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File No: 12133-001

VIA FAX

October 1, 2015

Roger Bilodeau, QC
Registrar
Supreme Court of Canada
301 Wellington Street
Ottawa, Ontario K1A 0J1

Dear Sir:

Re: Jessica Ernst v. Alberta Energy Regulator
Response to Intervener Motions in SCC Court File No. 36167

We represent the Respondent, Alberta Energy Regulator ("AER") in this appeal. We respectfully submit this letter as our response to the Applications of 1) Donna Francis Dahm ("Dahm") and Robert Pius Plowman ("Plowman"), and 2) The Canadian Civil Liberties Association ("CCLA") for leave to intervene in this appeal.

Rule 57 conveniently codifies the criteria applicable to the granting of an intervention. In an article entitled "Interveners and the Supreme Court of Canada" National 8: 3 (May 1999), 27, Major J comments on these criteria:

> The value of an intervener's brief is in direct proportion to its objectivity. Those interventions that argue the merits of the appeal and align their argument to support one party or the other with respect to the specific outcome of the appeal are, on this basis, of no value. That approach is simply piling on, and incompatible with a proper intervention.
>
> The anticipation of the court is that the intervener remains neutral in the result, but introduces points different from the parties and helpful to the court.

The Respondent does not oppose the application of the CCLA. The CCLA is not tied to the interests of any party to this appeal. It has an obvious longstanding and respected history of advocating for the recognition and expansion of *Charter* rights, a sound history of appearing before this Honourable Court on such issues, and an undeniable track record of providing a useful and helpful perspective to the Court. Notwithstanding that the CCLA intends to support a position different than that sought by the Respondent, the CCLA's intervention is not opposed.

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However, the Respondent submits that the CCLA's submissions should not be duplicative of any party's submissions, should not seek to introduce new facts or issues, and should be limited to 10 pages. The CCLA should not seek or be granted costs. Only once the Court has reviewed the CCLA's Factum, should it be decided whether the CCLA should be granted leave to make oral representations, in which case those should be limited to 10 minutes. The Respondent seeks leave to submit a reply Factum to the CCLA's Factum not exceeding 10 pages.

The proposed intervention by Dahm and Plowman is opposed by the Respondent. They do not satisfy the requirements of Rule 57 of the *Rules of the Supreme Court of Canada*. They are partisan and align their arguments with one party, thereby depriving their potential submissions of value to this Honourable Court. Their interests are wholly aligned with those of the Appellant, and they are proposing to "descend into the arena" by advocating the Appellant's position. The Appellant can readily advocate her position.

The purported interest of Dahm and Plowman is as persons who reside in an area with heavy oil reserves, regulated by the AER. They have personal concerns and issues regarding emissions and odours in that area, and claim in their Affidavits to have suffered "a range of physical and psychological impairments" from those (see, for example, Dahm Affidavit, paragraphs 7 and 8). These impairments apparently arose in 2008 (Motion for Intervention, paragraph 3). Alberta has a two year limitation.

Dahm, Plowman, and others apparently invoked the AER's processes, resulting in an independent inquiry by the AER, which received extensive submissions and testimony. The inquiry panel made findings, some of which are referred to in the Motion for Intervention. Dahm and Plowman assert that they "believe that the findings of the Proceedings demonstrate that the AER has deprived them of their liberty and security of person" which is "informed by advice of their counsel and a legal academic paper that specifically explores the section 7 *Charter* claim that could be made in this context". Their counsel, and the author of the paper on which they rely, are the same person (see, for example, Affidavit of Dahm, Exhibit A).

Dahm and Plowman explain in their Affidavits that the paper sets out the unique features of Peace River (Affidavit, paragraph 3) and the region's heavy oil deposits. They seek to introduce new evidence, being the Panel's Report (see Affidavit, Exhibit B - a 72 page report that is wholly irrelevant to this appeal), and the process for heavy oil extraction in the Peace River area. They raise the alleged effects of this activity on the area and on themselves (see Affidavits, paragraphs 7 and 8), and they address the proceedings that they have been involved in before the AER.

Dahm and Plowman indicate that they are "interested in potentially bringing a section 7 *Charter* claim against the AER. . ." (see Affidavit, paragraph 14), and they raise concerns as to the potential for success regarding their potential claim (see Affidavit of Dahm, paragraph 15). On this basis, Ms. Dahm asserts "a direct interest in the outcome of this appeal" (Affidavit, paragraph 16). This "direct interest" is a personal interest in bringing a personal claim (see Motion for Intervention, paragraph 3). Dahm and Plowman are, in effect, seeking to bring a

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reference question on their own potential claim to this Honourable Court (see Dahm Affidavit, paragraph 17).

Dahm and Plowman indicate that they are "interested in asserting their legal rights through a section 7 *Charter* claim" (emphasis added). They take precisely the same position as the Appellant in respect of section 43 of the *Energy Resources Conservation Act*, RSA 2000, c.E-10.

Dahm and Plowman further assert that, as a result of proceeding before the AER, they have a "special insight into the regulatory framework of the administrative body" (Dahm Affidavit, paragraph 18). With respect, appearing before a tribunal does not provide such a special insight.

The submissions that Dahm and Plowman intend to make are otherwise wholly duplicative of, and add nothing to, the Appellant's arguments. They propose to make submissions regarding the merits of the appeal (see Dahm Affidavit, paragraph 20 (c)). They assert that "Bringing this claim in this manner is the only way for the Appellant to assert her alleged *Charter* right" (Dahm Affidavit, paragraph 20 (c)).

The Dahm and Plowman application for leave to intervene is not likely to be objective or controlled to the parameters required by this Honourable Court, and is likely to be duplicative, repetitive, and not useful. The AER therefore opposes the Dahm and Plowman application for leave to intervene.

Should Dahm and Plowman be granted leave to intervene, it is respectfully submitted that they should be restricted to no more than 5 pages of submissions, they should be precluded from introducing any new facts, evidence or issues, they should be precluded from duplicating any submissions of the parties, they should not be allowed to seek costs, and they should not be granted leave to make oral representations. If Dahm and Plowman are entitled to intervene, the Respondent respectfully requests leave of this Honourable Court to file a Factum in reply not exceeding 5 pages.

Yours truly,

Jensen Shawa Solomon Duguid Hawkes LLP

as agent for

GLENN SOLOMON, Q.C.
GS:lj

cc: Murray Klippenstein & W. Cory Wanless, Counsel for the Appellant, Jessica Ernst
Christopher M. Rupar, Counsel for the Intervener, Attorney General of Canada
Graeme G. Mitchell, QC, Counsel for the Intervener, Attorney General for Saskatchewan
Jonathan G. Penner, Counsel for the Intervener, Attorney General of British Columbia
Robert Desroches & Carole Soucy, Counsel for the Intervener, Attorney General of Quebec
Avnish Nanda & Dev S. Nanda, Counsel for the Proposed Intervener, Donna Frances Dahm and Robert Pius Plowman
Stuart Svonkin, Brendan Brammal & Michael Bookman, Counsel for the Proposed Intervener, Canadian Civil Liberties Association

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