SCC Court File No.: 36167

**IN THE SUPREME COURT OF CANADA**
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

B E T W E E N:

**JESSICA ERNST**

Appellant

-and-

**ALBERTA ENERGY REGULATOR**

Respondent

-and-

**ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL FOR SASKATCHEWAN, ATTORNEY GENERAL OF QUEBEC, CANADIAN CIVIL LIBERTIES ASSOCIATION, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, and DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS**

Interveners

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# REPLY FACTUM OF THE APPELLANT, JESSICA ERNST

(Pursuant to Rules 29(4) and 35(4) of the *Rules of the Supreme Court of Canada*)

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**KLIPPENSTEINS**
**Barristers & Solicitors**
160 John Street, Suite 300
Toronto, ON M5V 2E5
Tel: (416) 598-0288
Fax: (416) 598-9520

**Murray Klippenstein**
murray.klippenstein@klippensteins.ca
**W. Cory Wanless**
cory.wanless@klippensteins.ca

Lawyers for the Appellant Jessica Ernst

**NELLIGAN O'BRIEN PAYNE LLP**
50 O'Connor Street, Suite 1500
Ottawa, ON K1P 6L2
Tel: (613) 231-8311
Fax: (613) 788-3667

**Christopher Rootham**
christopher.rootham@nelligan.ca

Ottawa agent for the Appellant Jessica Ernst


**ORIGINAL TO:**

**THE REGISTRAR**
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

**COPIES TO:**

**JENSEN SHAWA SOLOMON DUGUID HAWKES LLP**
800, 304 –8 Avenue SW
Calgary, AB T2P 1C2
Tel: (403) 571-1520
Fax: (403) 571-1528

**Glenn Solomon QC**
gsolomon@jssbarristers.ca
**Christy Elliott**
elliottc@jssbarristers.ca

Lawyers for the Respondent Alberta Energy Regulator

**GOWLING LAFLEUR HENDERSON LLP**
160 Elgin St., Suite 2600
Ottawa, ON K1P 1C3
Tel: (613) 786-0171
Fax: (613) 563-9869

**Jeffrey W. Beedell**
jeff.beedell@gowlings.com

Ottawa agent for the Respondent Alberta Energy Regulator

**MINISTRY OF THE ATTORNEY GENERAL OF BRITISH COLUMBIA**
6th-1001 Douglas Street
Victoria, British Columbia V8W 9J7
Tel: (205) 952-0122
Fax: (205) 356-9154

**Jonathan Penner**
jonathan.penner@gov.bc.ca

Lawyer for the Intervener, the Attorney General of British Columbia

**BURKE-ROBERTSON LLP**
441 MacLaren Street, Suite 200
Ottawa, ON K2P 2H3
Tel: (613) 236-9665
Fax: (613) 235-4430

**Robert E. Houston, Q.C.**
rhouston@burkerobertson.com

Ottawa agent for the Intervener, the Attorney General of British Columbia

**DEPARTMENT OF JUSTICE CANADA**
130 King Street West, Suite 3400, Box 36
Toronto, ON M5X 1K6
Tel: (416) 973-9704
Fax: (416) 973-0809

**Michael H. Morris**
michael.morris@justice.gc.ca

Lawyer for the Intervener, the Attorney

**DEPARTMENT OF JUSTICE CANADA**
William F. Penteny, Q.C.
Deputy Attorney General of Canada
50 O'Connor Street
Ottawa, ON K1A 0H8
Tel: (613) 670-6290
Fax: (613) 954-1920

**Christopher Rupar**
crupar@justice.gc.ca

General of Canada

Ottawa agent for the Intervener, the Attorney General of Canada

**SASKATCHEWAN MINISTRY OF JUSTICE**
Constitutional Law Branch
820 – 1874 Scarth Street
Regina, SK S4P 3V7
Tel: (306) 787-8385
Fax: (306) 787-9111

**Graeme G. Mitchell, Q.C.**
graeme.mitchell@gov.sk.ca

Lawyer for the Intervener, Attorney General for Saskatchewan

**GOWLING LAFLEUR HENDERSON LLP**
Barristers & Solicitors
160 Elgin Street, 26th Floor
Ottawa, ON K1P 1C3
Tel: (613) 786-8695
Fax: (613) 788-3509

**D. Lynn Watt**
lynne.watt@gowlings.com

Ottawa agent for the Intervener, the Attorney General for Saskatchewan

**PROCUREURE GÉNÉRALE QUÉBEC**
Direction du droit public
1200, route de l'Église, 2e étage
Québec, QC G1V 4M1
Tél: (418) 643-1477
Téléc.: (418) 644-7030

**Robert Desroches**
robert.desroches@justice.gouv.qc.ca
**Carole Soucy**
carole.soucy@justice.gouv.qc.ca

Procureurs de la Procureure générale Québec

**NOËL & ASSOCIÉS s.e.n.c.r.l.**
111, rue Champlain
Gatineau, QC J8X 3R1
Tél: (819) 771-7393
Téléc: (819) 771-5397

**Pierre Landry**
p.landry@noelassocies.com

Correspondants pour les procureurs de la procureure générale du Québec

**Chernos Flaherty Svonkin LLP**
40 University Avenue, Suite 710
Toronto, ON M5J 1T1
Tel: (416) 855-0404
Fax: (647) 725-5440

**Stuart Svokin**
ssvonkin@cfscounsel.com
**Brendan Brammall**
bbramall@cfscounsel.com
**Michael Bookman**
mbookman@cfscounsel.com

Counsel for the Intervener, Canadian Civil

**Borden Ladner Gervais LLP**
World Exchange Plaza
100 Queen Street, Suite 1300
Ottawa, ON K1P 1J9
Tel: (613) 787-3562
Fax: (613) 230-8842

**Nadia Effendi**
neffendi@blg.com

Ottawa agent for the Intervener, Canadian Civil Liberties Association

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## PART I – OVERVIEW AND STATEMENT OF FACTS

### *Overview*

The present appeal raises one discrete issue: can a government, through legislation, block an individual from applying to a superior court seeking a remedy for a breach of her *Charter* rights pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms* (the *"**Charter**"*)?

This is the issue on which the appellant sought leave to appeal,[1] this is the sole constitutional question as framed by the Chief Justice of this Honourable Court,[2] and this is the sole ground of appeal as set out in the appellant's factum.[3]

The respondent Alberta Energy Regulator[4] ("**AER**" or the "**Respondent**") now seeks to open another front in this appeal, specifically asking the Supreme Court of Canada to engage in what amounts to a basic procedural pleadings motion to determine whether the statement of claim discloses a cause of action for a breach of s. 2(b) of the *Charter*.[5] In so doing, the AER takes the untenable position that this claim does not engage s. 2(b) of the *Charter* at all.[6]

It is the Appellant's view that the question of whether the statement of claim discloses a cause of action is not before this Honourable Court. The specific finding made by Chief Justice Wittmann that the "*Charter* claim [as pleaded] is valid,"[7] has never been appealed by the AER. This question was explicitly not before the Court of Appeal of Alberta, [8] and therefore, in the Appellant's view, is not properly before this Court.

1 Application for leave to appeal, filed November 13, 2014.

2 Order on motion to state a constitutional question, Supreme Court of Canada, dated June 25, 2015 [Appellant's Record, Tab 7 at 85].

3 Factum of the Appellant, Jessica Ernst, dated September 11, 2015 ("**Appellant's Factum**") at paras. 41-42.

4 The Claim is brought against the Energy Resources Conservation Board ("ERCB"). The ERCB has since been succeeded by the Alberta Energy Regulator, which has assumed all of the ERCB's liabilities. For the purposes of this Factum, the public energy regulator will be referred to as the "**Alberta Energy Regulator**" or "**AER**."

5 Factum of the Respondent, Alberta Energy Regulator, dated November 5, 2015 ("**Respondent's Factum**") at paras. 3, 26, & 88-122.

6 Respondent's Factum at paras. 3 & 26.

7 Reasons for Judgment of the Honourable Chief Justice Neil Wittmann, Court of Queen's Bench of Alberta, dated September 16, 2013 ("**ABQB Reasons**") at para. 130(b) [Appellant's Record, Tab 2 at 41].

In any event, the respondent's new line of argumentation must be rejected. The pleadings clearly disclose a straightforward freedom of expression claim. The pleadings assert that the AER, a government agency, restricted Ms. Ernst's freedom of expression by withdrawing access to government services in response to her public criticism of the AER. The Appellant asserts that the action taken by the AER – in particular refusing to reopen regular communication with Ms. Ernst unless she agreed to stop criticizing the AER publicly (which she would not agree to do) – was intended both to punish Ms. Ernst for her past speech, and to control her future speech. This is clearly not a case where it is "plain and obvious" that the pleadings disclose no cause of action and therefore must be struck out at the outset of litigation.

***Facts***

The relevant facts in this appeal are covered in greater detail at paragraphs 11-40 of the Appellant's Factum. The pleadings relevant to this reply factum are summarized in brief below.

Oil and gas development in Rosebud, Alberta, has left a litany of harms including groundwater that is so contaminated with methane that water from household faucets can be lit on fire.[9] In that context, the Appellant Jessica Ernst became an outspoken and effective critic of the oil and gas industry and of the energy regulator, the AER. She spoke publicly about the harms caused by oil and gas development in her community and the regulator's failure to stop these harms.[10]

The AER did not take to Ms. Ernst's criticisms kindly. As set out in the pleadings, Ms. Ernst's "public criticisms brought public attention to the [AER] in a way that was unwanted by the [AER] and caused embarrassment within the organization."[11] As pleaded, as a result of and in response to her public criticisms, the AER seized on her offhand reference to a comment someone else made about Weibo Ludwig, and used it as an excuse to restrict her speech by prohibiting Ms. Ernst from communicating with the AER through the usual channels for public

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8 The Court of Appeal noted specifically that there was "no appeal or cross-appeal" on the issue of "whether the pleadings disclose a sustainable cause of action." Reasons for Judgment of the Court of Appeal of Alberta, dated September 15, 2014 ("**ABCA Reasons**") at para. 9 [Appellant's Record, Tab 4 at 48].

9 Fresh Statement of Claim, dated June 25, 2012 ("**Statement of Claim**") at paras. 14 & 45 [Appellant's Record, Tab 5 at 61 & 70]

10 Statement of Claim at paras. 45 & 46 [Appellant's Record, Tab 5 at 70].

11 Statement of Claim at para. 46 [Appellant's Record, Tab 5 at 70].

communication. These serious restrictions greatly limited her ability to lodge complaints, register concerns and to engage with the AER's compliance and enforcement mechanism.[12]

As pleaded, Richard McKee, a senior lawyer with the AER, later confirmed that the AER had specifically decided to stop communicating with Ms. Ernst, and would not "re-open regular communication until Ms. Ernst agreed to raise her concerns only with the [AER] and not publicly through the media or through communication with other citizens."[13] In other words, the AER attempted to control Ms. Ernst's speech by withholding regular government services from her unless and until she agreed to stop criticizing the AER publicly. Ms. Ernst did not and would never agree to such a restriction.

The pleadings further state that the AER's actions restricted Ms. Ernst's speech by (i) punishing her for publicly criticizing the AER and by (ii) arbitrarily preventing Ms. Ernst from speaking to key offices within the AER, in particular the AER's compliance and enforcement branch.[14]

The AER brought an application to strike the *Charter* 2(b) claim before the Court of Queen's Bench of Alberta on the grounds that it disclosed no reasonable cause of action.[15]

On this point, Wittmann C.J. specifically agreed with Ms. Ernst that the statement of claim properly pleads a cause of action regarding a breach of Ms. Ernst's right to freedom of expression as guaranteed by s. 2(b) of the *Charter*. Having analyzed the *Charter* claim and the general test on an application to strike, Wittmann C.J. allowed the claim to stand, ultimately concluding that the "*Charter* claim of Ernst against the [AER] is valid."[16]

The Court of Appeal did not disturb Wittmann C.J.'s conclusion. Indeed, the Court of Appeal specifically stated: "[T]o clarify, there was no appeal or cross-appeal on a number of other issues,

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12 Statement of Claim at para. 47 [Appellant's Record, Tab 5 at 70].

13 Statement of Claim at para. 52 [Appellant's Record, Tab 5 at 71].

14 Statement of Claim at para. 58 [Appellant's Record, Tab 5 at 72].

15 The AER also brought what it called an application for summary judgment. In the Appellant's view, the test for a summary judgment application cannot be met because of the complete lack of evidentiary record upon which to base a summary judgment. This issue is dealt with in greater detail at paras. 31 to 34 of this factum.

16 ABQB Reasons at para. 130(b) [Appellant's Record, Tab 2 at 41].

such as: a) whether the pleadings disclose a sustainable cause of action."[17]

## PART II – ARGUMENT

### *The law on an application to strike*

The test on an application to strike is clear. As stated by this Court in *Imperial Tobacco*, "[a] claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action."[18] The test is a stringent one. A plaintiff is entitled to a broad and generous reading of the pleadings: "[t]he approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial."[19] Indeed, as this Court held in *Hunt v. Carey*, "[n]either the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect" should the claim be struck out.[20]

There is no disagreement between the parties about the legal test on an application to strike.[21] Instead, the AER is asking the Supreme Court of Canada to repeat the work of the Court of Queen's bench by engaging in a basic pleadings analysis to determine if, on the facts as pleaded, it is "plain and obvious" that the statement of claim does not disclose a reasonable cause of action.

### *Law regarding freedom of expression*

Section 2(b) of the *Charter* reads as follows:

> **Fundamental freedoms**
> 2. Everyone has the following fundamental freedoms: …

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17 ABCA Reasons at para. 9 [Appellant's Record, Tab 4 at 48].

18 *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 ("***Imperial Tobacco***") at para. 17 [Reply Book of Authorities of the Appellant ("**Reply BOA**"), Tab 2]; see also *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 ("***Hunt***") at 980 [Reply BOA, Tab 2].

19 *Imperial Tobacco* at para. 21 [Reply BOA, Tab 4].

20 *Hunt* at 980 [Reply BOA, Tab 2].

21 The parties and the Court were in agreement regarding the strict test on an application to strike out a claim, see ABQB Judgment at paras. 14-16 [Appellant's Record, Tab 2 at 7-8]; see also Respondent's Factum at para. 17.

> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.[22]

From the earliest days of the *Charter*, this Court has repeatedly emphasized "the vital importance of freedom of expression."[23] Freedom of expression "serves to anchor the very essence of our democratic political and societal structure,"[24] and, as such, "should only be restricted in the clearest of circumstances."[25]

Crucially, the "liberty to comment on and criticize existing institutions and structures is an indispensable component of a 'free and democratic society.'"[26] Quoting the United States Supreme Court with approval, this Court has recognized that "debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials."[27]

In the words of Justice Cory J.A. (then of the Court of Appeal for Ontario), quoted with approval by L'Heureux-Dubé J. in *Committee for the Commonwealth of Canada v. Canada*,

> ... it is difficult to imagine a more important guarantee of freedom to a democratic society than that of freedom of expression. A democracy cannot exist without the freedom to express new ideas and to put forward opinions about the functioning of public institutions. These opinions may be critical of existing practices in public institutions and of the institutions themselves. However, change for the better is dependent upon constructive criticism. Nor can it be expected that criticism will always be muted by restraint. Frustration with outmoded practices will often lead to vigorous and unpropitious complaints. Hyperbole and colourful, perhaps even disrespectful language, may be the necessary touchstone to fire the interest and imagination of the public, to the need for reform, and to suggest the manner in which that reform may be achieved.
>
> The concept of free and uninhibited speech permeates all truly democratic societies. Caustic and biting debate is, for example, often the hallmark of

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22 *Canadian Charter of Rights and Freedoms* at s. 2(b).

23 *Committee for the Commonwealth of Canada v. Canada* [1991] 1 S.C.R. 139 ("***Committee for the Commonwealth***") at 170-171 & 182 [Reply BOA, Tab 1].

24 *Committee for the Commonwealth* at 174 [Reply BOA, Tab 1].

25 *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 ("***Ross***") at para. 59 [Reply BOA, Tab 5].

26 *Committee for the Commonwealth* at 172 [Reply BOA, Tab 1].

27 *Committee for the Commonwealth* at 173 [Reply BOA, Tab 1].

> election campaigns, parliamentary debates and campaigns for the establishment of new public institutions or the reform of existing practices and institutions. The exchange of ideas on important issues is often framed in colourful and vitriolic language. So long as comments made on matters of public interest are neither obscene nor contrary to the laws of criminal libel, citizens of a democratic state should not have to worry unduly about the framing of their expression of ideas. The very lifeblood of democracy is the free exchange of ideas and opinions. If these exchanges are stifled, democratic government itself is threatened.[28]

This Court has held that s. 2(b) must be given a "broad and purposive interpretation."[29] The purpose of the guarantee is to "permit free expression in order to promote truth, political and social participation, and self-fulfillment."[30] So long as the activity in question "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."[31]

In *Irwin Toy v. Quebec (Attorney General),* this Court established the following two-step enquiry to determine whether an individual's freedom of expression has been infringed:

1. First, was the individual engaged in "expression"?

2. Second was the purpose or effect of the government action to restrict that freedom of expression? [32]

***Application of the law to this case***

The pleadings in this case disclose a clear freedom of expression claim. First, Ms. Ernst was engaging in expression of the precise sort that the *Charter* was designed to protect. As noted by the pleadings, Ms. Ernst was a vocal and effective critic of the AER who expressed her criticisms,

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28 *Committee for the Commonwealth* at 182 [Reply BOA, Tab 1].

29 *Ross* at para. 59 [Reply BOA, Tab 5].

30 *Ross* at para. 59 [Reply BOA, Tab 5].

31 *Ross* at para. 60 (citations omitted) [Reply BOA, Tab 5].

32 *Ross* at para. 61 [Reply BOA, Tab 5]; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927 at 967 and 971 [Reply BOA, Tab 3].

views and concerns on matters of public importance to the press and to the public.[33] Ms. Ernst's political expression is at the very heart of the purpose of the *Charter* 2(b) guarantee.

Second, both the purpose and effect of the AER's actions were to restrict freedom of speech. The statement of claim asserts that the AER responded to Ms. Ernst's unwanted public criticism by taking punitive action against her, including manufacturing a 'security threat,' reporting her to the RCMP, barring her from communicating with AER staff, and excluding her from engaging with the regular AER complaints process.[34] The statement of claim also states that the AER further attempted to control Ms. Ernst's future speech by refusing to reopen its direct communication with her unless she muted her public criticisms of the AER (which she refused to do).[35] Indeed, the statement of claim explicitly states that the purpose of the AER's actions were to "punish Ms. Ernst for past criticisms of the [AER]" and "to prevent her from making future public criticisms of the [AER]."[36]

On the facts pleaded, a valid *Charter* 2(b) claim is clearly set out. Ms. Ernst was engaged in expressive content as recognized by the *Charter*, and the AER responded to that expression by taking action intended to restrict and control that expression.[37] 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. A government agency cannot, as here, react to a citizen's expression that it does not like by punishing that citizen by withdrawing government services. Nor can a government agency, as here, impose conditions that restrict future speech which must be met before government services are reintroduced. This is all the more so when, as here, the government service in question is a compliance and enforcement process that was established specifically to accept public complaints and concerns about the oil and gas industry, including reports of illegal industry behavior.[38]

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33 Statement of Claim at paras. 45-46 [Appellant's Record, Tab 5 at 70].

34 Statement of Claim at paras. 47-48, 52 and 55 [Appellant's Record, Tab 5 at 70-72].

35 Statement of Claim at para. 52 [Appellant's Record, Tab 5 at 71].

36 Statement of Claim at para. 55 [Appellant's Record, Tab 5 at 72].

37 See the test set out in *Ross* at para. 61 [Reply BOA, Tab 5].

38 Statement of Claim at paras. 42-44, 53 & 55-58 [Appellant's Record, Tab 5 at 69-72].

***The AER mischaracterizes and misstates the claim***

In the present appeal, the AER's attack on Ms. Ernst's claim depends in large part on mischaracterizing and misstating her lawsuit at the most basic level. The Respondent attempts to transform what is a basic and straightforward claim that seeks to recognize the freedom to express views without government interference into the extreme claim that the right to freedom of expression requires a government to respond to a citizen's communication specifically in the manner desired by that citizen.[39] Paragraph 110 of the AER's factum is illustrative of this mischaracterization: "Ms. Ernst's claim, properly understood, is that the AER violated her freedom of expression because it would not listen to her, or respond to her communications in a way that she found satisfactory."[40]

This is a radical misstatement; Ms. Ernst claims no such thing. On the contrary, and as explained above, Ms. Ernst's claim is a straightforward freedom of expression claim alleging that the AER intentionally punished Ms. Ernst for past speech and attempted to restrict and control her future speech by banning her from engaging with the compliance and enforcement branch of the AER until she stopped publicly criticizing the AER.

*Not a positive rights case*

As part of its argument, the AER argues that Ms. Ernst is claiming a "positive right" to state intervention to facilitate a particular means of expression.[41] Again, this is a mischaracterization of the claim.

Ms. Ernst is not asking the AER to facilitate or help her with her expression in any way; instead, she seeks recognition of her right to criticize the AER without fear that she will subsequently be barred from communicating with key offices of the AER. In other words, to borrow the words of

39 Respondent's Factum at paras. 3, 110 & 112.

40 Respondent's Factum at para. 110.

41 Respondent's Factum at para. 115-122; the Respondent goes on to note that in some circumstances, claims to positive rights are subject to s. 2(b) protection in accordance with the test described in *Baier v. Alberta,* 2007 SCC 31, [2007] 2 S.C.R. 673 at para. 30 [Book of Authorities of the Respondent ("**Respondent's BOA**"), Tab 3], and then argues that the Appellant does not meet this test. In response, the Appellant notes that she does not claim a positive entitlement to government action, and therefore the test from *Baier* is inapplicable.

the Supreme Court in *Haig v Canada*, Ms. Ernst is not asking that the state provide her with a megaphone; rather, she is simply asking that she not be subject to a gag.[42]

*Not seeking a right to petition government*

The AER also engages in a lengthy discussion about whether there exists in Canada a constitutional right to "petition the government," relying heavily on jurisprudence from the United States.[43] In the Appellant's view that while this is a potentially important and novel area of law in Canada, it does not have to be considered or resolved as part of this appeal for the simple reason that this is not a "right to petition the government" case. Instead, the key consideration in this case 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 ban one citizen from engaging with that mechanism because it dislikes what that individual has said publicly in the past? In short, Ms. Ernst's claim does not depend upon the establishment of a constitutional right to petition the government and therefore cannot be resolved on that ground.

In any event, even if this claim did raise fundamental questions regarding whether there exists in Canada a constitutional right to petition or speak to government, such questions should not be resolved through a motion to strike. As the Respondent candidly admits, "there appears to be no Canadian authority on point."[44] In the Appellant's view it would be a mistake to engage with this novel and important constitutional point on an application to strike in a case where the issue has not been squarely raised.[45]

***The AER's purported application for summary judgment must also fail***

In addition to seeking to strike out the claims before the Alberta Court of Queen's Bench, the AER also purported to seek summary judgment, despite the fact that the record consists solely of Ms. Ernst's statement of claim. The AER failed to file any affidavits, transcripts or other

42 *Haig v. Canada*, [1993] 2 S.C.R. 995 at 1035 [Respondent's BOA, Tab 11].

43 Respondent's Factum at paras.100-107.

44 Respondent's Factum at para. 100.

45 See *Imperial Tobacco* at para. 21 [Reply BOA, Tab 4] where this Court cautions about dismissing a claim through a motion to strike just because it raises novel points of law.

evidentiary material in support of its application for summary judgment – indeed, the AER's application for summary judgment was not supported by any evidence whatsoever.

The AER now complains that the courts below applied only the test for striking a claim, and erroneously failed to apply the "less stringent" test for summary judgment.[46]

It is difficult to see how the courts below could possibly have applied the summary judgment test where, as here, no evidence of any kind has been filed by either party.[47] As noted by this Court, a case will be a good candidate for summary judgment only when, among other things, "the process (1) allows the judge to make the necessary findings of fact" (emphasis added).[48] It is impossible for a court to make "the necessary findings of fact" required for summary judgment in the total absence of evidence.

As a result of a complete lack of an evidentiary record, the only issue that was properly before the Court of Queen's Bench was whether as a matter of law a valid cause of action had been pleaded – a question which only could have been resolved through an application to strike the claim, and not through an application for summary judgment.

***Summary of argument***

The Respondent asks this Court to repeat the work of the Court of Queen's Bench by engaging in a basic procedural pleadings analysis to determine whether the statement of claim discloses a sustainable claim for a breach of s. 2(b) of the *Charter*. The AER's approach should be rejected.

The statement of claim clearly disclose a basic and straightforward freedom of expression claim. This is not a case where it is "plain and obvious" that the pleadings disclose no cause of action.

All of which is respectfully submitted this 19th day of November, 2015.

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46 Respondent's Factum at paras. 17 & 108.

47 It is noteworthy that both the Appellant's Record and the Record of the Respondent in this Appeal consist only of the statement of claim and orders and judgments below. The index for the Record of the Respondent specifically states "Part II- Evidence N/A" and "Part III – Exhibits N/A".

48 *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 at para. 49 [Respondent's BOA, Tab 14].

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Murray Klippenstein

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W. Cory Wanless

Lawyers for the Appellant, Jessica Ernst

## PART VI – TABLE OF AUTHORITIES

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## PART VII – STATUTES AND REGULATIONS RELIED UPON

### *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

***The Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982.**

**Rights and freedoms in Canada**

**Guarantee of Rights and Freedoms**

**1.** The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

**Fundamental Freedoms**

**Fundamental freedoms**

**2.** Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
(c) freedom of peaceful assembly; and
(d) freedom of association.

### *LA CHARTE CANADIENNE DES DROIT ET LIBERTÉS*

***Loi constitutionnelle de 1982* (R-U), constituant l'annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 11.**

**Garantie des droits et libertés**

**Droits et libertés au Canada**

**1.** La Charte canadienne des droits et libertés garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

**Libertés fondamentales**

**Libertés fondamentales**

**2.** Chacun a les libertés fondamentales suivantes :

(a) liberté de conscience et de religion;
(b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;
(c) liberté de réunion pacifique;
(d) liberté d'association.