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SENT BY EMAIL

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Dear Counsel,

Re: *Jessica Ernst v Encana Corporation* – Serious issues with Encana’s Affidavit of Records, and with records produced

I am writing regarding your letter of May 4, 2015 and my letter of March 27, 2015. We have waited nearly two years now and still have not been provided with any of the promised updated .csv format List of Records, or updates of the pdf’s of the records themselves and remain waiting for a satisfactory response to the other concerns raised.

In my letter, I raised serious concerns regarding Encana’s failure to meet its legal obligations regarding the disclosure of records in this action. I understood from your letter that we would shortly expect both an updated .csv format List of Records, and updates of the pdf’s of the records themselves. We have heard nothing further from you.

The following issues as raised in my letter of March 27, 2015 remain outstanding:

Disorganized and Deficient List of Records

The problems identified below are widespread. In particular, the List of Records:

- **Fails to title or describe many records:** Paragraph 3(e) of the Protocol requires the party to input a title of the records, and if that is not available, to briefly describe the record. Similarly, rule 5.7 of the *Alberta Rules of Court* states that “Each producible record in an affidavit of records must. . . (b) be briefly described”. The reasons for this are obvious – if a document does not have a sufficient title or description, the list of records is of little or no use to the parties or to the court.

In the case of Encana’s affidavit of documents, many records are simply listed as “untitled”. In fact, many records do not include titles, descriptions, authors, or any

information regarding where they came from whatsoever. This is totally and obviously contrary to the Protocol and the *Rules*. For example, within the first 100 records, the following records are listed with no information whatsoever: ECA000012; ECA000013; ECA000041; ECA000042; ECA000043; ECA000047, ECA000058, ECA000066, ECA000067, ECA000070; ECA000071; ECA000075; ECA000076; and ECA000085.

- **Misdescribes/mistitles many records:** Again, paragraph 3(e) of the Protocol requires the party to input a title of the record, and if that is not available, to briefly describe the record. Similarly, rule 5.7 of the Alberta Rules of Court states that “Each producible record in an affidavit of records must. . . (b) be briefly described”.

With respect, the titles/descriptions of many records in Encana’s list of records are completely useless. For example, ECA000022 is titled “Rock” (despite clearly being a presentation of some description authored by Encana regarding CBM drilling in the Horseshoe Canyon); ECA000032 is titled “Multiple Layers of Rock”; ECA000023 is “1-Chart.xls”; ECA000038 is titled “Executive Summary”; ECA000045 is titled “Feckly.tif”; ECA000058 is titled “6513” and so on. It appears that whoever titled these records simply picked the first few words from the record and used it as a title/description. This is pretty much useless to the parties or the court, and is contrary to both the Protocol and the *Rules*, and obviously so.

- **Fails to list records chronologically:** Paragraph 4 of the Protocol states “Electronic List of Records will assign Record IDs chronologically”. As you know, this was a significant issue for us during the negotiations regarding the Protocol. We specifically insisted on disclosure in chronological order in order to save time and costs in the process of reviewing the records. Despite explicitly agreeing to this point, many of Encana’s records are not listed chronologically, without explanation or apparent reason. Examples within the first 150 records include ECA000006; ECA000008; ECA000110; ECA000121; ECA000123; ECA000125; ECA000127; ECA000129; ECA000131; ECA000133; ECA000134; and ECA000135
- **Fails to include dates for many records:** Paragraph 3(b) requires the date of the record be included in the List of Records. The list of records fails to include a date for numerous particular records, despite the fact that either a date is clearly included on the face of the record itself, or the record was clearly originally an electronic record authored by Encana itself, and therefore Encana knows when the record was created (for example, by reference to electronic meta data). Examples within the first 100 records include ECA000001; ECA000002; ECA000003; ECA000004; ECA000005; ECA000006; ECA000007; ECA000010; ECA000011; ECA000020; ECA000022; ECA000032; ECA000033; ECA000034; ECA000039; ECA000042; and ECA000076.

Related, several records listed did not follow the dating protocol (for example, ECA000006, ECA000107 and ECA000144), while other records provide dates that are clearly incorrect (for example, ECA000043 and ECA000044).

- **Fails to list Author and Recipient, including organizations:** Paragraph 3(c) and (d) require information regarding the author, the author organization, the recipient and recipient organization to be included in the List of Records.

Encana has failed to include this information for 36 of its first 100 records, even in cases where the author is clearly known to Encana (for example, where the document in question was created by Encana). Similarly, for multiple other records, Encana has listed only the name of the individual, but failed to include any information regarding the organization on whose behalf the record was created, again where this information is clearly known by Encana. Finally the List of Records uses an inconsistent convention regarding the listing of names (sometimes the format is first/last, other times it is last/first; sometimes it refers to the defendant as “Encana Corp” other times as “Encana”; sometimes it uses email addresses, other times it uses proper names; sometimes it lists organizations using their current name, other times it lists organizations using their previous names). The cumulative result is that this field is of little use to either the parties or the court.

Copies of the records themselves are inadequate

There are a number of significant deficiencies with the actual records provided by your client, including the fact that many of the records have been stripped of important electronic information. In many cases, the records do not abide by the Protocol. No explanation has been provided for why the Protocol was not followed. In particular:

- **Diagrams, maps and images not provided in original electronic format:** One of the primary benefits of electronic disclosure is that it ensures that both parties have electronic copies of records that are exact replicas of the original record. That is of great benefit to both parties as the original record will often contain relevant information in the form of colour diagrams, maps and photographs, as well as electronic data that goes to the core of the dispute. Accordingly, our protocol specifically states:
 10. To the extent possible, copies of electronic images, audio and video shall be provided in their native electronic format.
 11. Photographs and other images of photographic quality for which there is no corresponding electronic copy shall be provided in colour PDF format, 600 dpi or higher.
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 13. All Records for which there is likely to be meaningful and relevant electronic data (in the form of databases or otherwise) shall be provided in their native electronic format.

It appears that a number of Encana’s original records were already in electronic pdf format, or in other electronic formats that are easily convertible to electronic pdf format without loss of quality. Instead of simply providing copies of original records in their original electronic format, Encana has provided what are essentially low quality scans of black and white printouts of records. Many of the records disclosed by your client were clearly originally in electronic colour format and contain relevant diagrams, maps and photographs that are simply not decipherable in black and white. Examples from the first 100 records include ECA000020; ECA000022; ECA000023; ECA000032, ECA000043; ECA000044; ECA000106; ECA000107; ECA000108; ECA000110; ECA000121; ECA000154; ECA000175; and ECA000183.

Similarly, several documents disclosed are printouts of spreadsheets. Spreadsheets by their very nature include significant amounts of relevant electronic data and

information. Spreadsheets and databases needed to have been disclosed in their native electronic format.

- **Emails do not include the attachments which were originally sent with the email:** the parties were required to provide copies of all relevant records, including relevant electronic data. In order to make sense of an email and its attachment it is vital to know exactly what document was originally attached to what email. In most cases, Encana has failed to disclose the attachment together with the email to which it was attached, thus making it impossible for the parties or the court to know what document was attached to which email.
- **Records not in searchable PDF (OCR) format:** Paragraph 8 of the Protocol states “Written or paper records shall be digitally processed and provided in a searchable PDF (OCR) format, 300 dpi.”

A number of Encana’s records are very low quality scans that are not in searchable PDF (OCR) format. For example, within the first 50 records, the following are not in OCR format: ECA000017; ECA000018; ECA000019; ECA000020; ECA000033; ECA000036; ECA000037; ECA000045. Other records are of such low quality that the OCR is inevitably wrong (for example ECA000010).

- **Records regarding construction, drilling, perforating, hydraulic fracturing, acidizing, operating, servicing, reclaiming, remediating and abandoning of the Encana Wells were not provided in original electronic format:** Paragraph 13 of the Protocol specifically states that:

All Records for which there is likely to be meaningful and relevant electronic data (in the form of databases or otherwise) shall be provided in their native electronic format. Examples of kinds of native format Records that the Plaintiff expects might exist include electronic records associated with software that monitors, tracks, maps or reports on the construction, drilling, perforating, hydraulic fracturing, acidizing, operating, servicing, reclaiming, remediating and abandoning the Encana Wells as defined by the Fresh Statement of Claim

Encana has failed to provide records in original electronic format regarding construction, drilling, perforating, hydraulic fracturing, acidizing, operating, servicing, reclaiming, remediating and abandoning of the Encana Wells. To the extent to which such records were provided at all, they were provided in low quality black and white scans of print-outs.

- **Multiple duplicate records:** In many instances, Encana has listed and produced multiple identical copies of what appear to be the same record without any apparent reason. Again, this is not a merely technical concern. Repeat documents add real confusion to the oral discovery process (for example, by creating confusion regarding what document is actually being referred to, and whether this document is the same as or different from other documents also referred to). It is also wastes the time and resources of all the parties by forcing them to conduct document checks to determine whether the multiple documents produced are actually the same. Examples of repeat records include ECA000066 and ECA000067; ECA000116, ECA000117, ECA000118, and ECA000119; ECA000136-

ECA000139 and ECA000140-ECA000143; ECA000146 and ECA000147; and ECA000155 and ECA000156; and ECA000283 to ECA000286.

Failure to disclose and produce categories of relevant and producible records

In our initial review of the records provided by your client we have noted that there are several entire categories of records that are missing. These categories include records that are clearly relevant and clearly in the possession of your client, and needed to have been disclosed in Encana's original Affidavit of Records.

- **Failure to disclose records regarding the Encana Wells that are at the centre of the lawsuit:** The Fresh Statement of Claim specifically claims that Encana's activities (including construction, drilling, perforating, hydraulic fracturing, operating, servicing as well as reclamation and remediation) at the Encana Wells have caused the severe contamination of Ms. Ernst's well water. "Encana Wells" are clearly defined in the Fresh Statement of Claim as wells within 6 miles of the Ernst Property that Encana hydraulically fractured above the base of groundwater protection.

Encana has failed to disclose any records whatsoever regarding the vast majority of the Encana Wells that are at the very centre of this lawsuit. In fact, Encana did not even disclose records on any of the energy wells reviewed by Alberta Environment, the Alberta Research Council or the Energy Resources Conservation Board as part of their investigation into contaminated water wells in the Rosebud area.

For your reference, we attached to our letter of March 28, 2015 a list of wells owned by Encana around Rosebud and a map showing their location. This list includes both the EnCana wells, as well as other related and adjacent wells. We expect Encana to disclose records regarding each of these wells, including in particular surface casing vent flows, gas migration, lost circulation, blow outs, frac communication events (frac hits), cementing/casing repairs and treatments, water production, frac flow back, waste disposal, pressure testing, gas sampling and isotopic fingerprinting conducted on any of the Encana wells, all chemicals used at the Encana wells and records regarding experimental CBM wells. The records on all these wells are needed to compare to and assess the impacts of the experimental and or super shallow fractures by Encana into the fresh water zones around Rosebud, and to see if there were any blow outs and or frac communication events between shallow and deeper wells and what percentage of the EnCana wells at Rosebud experienced lost circulation. We know for instance, that EnCana testified at the EUB hearing in Torrington in 2006 that the company experienced lost circulation in about 10 per cent of the wells it drilled in the area (see "EUB DECISION 2006-102 EnCana Corporation Applications for Licences for 15 Wells, a Pipeline, and a Compressor Addition Wimborne and Twining Fields October 31, 2006").

In the interest of a more rational and efficient organization of records that will be most useful for both the parties and the court, we ask that all records regarding Encana wells not be interspersed within general records, but rather be disclosed together in groups organized by township/range, Encana well, and then organized chronologically.

- **Failure to disclose chemicals used in the Encana wells:** Encana has failed to disclose records regarding the chemicals used in construction, drilling (including cementing),

perforating, hydraulic fracturing, acidizing, operating, servicing, reclaiming, remediating and abandoning at the Encana wells around Rosebud.

This disclosure must include, among other things, records indicating the individual chemicals (within each product) used in construction, drilling, perforating, hydraulic fracturing, acidizing, operating, servicing, reclaiming, and remediating of each Encana well, the Material Safety Data Sheets (“MSDS”) for each chemical and product used and full compositional details for each, along with their parent chemicals. This disclosure must include records listing all chemical ingredients for each additive in addition to any proprietary name within all products used.

- **Failure to disclose records regarding baseline testing of water wells in the Rosebud Area:** Encana has not disclosed any data or records regarding baseline testing conducted on water wells in the Rosebud Area. Nor has it disclosed any historic data regarding such wells. For example, Encana has not disclosed the baseline water well data collected by WorleyParsons Kommex on behalf of Encana, and then summarized and sent to the Alberta Research Council for their review of Alberta Environment’s investigations of the contaminated water wells at Rosebud, including Ernst’s.
- **Failure to disclose investigations or records regarding investigations conducted on other water wells located near Rosebud:** Encana and Alberta Environment initiated a number of other investigations into the potential contamination of a number of other water wells in the Rosebud area that are located close to and completed in the same aquifer or aquifers as Ms. Ernst’s water well. Encana has failed to disclose a number of records regarding these investigations. Encana’s disclosure must include records of all investigations into potential contamination of water wells in the Rosebud area.
- **Failure to disclose reports regarding CBM and hydraulic fracturing and risks to public health and the environment:** For example, Encana has failed to disclose the following reports commissioned by Encana that are directly relevant to the allegations in this lawsuit:
 - “Assessment of potential human health risks associated with coal-bed methane (CBM) exploration and development activities in Wheatland County, AB”.
 - “Development of a hazard screening and assessment process in support of the responsible use of drilling and fracturing fluids.”
 - A study of the potential for methane leakage from coal-bed methane production carried out by the University of Alberta and Worley Parsons on behalf of Encana.

The plaintiff is independently aware of these reports - it is expected that many other such reports exist. These reports, together with the data used to create these reports needed to have been disclosed.

- **Failure to disclose records regarding Encana’s “Responsible Products Program”:** In 2010, and in response to mounting public concern regarding hydraulic fracturing, Encana initiated a company-wide “Responsible Products Program” aimed at insuring that fracturing fluids used by Encana do not harm human health or the environment. As part of this program, Encana determined some of the chemicals it had previously used in its

hydraulic fracturing program, which included the years Encana injected chemicals into the freshwater zones around Rosebud, were toxic and potentially harmful to the environment and human health, and replaced them with non-toxic alternatives. Records regarding this program are vitally needed to resolve the issue of whether Encana's use of fracturing fluids in the Rosebud area prior to the creation of "Responsible Products Program" was safe or not and therefore needed to have been disclosed.

- **Copies of records provided by Encana to ARC and AENV as part of their investigation into potential water well contamination near Rosebud:** Encana provided significant information and data to ARC and AENV at various times as part of their investigations into complaints of water well contamination near Rosebud. These include binders of Well View printouts, data tables, spreadsheets and other records sent by email, or otherwise. Encana has not disclosed most of these records.

Issues raised in your letter of December 19, 2014

Finally, in your letter of December 19, 2014, you raise a few issues regarding your records:

- **Missing logs, flow meters and records:** In your letter of December 19, 2014, you state that "certain records containing well data were not practical to scan due to their size". You list these documents as Schedule "A" to that letter. These records are various logs, flow meters and records, all of which exist as electronic records, and all of which fall within paragraph 13 of the Protocol, which states:

All Records for which there is likely to be meaningful and relevant electronic data (in the form of databases or otherwise) shall be provided in their native electronic format. Examples of kinds of native format Records that the Plaintiff expects might exist include electronic records associated with software that monitors, tracks, maps or reports on the construction, drilling, perforating, hydraulic fracturing, acidizing, operating, servicing, reclaiming, remediating and abandoning the Encana Wells as defined by the Fresh Statement of Claim.

Again, it appears that your client has printed out paper copies of electronic documents rather than simply providing a copy of the electronic original as required by the Protocol. Please provide the above records in their native electronic format in your next production.

- **Missing records currently on floppy disks and CDs:** In your letter of December 19, 2014 you note that several records contained in the well files are 3.5" floppy disks and CDs containing well data and images. You have not yet provided us with electronic copies of the records or any reason why it was not possible to produce electronic copies of these records in the first place. Please include electronic copies of these records in your next production.

As stated in the conclusion of my letter of March 27, 2015, given the nature, number and seriousness of these deficiencies, the only solution must be for Encana to redo its disclosure of records in a manner that complies with the *Alberta Rules of Court* and the agreed-upon Protocol Regarding Electronic Discovery. If we do not receive the complete, cleaned-up and appropriate disclosure of records by May 30, 2017 in a manner that complies with both Encana's obligations under the *Alberta Rules of Court* and the protocol agreed upon between the parties, my client will bring an application for a further and better affidavit of records. I

note that Encana has already had more than two years to provide an appropriate response to our serious concerns regarding Encana's affidavit of records, and has to date failed to do so.

We look forward to hearing from you.

Sincerely,



Murray Klippenstein

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