.

Representations made by the ERCB

43. Representations made by a public authority, and the reliance placed on the authority, are also important considerations in the proximity analysis. Where a government agency has encouraged reliance on it by repeatedly asserting that it is protecting specific classes of individuals from harm, as occurred in this case, such representations will ground a finding of proximity.

> "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".
>
> ***Tottrup v Alberta (Ministry of Environmental Protection)*, 2000 ABCA 121 (QL) at para 21 [Plaintiff's Book of Authorities, Vol. 1, Tab 14].**

44. For example, in the case of *Sauer v. Canada*, the Ontario Court of Appeal found, in a motion to strike out the claim, that the Canadian regulator could owe a duty of care to cattle farmers, in large part because of the "many public representations by Canada that it regulates the content of cattle feed to protect commercial cattle farmers". These public affirmations amount to a public acknowledgement of a private duty of care.

> ***Sauer v Canada*, 2007 ONCA 454 (QL) at para 62 [Plaintiff's Book of Authorities, Tab 15].**

45. The ERCB made numerous public representations regarding what individuals adversely impacted by oil and gas activities could expect from the ERCB's Field Offices and from its published investigation and enforcement compliance mechanism, with a special emphasis on protecting water. These numerous representations ground a finding of proximity. In particular, the pleadings state that ERCB represented that:

(a) the ERCB ensures that water and agricultural lands are protected from adverse impacts caused by oil and gas activities;

(b) the ERCB specifically "protects all freshwater aquifers from adverse impacts caused by oil and gas activities";

(c) ERCB Field Offices are responsible for, and do in fact, inspect oil and gas operations to ensure compliance with all applicable standards, specifications and approval conditions;

(d) ERCB field staff investigate and respond to all public complaints to ensure that appropriate action is taken; and

(e) when non-compliance is identified, the ERCB triggers an established policy for ERCB enforcement action.

Statement of Claim at para 27.

46. These representations were held out by the ERCB as an indication that rural landowners such as the Plaintiff could rely on the ERCB to respond to complaints about nearby gas wells, to prevent impacts on water from nearby oil and gas development and, if breaches of regulations did occur, to take enforcement and remedial action. These representations are important indicia of proximity, and demonstrate that the ERCB was in a relationship of sufficient proximity with the Plaintiff.

Important private property and safety interests of rural landowners are involved

47. The nature of the interests involved are a significant factor in the proximity analysis. The ERCB is tasked with securing the observance of safe practice in the production of oil and gas, and with controlling pollution in operations for the production of oil and gas. If proper regulations are not implemented and enforced, oil and gas development can potentially have significant detrimental impacts on those who live close to oil and gas operations, including by adversely affecting human health and private property.

48. The comments of La Forest J. in the Supreme Court case of *Rothfield v. Manolakos* are pertinent:

> Third parties, such as neighbours and subsequent purchasers or occupiers of a building, obviously have no say in the actual construction of a building that proves defective. It is therefore reasonable that they should be entitled to rely on the municipality to show reasonable care in inspecting the progress of the construction.
>
> ***Rothfield, supra* at para 5 [Plaintiff's Book of Authorities, Vol. 1, Tab 10].**

49. Rural landowners who live near oil and gas facilities have little say in where oil and gas operations are located or how such activities are conducted. Rural landowners have no ability to inspect operations, or to make sure that the operations are conducted in a safe manner. Moreover, they have limited ability to respond to protect themselves or their property when something goes terribly wrong. For these things, they must and do rely on the ERCB whose job it is to inspect and enforce requirements, a reliance that the ERCB itself has fostered and encouraged.

Operationalized scheme directed at protecting interests of rural landowners

50. The ERCB is the primary and specialized government agency responsible for overseeing and regulating the drilling and operating of every oil and gas well and facility located in the province of Alberta. The statutory purposes that the ERCB is entrusted with implementing include:

(a) "To *secure the observance of safe and efficient practices* in . . .operations for the production of oil and gas";

***The Oil and Gas Conservation Act*, RSA 2000, c O-6, s 4(b) [Plaintiff's Book of Authorities, Tab 16].**

(b) "to *control pollution* above, at or below the surface in the drilling of wells and in operations for the production of oil and gas"; and

***The Oil and Gas Conservation Act, ibid*, s 4(f) [Plaintiff's Book of Authorities, Tab 16].**

(c) "to secure *the observance of safe and efficient practices in the exploration for and use of underground formations for the injection of substances*". [Emphasis added].

***Energy Resources Conservation Act*, RSA 2000, c E-10, s 2(e.1) [Plaintiff's Book of Authorities, Vol. 1, Tab 17].**

51. The Plaintiff pleads that the ERCB passed a number of regulations and requirements aimed specifically at the protection of groundwater from interference or contamination due to oil and gas development, preventing pollution, protecting groundwater and protecting private property. For example, the ERCB has a number of regulations focused on the casing of oil and gas wells to ensure that the wells do not contaminate usable aquifers.

Statement of Claim at paras 24-26.

52. Further, the ERCB established a detailed Compliance Assurance and Enforcement scheme, which included detailed procedures for receiving and investigating public complaints, inspecting oil and gas operations to ensure that licenses were in compliance with all applicable rules, and taking appropriate enforcement and remedial action against oil and gas companies when noncompliance occurred. This scheme was operationalized through Field Offices located throughout Alberta.

Statement of Claim at paras 26-28.

53. In the case of *Heaslip*, the Ontario Court of Appeal held that once a government establishes and operationalizes a policy, it may be liable for failure to act in accordance with the policy when that failure caused harm to the plaintiff. The claim was allowed to proceed to trial based on the allegation that there was a negligent failure to respond to a request for a government service in accordance with the government's established policy.

***Heaslip, supra* at para 21 [Plaintiff's Book of Authorities, Vol. 1, Tab 11].**

54. This is exactly what happened in the present case. The ERCB established a detailed investigation and enforcement mechanism with specific policies determining when and how it would respond to complaints from rural landowners and alleged breaches of its water protection and safety regulations. When Ms. Ernst attempted to avail herself of the ERCB's services by requesting that the ERCB respond to her legitimate complaints in accordance with that established investigation and enforcement mechanism, the government authority arbitrarily and negligently failed to follow the established procedure it had set up for just such a case.

55. Finally, the ERCB's statutory purposes are specifically directed at protecting the interests of landowners with oil and gas operations located on or near their land, not just the undifferentiated public. The ERCB's statutory obligations include 1) securing safe practices at oil and gas operations, and 2) controlling pollution at oil and gas operations – two concerns that are, by their very nature, local and specific, not merely broad and general. Safety and pollution have a specific local impact, disproportionally affecting those who live close to oil and gas operations and in particular rural landowners. It is therefore clear that an immediate purpose of the legislative scheme must be to protect specific local land owners with oil and gas operations located on or near to their land. A similar determination was made in the case of *Adams v. Borrel.*

***Adams, supra* at paras 43-44 [Plaintiff's Book of Authorities, Vol. 1, Tab 6].**

There are no "conflicting duties" sufficient to negate a duty of care

56. The second stage of the *Cooper/Anns* test involves an analysis of whether there are "any overriding policy considerations that justify negating or limiting the duty of care."

***Hill, supra* at para 20 [Plaintiff's Book of Authorities, Vol. 1, Tab 12].**

57. In order to trump a *prima facie* duty of care, the "residual policy considerations must be more than speculative. They must be compelling; a real potential for negative consequences of imposing the duty of care must be apparent."

***Fullowka, supra* at para 57 [Plaintiff's Book of Authorities, Vol. 1, Tab 8].**

58. The ERCB repeatedly raises the spectre of "conflicting duties", arguing baldly that since the ERCB's governing statutes involve some duties to the public, that therefore these governing statutes implicitly preclude any private duty to the plaintiff. In the words of the ERCB, "the ERCB's governing statutes are aimed at public goods, impose public duties on the ERCB and preclude the imposition of a private duty of care." How or why the public duties preclude the imposition of a private duty of care is not made clear in the ERCB's brief.

ERCB Brief at para 90.

59. With respect, this concern is overstated and misplaced. It is perfectly consistent with case law and common sense that a public authority can simultaneously owe public duties as well as private duties. Indeed, it is in the very nature of public authorities that their governing statutes are, at least to some extent, aimed at public goods. Despite this fact, courts have repeatedly and regularly held that such public authorities can owe private duties of care, even when those public authorities owe significant duties to the public. For example in *Hill*, the police clearly owe significant statutory duties to the public as a whole in the conduct of investigations into crime. Despite the fact that police owe these significant public duties, police were nonetheless found to also owe a private duty of care to the individual under investigation.

***Hill, supra* at paras 40-43 [Plaintiff's Book of Authorities, Vol. 1, Tab 12].**

60. Further, the Supreme Court has specifically pointed out that it is not necessarily the case that a proposed private duty of care would conflict with statutory duties to the public.

> Serious negative policy consequences may flow where such a conflict exists. However, it does not follow that such consequences will follow from every imposition of a duty of care on those who carry out statutory or public duties. No such concern about conflicting duties was noted by the Court in the building inspector cases. (Emphasis added)

***Fullowka, supra* at para 72 [Plaintiff's Book of Authorities, Vol. 1, Tab 8].**

61. Even if a proposed private law duty of care does raise some concerns about potential conflicts with a public duty, the private law duty of care often will still be recognized. It is only in circumstances where there is a manifest and irreconcilable conflict between the statutory public duty and the *prima facie* private duty that the private duty should be negated. The

Supreme Court has repeatedly emphasized that "a conflict or potential conflict of duties does not in itself negate a *prima facie* duty of care; rather the conflict must be between the duty proposed and an overarching public duty and it must pose a real potential for negative policy consequences". For example, the Supreme Court in *Hill* found that there was no conflict between a private duty of care owed by the police to a suspect and the public duty to prevent crime.

> Even if a potential conflict could be posited, that would not automatically negate the prima facie duty of care. The principle established in Cooper and its progeny is more limited. A prima facie duty of care will be negated only when the conflict, considered together with other relevant policy considerations, give rise to a real potential for negative policy consequences. This reflects the view that a duty of care should not be denied on speculative grounds. *Cooper* illustrates the point. . . . Not only was there a conflict, but a conflict that would engender serious negative policy consequences. (Emphasis added)
>
> ***Fullowka, supra* at paras 72-73 [Plaintiff's Book of Authorities, Vol. 1, Tab 8].**
>
> ***Hill, supra* at paras 40-43 [Plaintiff's Book of Authorities, Vol. 1, Tab 12].**

62. Finally, appellate courts have cautioned against determining so early in an action that residual policy considerations make it plain and obvious that there is no duty of care. Defendants bear the evidentiary burden of showing countervailing policy considerations sufficient to negate a *prima facie* duty of care, and therefore such policy considerations are better left for determination at trial, with the benefit of a full factual record.

> ***Sauer, supra* at para 45 [Plaintiff's Book of Authorities, Vol. 1, Tab 15].**

63. Here, the conflicting duties, as alleged by the ERCB, are the duty owed by the ERCB to the public, and the duty to follow its established compliance and enforcement mechanism owed to a specifically identified complainant. It is unclear how these duties are in conflict at all. As pointed out by the Ontario Court of Appeal, "[t]he complaint is that Ontario failed to follow its own policy, and I fail to see how Ontario can claim that following its own policy would 'pose a real potential for negative policy consequences'".

> ***Heaslip, supra* at para 28 [Plaintiff's Book of Authorities, Vol. 1, Tab 11].**

64. Even if there was a potential for conflict (which the Plaintiff denies), the ERCB has not shown that there is a "real potential for negative policy consequences". Instead, it merely baldly and speculatively alleges that such a conflict exists, without explaining the nature of the conflict and without citing any law or leading any evidence to support its position. As noted by the Supreme Court, a "duty of care in tort law should not be denied on speculative grounds".

***Hill, supra* at para 43 [Plaintiff's Book of Authorities, Vol. 1, Tab 12].**
ERCB Brief at para 92.

ISSUE #2: It is not "plain and obvious" that the ERCB's statutory immunity applies to negligence claims for "omissions or things not done"

65. The Plaintiff's claim against the ERCB is for negligent omission, or nonfeasance. In sum, the Claim alleges that the ERCB negligently failed to implement its own specific published Compliance Assurance and Enforcement scheme and negligently failed to conduct any form of investigation, resulting in the initial and continued contamination of the Plaintiff's private household well water.

Statement of Claim at paras 39-40.

66. The ERCB seeks to rely on a statutory immunity clause, which it says absolves it of all potential liability.

See eg ERCB Brief at paras 97-98.

67. The words of the relevant statutory immunity clause, however, clearly do not cover claims for "negligent omission" including the negligent and arbitrary failure to implement the ERCB's own Compliance Assurance and Enforcement scheme. Accordingly, the ERCB is not immune from the Plaintiff's claim.

68. The relevant statutory immunity clause is as follows:

> No action or proceeding may be brought against the Board or a member of the Board or a person referred to in section 10 or 17(1) in respect of any act or thing done purportedly in pursuance of this Act, or any Act that the Board administers, the regulations under any of those Acts or a decision, order or direction of the Board. (Emphasis added)
>
> ***Energy Resources Conservation Act, supra* at s 43 [Plaintiff's Book of Authorities, Vol. 1, Tab 17].**

The statute is clear on its face: the immunity applies to actions only

69. It is a basic principle of statutory interpretation that "where a statute is clear, effect must be given to its wording". The legislature is presumed to be a competent and careful user of language and a skillful drafter. As pointed out by the Supreme Court in *Morguard Properties Ltd. v. Winnipeg (City)*:

> [T]he Legislature is guided and assisted by a well-staffed and ordinarily very articulate Executive. The resources at hand in the preparation and enactment of legislation are such that a court must be slow to

> presume oversight or inarticulate intentions when the rights of citizens are involved. The Legislature has complete control of the process of legislation, and where it has not for any reason clearly expressed itself, it has all the resources available to correct that inadequacy of expression. This is more true today than ever before in the history of parliamentary rule. (Emphasis added)
>
> ***Morguard Properties Ltd v Winnipeg (City)*, [1983] 2 SCR 493 (QL) at 12 [Plaintiff's Book of Authorities, Vol. 1, Tab 18].**
>
> ***Tardif (Estate of) v Wong*, 2002 ABCA 121 (QL) at para 34 [Plaintiff's Book of Authorities, Vol. 1, Tab 19].**

70. The statutory immunity clause is clear on its face: it bars any "action or proceeding in respect of any act or thing done or purported to be done". No mention is made of "any omission or thing not done".

71. The court must give effect to the wording of the statute. It is not open to the ERCB to ignore what the legislature enacted and instead substitute an alternate provision that is preferred by the ERCB. The ERCB seeks to add words that simply are not there in order to create an entirely new category of immunity. On a plain reading, the words "any act or thing done" cannot be reasonably interpreted as including "any omission or thing not done".

72. The application of these well-established legal principles fits well with the actual practice of the Alberta legislature. A review of Alberta statutes clearly demonstrates that when the Alberta Legislature intends to include "omissions" or "things not done" in statutory immunity clauses for various government regulators, it does so explicitly and with clear language. For example, the following statutory immunity clause for the Alberta Utilities Commission includes explicit wording specifying both "any act omitted to be done" in addition to "any act or thing done":

> No action or proceeding in respect of any act or thing done *or omitted to be done* or purported to be done or *omitted to be done* in good faith under this or any other enactment or under a decision, order or direction of the Commission may be brought against the Commission, any member or any person referred to in section 68(1). (Emphasis added)
>
> ***Alberta Utilities Commission Act*, SA 2007, c A-37.2, s 69 [Plaintiff's Book of Authorities, Vol. 1, Tab 20].**

73. Other Alberta acts which specifically immunize for omissions through clear statutory language include: *Agrology Profession Act*, SA 2005, c A-13.5, s 98 (1); *Alberta Human Rights Act*, RSA 2000, c A-25.5, s 41; *Child and Family Services Authorities Act*, RSA 2000, c C-11 RSS, s 19; *Court of Queen's Bench Act*, RSA 2000, c C-31, s 14; *Emergency Medical Aid Act*, RSA 2000, c E-7, s 2; *Farm Implement Act*, RSA 2000, c F-7, s 44; *Fisheries (Alberta) Act*, RSA

2000, c F-16, s 42; *Gaming and Liquor Act*, RSA 2000, c G-1, s 32; *Health Professions Act*, RSA 2000, c H-7 s 126 (1); *Health Quality Council of Alberta Act*, SA 2011, c H-7.2, s 23; *Persons with Developmental Disabilities Community Governance Act*, RSA 2000, c P-8, s 20; *Regulated Forestry Act*, RSA 2000, c R-13, s 95(1); *Safety Codes Act*, RSA 2000, c S-1, s 12(1); and *Securities Act*, RSA 2000, c S-4, s 222(1)

Plaintiff's Book of Authorities, Vol. 1, Tab 20.

74. Of particular note, since this litigation was launched, the Alberta Legislature has passed a new Act creating an agency that will replace the ERCB and include the ERCB's mandate entitled *Bill 2, Responsible Energy Development Act*, which received Royal Assent on December 10, 2012. This Act contains a modified "protection from action" clause, which reads:

> 27 No action or proceeding may be brought against the Regulator, a director, a hearing commissioner, an officer or an employee of the Regulator, or a person engaged by the Regulator, in respect of any act or thing done or omitted to be done in good faith under this Act or any other enactment. (Emphasis added)
>
> ***Bill 2, Responsible Energy Development Act*, SA 2012 cR-17.3, s. 27 [Plaintiff's Book of Authorities, Vol. 2, Tab 21].**

The wording chosen by the legislature in the most recent statutory immunity clause applicable to the government regulator of the oil and gas industry clearly demonstrates that the Legislature was alive to the distinction between an "act or thing done" and an "act or thing omitted to be done", and considered the difference significant enough to expressly include both categories in this Act.

> ***Bill 2, Responsible Energy Development Act, ibid*, s 27 [Plaintiff's Book of Authorities, Vol. 2, Tab 21].**

75. The legislature is familiar with its own statute book and its own drafting practices. If the legislature had intended to limit the liability of the ERCB for omissions as well as actions, it would have drafted a provision explicitly doing so, as it has done on numerous other occasions, and as it did in the *Responsible Energy Development Act*. The fact that it did not do so in this case must be seen as deliberate.

> ***Smorag v Nadeau*, 2008 ABQB 714 (QL) at para 28 [Plaintiff's Book of Authorities, Vol. 2, Tab 22].**

76. This interpretation is consistent with case law. For example, in the case of *Mercure v A Marquette & Fils Inc*, the Supreme Court of Canada considered whether the phrase "any action taken" could be construed to include negligent omissions, and concluded that, as the legislator

used restrictive wording, this section applied only to actions, and not to the negligent failure to act.

> ***Mercure v A Marquette & Fils Inc,* [1977] 2 SCR 547 (QL) at 5 [Plaintiff's Book of Authorities, Vol. 2, Tab 23].**

Statutes which limit rights of action must be strictly construed

77. Moreover, the interpretation that the ERCB's statutory immunity provision does not apply to omissions is consistent with the principle that if the legislature wishes to exempt a government agency from liability for negligent actions, it must do so expressly, in clear and unambiguous language.

> ***Encampment Creek Logging Ltd v Alberta*, 2005 ABQB 787 (QL) at para 16 [Plaintiff's Book of Authorities, Vol. 2, Tab 24].**

78. It is settled law that statues that purport to restrict or otherwise take away rights of action attract a strict interpretation, and any ambiguity should be resolved in favour of the person whose rights are being truncated.

> Section 11, being a restrictive provision, wherein the rights of action of the citizen are necessarily circumscribed by its terms attracts a strict interpretation and any ambiguity found upon the application of the proper principles of statutory interpretation should be resolved in favour of the person whose right of action is being truncated.
>
> ***Berardinelli v Ontario Housing Corp*, [1979] 1 SCR 275 (WL) at para 10 [Plaintiff's Book of Authorities, Vol. 2, Tab 25].**
>
> **See also *Tardif, supra* at paras 21, 26, 56 [Plaintiff's Book of Authorities, Vol. 1, Tab 19].**

79. The ERCB argues that the immunity provision takes away any and all causes of action for anything the ERCB has done or has failed to do, and provides immunity for "not only negligence, but gross negligence, bad faith and even deliberate acts". If indeed the legislature wishes to grant such sweeping and total immunity to a government agency that has such an important role in the lives of rural Albertans, it must do so specifically and with clear wording. It has not. The legislature has failed to include omissions. The statutory immunity clause therefore does not apply in this case.

> **ERCB Brief, at para 88.**

80. The ERCB also attempts to argue that the negligent failures pleaded by the Plaintiff are not "omissions" but rather are "acts taken by the ERCB". The pleadings, however, are clear. Paragraph 40 contains the particulars of the ERCB's numerous negligent failures to act. Black's

Law Dictionary defines "Omission" as a "failure to do something; esp. a neglect of duty". This is precisely what the Plaintiff has pleaded.

> **Statement of Claim at paras. 39-40.**
> ***Black's Law Dictionary*, 8th ed. (St. Paul: West, 2004), "omission" [Plaintiff's Book of Authorities, Vol. 2, Tab 26].**

81. The ERCB argues that such omissions were actually positive discretionary decisions taken by the ERCB – and therefore such decisions are better understood as "actions". With respect, this mischaracterizes the pleadings. The Plaintiff has not pleaded that the ERCB considered and specifically decided in each case whether or not to act. If the ERCB wishes to assert that the pleaded "failures to act" were actually positive decisions taken by the ERCB, the ERCB bears the onus of demonstrating that the alleged failures to act specified in paragraphs 39 and 40 were the subject of specific and positive discretionary decisions by the ERCB not to act. The ERCB has not and cannot do this, and has instead baldly alleged, without reference to any evidence or law, that numerous pled failures to act are actually positive acts. With respect, more is needed in order to convert what is on its face obviously an omission into an action.

> **Statement of Claim at paras 39-40.**
> **ERCB Brief at para 115.**

82. The case law is clear. Since the legislature failed to employ specific and clear language in s. 43 of the *Energy Resources Conservation Act* to include negligent omissions, the ERCB cannot rely on this section to immunize it from claims based in nonfeasance, or the negligent failure to act, including the specific omissions pleaded in the Plaintiff's Statement of Claim.

> ***Energy Resources Conservation Act, supra*, s 43 [Plaintiff's Book of Authorities, Vol. 1, Tab 17].**
> **Statement of Claim at para 40.**

ISSUE #3: The Plaintiff has asserted a valid *Charter* claim

The Charter *claim*

83. The ERCB is a government agency tasked with regulating all aspects of the oil and gas industry, a mandate that it must carry out, in part, in the "public interest" for the benefit of all Albertans. If a citizen wishes to communicate with the government agency with an interest in and power over the oil and gas industry, it must necessarily be with the ERCB.

> ***The Oil and Gas Conservation Act, supra*, ss 3-4 [Plaintiff's Book of Authorities, Vol. 1, Tab 16].**

***Energy Resources Conservation Act, supra,* s 3 [Plaintiff's Book of Authorities, Vol. 1, Tab 17].**

84. The ERCB invites and encourages such communication. The ERCB emphasizes the importance of public involvement in the regulation of oil and gas in Alberta, stating that "[t]he public are strongly encouraged to participate in ongoing issue identification, problem solving and planning with respect to local energy developments".

Statement of Claim at para 43.
***Guide 56: Energy Development Applications and Schedules,* at 5 [ERCB Book of Authorities, Tab 52].**

85. Important public communication with the ERCB takes place through the ERCB's compliance and field surveillance branches. These offices are the natural and usual offices to which a member of the public would seek to express their views on concerns arising from oil and gas development in Alberta.

Statement of Claim at para 43.

86. In the case at bar, the Plaintiff pleads that:

(a) Ms. Ernst voiced her concerns about oil and gas development near her home both by communicating directly with ERCB offices as well as through other modes of public expression, including through the press and in communication with fellow citizens;

Statement of Claim at para 45.

(b) Ms. Ernst was a vocal and effective critic of the ERCB. Her public criticisms put unwanted public attention on the ERCB and caused embarrassment within the organization;

Statement of Claim at para 46.

(c) The ERCB seized on an offhand reference to Weibo Ludwig and used it as an unjustified excuse to restrict her free speech by prohibiting her from communicating with the ERCB; and

Statement of Claim at paras 47-54.

(d) This communications ban was intended to punish Ms. Ernst for past criticisms, to prevent her from making future public criticisms of the ERCB, to marginalize her

concerns, and to prevent her from communicating with key offices within the ERCB.

Statement of Claim at para 55.

87. The Claim asserts that the ERCB's arbitrary decision to exclude Ms. Ernst from meaningful communication with the ERCB breached her s. 2(b) *Charter* rights in two ways:

(a) First, the ERCB punitively excluded Ms. Ernst from its own process in retaliation for her vocal criticism of the ERCB. In other words, it punished her for exercising her right to free speech; and

(b) Second, the ERCB arbitrarily prevented and constrained Ms. Ernst from expressing herself to the natural office that, in the normal course, accepted public concerns and complaints about the oil and gas industry from all members of the public. In other words, it blocked her and prevented her from speaking to key offices within the ERCB.

Statement of Claim at para 58.

Law regarding freedom of expression

88. Section 2(b) of the *Charter of Rights and Freedoms* guarantees that:

> 2. Everyone has the following fundamental freedoms:
> [...]
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> ***Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [Plaintiff's Book of Authorities, Vol. 2, Tab 27].**

89. The Supreme Court has held that s. 2(b) must be given a "broad and purposive interpretation". The purpose of the guarantee is to "permit free expression in order to promote truth, political and social participation and self fulfillment". The Supreme Court has emphasized that "[i]t is difficult to imagine a guaranteed right more important to a democratic society" and as such, "freedom of expression should only be restricted in the clearest of circumstances".

> ***Ross v New Brunswick School District No 15*, [1996] 1 SCR 825 (QL) at para 59 [Plaintiff's Book of Authorities, Vol. 2, Tab 28].**

90. "[S]o long as the activity conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of the guarantee of freedom of expression. The scope of constitutional protection of expression is, therefore, very broad."

***Ross, ibid* at para 60 [Plaintiff's Book of Authorities, Vol. 2, Tab 28].**

91. The test for whether there has been a breach of the right to freedom of expression is established by the Supreme Court in the following terms:

(a) First, was the individual engaged in "expression"?

(b) Second, was the purpose or effect of the government action to restrict freedom of expression?

***Ross, ibid* at para 61 [Plaintiff's Book of Authorities, Vol. 2, Tab 28].**

92. Courts are hesitant to strike out *Charter* claims at the pleadings stage, before considering a full description of the facts on which the claim is based. Claims for *Charter* relief, by their nature, impact rights and interests of individuals beyond the specific parties in the case at issue, and deserve consideration on a full record. According to the Supreme Court, "*Charter* decisions should not be made in a factual vacuum".

> A motion to strike for want of a reasonable cause of action is an unlikely vehicle in cases which comprise substantive Charter claims that raise issues of general importance, and call for a contextual approach in the assessment of fact.
>
> ***Public Service Alliance of Canada v Canada*, 2001 FCT 890, (QL) at para 40 [Plaintiff's Book of Authorities, Vol. 2, Tab 29].**
>
> ***Pacific Press, A Division of Southam Inc v British Columbia (Attorney General)* (1998), 52 BCLR (3d) 197 (SC) (QL) at para 12 [Plaintiff's Book of Authorities, Vol. 2, Tab 30].**

93. As explained above, the Claim asserts that the ERCB violated Ms. Ernst's s. 2(b) *Charter* rights in two ways:

(a) First, the ERCB punished Ms. Ernst for publicly expressing views that were critical of the ERCB; and

(b) Second, the ERCB restricted Ms. Ernst's speech by arbitrarily preventing her from communicating with key offices within the ERCB.

Statement of Claim at para 58.

94. Given both the "very broad" constitutional protection afforded by s. 2(b), as well as the stringent test to strike out a claim at the pleadings stage, the ERCB has a very difficult hill to climb if it is to be successful in dismissing the Plaintiff's *Charter* claims in this Application. It must show that, taking the facts pleaded as proved, it is plain and obvious that neither of the above claims under s. 2(b) could possibly succeed. The mere fact that the claim is somewhat novel should not prevent the claim from proceeding.

95. The two distinct aspects of the Plaintiff's claims to a *Charter* breach of the right to freedom of expression will be dealt with in turn below.

Breach #1: The ERCB violated Ms. Ernst's s. 2(b) Charter right by punishing her for expressing criticism of the ERCB to the public and the press

96. The allegation set out in the Claim is that Ms. Ernst was a vocal and effective critic of the ERCB who expressed her views, concerns and complaints regarding local impacts of the oil and gas activities and regarding the ERCB's regulation of such activities to the press, to elected government officials and to fellow citizens. She was clearly engaged in political expression of the most basic sort.

Statement of Claim at paras 45-46.

97. As pointed out by L'Heureux Dubé J., "The liberty to comment on and to criticize existing institutions and structures is an indispensible component of a 'free and democratic society'", and attracts strict *Charter* protection. As quoted with approval by L'Heureux Dubé:

> It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. These opinions may be critical of existing practices in public institutions and of the institutions themselves. [It can not be] expected that criticism will always be muted by restraint. Frustration with outmoded practices will often lead to vigorous and unpropitious complaints. (Emphasis added).
>
> ***Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139 (QL) at paras 69 & 94, citing *R v Kopyto* (1987), 24 OAC 81 (CA), at 90-91 [Plaintiff's Book of Authorities, Vol. 2, Tab 31].**

98. Ms. Ernst's expressive activity in criticizing the functioning of the ERCB publicly to citizens, to community groups, to elected officials and to the press is at the heart of s. 2(b) of the

Charter. Ms. Ernst was engaging in speech of the precise sort that the *Charter* was designed to protect.

99. The Claim asserts that the ERCB violated Ms. Ernst's s. 2(b) *Charter* right by taking punitive action against her in response to her public criticism of the ERCB. This punitive action included reporting her to the RCMP, barring her from communicating with certain ERCB staff, and excluding her from participating in the regular ERCB complaints process. The Claim also states that the ERCB further attempted to control her speech by refusing to re-open its direct communication with Ms. Ernst unless she muted her criticisms. The Statement of Claim asserts that the very purpose of the actions taken by the ERCB were to punish her for past criticism and to restrict her future speech.

Statement of Claim at paras 55-57.

100. Ms. Ernst is protected by s. 2(b) of the *Charter* in her right to publicly and openly criticize the functioning of a public institution without fear of retaliation. Punitive action in response to expression is a clear violation of s. 2(b). This was the conclusion in *Ross v New Brunswick School District No 15*, where an order was made to place a teacher on a forced leave of absence because of the teacher's public comments. The forced leave of absence was found to violate the teacher's s. 2(b) rights.

> ***Ross, supra* at para 57 [Plaintiff's Book of Authorities, Vol. 2, Tab 27].**
> ***Haydon v Canada,* [2001] 2 FC 82 (Trial Div) (QL) at para 62 [Plaintiff's Book of Authorities, Vol. 2, Tab 32].**
> ***Pridgen v University of Calgary*, 2010 ABQB 644 (QL) at para 75 [Plaintiff's Book of Authorities, Vol. 2, Tab 33].**

101. On the facts pleaded, it is clear that Ms. Ernst was engaged in expressive content as recognized by the *Charter*, and that the ERCB, through its actions, was attempting to control or restrict that speech by punishing Ms. Ernst.

Breach #2: The ERCB infringed Ms. Ernst's right to freedom of expression by prohibiting and constraining her communication with key offices of the ERCB

102. In November 2005, the ERCB took action against Ms. Ernst which was intended to, and did in fact, restrict and constrain Ms. Ernst's ability to communicate with key offices of the ERCB. In particular, Ms. Ernst attempted to communicate with offices within the ERCB and was told in no uncertain terms that the ERCB had decided to prohibit and otherwise restrict her

communications. For example, Mr. Jim Reid, the Manager of Compliance Branch at the ERCB, the office responsible for receiving public concerns and complaints, informed Ms. Ernst that he had instructed staff to avoid any further contact with her. Further, Mr. Richard McKee, a lawyer with the ERCB, confirmed to Ms. Ernst that the ERCB had made a decision to discontinue communication with her. These actions by the ERCB were prohibitive and constraining, and were intended to be so.

Statement of Claim at paras 48, 52, 55.

103. The communications restrictions placed on Ms. Ernst prevented her from effectively raising her concerns to the very office within the ERCB that had the mandate and capability to address her concerns. These restrictions were a clear breach of her right to freedom of expression. It is certainly not the case that it is plain and obvious that Ms. Ernst's *Charter* claim is certain to fail; it should not be dismissed summarily.

The expression made by Ms. Ernst was not "violent expression"

104. The ERCB takes the prejudicial, vexatious, unsupported and wholly unsupportable position that the "expression" the Plaintiff seeks to protect was a "threat of violence" and that the ERCB ceased communication with Ms. Ernst "in order to protect its staff, the Alberta public and the Alberta oil and gas industry from further acts of eco-terrorism". This is a prejudicial and irresponsible accusation that is entirely without foundation.

ERCB Brief at paras 133-134.

105. While s. 2(b) does not protect "violent expression", no reasonable interpretation of Ms. Ernst's offhand reference to Weibo Ludwig would possibly view her comment as a "threat of violence" not deserving protection under s. 2(b).

Statement of Claim at para 47.

***Baier v. Alberta*, 2007 SCC 31 (QL) at para 20 [Plaintiff's Book of Authorities, Vol. 2, Tab 34].**

106. In any event, at the moment, all that is before the court are the Plaintiff's pleadings contained in the Statement of Claim. If the ERCB wishes to advance its patently absurd and irresponsible theory that Ms. Ernst's offhand reference to Weibo Ludwig was somehow a "threat of violence", and that an appropriate response to "protect against further acts of eco-terrorism"

was to cease communication with the Plaintiff, it must do so by forwarding cogent evidence. The ERCB has not, and frankly cannot, put forward such evidence.

107. The Plaintiff looks forward to contesting these unfounded allegations, but it must be done in accordance with the proper process, not by advancing damaging allegations in a Brief without any supporting evidence. It is wholly improper for the ERCB to engage in character assassination or to assert an extreme interpretation of the Plaintiff's expression by asserting "facts" that have no basis in the record.

ERCB Brief at paras 133-134.

108. The Plaintiff asserts that the forwarding of these irresponsible accusations in an improper form and for an improper purpose is conduct deserving of a costs award under r. 10.50 of the *Alberta Rules of Court*. The Plaintiff asserts that this situation is analogous to the case of *Eblie v. Yankoski*, where a lawyer was sanctioned for forwarding "completely and utterly irrelevant, scandalous, frivolous and vexatious" accusations in an affidavit. In that case, the court found that it was "difficult to accept that these materials were not prepared and filed for an improper purpose, namely to prejudice the mind of the court against the opposite party." Such comments are apposite here.

***Alberta Rules of Court*, r 10.50 [Plaintiff's Book of Authorities, Vol. 1, Tab 1].**
***Eblie v. Yankoski*, 2007 MBQB 106 (CanLII) at paras. 24-26 [Plaintiff's Book of Authorities, Vol. 2, Tab 35].**

This is not a case of a "captive audience"

109. The ERCB argues that Ms. Ernst's right to freedom of expression was not infringed when her means of expression was limited by the arbitrary restriction preventing her from communicating with the ERCB's public complaints department because, as the ERCB asserts, s. 2(b) of the *Charter* does not guarantee "the right to an audience" or a "captive audience". With respect, this is not such a claim.

ERCB Brief at paras 64, 136 and 138.

110. At best, the ERCB's position responds to only the second of the two asserted *Charter* breaches. It does not and cannot respond to the first *Charter* breach claimed – that the ERCB

sought to punish Ms. Ernst for her speech by reporting her to police and by prohibiting her from communicating with the public complaints section of the ERCB.

111. Further, the position advanced by the ERCB misunderstands and misplaces the concerns underlying the so-called "captive audience claims". To support its proposition, the ERCB cites *Ontario (Attorney General) v. Dieleman* – a case where the court considered the constitutionality of legislation designed to create a protest-free safe-zone around abortion clinics. In that case, the Plaintiffs wished to have the right to protest to what was, in effect, a "captive audience" of women seeking to use abortion clinics. The manner, form and location of the plaintiff's expression made it impossible for women seeking to use the clinics to decline to receive that message. In these cases, the courts held that in the face of substantial and pressing impacts on the right of women not to be subjected to such a message, there was no *Charter* right to express oneself in that location and in that manner.

> ***Ontario (Attorney General) v Dieleman* (1994), 20 OR (3d) 229 (Ct J – Gen Div) at paras 175-179 [Plaintiff's Book of Authorities, Vol. 2, Tab 36].**
>
> ***R v Watson*, 2008 BCCA 340 (WL) [Plaintiff's Book of Authorities, Vol. 2, Tab 37].**

112. In essence, the "captive audience" cases deal with situations where one member of the public seeks to "force" its message on another member of the public in a manner and in a forum that is wholly inappropriate, and that is detrimental to the targeted individual who does not want to receive the message. The rights of the would-be listener not to hear a message are directly at odds with the claimed rights of the speaker, and the interests of the would-be listener are substantially and significantly impacted. The court describes the problem in the following terms:

> While society cannot spin a protective cocoon around each and every woman who has decided to undergo an abortion and insulate her from all unwanted communication, there is something fundamentally disturbing about "capturing" women at the threshold of a medical facility and doing so immediately before they undergo a serious medical procedure.
>
> ***Dieleman, supra* at para 178 [Plaintiff's Book of Authorities, Vol. 2, Tab 36].**

113. The question here is entirely different. The Plaintiff does not seek to force her message on a captive audience or indeed any individual; she merely wishes to communicate with the ERCB in the same manner as everyone else. The pertinent consideration is: can a government agency, having established a public complaints mechanism and invited members of the public to communicate with the government through it, arbitrarily restrict one individual from such communication?

See for example Statement of Claim at para 53.

114. Ms. Ernst sought to express her concerns to precisely the office that the ERCB expressly created to receive exactly this type of expression, and in an entirely appropriate manner. It bears emphasizing that Ms. Ernst communicated with the ERCB in a manner that had no negative effects on the functioning of the ERCB or anyone else. Ms. Ernst does not seek to force any particular individual to hear her message; on the contrary, Ms. Ernst seeks only not to be arbitrarily restricted from expressing herself to the very office set up by the ERCB to hear complaints from the public.

Statement of Claim at paras 56-58.

The Plaintiff has not asserted a "positive right" to a government platform to enable her expression

115. The ERCB further claims that the Plaintiff seeks protection of a "positive right" to expression, and therefore her asserted *Charter* s. 2(b) claim is subject to the more restricted analysis used to determine when the government must take active steps to enable the communication of an individual. The ERCB wrongly claims that Ms. Ernst is seeking positive action on behalf of the government to enable her speech.

ERCB Brief at para 141.
See *Baier v. Alberta, supra* [Plaintiff's Book of Authorities, Vol. 2, Tab 34].

116. Again, the ERCB's position is a response to only the second of the two asserted *Charter* breaches. It does not and cannot respond to the first *Charter* breach claimed – that the ERCB sought to punish Ms. Ernst for her speech by prohibiting her from communicating with the public complaints section of the ERCB.

117. Further, the ERCB mischaracterizes Ms. Ernst's second claim (that the ERCB breached her right to freedom of expression by restricting her from communicating with ERCB offices) by misunderstanding the right claimed as a "positive right". In fact, the right claimed by the Plaintiff is merely the right to engage in expression open to all members of the public without arbitrary restriction or constraint.

118. The distinction between positive and negative rights is encapsulated by the Supreme Court: "[t]he traditional view, in colloquial terms, is that the freedom of expression contained in s. 2(b) prohibits gags, but does not compel the distribution of megaphones."

***Baier v. Alberta, supra* at para 21 [Plaintiff's Book of Authorities, Vol. 2, Tab 34].**

119. Positive rights cases are characterized by situations where a government has, through statute, created a platform for expression that only some individuals are able to access. Claimants in positive rights cases tend to argue that the statutory framework is under-inclusive, and that it should be expanded to allow others access to the statutorily created platform as well. Put colloquially, claimants in positive rights cases are seeking that the government be made to distribute more megaphones to more people.

***Baier v. Alberta, supra* at paras 20-25 [Plaintiff's Book of Authorities, Vol. 2, Tab 34].**

120. As held in *Baier*, when the government creates by statute a particular forum for expression, and the right claimed depends on that statutory framework to enable the right, a claim for a positive right to access to this particular statutory forum may be worthy of *Charter* protection, but only in the limited circumstances as defined in *Baier*. For clarity, the Plaintiff does not make any claims for a positive right of expression requiring government support.

***Baier v. Alberta* [2007] 2 SCR 673, at paras 27, 30 [Plaintiff's Book of Authorities, Vol. 2, Tab 34].**

121. On the other hand, claims regarding government action which interferes with or restricts expression will always infringe s. 2(b), provided that the test first set out in *Irwin Toy* is met (i.e. the individual was engaged in expression and the purpose or effect of the government action was to restrict that expression). These claims are better understood as involving situations where the government has taken actions which limit, prohibit, restrict or otherwise constrain expression. Again, in the colloquial words of the Supreme Court "the freedom of expression contained in s. 2(b) prohibits gags".

***Ross, supra* at para 61 [Plaintiff's Book of Authorities, Vol. 2, Tab 28].**
***Baier, supra* at paras 21, 25 [Plaintiff's Book of Authorities, Vol. 2, Tab 34].**

122. In her Statement of Claim, the plaintiff is clearly asserting that her Charter right has been infringed by arbitrary action taken by the ERCB which restricted and constrained her expression. In other words, the Plaintiff is not seeking a megaphone; rather she is simply asking that her attempts to engage in communication with the ERCB not be subject to a gag..

Statement of Claim, paras. 57-58.

123. Further the Alberta Court of Appeal has clarified that the *Baier* analysis only applies when the legislation itself gives rise to the platform to which the applicant seeks access. It does

not apply if the right sought to be protected is a pre-existing right that is later incorporated into a statutory regime. In other words, the legislature may modify the scope of the right, but must respect its pre-existence as well as the pre-existing entitlement of individuals who seek to access it.

> ***Cunningham v. Alberta (Minister of Aboriginal Affairs and Northern Development)*, 2009 ABCA 239, at paras 55-56 [Plaintiff's Book of Authorities, Vol. 2, Tab 38].**

124. This is exactly the case here. Ms. Ernst has always had the right to express her concerns regarding the oil and gas industry to various branches of government. The legislature created a statutory framework which provides for a specific office within the ERCB mandated to receive and act on concerns regarding the oil and gas industry. This statutory framework did not add to or modify the pre-existing right of communication; rather it merely directed the office to which such communication should be made. In such circumstances, it is not open to the government to arbitrarily restrict one individual from engaging in such communication.

125. Finally, the Supreme Court has cautioned against a finding that a case involves a "positive rights claim" just because there is some government involvement underlying the right claimed:

> Expression in public places invariably involves some form of government support or enablement. Streets, parks and other public places are often created or maintained by government legislation or action. If government support or enablement were all that was required to trigger a "positive rights analysis", it could be argued that a claim brought by demonstrators seeking access to a public park should be dealt with under *Baier*. . . . But to argue this would be to misconstrue *Baier*.
>
> ***Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*, 2009 SCC 31 (QL) at paras 34-35 [Plaintiff's Book of Authorities, Vol. 2, Tab 39].**

126. In particular, the Supreme Court draws attention to the distinction between, on the one hand, placing an obligation on government to provide individuals with a particular platform on the one hand (which the plaintiff is not trying to do) and, on the other hand, protecting the underlying freedom of expression of those who are free to participate in expression on that platform. In the case at bar, the Plaintiff merely seeks to express herself by means of an existing platform that she is entitled to use without undue state interference.

> ***Greater Vancouver Transportation Authority, supra* at para 35 [Plaintiff's Book of Authorities, Vol. 2, Tab 39].**

***The ECRB cannot justify its infringement of Ms. Ernst's* Charter *rights under s. 1 of the* Charter**

127. The ERCB has restricted its submissions only to the issue of whether it is possible that a court could find that Ms. Ernst's *Charter* right had been breached. No attempt was made by the ERCB to put forward an argument that would deal with the additional and fundamental legal issues raised under s. 1 of the *Charter*.

128. It is, of course, open to the ERCB to argue that, according to the evidence, the ERCB's infringement of Ms. Ernst's right to freedom of expression was somehow justified under s. 1 of the *Charter*. It is difficult to see how such an argument might be possible.

129. In order to justify the asserted breach of s. 2(b), the ERCB would be required to prove that the infringement was saved under s. 1 of the *Charter*. To satisfy the requirements of s. 1, the government must establish on a balance of probabilities that the infringement of the right is a reasonable limit, prescribed by law, which is demonstrably justified in a free and democratic society. The evidence relied upon by the government must be cogent and persuasive.

> ***R v Watson, supra* at para 30 [Plaintiff's Book of Authorities, Vol. 2, Tab 37].**

130. Summary applications are not an appropriate venue to address these issues. Indeed, as the ERCB has not yet served a statement of defence, it is not known what the ERCB's defenses will be, let alone whether such defenses are in accordance with the facts and the law. A s. 1 analysis is necessarily fact specific and, as a result, must usually take place in the context of a trial, rather than summarily in a motion to strike.

> The nature of the balancing of interests required by this test requires, in my respectful view, a careful analysis of the circumstances within the context of the factual matrix from which they arise. Such a process does not easily lend itself to the type of summary determination sought here [motion to strike the claim].
>
> ***Pacific Press, supra* at para 12 [Plaintiff's Book of Authorities, Vol. 2, Tab 30].**

131. Moreover, in order to justify a *Charter* breach under s. 1, the action constituting the breach must be "prescribed by law". Given that the decision to exclude Ms. Ernst from the regulatory regime was arbitrary and not based in legislation or regulation, it cannot be said to be "prescribed by law".

> The requirement that the limit be prescribed by law is chiefly concerned with the distinction between a limit imposed by law and one that is arbitrary. The limit will be prescribed by law within the meaning

of s. 1 if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements. (Emphasis added)

***R v Therens*, [1985] 1 SCR 613 (QL) at para 56 [Plaintiff's Book of Authorities, Vol. 2, Tab 40].**

The Charter claim is not barred by the Limitations Act

132. The ERCB seeks Summary Judgment on the grounds that the *Charter* claim was filed outside the two-year limitation period set by the *Limitations Act*. The *Limitations Act* reads:

> 3(1) . . . if a claimant does not seek a remedial order within
>
> (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
>
> (i) that the injury for which the claimant seeks a remedial order had occurred,
>
> (ii) that the injury was attributable to conduct of the defendant,
>
> that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding
>
> or
>
> 10 years after the claim arose,
>
> Whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim. (Emphasis added)

***Limitations Act*, RSA 2000, c L-12, s 3 [Plaintiff's Book of Authorities, Vol. 2, Tab 41].**

133. As Ms. Ernst's claim was filed on December 3, 2007, in order for the ERCB's Application for Summary Judgment to be successful, the ERCB must prove, at the very least, that Ms. Ernst knew before December 3, 2005 that (1) the *Charter* breach had occurred; (2) the breach was attributable to the ERCB, and (3) the breach warranted bringing a proceeding. The ERCB cannot and has not proven any of these elements.

134. The ERCB has filed no evidence whatsoever to show that all requirements needed to ground their limitation argument are present. Instead, the ERCB can only point to a reference in the pleadings to a letter from the ERCB that informed Ms. Ernst she was no longer permitted to communicate with ERCB staff. This letter was dated November 24, 2005. This brief reference to the date on which the letter was purportedly written is incapable of meeting the requirements set out in the *Limitations Act*.

ERCB Brief at paras 146-149.
Statement of Claim at para 48.

135. For example, the pleadings are entirely silent on the crucial issue of when Ms. Ernst actually received and read the letter. As the ERCB has failed to file any evidence regarding these essential points, there are no grounds for the ERCB's position.

136. In fact, Ms. Ernst was in the Yukon from November 26, 2005 until December 3, 2005, and did not receive or read the letter until after she had returned from her trip. If necessary, Ms. Ernst will in the future file an affidavit to that effect. Given, however, the lack of required evidence put forward by the ERCB, this step was considered premature at this time.

137. Finally, it should also be noted that the ERCB has not yet filed a statement of defence. Limitation periods are defences which must be pleaded. In order to avail themselves of the *Limitations Act*, defendants must "plead this Act as a defence". Had the ERCB pleaded the limitation period, the Plaintiff could have pleaded further facts in reply, including the fact that, as noted above, she did not receive or read the letter from the ERCB until after her return on December 3, 2005.

> ***Limitations Act, supra,* s 3(1) [Plaintiff's Book of Authorities, Vol. 2, Tab 41].**
> ***Alberta Rules of Court, supra,* ss 3.30-3.33 [Plaintiff's Book of Authorities, Vol. 1, Tab 1].**

Miscellaneous issues

138. The ERCB also improperly and prematurely seeks to have particulars ordered. There is a procedure for particulars under the Rules, which the ERCB has chosen not to follow. Its request that the Court order particulars before making any attempt to request them from the Plaintiff, as required by the Rules, is therefore premature:

> **Request for particulars**
> 3.61(1) A party on whom a pleading is served may serve on the party who served the pleading a request for particulars about anything in the pleading.
> (2) If the requesting party does not receive a sufficient response within 10 days after the date on which the request is served, the requesting party may apply to the Court for an order requiring the party who served the pleading to provide the particulars.
>
> **ERCB Brief at paras 244-250.**
> **Alberta Rules of Court, r. 3.61 [Plaintiff's Book of Authorities, Vol. 1, Tab 1].**

PART III: RELIEF SOUGHT

139. The Plaintiff (Respondent) Jessica Ernst respectfully requests the following relief:

(a) An Order dismissing the Application brought by the ERCB;

(b) An Order granting costs of these Applications to Ms. Ernst on such a basis as this Honourable Court deems just and appropriate in the circumstances;

(c) Such further and other relief as counsel may advise and this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of December, 2012.

KLIPPENSTEINS BARRISTERS & SOLICITORS

Per: _____
Murray Klippenstein

_____
W. Cory Wanless

Counsel for the Respondent,
Jessica Ernst

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