Appeal Number: 1301-0346 AC
Q.B. Number: 0702-00120

IN THE COURT OF APPEAL OF ALBERTA

BETWEEN:

JESSICA ERNST

Appellant (Plaintiff)

-and-

ENERGY RESOURCES CONSERVATION BOARD

Respondent (Defendant)

-and-

ENCANA CORPORATION
AND HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA

Not Parties to the Appeal (Defendants)

APPEAL FROM THE WHOLE OF THE ORDER OF THE HONOURABLE MR. JUSTICE WITTMANN, CJQB, PRONOUNCED THE 13TH DAY OF NOVEMBER, 2013 FILED THE 2ND DAY OF DECEMBER, 2013

FACTUM OF THE RESPONDENT

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I. INTRODUCTION

1. Jessica Ernst sued EnCana Corporation ("**EnCana**"), the Energy Resources Conservation Board (the "**ERCB**"), and the Government of Alberta, claiming, *inter alia,* that the Defendants are responsible for the contamination of the groundwater near her residence near Rosebud, Alberta. The Appellant claimed against the ERCB in negligence and under section 24(1) of the *Canadian Charter of Rights and Freedoms.* Wittmann CJ struck the Appellant's claims against, and granted judgment in favour of, the ERCB.

Fresh Statement of Claim [Appeal Record at P1]
Ernst v EnCana Corporation, 2013 ABQB 537 ("*Reasons of Wittmann CJ*") [Appeal Record at F1]

2. The "Fresh Statement of Claim" did not disclose a cause of action against the ERCB, or alternatively should have been summarily dismissed. In respect of the Appellant's negligence claims, negligence requires a duty of care, a breach of that duty, a causal link and resulting damage. Each element is lacking in this case. The ERCB owes a public duty of care, not a private duty of care. Even if the ERCB owed a private duty of care to the Appellant, the ERCB is protected by a statutory immunity clause. The Appellant's personal *Charter* claim for damages also fails to disclose a cause of action. The Appellant's right to free expression is not engaged by the ERCB's purported refusal to respond to her communications. In any event, the ERCB's statutory immunity clause bars the Appellant's personal claim for damages under the *Charter.*

II. STATEMENT OF FACTS

3. The Appellant filed a Statement of Claim on December 3, 2007, an Amended Statement of Claim on April 21, 2011, a Second Amended Statement of Claim on February 7, 2012, and a "Fresh" Statement of Claim on June 25, 2012.

Reasons of Wittmann CJ, at para 4 [Appeal Record at F3]

4. The ERCB applied for an Order striking the Fresh Statement of Claim as disclosing no cause of action, or alternatively for summary judgment.

Reasons of Wittmann CJ, at paras 46, 10, 90, 94-95 [Appeal Record at F4, F30]

5. The Application of the ERCB was heard before Veldhuis J (as she then was). Chief Justice Wittmann became the Case Management Judge in this matter and, with the consent of all parties, decided the Applications heard by Justice Veldhuis.

Reasons of Wittmann CJ, at para 8 [Appeal Record at F4]

6. The ERCB was a statutory agency of the Government of Alberta which regulated the development of Alberta's energy resources. On June 17, 2013, the *Energy Resources Conservation Act*, RSA 2000, c E-10 (the "**ERCA**") was repealed and was replaced by the *Responsible Energy Development Act*, SA 2012, c R-17.3, which created the ERCB's successor, the Alberta Energy Regulator.

Reasons of Wittmann CJ, at para 9 [Appeal Record at F4]

A. The Decision Below

7. Supported by extensive and thoughtful Reasons for Decision, Wittmann CJ struck the Appellant's claims against, and awarded judgment in favour of, the ERCB. In respect of the claims of negligence against the ERCB, Wittmann CJ held that it was plain and obvious that the Fresh Statement of Claim did not disclose a reasonable cause of action. He held that "the duties owed by the ERCB in the circumstances of this case" were public duties, not private duties, and that the requisite proximity between the Appellant and the ERCB to ground a private duty of care was absent. Wittmann CJ further held that, even if he had found that the ERCB owed a private duty of care to the Appellant, the negligence claims against the ERCB were barred by the statutory immunity clause in section 43 of the *ERCA*.

Reasons of Wittmann CJ, at para s27-30, 52-58 [Appeal Record at F14-15, 21-23]

8. In respect of the Appellant's personal *Charter* claim, Wittmann CJ held that the evidence before him was insufficient to dismiss the claim on the basis that it did not disclose a reasonable cause of action, or on the basis that it was brought outside the relevant limitation period. However, Wittmann CJ held that section 43 of the *ERCA* barred the Appellant's personal claim for damages under the *Charter*. Wittmann CJ held that although a statutory immunity clause will not bar a claim for a general constitutional remedy, it can bar a personal claim for damages under the *Charter*.

Reasons of Wittmann CJ, at paras 59-88 [Appeal Record at F23-29]

III. GROUNDS FOR APPEAL

9. The Appellant has stated her grounds of appeal in her Notice of Appeal and her Factum.

Civil Notice of Appeal, p 2 [Appeal Record at F 44]

IV. POINTS OF LAW

A. Standard of Review

10. The standard of review in respect of a question of law is correctness. The question of whether a pleading discloses a cause of action is a question of law, reviewable on the correctness standard. However, "a determination on application to strike a claim" is "an exercise of discretion," reviewable on a reasonableness standard, "absent an error of law."

Housen v Nikolaisen, 2002 SCC 33 at para 8 [Tab 1]
Canadian Natural Resources Ltd v Arcelormittal Tubular Products Roman SA, 2013 ABCA 279 at para 11 [Tab 2]
Trottrup v Alberta (Minister of Environment), 255 AR 204 at para 3 (CA) [Tab 3]
Mitten v College of Psychologists (Alberta), 2010 ABCA 159 at para 9 [Tab 4]

B. Analysis

(a) Principles on an Application to Strike

11. Rule 3.68 of the Alberta *Rules of Court* provides that a Statement of Claim may be struck if it does not disclose a cause of action. The test for striking a pleading under Rule 3.68 is, assuming that the facts as stated are true, is it "plain and obvious" that the pleading does not disclose a reasonable claim?

Alberta *Rules of Court*, Alta Reg 124/2010, r 3.68 [Tab 5]
First Calgary Savings & Credit Union Ltd v Perera Shawnee Ltd, 2011 ABQB 26 at para 4 [Tab 6]

12. Although this test requires a liberal interpretation of the pleadings, the analysis to be employed pursuant to Rule 3.68 must be applied in light of the purpose of the foundational rules, including Rule 1.2, which provides that the Rules of Court are intended to be used to, *inter alia,* facilitate the effective and efficient resolution of claims.

Alberta *Rules of Court*, supra, Rule 1.2 [Tab 5]
First Calgary Savings & Credit Union Ltd v Perera Shawnee Ltd, supra, at para 4 [Tab 6]

13. There is a significant purpose behind Rule 3.68, and Courts have consistently applied the Rule as intended in circumstances which warrant its application. If the facts and allegations in

the Statement of Claim do not disclose a reasonable cause of action, the Defendant should not be subjected to needless litigation and the time and expense associated with such proceedings.

Trottrup v Alberta (Minister of Environment), supra, at para 9 (CA) [Tab 3]

(b) The Appellant's claim in negligence against the ERCB discloses no cause of action

(i) It is plain and obvious that the ERCB does not owe a private duty of care to the Appellant

14. If no duty of care exists between parties, there can be no cause of action in negligence. In order for a private duty of care to be imposed on a statutory regulator, the test set out in *Anns v Merton London Borough Council* (adopted by the Supreme Court in *Cooper v Hobart*) requires sufficient proximity and foreseeability between the parties to create a *prima facie* duty of care. If such proximity and foreseeability exists, there must also be an absence of policy factors that would negate the imposition of a private duty of care.

Anns v Merton London Borough Council (1977), [1978] AC 728 (UK HL) [Tab 7]
Cooper v Hobart, 2001 SCC 79 at paras 24 and 30 [Tab 8]
Edwards v Law Society of Upper Canada, 2001 SCC 80 at paras 9-10 [Tab 9]

15. The governing statute is the sole basis for a statutory regulator's duties and, as such, is the foundation of the proximity analysis and policy factors contemplated by the *Anns* test. In order for a governing statute to impose a private law duty of care, the governing statute must include, either "expressly or by implication", legislative intent to impose such a duty.

Fullowka v Royal Oak Ventures Inc, 2010 SCC 5 at para 39 [Tab 10]
Edwards v. Law Society of Upper Canada, supra, at paras 9 and 13 [Tab 9]
Cooper v Hobart, supra, at paras 43-44 [Tab 8]

16. No private duty of care arises out of the ERCB's governing statutes. Although the *ERCA* and the other statute relevant to this analysis, the *Oil and Gas Conservation Act* [*OGCA*], may impose a duty on the ERCB to the public as a whole, nothing in the *OGCA* or the *ERCA*, expressly or by implication, demonstrates that the Legislature intended to impose a private duty of care between the Appellant and the ERCB.

Cooper v Hobart, supra, at paras 43-44 [Tab 8]
Oil and Gas Conservation Act, RSA 2000, c O-6 [Tab 11]
Energy Resources Conservation Act, RSA 2000, c E-10 [Tab 12]

17. While a private duty of care may arise out of a statutory scheme, a private duty may also arise out of specific interactions between a claimant and a statutory regulator, provided such a

duty is not negated by statute. Rather than argue that the private duty of care arises out of the ERCB's statutory scheme, the Appellant argues that a private duty of care arose out of her specific interactions with the ERCB.

Knight v Imperial Tobacco Canada Ltd, 2011 SCC 42 at paras 43-50 [Tab 13]

18. Wittmann CJ rejected the Appellant's argument that her interactions with the ERCB gave rise to a private duty of care, and held that the Appellant stood in her relationship with the ERCB much like as between the plaintiffs in *Edwards . Law Society of Upper Canada* [*Edwards*] and *Cooper v Hobart* [*Cooper*] and the regulators in those cases, despite the fact that she had some direct contact with the ERCB. Wittmann CJ held that in *Edwards*, *Cooper* and the present case, a member of the public could communicate with a regulator, but the regulator had no direct authority over a member of the public. Wittmann CJ held that a private duty of care is not dependant on whether an individual merely communicates with the regulator and, in any event, there was not sufficient proximity to ground a duty of care. Ms. Ernst's theory is that communicating with the ERCB, which she also asserts that the ERCB has no option in respect of, somehow converts the regulator's duties to private ones.

Reasons of Wittmann CJ, at paras27-29 [Appeal Record at F14]

19. It is the fundamental nature of the relationship between an individual and a statutory regulator that is determinative of whether a private duty of care can arise therefrom. While a private duty of care may arise out of a direct relationship between an individual and a statutory regulator, a mediated relationship is not capable of giving rise to a private duty of care.

Heaslip Estate v Mansfield Ski Club Inc, 2009 ONCA 594 at paras 17-20 [Tab 14]

20. Any relationship between the Appellant and the ERCB is not direct, but is mediated by parties subject to the ERCB's regulatory authority. That is, if the Appellant suffered any harm, that harm was at the hands of a party subject to the ERCB's regulatory authority, and not the ERCB itself. That is precisely analogous to the circumstances in each of *Edwards* and *Cooper*. Regardless of how the ERCB exercised its regulatory authority, if the damage was caused by EnCana, a regulated party, there is no relief available to Ms. Ernst as against the ERCB. The Appellant's contact with the ERCB does not, and cannot, fundamentally change the nature of her relationship with the ERCB.

21. In *Cooper*, a registered mortgage broker was investigated by the Registrar of mortgage brokers and the broker's licence was suspended. The plaintiff, who had advanced money to the

broker, brought an action against the Registrar on the basis that the Registrar negligently failed to oversee the conduct of the broker. The Supreme Court held that the fact that the Registrar had statutory powers of investigation did not create a private duty of care. Rather, the regulatory scheme required the Registrar to balance a "myriad of competing interests" and, although the scheme served "to protect the interests of investors", the overall regulatory scheme mandated "that the Registrar's duty of care is not owed to investors exclusively but to the public as a whole." The Court held that there was insufficient proximity to ground a private duty of care.

Cooper v Hobart, *supra* at paras 46, 48-50 [Tab 8]

22. In *Edwards*, the plaintiffs were members of a group of alleged victims of fraud, who were encouraged to purchase gold and advised that their funds would be held in trust in a solicitor's trust account. The Law Society of Upper Canada commenced an investigation following a complaint regarding the unorthodox use of the solicitor's trust account. The plaintiffs brought an action for damages against, *inter alia*, the Law Society. The Supreme Court upheld the decision to strike the claim against the Law Society, and held that no private duty of care existed between the Law Society and the plaintiffs, despite the Law Society's statutory powers of investigation. The Court held that the governing statute, including the Law Society's investigative powers, were aimed at the protection of the public as a whole, and therefore could not ground a private duty of care.

Edwards v Law Society of Upper Canada, *supra*, at paras 12-18 [Tab 9]

23. *Cooper* and *Edwards*, like the present matter, involved mediated, and not direct, relationships between the plaintiffs and the statutory regulator. The regulator was charged with overseeing a party (the mortgage broker, the solicitor) that caused harm to the plaintiffs (the investors). The Registrar of Mortgage Brokers and the Law Society both had statutory powers of investigation. However, such powers did not convert the regulator's public duties into a private duty of care owed to any individual who lodged a complaint. Rather, the regulators' duties, like those of the ERCB, extended beyond powers of investigation and included public duties related to the regulation of the industry as a whole. It should also be noted that the regulators in *Cooper* and *Edwards*, like the ERCB, were each protected by a statutory immunity clause.

Cooper v Hobart, 2001 SCC 79 at paras 44,46 and 48-50 [2001] 3 SCR 537 [Tab 8]
Edwards v Law Society of Upper Canada, *supra*, at paras 12-18 [Tab 9]

24. As in *Cooper* and *Edwards*, although the ERCB is tasked with regulating oil and gas development, it is also tasked with a myriad of other duties, including providing "for the

economic, orderly and efficient development in the public interest of the oil and gas resources of Alberta." The ERCB must balance all of the duties imposed on it by its governing statutes. As in *Cooper* and *Edwards*, this is a delicate balance which precludes finding a private duty of care owed to a specific individual. Regulation of the industry would be impossible if it was subject to the whimsical override of every single citizen's different policy goals.

Oil and Gas Conservation Act, *supra*, at s 4 [Tab 11]
Energy Resources Conservation Act, *supra,* at s 2 [Tab 12]

25. The Appellant places much emphasis on the fact that she made contact with the ERCB. If merely making contact with a regulator who is otherwise in a mediated role could change that role, it would be a simple matter for everyone to create for themselves private duties of care out of public ones - even after the fact of alleged damage as in Ms. Ernst's case. Ms. Ernst's contact with the ERCB does not change the law - if Ms. Ernst suffered harm, she did so at the hands of a party involved in an activity subject to regulatory authority, and can assert no higher claim to a duty of care from the regulator than any other member of the public.

26. In *Fullowka v Royal Oak Ventures Inc.*, a striking miner set off an explosive device in a mine that killed nine miners. The families of the murdered miners commenced actions against, *inter alia*, the Crown, for negligently failing to prevent the murders. The Supreme Court held that there was a sufficiently close and direct relationship between the mine inspectors and the miners that gave rise to a *prima facie* duty of care, on the basis that the mine inspectors had a statutory duty to inspect the mine and to order the cessation of work if they considered it unsafe. In exercising this statutory power, the inspectors had been physically present in the mine on many occasions, had identified specific and serious risks to an identified group of workers and knew that the steps being taken to maintain safe working conditions were ineffective. Moreover, the Court held that there were no residual policy considerations on which to decline to impose a duty of care on the government, and that the proposed duty of care did not expose the Crown to indeterminate liability.

Fullowka v Royal Oak Ventures Inc, *supra* at paras 1-12, 41-45 [Tab 10]

27. The Supreme Court in *Fullowka* engaged in an in depth discussion of proximity, which is set out at length in the reasons of Wittmann CJ. Briefly, the Court held that the persons to whom the inspectors owed a duty was "a much smaller but also a more clearly defined group" than in *Cooper* and *Edwards*, where the alleged duties "were owed, in effect, to the public at large

because they extended to all clients of all lawyers and mortgage brokers." Further, the inspectors had much more direct and personal dealings with the miners than was at issue in *Cooper* or *Edwards*. Finally, the Court held that the inspectors' statutory duties "related directly to the conduct of the miners themselves," unlike in *Cooper* and *Edwards*, where the statutory regulators "had no direct regulatory authority over the claimants who were the clients of the regulated lawyers and mortgage brokers."

Fullowka v Royal Oak Ventures Inc, *supra* at paras 41-45 [Tab 10]

28. The scope of the duty claimed is highly relevant to the analysis of whether a private duty of care exists. If the duty would necessarily be owed to everyone, it is a public duty. A regulatory duty applicable only to a smaller and more defined group - such as the mine inspector for a specific mine owing a duty to the workers at that specific mine as in *Fullowka* - could give rise to a private duty of care. However, where the duty would be owed to everyone, the case is akin to *Cooper* and *Edwards*. If a private duty of care was found in the present matter, the ERCB would effectively owe a private duty of care to any and all individuals who could claim to be adversely affected by any and all oil and gas development in Alberta.

29. The Appellant argues that she is in a relationship of sufficient proximity with the ERCB to ground a private duty of care, on the basis of four alleged factors: the specific interactions between the Appellant and the ERCB, public representations made by the ERCB and the Appellant's reliance thereon, the ERCB's compliance scheme, and the interests of the Appellant and rural landowners. Only the first factor relates to the particular relationship between the Appellant and the ERCB. With respect to the other three factors, there is no distinction between the ERCB's relationship with the Appellant and the ERCB's relationship with any other member of the public. The private duty alleged by the Appellant would effectively be owed to the public at large, because it would extend to an undifferentiated multitude of individuals who choose to contact the ERCB. As the ERCB did not have a direct regulatory relationship with the Appellant (for example, as compared with the regulatory relationship with the miners in *Fullowka*), the Appellant's choice to make contact with the ERCB, after the alleged damage to the ground water, would have to support any alleged private duty of care.

(A) Specific Interactions between the Appellant and the ERCB

30. The Appellant argues that Wittmann CJ erred in failing to give any weight to the direct contact between the Appellant and the ERCB in his proximity analysis, and argues that specific interactions between a claimant and a regulator are a key factor in establishing proximity.

31. The specific interactions contemplated by the Court in *Fullowka* were of a more personal and involved nature than merely lodging complaints with a regulator, reading brochures or attending public meetings. The specific interactions which the Appellant claims ground a private duty of care are limited to the Appellant contacting the ERCB regarding then existing alleged water contamination issues on her property. Under this theory, the Plaintiffs in *Cooper* and *Edwards* would have had an entirely different result by merely reading brochures, attending public meetings or contacting the regulator after the damage was done.

Fullowka v Royal Oak Ventures Inc, supra at paras 41-45 [Tab 10]
Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board, 2007 SCC 41 [Tab 15]

(B) Representations made by the ERCB

32. The Appellant argues, without support, that where a government agency encourages reliance on it by asserting that it is protecting individuals from harm, such representations will ground a finding of proximity. The Appellant cites this Honourable Court's decision in *Tottrup v Alberta* for the proposition that the degree of public reliance, and the degree to which such reliance was encouraged by the authority, is an important consideration in the proximity analysis. However, the comments in *Tottrup v Alberta* cited by the Appellant related to distinguishing between a policy or operational matter, and were not related to the proximity analysis. For example, the Alberta Securities Commission (equivalent to the regulator in *Cooper*) and the Law Society of Alberta (equivalent to the regulator in *Edwards*) have mandates to protect the public interest, but those types of mandates did not found liability in *Cooper* and *Edwards*.

Tottrup v Alberta, supra, at para 21 [Tab 3]

33. The Appellant also cites the Ontario Court of Appeal in *Taylor v. Canada (Attorney General)* for the proposition that "general representations and reliance on those representations" can, when combined with other factors, ground a private duty of care. However, the Court in *Taylor v. Canada* also held:

> [...] a regulator's public statements acknowledging its public duties and obligations and its commitment to the performance of those duties, combined with the reliance on those

> public statements by members of the public affected by the performance of those duties, cannot, standing alone, create a relationship of proximity between individual plaintiffs and the regulator. In my view, to assert that the kind of representations made by Health Canada and relied on in the Fresh Statement of Claim can, coupled with reliance on those representations, create a relationship of proximity, is in reality to assert that the public duties set out in the legislative scheme can become a private law duty of care if relied on by an individual member of the public. The legislative scheme does not create any private law duty of care. An individual's reliance on public representations that the regulator will do its public and statutory duty cannot by itself create one.
> *Taylor v Canada (Attorney General)*, 2012 ONCA 479, at paras 105 and 118 [Tab 16]

34. The Appellant's descriptions of the ERCB's purported public representations cannot reasonably give rise to the assumption that the ERCB acts specifically in the interests of the Appellant, or others in similar circumstances, rather than in the public interest. An ERCB statement suggesting that it investigates and responds to public complaints cannot reasonably give rise to an assumption that the ERCB will act in the interests of complainants, rather than in the public interest. Indeed, the ERCB Compliance Assurance Directive (Directive 19) states that the ERCB's investigation and enforcement processes are to be undertaken in the public interest. There is simply no basis upon which the alleged public representations could ground the proximity necessary to find a private duty of care.

ERCB, Directive 19: Compliance Assurance, September, 2010, pp 1-2 [not reproduced]

(C) Regulatory and Legislative Scheme

35. The Appellant argues that the ERCB established an operational compliance and enforcement scheme that included procedures for receiving and investigating public complaints, inspecting oil and gas operations, and enforcement in relation to oil and gas companies. Merely alleging that a "detailed and publicized Compliance and Enforcement Scheme" is administrative or operational in nature does not make it so. In the Court below, the Appellant argued that the compliance and enforcement scheme she referred to could be found in the ERCB's governing statutes, associated regulations, and various ERCB Directives and publications. Although these sources set out ERCB policy in respect of compliance and enforcement, they cannot fairly be termed operationalized compliance schemes. On appeal, the Appellant does not cite any sources for the purported operationalized compliance scheme to which she refers, but her argument suggests that the scheme is a combination of the ERCB's statutory powers of investigation, and the mechanism by which ERCB receives public complaints.

See: *Oil and Gas Conservation Act, supra*, at ss 94-110 [Tab 11]; *Energy Resources Conservation Act*, *supra,* at s 2 [Tab 12]; *Oil and Gas Conservation Regulations*, *supra*, [Tab 11]; *Oil and Gas Conservation Regulation*, Alta Reg 151/71 [not reproduced]; *ERCB, Guide 65: Resources Applications for Conventional Oil and Gas Reservoirs* (2003) [not reproduced]; *ERCB, Guide G-8: Surface Casing Depth - Minimum Requirements* (1997) [not reproduced]; *ERCB, Guide 56: Energy Development Applications and Schedules* (2003) [not reproduced]; *ERCB, Informational Letter IL 91-11: Coalbed Methane Regulation* (1991) [not reproduced]; *ERCB, Informational Letter (IL) 99-4: EUB Enforcement Process, Generic Enforcement Ladder, and Field Surveillance Ladder* [not reproduced];*ERCB, Directive 19: Compliance Assurance,* September, 2010 [not reproduced]; *ERCB, Directive 27-Shallow Fracturing Operations-Restricted Operations*, August 2009 [not reproduced]; *ERCB, Directive 035: Baseline Water Well Testing Requirement for Coalbed Methane Wells Completed Above the Base of Groundwater Protection* [not reproduced]; *ERCB, Directive 044: Requirements for Surveillance, Sampling, and Analysis of Water Production in Hydrocarbon Wells Completed Above the Base of Groundwater Protection* [not reproduced]

36. Statutory powers of investigation coupled with the ability to receive public complaints were not sufficient in *Cooper* or *Edwards* to ground a finding of proximity. Further, as the Supreme Court held in in *Elder Advocates of Alberta Society v. Alberta*, in the absence of a statutory duty:

> [...] the fact that Alberta may have audited, supervised, monitored and generally administered the accommodation fees objected to does not create sufficient proximity to impose a *prima facie* duty of care. As stated in *Broome*, at para. 40:
>
> > Even if the statute ought to be interpreted so that there was a duty to inspect the Home, on the record before me, the statute gives no direction as to the purpose or scope of such inspections, imposes no standards to be applied and requires no action to be taken as a result of an inspection. No authority is cited for the proposition that such a bare duty of inspection would be sufficient to support a finding of proximity between the Director and the children. [Emphasis in original.]
>
> *Cooper v Hobart, supra*, at paras 46 and 48-50 [Tab 8]
> *Edwards v Law Society of Upper Canada*, *supra*, at paras 12-18 [Tab 9]
> *Elder Advocates of Alberta Society v Alberta*, 2011 SCC 24 at para 72 [Tab 17]

37. Further, while an operationalized scheme may, in some circumstances, ground the proximity necessary to impose a private duty of care, a close and direct relationship must exist between the statutory body and the claimant in order for such proximity to arise. As discussed above, no such close or direct relationship exists in the present case between the Appellant and the ERCB. In fact, Ms. Ernst's other claims object to the ERCB's alleged refusal to have her

define her relationship with the ERCB - that is, that the ERCB did not respond to her when and how she wished.

Elder Advocates of Alberta Society v Alberta, 2012 ABCA 355 at para 21 [Tab 18]

38. Contrary to the Appellant's assertion, there is no parallel between the duty of care alleged in the present case, and the duty of care found in the "negligent implementation of an inspection scheme" cases. The Appellant cites a number of cases in which such a duty of care has been found, including *Fullowka* and the New Brunswick Court of Appeal decision in *Adams v Borrel*. In *Adams v Borrel*, a potato virus was discovered in tobacco fields in Ontario. Agriculture Canada decided to eradicate the virus and three potato growers were compensated. Agriculture Canada later changed its method from eradication of the virus to restrictions on potato farmers. A group of potato farmers brought an action in negligence against the federal government. The Court of Appeal held that a duty of care between the government and the farmers arose once Agriculture Canada made the policy decision to inspect and identify the source of the virus. Agriculture Canada owed the farmers a *prima facie* duty of care to carry out its investigation properly.

Adams v Borrel, 2008 NBCA 62 at paras 41-44 [Tab 19]

39. The finding of a private duty of care in the inspection scheme cases requires a direct, not a mediated, relationship between the statutory body and the plaintiff – a relationship notably absent from the present facts. The relationship between Agriculture Canada and the potato farmers in *Adams v Borrel* was a direct, and not a mediated, relationship. Agriculture Canada had a statutory mandate to detect crop disease, and had specifically decided to investigate and eradicate the potato virus at issue. The potato farmers did not suffer harm at the hands of a party regulated by Agriculture Canada, but at the hands of Agriculture Canada itself. If Ms. Ernst suffered a harm at all, that was a harm suffered at the hands of EnCana - a regulated party. Notably, if the ERCB in the present case had a duty to do something properly, and did so improperly, it can rely on its immunity from suit.

Adams v Borrel, *supra* at paras 41-44 [Tab 19]

40. The ERCB's legislative scheme is not aimed specifically at protecting local landowners with oil and gas operations located on or near their land. Rather, the ERCB's statutory scheme is clear that any duties imposed on the ERCB are owed to the public as a whole. The ERCB must

balance all of the duties imposed on it by its governing statutes. As in *Cooper* and *Edwards*, this is a delicate balance which precludes finding a private duty of care owed to a specific individual.

(D) The Interests of the Appellant and Rural Landowners

41. The Appellant argues that the nature of the interests involved in the present matter is a significant factor in the proximity analysis. The Appellant has cited no relevant authority for the proposition that the importance of the interests involved is a relevant factor in establishing sufficient proximity to ground a duty of care. Indeed, any matter involving a statutory regulator will, necessarily, involve various important interests. This factor has no relevance to a proximity analysis.

(ii) Any private duty is negated by the ERCB's statutory scheme

42. Pursuant to the *Anns* test, a private duty of care cannot arise if such a duty is negated by statute. Even if the interactions between the Appellant and the ERCB were capable of giving rise to a private duty of care, such a duty would be negated by the ERCB's governing statutes. For instance, section 3 of the *ERCA* clearly imposes a public duty on the ERCB in the conduct of investigations, but does not impose a private duty, such that in the conduct of investigations, the ERCB owes a private duty of care to any particular individual. The imposition of a private duty on the ERCB in the conduct of investigations would undoubtedly conflict with its duty to the public as a whole. The interests of each individual, which would certainly conflict with one another over the entire spectrum of personal preferences, would somehow have to be reconciled in order to pre-empt the public interest. The threat of being sued for failing to achieve any individual's desired outcome would have a severe impact on the Board's functioning.

Energy Resources Conservation Act, supra, at s 3 [Tab 12]

43. Section 6(1) of the *ERCA* explicitly provides that the members of the ERCB shall act in the public interest. The responsibilities of the members of the ERCB explicitly set out in the *ERCA* do not contemplate that the ERCB, or its members, owes a private law duty of care to specific individuals. The existence of a private duty of care would necessarily have the effect of compromising the ERCB's express public duty to act "in the public interest".

Energy Resources Conservation Act, supra, at s 6 [Tab 12]

44. According to the maxim of statutory interpretation *expressio unius est exclusio alterius* ("the express mention of one is the exclusion of the other"), that the Legislature expressly

imposed a public responsibility on the ERCB and its members demonstrates that the legislature did not intend to impose a private duty of care owed to specific individuals. As such, there is no private duty of care between the ERCB and individual litigants, including the Appellant.

Energy Resources Conservation Act, supra, at s 6 [Tab 12]
Yugraneft Corp v Rexx Management Corp, 2010 SCC 19 at para 39 [Tab 20]

45. The inclusion of a statutory immunity clause in section 43 of the *ERCA* further demonstrates that no private duty of care exists between the ERCB and the Appellant. By enacting s. 43, the Legislature expressly exempted the ERCB from any liability in any actions brought against it by any private individuals. A private duty of care between the ERCB and the Appellant simply cannot be inferred in the context of s. 43.

Energy Resources Conservation Act, supra, at s 43 [Tab 12]

46. The Appellant argues that there are no conflicting duties which are sufficient to negate the finding of a private duty of care. To be clear, it is not necessary to find conflicting alleged private and existing public duties in order to find that the ERCB has only public duties. The Appellant argues that a public authority can simultaneously owe private and public duties, and that there must be "a real potential for negative policy consequences" for the conflict to trump a private duty of care.

Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board, supra, at para 43 [Tab 15]

47. A private duty of care would undoubtedly conflict with the ERCB's public duties. The ERCB's governing statutes unequivocally state that the ERCB owes a duty to the public as a whole. The ERCB has broad purposes that extend beyond compliance assurance and enforcement. These purposes range from the conservation of energy resources in Alberta, to appraising energy resources in Alberta, to providing for the economic, orderly and efficient development in the public interest of the oil and gas resources of Alberta. The ERCB has public duties related to the development of Alberta's oil and gas reserves, the assessment of proposals for development and exploration, and the regulation and expansion of oil and gas development. The ERCB's compliance directive states that the ERCB's investigation and enforcement processes are to be undertaken in the public interest. The imposition of a private duty of care between the ERCB and individuals impacted by, or opposed to, oil and gas development would have wide-ranging and detrimental impacts on oil and gas development in Alberta. If a private duty of care was imposed on the ERCB *vis-à-vis* any individual who claims to be adversely

affected by oil and gas development in Alberta, the ERCB would be unable to carry out its public mandate. In this context, the imposition of a private duty of care would conflict with the ERCB's overarching public duties, and pose a real potential for negative policy consequences.

ERCB, Directive 19: Compliance Assurance, September, 2010, pp 1-2 [not reproduced]
Oil and Gas Conservation Act, *supra*, at s 4 [Tab 11]
Energy Resources Conservation Act, *supra,* at s 2 [Tab 12]

(iii) Section 43 of the ERCA bars the Appellant's claims in negligence

48. The Appellant argues that the ERCB cannot rely on the statutory immunity clause set out in section 43 of the *ERCA*, because her claims do not relate to actions of the ERCB, but to omissions, and section 43 does not immunize the ERCB in respect of omissions. Wittmann CJ rejected this argument, and held that even if he had found that the ERCB owed a private duty of care to the Appellant, her claim in negligence was barred by section 43 of the *ERCA*. It is evident from the Fresh Statement of Claim that Ms. Ernst's complaints are directed to what the ERCB allegedly chose to do or not do. The complaint about the ERCB's acts, including its acts of choosing not to do certain things, is the essence of the claim.

Reasons of Wittmann CJ, at paras52-58 [Appeal Record at F21-23]

49. As Wittmann CJ held, a decision by a statutory regulator such as the ERCB "to act in a certain way among alternatives inherently involves a decision not to act in another way." In arguing that section 43 of the *ERCA* does not cover omissions, the Appellant argues that actions and omissions in the context of a statutory regulator are mutually exclusive; that is, the occurrence of one is precluded by the occurrence of the other. However, this construction does not reflect the complex, multifaceted decision-making process of a statutory regulator such as the ERCB. The decision of a statutory regulator such as the ERCB to take an action is inherently and inextricably tied to a corresponding decision to not take an alternate action. In this sense, the Appellant's construction would render section 43 meaningless, because a civil claim would be available in respect of every decision made by the ERCB. Proponents on one side of any ERCB decision could rely on the ERCB's failure to choose to act in accordance with their interests to be an omission not covered by section 43 of the *ERCA*.

Reasons of Wittmann CJ, at paras52-8 [Appeal Record at F21-23]

50. There are sound policy reasons for immunizing a statutory regulator from civil action. A public decision-maker should be free to make the decisions it deems appropriate, having regard to all the various interests involved. It should not make decisions based on which result is least likely to lead to a civil action. If a public decision maker, balancing a myriad of different interests, could be civilly liable for its decisions, other incentives, irrelevant to the dispute before it, would be created. Immunity from suit is a crucial element of maintaining the integrity of public decision-makers at all levels. A party unhappy with a decision of a regulatory body has a remedy: judicial review. However, that party cannot claim against the decision-maker because it is unhappy with its decision. The underlying rationale for this approach is similar to the principles underlying judicial immunity. A judge's decision can be appealed, but judicial immunity provides that judges acting in their capacity as judges are immune from civil action. If it were otherwise, the same difficulties and irrational incentives would arise in respect of judicial decision making.

SG v Larochelle, 2004 ABQB 123 at para 8 [Tab 21]

51. The Appellant cites a number of Alberta statutes for the proposition that the Alberta Legislature will specifically immunize omissions when it intends such a result. However, references to omissions in other Alberta statutes does not indicate that the Legislature intended to exclude omissions from section 43 of the *ERCA*.

ATA v Alberta (Information and Privacy Commissioner), 2011 SCC 61 at paras 65-66, [2011] 3 SCR 654 [Tab 22]

52. In respect of the other statutory immunity clauses cited by the Appellant in the Court below, Wittmann CJ held:

> [...] **to the extent that the other statutes providing statutory immunity to the regulator are relevant** in that they contain the additional phrase "or anything omitted to be done", I regard those words as **mere surplusage in the circumstances**. [emphasis added]

The Appellant argues that this finding was an error in law, in that a legislative provision should not be interpreted so as to render it mere surplusage. However, Wittmann CJ did not engage in the statutory interpretation of the other provisions cited by the Appellant, nor deem the wording of those provisions to be "mere surplusage." Rather, when Wittmann CJ's comments are read in their full and fair context, it is clear that he was referring to the relevance of the provisions in the context of the ERCB and section 43 of the *ERCA*. That is, he found that insofar as the other

provisions referenced by the Appellant were relevant to the present matter, any reference to omissions was surplusage in the context of section 43 of the *ERCA*. Wittmann CJ did not deem the words in the other provisions, which were not at issue before him, to be mere surplusage.

Reasons of Wittmann CJ, at paras52-58 [Appeal Record at F22-23]

53. Even if the Appellant's construction of section 43 of the *ERCA* is accepted, a plain reading of many of the Appellant's claims relate to acts taken by the ERCB. The Appellant claims, *inter alia*, that the ERCB did not respond *reasonably* to her complaints, did not take *reasonable* steps with respect to the EnCana Wells, did not *adequately* inspect her complaints, did not conduct *adequate* ground water testing, and did not *promptly* inform the Appellant of potential contamination. A plain reading of these allegations demonstrates that the Appellant's claims relate to acts, and not omissions. A failure to act reasonably or adequately is not an omission. Indeed, on the Appellant's logic, any ERCB action claimed to be unreasonable or inadequate would be deemed an omission, and not an act. Such an approach would lead to the absurd conclusion that section 43 of the *ERCA* would never have any application.

Fresh Statement of Claim, paras 36 and 40 [Appeal Record at P11-12]

54. Further, even if some of the Appellant's claims could relate to omissions, the Appellant claims that the "ERCB's various omissions [...] were taken in bad faith." The notion that an omission could be taken in bad faith simply belies reason. Bad faith requires intent. An omission taken in bad faith is, necessarily, a deliberate or intentional decision made in bad faith. Even on the Appellant's construction, decisions are immunized under section 43 of the *ERCA*.

Fresh Statement of Claim, para 41 [Appeal Record at P12]

55. The Legislature's choice to exclude all actions against the ERCB, by using the phrase "no action or proceeding", necessarily includes the Appellant's action in this case. The prohibition on bringing this action against the ERCB includes "any act or thing done" under the ERCB's governing legislation, its regulations, its decisions, orders or directions. Among other things, the ERCB's immunity extends to "any act or thing done . . . or a decision . . . of the Board". The Legislature is presumed to know that it has created a Board with only a public duty, exempt from any private law actions. As the immunity extends to "any act or thing done" it excludes not only negligence, but gross negligence, bad faith and even deliberate acts. The Legislature has been patently clear in the words used. The Appellant is bound by the laws enacted by the Legislature.

Energy Resources Conservation Act, supra, at s 43 [Tab 12]

(c) The Appellant's *Charter* claim against the ERCB discloses no cause of action

56. The Appellant claims that the ERCB breached her *Charter* right to free expression by punitively excluding her from its complaint process in retaliation for her criticism of the ERCB, or arbitrarily removing her from a public forum that had been established to accept complaints about the oil and gas industry. Wittmann CJ held that the evidence before him was insufficient to dismiss the Appellant's *Charter* claim on the basis that it did not disclose a reasonable cause of action, or on the basis of limitations. However, as discussed below, Wittmann CJ dismissed the *Charter* claim on the basis of the statutory immunity clause contained in the *ERCA*.

Fresh Statement of Claim, para 58 [Appeal Record at P15]

Reasons of Wittmann CJ, at paras59-88 [Appeal Record at F23-29]

(i) The ERCB did not limit the Appellant's right to free expression

57. The right to free expression contained in s. 2(b) of the Charter ensures that "everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the main stream." In determining whether a violation of section 2(b) has occurred, it must first be determined whether the activity in question is a protected form or method of expression. If this step is met, it must be determined whether the purpose or effect of the government activity infringes on the right to free expression.

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, s 2(b) [not reproduced]
Irwin Toy Ltd v Quebec (Attorney General), [1989] 1 SCR 927 at paras 42, 48 and 58 DLR (4th) 577 [Tab 23]

58. The Appellant's claims in respect of her right to free expression, in essence, are that the ERCB prevented her from exercising her right to free expression by discontinuing communications with her, and instructing staff to avoid further contact. The Appellant alleges that the ERCB seized on a reference she made about Weibo Ludwig and used it as an excuse to prohibit her from communicating with the ERCB. The ERCB purportedly ceased communications with the Appellant after it learned she had commented that "the only way is the Weibo way."

Fresh Statement of Claim, para 47 [Appeal Record at P13]
Second Amended Statement of Claim, para 114 [Respondent's Extracts of Key Evidence, R28]

59. The Appellant's *Charter* claims as set out in paragraphs 42 to 58 of the Fresh Statement of Claim demonstrate that the Appellant continued to contact the ERCB after it ceased communications with her. On the Appellant's own facts, the Appellant was free to, and did, continue to contact the ERCB after the purported decision to exclude her from the ERCB complaint process. The Appellant also continued to express her views relating to the ERCB and oil and gas development publically. The Appellant's own claim makes it clear that she was never restricted from expressing herself. In this context, it appears that the Appellant's claim, properly understood, is that the ERCB breached her right to free expression because it would not respond to her communications, or did not respond to her communications in a way that the Appellant found satisfactory.

Fresh Statement of Claim, paras 42-58 [Appeal Record at P12-15]

60. Section 2(b) of the *Charter* does not guarantee an audience, and it certainly does not require a statutory regulator such as the ERCB to be that audience. Given that the Appellant's right to free expression does not guarantee an audience, it can hardly guarantee a right to effective, two-way communication with, or specific and satisfactory responses from, an audience. The Appellant's right to free expression cannot require the ERCB to communicate with her, or provide her with a specific or prescribed response. Such a requirement would effectively constitutionalize the form and content of ERCB responses to public complaints or requests. Rather, judicial review is the available remedy: relief in the nature of *mandamus* to compel a response, prohibition to stop a course of conduct, or *certiorari* to quash a decision, would have been the appropriate course to pursue.

Ontario (Attorney General) v Dieleman, 1994 CarswellOnt 151 at paras 637-8 (Gen Div) [Tab 24]
See also: *R v Breeden*, 2009 BCCA 463 at paras 33-34 [Tab 25]; *R v Spratt*, 2008 BCCA 340 at para 82 [Tab 26]

61. It is also important to note that section 2(b) does not guarantee any particular means or platform of expression, including expression which would take place within a platform that was statutorily created. As such, restricting access to such a platform, absent exceptional circumstances, will not engage section 2(b). The Appellant is asserting a positive right, but did not meet the criteria for the protection of a positive right.

Baier v Alberta, 2007 SCC 31, at para 20-23, 30, 35 and 44-55 [Tab 27]

62. Given that the ERCB's purported decision to cease communication with the Appellant had no effect on the Appellant's ability to express her views relating to oil and gas development in Alberta, either publically or to the ERCB, it is unclear how the Appellant's section 2(b) rights are engaged at all. The Appellant's right to free expression is not engaged by the refusal of a statutory regulator to listen or respond to her communications as she wishes or at all.

63. Taken to its logical conclusion, the Appellant is asserting that everyone has an unlimited constitutional right to be listened to by, and to have a response from, all statutory bodies - without regard to content or processes - failing which they may sue for damages. They may abuse or threaten, they are not bound by limitations, prescribed forms, or procedures, they may not be cut short, and they are constitutionally entitled to a response - in fact, each individual may be entitled to only her preferred response. If any such right to be heard, or to a response, exists at all, it must be enforced by judicial review - which allows the Court to determine the lawfulness of the Board's actions, and to grant the remedy due (such as a hearing or a response).

(ii) Section 43 bars the Appellant's Charter claim against the ERCB

64. The Appellant's *Charter* claim against the ERCB is a personal claim for damages in the amount of $50,000.00 for the purported violation of her right to free expression under section 2(b) of the *Charter*. The Appellant does not seek a general remedy under the *Charter*, in the form of a declaration of invalidity or otherwise.

Fresh Statement of Claim, paras 58 and 87 [Appeal Record at P15 and P25]

65. When considering statutory bars to constitutional claims, the Courts have distinguished between personal and general claims for constitutional relief. If the Appellant's claim was a general claim for constitutional relief, the statutory immunity clause in section 43 of the *ERCA* would not apply. As Wittmann CJ held, a statutory immunity clause cannot immunize a government actor from a constitutional challenge of a general nature. However, prior to the decision of Wittmann CJ, the question of whether a statutory immunity clause applied in respect of a personal *Charter* claim does not appear to have been considered in Alberta.

Reasons of Wittmann CJ, at para80 [Appeal Record at F29]
Kingsway General Insurance Co v Alberta, 2005 ABQB 662 at para 67 [Tab 28]
Amax Potash Ltd v Saskatchewan, [1977] 2 SCR 576 at paras 26-27 [Tab 29]

66. In *Prete v Ontario*, the Ontario Court of Appeal considered the application of a statutory immunity clause in respect of a personal *Charter* claim. The plaintiff brought an action for damages pursuant to section 24(1) of the *Charter* for malicious prosecution against, *inter alia,* the Attorney General of Ontario, who applied to dismiss the claim on a number of grounds, including limitations and crown immunity. Relying on *obiter* comments of Lamer J. in *Nelles v Ontario*, the majority held that neither the six-month limitation period contemplated in section 11(1) of the *Public Authorities Protection Act,* nor the statutory immunity provision in section 5(6) of the *Proceedings Against the Crown Act*, could negate the plaintiff's ability to seek a personal remedy under the *Charter*.

Prete v Ontario (1993), 16 OR (3d) 161 at paras 6-9 and 14 [Tab 30]
Nelles v Ontario, [1989] 2 SCR 170 at paras 50 and 54-55 [Tab 31]

67. As Wittmann CJ held, *Prete v Ontario* is distinguishable from the present matter on the basis that section 43 of the *ERCA* immunizes the ERCB from civil action generally, and its application is not targeted at any particular individual or group. Conversely, the application of section 5(6) of the *Proceedings Against the Crown Act* was of limited application, and only applied to liabilities set out in section 5(1) of the Act.

Reasons of Wittmann CJ, at para64 [Appeal Record at F24]

68. Further, in *Prete v Ontario*, the Court held that the reasons underlying the inapplicability of statutory immunity clauses to personal *Charter* claims were the same as those underlying the inapplicability of limitation periods to personal *Charter* claims. In this context, *Prete v Ontario* has effectively been overturned by the Supreme Court, in that limitation periods of general application apply to claims for constitutional relief "brought as an individual *qua* individual for a personal remedy."

Prete v Ontario, *supra* at para 14 [Tab 30]
Ravndahl v Saskatchewan, 2009 SCC 7 at paras 16-17 [Tab 32]
See also: *Kingstreet Investments Ltd. v. New Brunswick (Department of Finance),* 2007 SCC 1 at paras 59-61 [Tab 33]; *Manitoba Métis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 134 [Tab 34]

69. The law is settled that limitation periods of general application are capable of barring personal claims for damages under the *Charter.* Although limitation periods are distinct from statutory immunity clauses, the law respecting limitation periods is a helpful starting point in determining whether section 43 of the *ERCA* bars the Appellant's *Charter* claims in the present case. As stated above, the commonalities between limitation periods and statutory immunity

clauses were recognized by the Ontario Court of Appeal in *Prete v Ontario*, such that the Court held that the reasons for its decision in respect of statutory immunity applied equally to limitation periods.

Prete v Ontario, *supra* at para 14 [Tab 30]

70. Limitation periods of general application and statutory immunity clauses are both statutory bars to otherwise potentially meritorious claims. That limitation periods apply to *Charter* claims for personal damages is an indication that Courts have recognized that the state is entitled to balance public and private interests in respect of personal claims for damages under the *Charter*. There is no principled reason why, if a limitation period can apply to such a claim, a statutory immunity clause of general application that does not target specific individuals or groups should not apply to such claims.

Reasons of Wittmann CJ, at paras 74 -87 [Appeal Record at F27-30]

71. As Wittmann CJ held, an undesirable incentive would be created if it were found that section 43 of the *ERCA* barred all claims against the ERCB, save for personal claims for damages under the *Charter*. Plaintiffs would "come to the litigation process dressed in their *Charter* clothes wherever possible," because the mere assertion of a personal damages claim under the *Charter* would render impotent all statutory immunity clauses, including section 43 of the *ERCA*. A finding that statutory immunity clauses cannot bar personal *Charter* claims would thwart the well-established legislative prerogative to limit liability in respect of government actors. As the Supreme Court stated in *Swinamer v Nova Scotia (Attorney General)*, the Crown is entitled to exempt itself from private liability by legislating to that effect, and the "propriety of that legislative action" should be left for "the voters' consideration."

Reasons of Wittmann CJ, at para 81 [Appeal Record at F29]
Swinamer v Nova Scotia (Attorney General), [1994] 1 SCR 445 at para 24 [Tab 35]

72. Contrary to the Appellant's assertions, it is simply not the case that a personal claim for damages under the *Charter*, in and of itself, trumps the general law. If it were otherwise, limitation periods, being statutory bars to potentially meritorious claims, could never apply to personal *Charter* claims. As stated by McLachlin CJ in *Ward v Vancouver (City)*, "s. 24(1) operates concurrently with, and does not replace, the general law," and "[p]rocedural requirements associated with existing remedies" are "crafted to achieve a proper balance between public and private interests, and the underlying policy considerations of these requirements should not be negated by recourse to s. 24(1) of the Charter."

Ward v Vancouver (City), 2010 SCC 27 at para 43 [Tab 37]

73. The Appellant argues that because section 24(1) of the *Charter* provides a remedy in respect of unconstitutional government acts, the right to a remedy is a constitutional right in and of itself. The authorities cited by the Appellant provide no support for the proposition that the right to a remedy is a constitutional right. This is not surprising, considering that such a proposition is not consistent with the Supreme Court's finding that statutory limitation periods apply to personal claims for damages under the *Charter*. If a right to a remedy was a constitutional right, limitation periods simply could not apply to personal *Charter* claims.

Ravndahl v Saskatchewan, *supra* at paras 16-17 [Tab 33]

74. The Appellant cites the Supreme Court's decision in *Re Manitoba Language Rights* for the proposition that the Court's role as the guarantor of the *Charter* "cannot be usurped by a statutory immunity clause purporting to free government from judicial scrutiny." The Supreme Court made no such pronouncement in *Re Manitoba Language Rights.* The Appellant has not included this case in her authorities; the Respondent has.

Re Manitoba Language Rights, [1985] 1 SCR 721 [Tab 38]

75. If the Appellant's claim were a general claim under the *Charter,* section 43 of the *ERCA* would not bar the Appellant's *Charter* claim against the ERCB. However, the Appellant's claim is a personal claim for damages in the amount of $50,000.00 under section 24(1) of the *Charter.* Section 43 of the *ERCA* immunizes the ERCB from personal claims under the *Charter* and, as such, bars the Appellant's personal *Charter* claim against the ERCB.

V. NATURE OF RELIEF DESIRED

76. The Respondent respectfully requests that this appeal be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17TH DAY OF MARCH, 2014.

Estimated Time for Argument: 45 Minutes

JENSEN SHAWA SOLOMON DUGUID HAWKES LLP

Per: _____

Glenn Solomon Q.C.
Solicitor for the Respondent, Energy Resources Conservation Board

VI. LIST OF AUTHORITIES

Description	Tab
Housen v Nikolaisen, 2002 SCC 33	1
Canadian Natural Resources Ltd v Arcelormittal Tubular Products Roman SA, 2013 ABCA 279	2
Trottrup v Alberta (Minister of Environment), 255 AR 204 (CA)	3
Mitten v College of Psychologists (Alberta), 2010 ABCA 159	4
Alberta *Rules of Court*, Alta Reg 124/2010, rr 1.2 and 3.68	5
First Calgary Savings & Credit Union Ltd v Perera Shawnee Ltd, 2011 ABQB 26	6
Anns v Merton London Borough Council (1977), [1978] AC 728 (UK HL)	7
Cooper v Hobart, 2001 SCC 79, [2001] 3 SCR 537	8
Edwards v Law Society of Upper Canada, 2001 SCC 80	9
Fullowka v Royal Oak Ventures Inc, 2010 SCC 5	10
Oil and Gas Conservation Act, RSA 2000, c O-6	11
Energy Resources Conservation Act, RSA 2000, c E-10	12
Knight v Imperial Tobacco Canada Ltd, 2011 SCC 42	13
Heaslip Estate v Mansfield Ski Club Inc, 2009 ONCA 594	14
Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board, 2007 SCC 41	15
Taylor v Canada (Attorney General), 2012 ONCA 479, OR (3d) 161	16
Elder Advocates of Alberta Society v Alberta, 2011 SCC 24	17
Elder Advocates of Alberta Society v Alberta, 2012 ABCA 355	18
Adams v Borrel, 2008 NBCA 62	19
Yugraneft Corp v Rexx Management Corp, 2010 SCC 19	20
SG v Larochelle, 2004 ABQB 123	21
ATA v Alberta (Information and Privacy Commissioner), 2011 SCC 61	22
Irwin Toy Ltd v Quebec (Attorney General), [1989] 1 SCR 927 DLR (4th) 577	23
Ontario (Attorney General) v Dieleman, 1994 CarswellOnt 151 (Gen Div)	24
R v Breeden, 2009 BCCA 463	25