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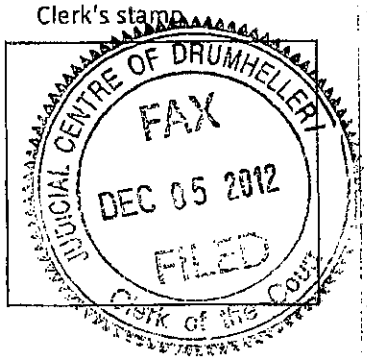

COURT FILE NUMBER	0702-00120
COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL CENTRE	DRUMHELLER
PLAINTIFF	JESSICA ERNST
DEFENDANTS	ENCANA CORPORATION ENERGY RESOURCES CONSERVATION BOARD and HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA

BRIEF OF ARGUMENT OF THE DEFENDANT, ENERGY RESOURCES CONSERVATION BOARD, TO BE HEARD IN CALGARY BY THE HONOURABLE JUSTICE VELDHUIS, JANUARY 18, 2013

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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I. INTRODUCTION

1. This Action involves a claim against EnCana Corporation ("EnCana"), the Energy Resources Conservation Board ("ERCB"), and the Government of Alberta. The Plaintiff claims, *inter alia,* that the Defendants are responsible for the contamination of the groundwater near her residence in the Rosebud, Alberta area.

2. The Plaintiff filed her original Statement of Claim on December 3, 2007. The Plaintiff filed an Amended Statement of Claim on April 21, 2011. The Plaintiff filed a Second Amended Statement of Claim on February 7, 2012. The amendments resulting in the Second Amended Statement of Claim were made by the Plaintiff *ex parte*, notwithstanding that counsel for the ERCB had asked that the amendments be made on Application, and for notice of such an Application.

3. On April 26, 2012, the Defendant ERCB brought an Application for an Order striking the Second Amended Statement of Claim as disclosing no cause of action, or alternatively for summary judgment, on the basis that the ERCB does not owe a private duty of care to the Plaintiff, and on the basis that the ERCB has a statutory immunity from being sued. The ERCB also applied in the alternative for an Order striking the Second Amended Statement of Claim on the basis that it was drafted in a manner inconsistent with the Alberta *Rules of Court*, and in the further alternative, for an Order granting the ERCB particulars of some of the claims in the Second Amended Statement of Claim.

4. Madam Justice Veldhuis heard the Application of the ERCB concurrently with Applications brought by EnCana and the Government of Alberta. At the outset of the proceedings, Justice Veldhuis noted that all three Defendants were seeking an Order regarding the manner in which the Statement of Claim, which was then in its third iteration, was drafted. Justice Veldhuis determined that prior to dealing with any substantive issues raised by the Defendants, the Plaintiff's Statement of Claim needed to be drafted properly. As such, Justice Veldhuis directed that a fresh Statement of Claim, drafted in accordance with the *Rules of Court*, be filed and served within 60 days. Justice Veldhuis adjourned the ERCB's Applications to strike for want of a cause of action and for summary judgment until after the Fresh Statement of Claim was served. Justice Veldhuis also ordered that costs would be spoken to when the Application was heard, or thereafter.

5. Pursuant to the Order of Madam Justice Veldhuis, the Plaintiff filed a Fresh Statement of Claim on June 25, 2012. The Plaintiff claims against EnCana Corporation, the ERCB and the Government of Alberta. No Statements of Defence have been filed. We are now on the fourth iteration of the Statement of Claim in a case which has been in the Pleadings phase for five years.

6. The ERCB now applies to strike out paragraphs 24-58, 81-84 and 87 of the Fresh Statement of Claim pursuant to Rule 3.68 of the Alberta *Rules of Court*. These paragraphs should be struck on the basis that they fail to disclose a reasonable cause of action.

7. In the alternative, the ERCB applies for Summary Judgment in relation to the claims against it in the Fresh Statement of Claim. It is plain and obvious that there is no merit to any of the Plaintiff's claims against the ERCB.

8. In the alternative, the ERCB applies for an order for further particulars of paragraphs 27, 29, 31, 32, 45, 47, 51 and 52 in order to allow the ERCB to properly defend the claims brought against it.

II. FACTS

9. The ERCB is a statutory agency of the Government of Alberta. The ERCB regulates the development of Alberta's energy resources, including oil, natural gas, oil sands, coal, and pipelines. The ERCB is responsible for the administration of the following statutes: *Coal Conservation Act*, c C-17, RSA 2000, *Energy Resources Conservation Act*, c E-10, RSA 2000, *Gas Resources Preservation Act*, c G-4, RSA 2000, *Oil and Gas Conservation Act*, c O-6, RSA 2000, *Oil Sands Conservation Act*, c O-7, RSA 2000, *Pipeline Act*, c P-15, RSA 2000, *Turner Valley Unit Operations Act,* c T-9, RSA 2000.

10. The Plaintiff, Jessica Ernst, purports to claim against the ERCB in negligence and pursuant to section 2(b) of the Canadian *Charter of Rights and Freedoms*. The claims against the ERCB appear to be set out in paragraphs 38 to 41 and 56-58 of the Fresh Statement of Claim:

    38. At all material times, the ERCB owed a duty to the Plaintiff to exercise a reasonable standard of care, skill and diligence in taking reasonable and adequate steps to protect her well water from foreseeable contamination caused by drilling for shallow methane gas; to conduct a reasonable investigation after contamination of her water was reported; and to take remedial steps to correct the damage caused.

    39. The ERCB breached this duty, and continues to breach this duty, by failing to implement the ERCB's own specific and published investigation and enforcement scheme; failing to conduct any form of investigation; and arbitrarily preventing the Plaintiff from participating in the usual regulatory scheme.

    40. Particulars of the ERCB's negligence include:

        (a) failing to take reasonable steps to ensure that the EnCana Wells licensed by the ERCB would not pose a serious risk of contamination to the Plaintiff's underground freshwater sources, including the Rosebud Aquifer;

        (b) failing to adequately inspect and investigate known and/or credible allegations of water contamination of Plaintiff's underground freshwater sources, including the Rosebud Aquifer, and of the possible link between such contamination and the EnCana Wells licensed by the ERCB;

        (c) failing to adequately inspect and investigate known and/or credible allegations of breaches of oil and gas requirements under the jurisdiction of the ERCB at the EnCana Wells;

        (d) failing to use available enforcement powers to stop CBM Activities that were causing contamination of the Plaintiff's underground freshwater sources, including the Rosebud Aquifer and to remediate water contamination and other harms caused by oil and gas industry activity that had already occurred;

        (e) failing to implement the ERCB's established and publicized enforcement and investigation scheme;

        (f) failing to conduct adequate groundwater testing and monitoring;

        (g) failing to investigate potential long-term impacts of CBM Activities on the Rosebud Aquifer; and

        (h) failing to promptly inform the Plaintiff of potential contamination of the Rosebud Aquifer and of the potential risks posed by such contamination to the Plaintiff's health, safety and property.

    41. The ERCB's various omissions as listed above were taken in bad faith.

    [...]

    56. Ms. Ernst pleads that the decision to restrict her communication with the ERCB, and the decision to continue such restriction, was made arbitrarily, and without legal authority.

    57. Throughout this time, Ms. Ernst was prevented from raising legitimate and credible concerns regarding oil and gas related water contamination with the very regulator mandated by the government to investigate and remediate such contamination and at the very time that the ERCB was most needed. Her exclusion from the ERCB's specific and publicized investigation and enforcement process prevented her from raising concerns with the ERCB regarding its failure to

enforce requirements under its jurisdiction, including those aimed at protecting groundwater quantity and quality.

58. The ERCB's arbitrary decision to restrict Ms. Ernst's communication with the ERCB, specifically by prohibiting her from communicating with the enforcement arm of the ERCB, breached Ms. Ernst's rights contained in s. 2(b) of the Canadian Charter of Rights and Freedoms by:

    (a) punitively excluding Ms. Ernst from the ERCB's own complaints, investigation and enforcement process in retaliation for her vocal criticism of the ERCB, thereby punishing her for exercising her right to free speech; and

    (b) arbitrarily removing Ms. Ernst from a public forum of communication with a government agency that had been established to accept public concerns and complaints about oil and gas industry activity, thereby blocking her and preventing her from speaking in a public forum that the ERCB itself had specifically established to facilitate free speech.

11. Ms. Ernst sets out the damages she claims against the ERCB in paragraph 87 of the Fresh Statement of Claim:

87. The Plaintiff Jessica Ernst claims from the Defendant Energy Resources Conservation Board:

    (a) general damages in the amount of $500,000.00;

    (b) special damages in the amount of $100,000.00;

    (c) aggravated damages in the amount of $100,000.00;

    (d) punitive and exemplary damages in the amount of $10,000,000.00;

    (e) damages in the amount of $50,000.00 under section 24(1) of the Canadian Charter of Rights and Freedoms, Part i of the Constitution Act, 1982 being Schedule B to the Canada Act 1982(U.K.), 1982, c.11;

    (f) prejudgment interest pursuant to the Judgment Interest Act, R.S.A. 2000, c. J-1 and amendments thereto;

    (g) postjudgment interest pursuant to the Judgment Interest Act, R.S.A. 2000, e. J-1 and amendments thereto;

    (h) costs; and

    (i) such further and other relief as seems just to this Honourable Court.

III. ISSUES

12. Should paragraphs 24-58, 81-84 and 87 of the Fresh Statement of Claim be struck because they fail to disclose a reasonable cause of action against the Defendant ERCB?

13. In the alternative, should Summary Judgment be granted in favour of the Defendant ERCB?

14. In the alternative, should the Plaintiff be required to provide particulars in relation to paragraphs 27, 29, 31, 32, 45, 47, 51 and of the Fresh Statement of Claim?

15. Should Costs of the April, 2012 Application brought by the Defendant ERCB be awarded to the ERCB, payable forthwith and in any event of the cause?

IV. PARAGRAPHS 24-58, 81-84 AND 87 OF THE FRESH STATEMENT OF CLAIM SHOULD BE STRUCK BECAUSE THEY FAIL TO DISCLOSE A REASONABLE CAUSE OF ACTION AGAINST THE ERCB. IN THE ALTERNATIVE, SUMMARY JUDGMENT SHOULD BE GRANTED IN FAVOUR OF THE ERCB BECAUSE THERE IS NO MERIT TO THE PLAINTIFF'S CLAIMS AGAINST THE ERCB.

16. As will be demonstrated in detail below, paragraphs 24-58, 81-84 and 87 of the Fresh Statement of Claim fail to disclose a reasonable claim against the Defendant ERCB. As such, these paragraphs should be struck. In the alternative, Summary Judgment should be granted to the Defendant ERCB on the basis that it is plain and obvious that there is no merit to any of the Plaintiff's claims against the ERCB.

A. LAW

(i) Application to Strike Fresh Statement of Claim

17. Under Rule 3.68 of the Alberta *Rules of Court*, this Honourable Court has the jurisdiction to strike a Statement of Claim for failing to disclose a reasonable cause of action. Rule 3.68 provides:

> Court options to deal with significant deficiencies
>
> 3.68(1) If the circumstances warrant and a condition under subrule (2) applies, the Court may order one or more of the following:
>
> (a) that all or any part of a claim or defence be struck out;
>
> (b) that a commencement document or pleading be amended or set aside;
>
> (c) that judgment or an order be entered;. . .
>
> (2) The conditions for the order are one or more of the following: . . .
>
> (b) a commencement document or pleading discloses no reasonable claim or defence to a claim;
>
> (c) a commencement document or pleading is frivolous, irrelevant or improper;
>
> (d) a commencement document or pleading constitutes an abuse of process;
>
> (e) an irregularity in a commencement document or pleading is so prejudicial to the claim that it is sufficient to defeat the claim.
>
> (3) No evidence may be submitted on an application made on the basis of the condition set out in subrule (2)(b).

- Alberta *Rules of Court*, Alta Reg 124/2010, r 3.68 **[Tab 41].**

18. This portion of the Application is brought pursuant to R. 3.68(2)(b). Rule 3.68(3) provides that no evidence is to be considered on an Application made on the basis that a pleading discloses no reasonable claim.

- Alberta *Rules of Court, supra,* r 3.68 **[Tab 41].**

19. Rule 3.68 replaces former Rule 129. However, both the former and the new rule have the same effect and are to be applied in a similar fashion.

- *Donaldson v Farrell*, 2011 ABQB 11 at para 30, 2011 CarswellAlta 21 **[Tab 11].**

20. Any pleading may be struck out if it discloses no claim. The general principles governing former Rule 129, and now Rule 3.68, forming the basis of the "plain and obvious" test, have been stated as follows:

> The principles relating to an application under rule 129 were summarized and reviewed by the Northwest Territories Court of Appeal in *Fullowka v. Royal Oak Mines Inc.* (1996), 147 D.L.R. (4th) 531

(N.W.T. C.A.) (leave to appeal to S.C.C. refused) [(1997), 222 N.R. 320 (note) (S.C.C.)] which includes statement of the following principles:

1. It is well settled that the impugned pleadings must be read generously.
2. The pleading will not be struck out if the flaws in it are capable of amendment.
3. A pleading will not be struck out for want of a cause of action unless the flaw is plain and obvious and beyond doubt.
4. The claim advanced must be hopeless to be struck out.
5. The Statement of Claim should be struck out on a question of law only if it is a pure question of law requiring no evidence or no further pleadings.
6. Care must be exercised in striking out part of a Statement of Claim only.
7. Facts pleaded must be taken to be true.
8. The Court should consider allowing an amendment before an order for striking.

- *Roasting v. Lee* (1998), 222 AR 234 at para 6, 63 Alta LR (3d) 260 **[Tab 33].**

21. The test under former Rule 129 has remained the same for Rule 3.68, namely: assuming that the facts as stated are true, is it "plain and obvious" that the pleading does not disclose a reasonable claim or defence?

- *First Calgary Savings & Credit Union Ltd v Perera Shawnee Ltd*, 2011 ABQB 26 at para 4, 2011 CarswellAlta 58 **[Tab 15]**; see also *Donaldson v Farrell, supra*, at para 30 **[Tab 11].**

22. However, unlike former Rule 129, Rule 3.68 must also be applied and read in light of foundational Rule 1.2. Rule 1.2 provides:

Purpose and intention of these rules

1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost effective way.

(2) In particular, these rules are intended to be used

(a) to identify the real issues in dispute,

(b) to facilitate the quickest means of resolving a claim at the least expense, . . .

(e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.

- Alberta *Rules of Court, supra*, Rule 1.2 **[Tab 41].**

23. When determining the appropriate remedy pursuant to a Rule 3.68 application, the Court must have regard to Rule 1.2.

- *Donaldson v Farrell, supra*, at paras 9, 10 and 30 **[Tab 11].**

24. The test requires a liberal interpretation of the pleadings. However, the analysis to be employed pursuant to Rule 3.68 and the applicable test must be applied in light of the purpose of the foundational rules.

- *First Calgary Savings & Credit Union Ltd v Perera Shawnee Ltd, supra* at para 4 **[Tab 15].**

25. There is a significant purpose behind Rule 3.68 and its predecessor Rule 129 and Courts have consistently applied the Rule as intended in circumstances which warrant its application. In particular, if the facts and

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

- *Trottup v Alberta (Minister of Environment)*, 255 AR 204, 2000 CarswellAlta 365 at para 9 (CA) **[Tab 37].**

26. A demand for relief should be struck out where it relates to a pleading that discloses no cause of action.

- *A (S) (Trustee of) v S (M)*, 2005 ABQB 549 at paras 17-20, 383 AR 264 **[Tab 1].**

27. It is anticipated that the Plaintiff may argue, as she did in her Brief filed with respect to the April 26, 2012, Application, that the Supreme Court of Canada's decision in *Hunt v T & N plc* is relevant to the present matter. Specifically, in *Hunt v T & N plc*, the Court held that the novelty of a cause of action or the potential for a defendant to mount a defence should not prevent a claim from proceeding to trial. Rather, a claim should only be struck out if the action is certain to fail because it contains a radical defect.

- *Hunt v T & N plc*, [1990] 2 SCR 959 at paras 32-3, 74 DLR (4th) 321 **[Tab 19]**.
- Brief of Argument of Jessica Ernst in support of the April 26, 2012 Application at para 15.

28. The Supreme Court's decision in *Hunt v T & N plc* related to a proposed extension of the tort of conspiracy. The Supreme Court held that it was not plain and obvious that allowing the action to proceed would amount to an abuse of process, because while there was judicial reluctance to extend the scope of the tort of conspiracy beyond the commercial context, it was never suggested that the tort could not have application in other contexts. The Court held that if a pleading related to an arguable, difficult or important point of law, the Court could not justify striking out a Statement of Claim.

- *Hunt v T & N plc*, [1990] 2 SCR 959 at paras 51 & 55, 74 DLR (4th) 321 **[Tab 19]**.

29. The Supreme Court of Canada's decision in *Hunt v T & N plc* is not relevant to the Plaintiff's claims in the present matter. The issue in *Hunt v T & N plc* was an extension of an existing and recognized tort. Conversely, as will be discussed in detail below, the Fresh Statement of Claim does not disclose a cause of action against the ERCB. The Plaintiff does not advance a claim which is merely an extension of a recognized cause of action. The Plaintiff's claim is not novel. Rather, as discussed below, the Plaintiff's claim simply does not disclose a cause of action that is recognized in law.

30. Where there is no cause of action disclosed by the pleadings, a Statement of Claim may be struck. In *Hughes Estate v Hughes*, the Court struck out a Claim which was based on the unrecognized tort of undue influence because it was not a separate tort for which there was a remedy in damages. Rowbotham J. (as she then was) held that because the Plaintiff's allegations did not disclose a cause of action, the claim should be struck.

- *Hughes Estate v Hughes*, 2006 ABQB 159 at paras 26-8, 396 AR 250 **[Tab 18]**.

(ii) Summary Judgment

31. Rule 7.2 of the Alberta *Rules of Court* provides:

> Application for Judgment
>
> 7.2 On application, the Court may at any time in an action give judgment or an order to which an applicant is entitled when
>
> (a) admissions of fact are made in a pleading or otherwise, or;
>
> (b) the only evidence consists of records and an affidavit is sufficient to prove the authenticity of the records in which the evidence is contained.

- Alberta *Rules of Court, supra*, Rule 7.2 **[Tab 41]**.

32. Summary judgment may be granted pursuant to Rule 7.3(1) of the Alberta *Rules of Court*, which provides, in part:

> 7.3(1) A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds:
>
> . . .
>
> (b) there is no merit to a claim or part of it; . . .

- Alberta *Rules of Court, supra*, Rule 7.3 **[Tab 41]**.

33. Rules 7.3(2) and (3) provide:

> 7.3(2) The application must be supported by an affidavit swearing positively that one or more of the grounds described in subrule (1) have been met or by other evidence to the effect that the grounds have been met.
>
> 7.3(3) If the application is successful the Court may, with respect to all or part of a claim, and whether or not the claim is for a single and undivided debt, do one or more of the following.
>
> (a) dismiss one or more claims in the action or give judgment for or in respect of all or part of the claim or for a lesser amount;
>
> (b) if the only real issue to be tried is the amount of the award, determine the amount or refer the amount for determination by a referee;
>
> (a) if judgment is given for part of a claim, refer the balance of the claim to trial or for determination by a referee, as the circumstances require.

- Alberta *Rules of Court, supra*, Rule 7.3 **[Tab 41]**.

34. The ERCB relies on "other evidence" as referred to in Rule 7.3(2) which, it is submitted, includes admissions of fact in the pleadings and records consisting of legislation, regulations and public documents.

- Alberta *Rules of Court, supra*, Rules 7.2 & 7.3 **[Tab 41]**.

35. While the former Rules of Court only permitted an Application for Summary Judgment after a Statement of Defence had been filed (former Rule 159), Rule 7.2 allows an Order for Summary Judgment to be given "at any time in an action". As such, there is no need for a Statement of Defence to be submitted prior to a Court granting summary judgment. It is submitted that such a reading of Rule 7.2 is consistent with the requirements of Rule 1.2 of the Rules of Court, by allowing for the identification of the real issues in dispute and the quickest means of resolving the claim at the least expense.

- Alberta *Rules of Court, supra*, Rules 1.2 & 7.2 **[Tab 41]**.

36. Rule 7.2 allows judgment to be given summarily when (1) there are admissions of fact made in the pleading, as is the case here, or when (2) the only evidence consists of records and an affidavit is sufficient to prove their authenticity. In this case, the records relied on are all statutes, regulations and public documents, for which no affidavit is required and no proof of authenticity is required in respect of the "evidence" within them.

- Alberta *Rules of Court, supra*, Rule 7.2 & 7.3 **[Tab 41]**.
- *Alberta Evidence Act*, R.S.A. 2000, c A-18, s. 29-30 **[Tab 40]**.

37. Rule 7.3 replaces former Rule 159. However, the test developed in Alberta for summary judgment remains generally the same for the new rule, as it existed under Rule 159. While the new Rule differs slightly in wording and presentation from the former Rule, the basic concept remains the same. In order to be successful on a summary judgment application, the Defendant has to demonstrate that there is no merit to the Plaintiff's claim.

- *Manufacturers Life Insurance Co v Executive Centre at Manulife Place Inc*, 2011 ABQB 189 at para 11, [2011] 11 WWR 833 **[Tab 22].**
- *Elbow River Marketing Ltd Partnership v Canada Clean Fuels Inc*, 2011 ABQB 321 at paras. 29 – 31, 2011 CarswellAlta 803 **[Tab 13]**; rev'd by *Elbow River Marketing Ltd Partnership v Canada Clean Fuels Inc*, 2011 ABCA 258, 2011 CarswellAlta 1628, but not on this point **[Tab 14]**.

38. The important purpose of the summary judgment rule was articulated by the Supreme Court of Canada as follows:

> The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system, and beneficial to all parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.

- *Papaschase Indian Band No 136 v Canada (Attorney General)*, 2008 SCC 14 at para 10, [2008] 1 SCR 372 **[Tab 28].**

39. In balancing the competing interests of weeding out unmeritorious claims and ensuring that claims which may be successful proceed to trial, the test for the granting of summary judgment is a stringent one. The Court of Appeal of Alberta summarized the various articulations of the test in its decision in *Papaschase Indian Band No 136 v Canada (Attorney General)*. While the decision of the Court of Appeal was overturned at the Supreme Court of Canada, the articulation of the test for summary judgment was not criticized or revised. The Alberta Court of Appeal held:

> But the Supreme Court of Canada and our Court have repeatedly adopted a somewhat different standard of proof for summary judgment (or summary dismissal). It is either "no genuine issue for trial" or "plain and obvious". To put it another way, summary judgment (or dismissal) will be granted unless the party opposing has a real chance of success.

- *Papaschase Indian Band No 136 v Canada (Attorney General)*, 2006 ABCA 392 at para 14, 404 AR 349 **[Tab 29].**

40. The principles with respect to meeting the burden of proof relevant to a summary judgment application are:

(a) A party bringing a motion for summary judgment bears the legal onus of showing no genuine issue for trial.

(b) There is no onus on the responding party to prove a genuine issue for trial.

(c) If the applicant for summary judgment discharges his/her onus on the material filed, a respondent who does not resist the application through admissible evidence risks judgment against him/her. That is an evidentiary burden.

(d) There is no obligation on the respondent to file material. He/she can accept the risk described above. If the applicant fails to discharge his/her legal onus, the application will fail.

(e) More commonly a respondent will provide admissible evidence opposing the motion. In that event, the court will consider all the evidence to determine whether the applicant has shown that there is no genuine issue for trial.

- *Murphy Oil Co v Predator Corp*, 2004 ABQB 688 at para 17, 365 AR 326 **[Tab 23]**; aff'd 2006 ABCA 69, 384 AR 251 **[Tab 24]**.

41. It is anticipated that the Plaintiff may argue, as she did in her Brief filed with respect to the April 26, 2012, Application, that the ERCB has failed to submit affidavit evidence in support of its Summary Judgment Application, and further that the only evidence that the ERCB has provided in support of this Application are a number of ERCB policy documents. Indeed, in her previous Brief, the Plaintiff cited the Supreme Court of Canada's decision in *Papaschase Indian Band No 136 v Canada (Attorney General)*, for the proposition that a successful Summary Judgment Application requires a defendant to prove that there is no genuine issue for trial with evidence, and not by relying on mere allegations or the pleadings.

- *Papaschase Indian Band No 136 v Canada (Attorney General)* (SCC), *supra*, at paragraph 11 **[Tab 28]**.
- Brief of Argument of Jessica Ernst in support of the April 26, 2012 Application at para 10.

42. In its Application for Summary Judgment, the ERCB does not rely on mere allegations or the pleadings. Rather, as stated above, the "other evidence" (as referred to in Rule 7.3(2)) that the ERCB relies on includes admissions of fact in the pleadings and records consisting of legislation, regulations and public documents, for which no affidavit is required.

- Alberta *Rules of Court*, *supra*, Rules 7.2 & 7.3 **[Tab 41]**.
- *Alberta Evidence Act*, R.S.A. 2000, c A-18, s. 29-30 **[Tab 40]**.

43. It is likely that the Plaintiff will also argue, as she did in her Brief filed with respect to the April 26, 2012, Application, that the public documents referred to in the ERCB's Brief cannot be a complete answer to her claims because they do not answer questions such as whether the ERCB owes the Plaintiff a private duty of care. The Plaintiff is also likely to argue that, by bringing an Application for Summary Judgment, the ERCB seeks a determination as to whether the Plaintiff has plead valid causes of action against the ERCB as a matter of law, which is a question better suited for an Application to Strike.

- Brief of Argument of Jessica Ernst in support of the April 26, 2012 Application at paras 11-14.

44. However, such an approach would demonstrate a misunderstanding of the purpose underlying the Summary Judgment Rule. The Plaintiff has failed to plead a proper cause of action against the ERCB, and therefore it is plain and obvious that the action cannot succeed and has no prospect of success. As the Alberta Court of Appeal held in *Condominium Corp No 0321365 v 970365 Alberta Ltd*:

> In the first instance, a summary judgment application involves two steps. First, the moving party must adduce evidence to show there is no genuine issue for trial. This is a high threshold. If there is no genuine issue for trial, then there will be no merit to a claim. Accordingly, **if the evidentiary record establishes either that there are missing links in the essential elements of a cause of action or that there is no cause of action in law, then there will be no genuine issue for trial.** The fact there is no genuine issue for trial must be proven; relying on mere allegations or the pleadings will not suffice: *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2008 SCC 14 (S.C.C.) at para 11, [2008] 1 S.C.R. 372 (S.C.C.). [emphasis added]

- *Condominium Corp No 0321365 v 970365 Alberta Ltd*, 2012 ABCA 26 at para 43, 2012 CarswellAlta 58 **[Tab 7]**.

(iii) Duty of Care & Statutory Regulators

45. In the present case, the Plaintiff alleges that the ERCB, a statutory body and a regulator, owes her a private duty of care by virtue of its statutory mandate, or alternatively, by virtue of specific interactions between the Plaintiff and the ERCB. If no duty of care exists between the parties, there can be no reasonable cause of action in negligence. The finding of a duty of care requires sufficient proximity between the parties and an absence of policy factors that would negate the imposition of a duty. The Supreme Court of Canada has articulated this test as follows:

> At the first stage of the Anns test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the Anns test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the Anns test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care.

- *Cooper v Hobart*, 2001 SCC 79 at para 30, [2001] 3 SCR 537 **[Tab 9].**
- *Anns v Merton London Borough Council* (1977), [1978] AC 728, [1977] 2 WLR 1024 (UK HL) **[Tab 2].**

46. At the first stage of the *Anns* test, it must be determined whether the case falls within, or is analogous to, any category of cases in which a duty of care has previously been recognized. If the case does not fall into a recognized category, it must be determined whether it is an appropriate situation in which a new duty of care should be found. The Plaintiff must show that there is sufficient foreseeability and proximity to justify the imposition of a novel duty of care. If sufficient proximity is found, the second stage of the *Anns* test requires a determination as to whether there are policy reasons upon which to negate finding a duty of care.

- *Edwards v. Law Society of Upper Canada*, 2001 SCC 80 at paras 12-3, [2001] 3 SCR 562 **[Tab 12].**

47. The foundation of the proximity analysis and policy considerations required by the *Anns* test is the governing statute. In *Edwards v. Law Society of Upper Canada*, the Supreme Court held that "[f]actors giving rise to proximity must be grounded in the governing statute, if there is one". The Supreme Court of Canada held in *Fullowka v Royal Oak Ventures Inc*:

> These submissions must be evaluated in the context of **legal principles which are not in dispute.** They were recently summarized by the Court in *D. (B.) v. Children's Aid Society of Halton (Region)*, 2007 SCC 38, [2007] 3 S.C.R. 83 (S.C.C.) [*D. (B.)*], at paras. 26-30:
>
> > **• The statute is the foundation of the proximity analysis and policy considerations arising from the particular relationship between the plaintiff and the defendant must be considered.**
> >
> > **• The fact that an alleged duty of care is found to conflict with an overarching statutory or public duty may provide a policy reason for refusing to find proximity.** Both *Cooper* and *Edwards* are examples. In *Cooper*, a duty to individual investors on the part of the Registrar of Mortgage Brokers potentially conflicted with the Registrar's overarching public duty; in *Edwards*, the proposed private law duty to the victim of a dishonest lawyer potentially conflicted with the Law Society's obligation to exercise its discretion to meet a myriad of objectives
> >
> > **• A statutory immunity provision may also, as in *Edwards*, indicate the Legislature's intention to preclude or limit private law duties.** [emphasis added]

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

- *Fullowka v. Royal Oak Ventures Inc*, 2010 SCC 5 at para 39, [2010] 1 SCR 132 **[Tab 16].**

48. The governing statute is the foundation of this analysis simply because it is the sole basis for all of a statutory regulator's duties. As the Supreme Court held in *Cooper v Hobart*:

> In this case, the factors giving rise to proximity, if they exist, must arise from the statute under which the Registrar [of Mortgage Brokers] is appointed. That statute is the only source of his duties, private or public. Apart from that statute, he is in no different position than the ordinary man or woman on the street. If a duty to investors with regulated mortgage brokers is to be found, it must be in the statute.
>
> In this case, the statute does not impose a duty of care on the Registrar to investors with mortgage brokers regulated by the Act. The Registrar's duty is rather to the public as a whole. Indeed, a duty to individual investors would potentially conflict with the Registrar's overarching duty to the public.

- *Cooper v Hobart, supra,* at paras 43-4 **[Tab 9].**

49. Although the statutory scheme is the central source of any private duty of care owed by a statutory regulator, it is also possible for a private duty of care to arise out of a plaintiff's specific interactions with a statutory regulator, provided such a duty is not negated by statute:

> A complicating factor is the role that legislation should play when determining if a government actor owed a prima facie duty of care. Two situations may be distinguished. The first is the situation where the alleged duty of care is said to arise explicitly or by implication from the statutory scheme. The second is the situation where the duty of care is alleged to arise from interactions between the claimant and the government, and is not negated by the statute.
>
> The argument in the first kind of case is that the statute itself creates a private relationship of proximity giving rise to a prima facie duty of care. It may be difficult to find that a statute creates sufficient proximity to give rise to a duty of care. Some statutes may impose duties on state actors with respect to particular claimants. **However, more often, statutes are aimed at public goods, like regulating an industry (*Cooper*), or removing children from harmful environments (*D. (B.)*). In such cases, it may be difficult to infer that the legislature intended to create private law tort duties to claimants. This may be even more difficult if the recognition of a private law duty would conflict with the public authority's duty to the public**: see, e.g., *Cooper* and *D. (B.)*. As stated in *D. (B.)*, "[w]here an alleged duty of care is found to conflict with an overarching statutory or public duty, this may constitute a compelling policy reason for refusing to find proximity" (at para. 28; see also *Fullowka v. Royal Oak Ventures Inc.*, 2010 SCC 5, [2010] 1 S.C.R. 132 (S.C.C.), at para. 39).
>
> The second situation is where the proximity essential to the private duty of care is alleged to arise from a series of specific interactions between the government and the claimant. **The argument in these cases is that the government has, through its conduct, entered into a special relationship with the plaintiff sufficient to establish the necessary proximity for a duty of care. In these cases, the governing statutes are still relevant to the analysis. For instance, if a finding of proximity would conflict with the state's general public duty established by the statute, the court may hold that no proximity arises**: *D. (B.);* see also *Heaslip Estate v. Mansfield Ski Club Inc.*, 2009 ONCA 594, 96 O.R. (3d) 401 (Ont. C.A.). However, the factor that gives rise to a duty of care in these types of cases is the specific interactions between the government actor and the claimant.
>
> Finally, it is possible to envision a claim where proximity is based both on interactions between the parties and the government's statutory duties.
>
> Since this is a motion to strike, the question before us is simply whether, assuming the facts pleaded to be true, there is any reasonable prospect of successfully establishing proximity, on the basis of a

> statute or otherwise. On one hand, where the sole basis asserted for proximity is the statute, conflicting public duties may rule out any possibility of proximity being established as a matter of statutory interpretation: *D. (B.)*. On the other, where the asserted basis for proximity is grounded in specific conduct and interactions, ruling a claim out at the proximity stage may be difficult. So long as there is a reasonable prospect that the asserted interactions could, if true, result in a finding of sufficient proximity**, and the statute does not exclude that possibility,** the matter must be allowed to proceed to trial, subject to any policy considerations that may negate the prima facie duty of care at the second stage of the analysis. [emphasis added]

- *Knight v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at paras 43-50, 335 DLR (4th) 513 **[Tab 21].**

50. In his text *Liability of the Crown*, Professor Peter Hogg summarized the law relating to proximity arising out of specific interactions in the context of public authorities:

1. A public authority will not be open to liability for negligence unless the public authority was in a "close and direct" or proximate relationship with the Plaintiff.
2. The relevant statutory scheme is not the exclusive, or even a necessary, source of proximity in cases involving public authorities: *Hill* and *Fullowka* as well as *Cooper* and *Edwards*, on one reading, provide the support for this conclusion.
3. However, a statutory scheme will *preclude* a duty of care, where such a duty would conflict with the statute: *Hill* provides the support for this conclusion.
4. In addition, the statutory scheme *may* also play a positive role in *establishing* proximity: *Fullowka* provides the support for this conclusion. [emphasis in original]

- Peter W Hogg, Patrick J Monahan, and Wade K Wright, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011) at 242 **[Tab 47].**

51. In summary, there are only two circumstances in which a private duty of care may be owed by a statutory regulator. First, a private duty may arise explicitly or by implication from the statutory scheme. Second, a private duty may arise out of specific interactions with the statutory body, provided such a duty is not negated by statute. As will be discussed below, in the present case, no private duty of care arises from the statutory scheme, and no specific interactions exist between the Plaintiff and the ERCB which could ground a private duty of care. In any event, even if such specific interactions existed, any private duty arising therefrom would be negated by the ERCB's governing statutes, on the basis that these statutes are aimed at public goods. If the ERCB were to have a private duty of care to individuals, such a duty would inevitably conflict with the ERCB's public duties. Further, the ERCB is immune from suit by virtue of a statutory immunity clause.

- *Knight v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at paras 43-50, 335 DLR (4th) 513 **[Tab 21].**
- *See: Edwards v. Law Society of Upper Canada, supra*, at para 9 **[Tab 12]**; *Cooper v Hobart, supra,* at paras 43-4 **[Tab 9]**; and *Nette v Stiles*, 2010 ABQB 14 at para 45, 489 AR 347 **[Tab 25].**

52. A private duty of care that arises from a statutory scheme must be grounded in the regulator's governing statutes, because those statutes are the sole basis for the regulator's duties. The governing statutes are also relevant to a private duty that arises out of specific interactions with the statutory regulator because, as stated above, such a duty can be negated by the statutory scheme.

- *Cooper v Hobart, supra,* at paras 43-4 **[Tab 9].**

53. Governing statutes are, generally, aimed at public goods, and as such, generally impose duties to the public as a whole, rather than private duties to particular individuals. If a governing statute does not provide for a private law duty of care, a private duty of this type does not exist and a claim in negligence

cannot be supported. In the absence of a clear legislative intention, it cannot be inferred that a governing statute confers private law duties owed to specific individuals.

Knight v Imperial Tobacco Canada Ltd, supra, at paras 44 & 50, 335 DLR (4th) 513 **[Tab 21].**

54. In order for a governing statute to impose a private law duty of care, the governing statute must include "expressly or by implication" legislative intent to impose such a duty. As Turnbull J. held in *Burgess (Litigation Guardian of) v Canadian National Railway*:

> When determining whether a reasonable cause of action exists in negligence on the face of the pleadings, a court needs first to assess the question of whether a private law duty of care exists. If the statute does not provide for a private law duty of care, no such duty exists and there can be no claim in negligence. *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562 (S.C.C.); *Mitchell Estate v. Ontario (2004)*, 71 O.R. (3d) 571 (Ont. Div. Ct.), paragraph 19.

It is, therefore, proper to consider whether the ERCB has a private duty of care within its empowering legislation. If not, then there is no such private duty.

- *Edwards v. Law Society of Upper Canada, supra,* at para 13 **[Tab 12].**
- *Burgess (Litigation Guardian of) v Canadian National Railway*, 2005 CarswellOnt 5315 at para 50, 78 OR (3d) 209 (SCJ) **[Tab 5].**

55. Statutory immunity clauses are relevant to the assessment of whether a private duty of care exists between the parties to an action. A statutory immunity clause exempts Crown servants from liability for acts done in the execution of their duties. Such a clause in a governing statute is clear evidence that the legislature did not intend to impose a private duty on the statutory regulator, and intended to preclude any private duty that could arise from specific interactions between the statutory regulator any individual claimants. In *Edwards v. Law Society of Upper Canada*, the Supreme Court of Canada considered whether the Law Society of Upper Canada owed a private duty of care to individuals who had deposited money into a solicitor's trust account not as clients but as participants in a third person's business promotion. In its consideration of the *Law Society Act*, RSO 1990, c L 8, the Court held:

> Finally, and perhaps most indicative of the Legislature's intent, the Act provides statutory immunity in s. 9 of the Act, which reads:
>
> > 9. No action or other proceedings for damages shall be instituted against the Treasurer or any bencher, official of the Society or person appointed in Convocation for any act done in good faith in the performance of any duty or in the exercise or in the intended exercise of any power under this Act, a regulation or a rule, or for any neglect or default in the performance or exercise in good faith of any such duty or power.
>
> Section 9 precludes any inference of an intention to provide compensation in circumstances that fall outside the lawyers' professional indemnity insurance and the lawyers' fund for client compensation.

- *Edwards v. Law Society of Upper Canada, supra,* at paras 16-7 **[Tab 12].**

56. In *Nette v Stiles*, Belzil J. of the Alberta Court of Queen's Bench held that the inclusion of statutory immunity clauses in section 77(1) of the *Chiropractic Profession Act*, SA 1984, c C-9.1 and section 126(1) of the *Health Professions Act*, RSA 2000, c. H-7 "is strong evidence that the Legislature was not creating private law duties of care."

- *Nette v Stiles, supra* at para 29 **[Tab 25].**

57. In *Smorag v Nadeau Estate (Trustee of)*, Ross J. of the Alberta Court of Queen's Bench, in considering the meaning of section 10(5) of the *Dependent Adults Act*, RSA 2000, c D-11, held:

It would take more express statutory language to limit or exclude a person's cause of action. Had the Legislature intended to limit the Guardian's liability as to third parties for decisions he or she makes, it could have said so expressly. Such provisions are routinely found in Alberta legislation, using such language as in the *Child, Youth and Family Enhancement Act*, c. C-12:

> 3.1(5) No action may be brought against a person who conducts alternative dispute resolution under this section for any act done or omitted to be done with respect to the alternative dispute resolution unless it is proved that the person acted maliciously and without reasonable and probable cause.

Similar provisions can be found in s. 14 of the *Court of Queen's Bench Act* (no action may be brought against a master in chambers for actions done in the execution of his duty), s. 15 of the *Criminal Notoriety Act*, s.93 of the *Electric Utilities Act*, s.6(2) of the *Family Support for Children with Disabilities Act*, s.52(4) of the *Personal Property Security Act*, and s.9.51(1) and s. 68 of the *Provincial Court Act*.

- *Smorag v Nadeau Estate (Trustee of)*, 2008 ABQB 714 at paras 28-9, 461 AR 156 **[Tab 34].**

58. While courts construe statutory immunity provisions narrowly, a statutory exemption from liability will be recognized where the wording of the clause is clear. As the Supreme Court of Canada stated in *Swinamer v Nova Scotia (Attorney General)*:

> If the Crown wishes to exempt itself from tortious liability in the construction and maintenance of highways it is a simple matter to legislate to that effect, and to leave the propriety of that legislative action for the voters' consideration. ...

- *Swinamer v Nova Scotia (Attorney General)*, [1994] 1 SCR 445 at para 24, 163 NR 291 **[Tab 36].**
- Peter W Hogg, Patrick J Monahan, and Wade K Wright, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011) at 280-1 **[Tab 47].**

59. The majority of statutory immunity clauses relieve Crown servants from liability for acts done in good faith in the intended execution of their duties. Such clauses do not have to provide an exemption from liability for actions conducted in bad faith. However, the legislature is entitled to give blanket immunity to a governing body or statutory agency regardless of conduct, provided that intention is reflected in the language of the statutory immunity clause:

> ... It would seem that if there is a provision such as Section 12 of the *Safety Codes Act* providing immunity to the City and its officials for acts conducted in "good faith", the converse must be that there is no such exemption for liability for actions conducted in "bad faith". If the legislature had intended to give a blanket immunity to the City regardless of its conduct, such language could have easily been employed. The legislature, however, chose not to do so. It therefore seems to follow logically that the legislature has decided that if the City otherwise owes a duty of care, it will be liable only if it has acted in bad faith. Mere negligence will not suffice.

- *Condominium Corp No 9813678 v Statesman Corp*, 2009 ABQB 493 at para 230, 472 AR 33 **[Tab 8].**

(iv) Free Expression & The Right to be Listened To

60. Section 2(b) of the Canadian *Charter of Rights and Freedoms* provides:

> 2. Everyone has the following fundamental freedoms:
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

- Canadian *Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11, s 2(b) **[Tab 42].**

61. 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."

- *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at para 42, 58 DLR (4th) 577 **[Tab 20].**

62. The determination of whether a violation of section 2(b) has occurred is a two-step analysis. First, it must 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.

- *Irwin Toy Ltd v Quebec (Attorney General)*, *supra*, at para 48 **[Tab 20].**

63. While section 2(b) is given a broad and purposive interpretation, the law is clear that section 2(b) protection is not without limits. The form or method of expression may remove it from protection under section 2(b). For instance, section 2(b) does not extend to protect violence or threats of violence:

> While the guarantee of free expression protects all content of expression, certainly violence as a form of expression receives no such protection. [...] As McIntyre J., writing for the majority in *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, observed in the course of discussing whether picketing fell within the scope of s. 2(b), at p. 588:
>
> > Action on the part of the picketers will, of course, always accompany the expression, but not every action on the part of the picketers will be such as to alter the nature of the whole transaction and remove it from Charter protection for freedom of expression. **That freedom, of course, would not extend to protect threats of violence or acts of violence.**
>
> Indeed, freedom of expression ensures that we can convey our thoughts and feelings in non-violent ways without fear of censure. [emphasis added]

- *Irwin Toy Ltd v Quebec (Attorney General)*, *supra,* at para 43 **[Tab 20].**
- *Baier v Alberta*, 2007 SCC 31 at para 20, [2007] 2 SCR 673 **[Tab 3]**.

64. The right to free expression does not include the right to an audience. In *Ontario (Attorney General) v Dieleman*, Adams J. of the Ontario General Division held:

> It has also been held that freedom of expression assumes an ability in the listener *not* to listen but to turn away if that is her wish. The Charter does not guarantee an audience and, thus, a constitutional right to listen must embrace a correlative right *not* to listen. In *Committee for the Commonwealth of Canada v. Canada*, supra, at pp. 204-05, L'Heureux-Dubé J., in considering the access of would-be speakers to an airport terminal, dealt with the concern that such access could result in exposing "captive viewers or listeners" to unwanted messages. In this respect, she reproduced and approved the following excerpt from the reasons of Douglas J. in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) at pp. 306-307:
>
> > ... if we are to turn a bus or a streetcar into either a newspaper or a park, we take great liberties with people who because of necessity become commuters and at the same time captive viewers or listeners.
> >
> > In asking us to force the system to accept his message as a vindication of his constitutional rights, the petitioner overlooks the constitutional rights of the commuters. *While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his*

> *message upon an audience incapable of declining to receive it.* In my view the right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience.
>
> [Emphasis added]

The principle behind a constitutional aversion to "captive audiences" is that forced listening "destroys and denies, practically and symbolically, that unfettered interplay and competition among ideas which is the assumed ambient of the communication freedoms." See Black Jr., "He Cannot Choose but Hear: The Plight of the Captive Auditor" (1953), 53 Columbia L. Rev. 960 at p. 967. Free speech, accordingly, does not include a right to have one's message listened to. In fact, an important justification for permitting people to speak freely is that those to whom the message is offensive may simply "avert their eyes" or walk away. Where this is not possible, one of the fundamental assumptions supporting freedom of expression is brought into question. [...]

- *Ontario (Attorney General) v Dieleman*, 1994 CarswellOnt 151 at paras 637-8, 20 OR (3d) 229 (Gen Div) **[Tab 27]**.
- See also: *R v Breeden*, 2009 BCCA 463 at paras 33-34, 248 CCC (3d) 317 **[Tab 30]**; *R v Spratt*, 2008 BCCA 340 at para 82, 298 DLR (4th) 317 **[Tab 31]**.

65. Further, section 2(b) "generally imposes a negative obligation on government rather than a positive obligation of protection or assistance." As the Supreme Court of Canada stated in *Baier v Alberta*:

> To determine whether a right claimed is a positive right, the question is whether the appellants claim the government must legislate or otherwise act to support or enable an expressive activity. Making the case for a negative right would require the appellants to seek freedom from government legislation or action suppressing an expressive activity in which people would otherwise be free to engage, without any need for any government support or enablement.

- *Baier v Alberta*, *supra*, at paras 20-23 & 35 **[Tab 3]**.

66. 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).

- *Baier v Alberta*, *supra*, at para 55 **[Tab 3]**.

67. The analysis relating to a positive rights claim under section 2(b) was set out by the Supreme Court of Canada in *Baier v Alberta*:

> In cases where a government defending a *Charter* challenge alleges, or the *Charter* claimant concedes, that a positive rights claim is being made under s. 2(b), a court must proceed in the following way. First it must consider whether the activity for which the claimant seeks s. 2(b) protection is a form of expression. If so, then second, the court must determine if the claimant claims a positive entitlement to government action, or simply the right to be free from government interference. If it is a positive rights claim, then third, the three *Dunmore* factors must be considered. As indicated above, these three factors are (1) that the claim is grounded in a fundamental freedom of expression rather than in access to a particular statutory regime; (2) that the claimant has demonstrated that exclusion from a statutory regime has the effect of a substantial interference with s. 2(b) freedom of expression, or has the purpose of infringing freedom of expression under s. 2(b); and (3) that the government is responsible for the inability to exercise the fundamental freedom. If the claimant cannot satisfy these criteria then the s. 2(b) claim will fail. If the three factors are satisfied then s. 2(b) has been infringed and the analysis will shift to s. 1.

- *Baier v Alberta, supra*, at para 30 **[Tab 3]**.

(v) Limitations

68. Section 3(1) of the *Limitations Act*, RSA 2000, c L-12 provides:

> 3(1) Subject to section 11, if a claimant does not seek a remedial order within
>
> (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
>
> (i) that the injury for which the claimant seeks a remedial order had occurred,
>
> (ii) that the injury was attributable to conduct of the defendant, and
>
> (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,
>
> or
>
> (b) 10 years after the claim arose,
>
> whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

- *Limitations Act*, RSA 2000, c L-12, s 3(1) **[Tab 44]**.

69. A cause of action arises for the purpose of limitation periods when the material facts on which the action is based have, or ought to have, been discovered by the plaintiff, by the exercise of reasonable diligence.

- *Central & Eastern Trust Co v Rafuse*, [1986] 2 SCR 147 at para 89, 31 DLR (4th) 481 **[Tab 6]**.

70. If a claim is brought outside the relevant limitations period, summary judgment will be granted because it is plain and obvious that the action cannot succeed. As Verville J. held in *Borchers v Kulak*:

> **A finding that a claim has been filed outside of the limitations period will result in summary judgment being granted. In such cases, it is plain and obvious that the claim cannot succeed,** because, by operation of law, the defence would be entitled to immunity from the action. [citations omitted] [emphasis added]

- *Borchers v Kulak*, 2009 ABQB 457 at para 36, 479 AR 136 **[Tab 4]**.

71. In *De Shazo v Nations Energy Co*, the Alberta Court of Appeal examined the application of the discoverability rule incorporated in section 3(1)(a) to a summary judgment application. At paragraph 19, the Court stated:

> When faced with a summary judgment application of this type the court must ascertain whether there are undisputed facts that necessarily lead to the conclusion that it is plain and obvious the plaintiff's claim is statute barred.

- *De Shazo v Nations Energy Co*, 2005 ABCA 241 at para 19, 367 AR 267 **[Tab 10]**.

72. Such an analysis turns on the plaintiff's knowledge relating to the three elements set out in section 3(1)(a). Specifically:

> The statute specifies the type of knowledge that must have been available to the claimant in order to trigger the running of the limitation period. The claimant must know or have been reasonably able to discover that: (i) the injury occurred; (ii) the injury was attributable to the conduct of the defendant; and (iii) the injury warrants bringing a proceeding.

- *De Shazo v Nations Energy Co, supra*, at para 28 **[Tab 10]**.

73. The *Limitations Act*, RSA 2000, c L-12, applies to constitutional causes of action. In *Ravndahl v Saskatchewan*, the Supreme Court of Canada held that limitation periods apply to personal claims for constitutional relief:

> It was argued below that statutory limitation periods do not apply to personal claims for constitutional relief. Personal claims for constitutional relief are claims brought as an individual *qua* individual for a personal remedy. As will be discussed below, personal claims in this sense must be distinguished from claims which may enure to affected persons generally under an action for a declaration that a law is unconstitutional.
>
> The argument that *The Limitation of Actions Act* does not apply to personal claims was abandoned before us, counsel for the appellant conceding that *The Limitations of Actions Act* applies to such claims. This is consistent with this Court's decision in *Kingstreet Investments Ltd. v. New Brunswick (Department of Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3 (S.C.C.), which held that limitation periods apply to claims for personal remedies that flow from the striking down of an unconstitutional statute.

- *Ravndahl v Saskatchewan*, 2009 SCC 7 at paras 16-7, [2009] 1 SCR 181 **[Tab 32]**.
- Peter W Hogg, Patrick J Monahan, and Wade K Wright, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011) at 105-7 **[Tab 47].**

B. ARGUMENT

74. The Plaintiff claims against the Defendant ERCB in negligence, and on the basis that the ERCB breached her *Charter* right to free expression. As discussed below, every claim set out in the Fresh Statement of Claim against the Defendant ERCB fails to disclose a reasonable cause of action, and should be struck. In the alternative, it is plain and obvious that the Plaintiff's claims against the Defendant ERCB are without merit, and as such, Summary Judgment should be granted in favour of the ERCB.

(i) The ERCB does not owe a private duty of care to the Plaintiff

75. As stated above, in order for a private duty of care to be found between the ERCB and the Plaintiff, it must be determined whether the case falls within, or is analogous to, any category of cases in which a duty of care has previously been recognized. The Plaintiff's claim does not fall into any category in which a private duty of care has been previously recognized. As such, it must be determined whether a new private duty of care should be found. The imposition of a novel private duty of care in the present case requires sufficient proximity between the Plaintiff and the ERCB. If sufficient proximity is demonstrated, the second stage of the *Anns* test requires a determination as to whether there are policy reasons upon which to negate finding a duty of care.

- *Edwards v. Law Society of Upper Canada*, 2001 SCC 80 at paras 12-3, [2001] 3 SCR 562 **[Tab 12].**

76. In the present case, and as stated above, there are only two circumstances in which a private duty of care between the Plaintiff and the ERCB could be found. A private duty of care could arise explicitly or by implication from the ERCB's statutory scheme. A private duty of care could also arise through specific interactions between the Plaintiff and the ERCB, provided a private duty is not negated by the ERCB's governing statutes. Each circumstance will be dealt with in turn.

- *Edwards v. Law Society of Upper Canada*, 2001 SCC 80 at paras 12-3, [2001] 3 SCR 562 **[Tab 12].**
- *Knight v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at paras 43-50, 335 DLR (4th) 513 **[Tab 21].**

(a) Private Duty of Care Arising from the Statutory Scheme

77. A private duty of care that arises from the ERCB's statutory scheme must be grounded in the ERCB's governing statutes, because those statutes are the sole basis for the ERCB's duties. The governing statutes relevant to the present matter are the *Energy Resources Conservation Act* [*ERCA*] and the *Oil and Gas Conservation Act* [*OGCA*].

- *Cooper v Hobart, supra,* at paras 43-4 **[Tab 9].**
- *Oil and Gas Conservation Act*, RSA 2000, c O-6 **[Tab 45].**
- *Energy Resources Conservation Act*, RSA 2000, c E-10 **[Tab 43].**

78. Although the *ERCA* and the *OGCA* may impose a duty on the ERCB to the public as a whole, they do not impose a private duty of care between the Plaintiff and the ERCB. As stated above, in order for the *OGCA* or the *ERCA* to impose a private law tort duty, the statute must, expressly or by implication, demonstrate that the legislature intended to impose such a duty.

79. The purposes of the *OGCA* are set out at section 4:

> 4 The purposes of this Act are
>
> (a) to effect the conservation of, and to prevent the waste of, the oil and gas resources of Alberta;
>
> (b) to secure the observance of safe and efficient practices in the locating, spacing, drilling, equipping, constructing, completing, reworking, testing, operating, maintenance, repair, suspension and abandonment of wells and facilities and in operations for the production of oil and gas or the storage or disposal of substances;
>
> (c) to provide for the economic, orderly and efficient development in the public interest of the oil and gas resources of Alberta;
>
> (d) to afford each owner the opportunity of obtaining the owner's share of the production of oil or gas from any pool;
>
> (e) to provide for the recording and the timely and useful dissemination of information regarding the oil and gas resources of Alberta;
>
> (f) to control pollution above, at or below the surface in the drilling of wells and in operations for the production of oil and gas and in other operations over which the Board has jurisdiction.

These purposes demonstrate that any duties imposed on the ERCB pursuant to the *OGCA* are duties owed to the public as a whole. The purposes of the *OGCA* do not indicate, either expressly or by implication, that the Legislature intended to impose a duty on the ERCB to any particular individual - or every particular individual. The ERCB has a public duty of care in implementing the regulation of an industry, but no private duty of care.

- *Oil and Gas Conservation Act, supra,* at s 4 **[Tab 45].**

80. Although not referred to in the Fresh Statement of Claim, the *ERCA* governs the composition and conduct of the ERCB, and as such, is relevant to the determination of the applicable duty of care. The purposes of the *ERCA* are set out in section 2:

> 2 The purposes of this Act are
>
> (a) to provide for the appraisal of the reserves and productive capacity of energy resources and energy in Alberta;
>
> (b) to provide for the appraisal of the requirements for energy resources and energy in Alberta and of markets outside Alberta for Alberta energy resources or energy;
>
> (c) to effect the conservation of, and to prevent the waste of, the energy resources of Alberta;

(d) to control pollution and ensure environment conservation in the exploration for, processing, development and transportation of energy resources and energy;

(e) to secure the observance of safe and efficient practices in the exploration for, processing, development and transportation of the energy resources of Alberta;

(e.1) to secure the observance of safe and efficient practices in the exploration for and use of underground formations for the injection of substances;

(f) to provide for the recording and timely and useful dissemination of information regarding the energy resources of Alberta;

(g) to provide agencies from which the Lieutenant Governor in Council may receive information, advice and recommendations regarding energy resources and energy

These purposes demonstrate that any duties imposed on the ERCB pursuant to the *ERCA* are owed to the public as a whole. The purposes of the *ERCA* do not indicate, either expressly or by implication, that the Legislature intended to impose a duty on the ERCB to any particular individual. The ERCB's duties are public, not private.

- *Energy Resources Conservation Act, supra,* at s 2 **[Tab 43]**.

81. Section 3 of the *ERCA* provides:

> 3 Where by any other enactment the Board **is charged with the conduct of a hearing, inquiry or other investigation** in respect of a proposed energy resource project or carbon capture and storage project, **it shall, in addition to any other matters it may or must consider in conducting the hearing, inquiry or investigation,** give **consideration to whether the project is in the public interest,** having regard to the social and economic effects of the project and the effects of the project on the environment. [emphasis added]

This section clearly imposes a public duty on the ERCB in the conduct of investigations. However, section 3 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, including the Plaintiff. Not only is there no basis upon which a private duty could be found, 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. In fact, the threat of being sued by any of the numerous competing interests before the Board would have a severe impact on its functioning.

- *Energy Resources Conservation Act, supra,* at s 3 **[Tab 43]**.

82. Section 6(1) of the *ERCA* explicitly sets out the responsibilities of the members of the ERCB to the public:

1. Every member [of the ERCB], in exercising powers and in discharging functions and duties,

   (a) shall act honestly, in good faith and in the public interest,

   (b) shall avoid conflicts of interest, and

   (c) shall exercise the care, diligence and skill that a reasonable and prudent person would exercise under comparable circumstances.

- *Energy Resources Conservation Act, supra,* at s 6 **[Tab 43]**.

83. 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". Further, even the duty to act in good faith is not owed to any individual. The

Legislature made it clear that the public responsibility of the ERCB's members is to act "in good faith and in the public interest". As the word "and" is conjunctive, the public responsibility to act in good faith can only apply as part of the public responsibility to act in good faith. To separate the responsibility of members to act in good faith from the responsibility to act in the public interest would ignore the clear intention of the Legislation.

- *Energy Resources Conservation Act, supra,* at s 6 **[Tab 43].**

84. 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 to specific individuals. As such, there is no private duty of care between the ERCB and individual litigants, including the Plaintiff.

- *Energy Resources Conservation Act, supra,* at s 6 **[Tab 43].**
- *Yugraneft Corp v Rexx Management Corp*, 2010 SCC 19 at para 39, [2010] 1 SCR 649 **[Tab 39].**

85. The inclusion of a statutory immunity clause in s. 43 of the *ERCA* further demonstrates that no private duty of care exists between the ERCB and the Plaintiff. Section 43 of the *ERCA* provides:

> 43 Protection from action
>
> No action or proceeding may be brought against the Board or a member of the Board or a person referred to in section 10 or 17(1) in respect of any act or thing done purportedly in pursuance of this Act, or any Act that the Board administers, the regulations under any of those Acts or a decision, order or direction of the Board. [Emphasis added]

- *Energy Resources Conservation Act, supra,* at s 43 **[Tab 43].**

86. Section 43 of the *ERCA* relieves the ERCB from liability for any act done in pursuance of any Act it administers, or any regulations, orders or directives. By enacting s. 43, the Legislature expressly exempted the ERCB from any liability in any actions brought against it by any private individuals. The language in s. 43 is clear and precise: no action may be brought against the ERCB in respect of any act done in pursuance of any Act the ERCB administers, or any regulations, decisions, orders or directives of the ERCB. The statutory language precludes the Plaintiff's claims. A private duty of care between the ERCB and the Plaintiff simply cannot be inferred in the context of s. 43.

87. Further, s. 43 does not limit immunity to only those acts done by the ERCB in good faith. Rather, s. 43 acts as a blanket immunity in favour of the ERCB, in respect of any act done.

88. The Legislature's choice to exclude all actions against the ERCB, by using the phrase "no action or proceeding", necessarily includes the Plaintiff'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 Plaintiff is bound by the laws enacted by the Legislature.

- *Energy Resources Conservation Act,* RSA 2000, *supra,* at s 43 **[Tab 43].**

(b) Private Duty of Care Arising from Interactions between the Plaintiff and the ERCB

89. As stated above, no private duty of care arises out of the ERCB's statutory scheme. The Plaintiff's claim is also incapable of establishing that a private duty of care arose out of specific interactions between the Plaintiff and the ERCB.

90. It must be remembered that even in circumstances in which a private duty of care can be said to arise out of specific interactions between a claimant and a statutory regulator, the regulator's governing statutes are relevant to the proximity analysis. Any such private duty can be negated by the statutory scheme. As set out above, the ERCB's governing statutes negate any private duty to the Plaintiff. The ERCB's governing statutes are aimed at public goods, impose public duties on the ERCB and preclude the imposition of a private duty of care. Further, the ERCB is immune from suit by virtue of a statutory immunity clause.

- *Knight v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at paras 43-50, 335 DLR (4th) 513 **[Tab 21].**

91. Indeed, as the Supreme Court of Canada held in *Fullowka v Royal Oak Ventures Inc*, the ERCB's governing statutes are the foundation of the proximity analysis and policy considerations arising out of the particular relationship between the ERCB and the Plaintiff. A private duty of care would conflict with the ERCB's overarching public duty, and as such, policy considerations preclude the imposition of any such duty. The statutory immunity clause set out in section 43 of the *ERCA* also demonstrates the Legislature's intention to preclude private law duties. As such, even if the Plaintiff argues that a private duty of care arose out of specific interactions she had with the ERCB, that duty is explicitly precluded by the ERCB's governing statutes.

- *Fullowka v. Royal Oak Ventures Inc*, 2010 SCC 5 at para 39, [2010] 1 SCR 132 **[Tab 16].**

92. In any event, any specific interactions the Plaintiff claims to have had with the ERCB are not sufficient to ground a private duty of care. The Plaintiff claims that she engaged in direct and personal interactions with the ERCB regarding water contamination on her land. These interactions took place via the ERCB's public complaints process. However, lodging complaints with the ERCB is an insufficient basis upon which to ground the requisite proximity for a private duty of care. If such interactions were sufficient to ground proximity and impose a private law duty of care, even in the face of legislation which precludes such a duty, all government agencies would owe private duties of care to all citizens who lodged complaints via a publically available complaints process. Not only would such a finding create a flood of litigation, it would undermine the Legislature's ability to preclude private duties of care with respect to statutory schemes.

93. In this context, not only are any specific interactions the Plaintiff claims to have had with the ERCB not sufficient to ground a private duty of care, any private duty is negated by the ERCB's governing statutes. As stated above, the Legislature has clearly negated a private duty of care between the ERCB and the Plaintiff.

94. The Legislature did not leave the Plaintiff without any remedies in respect of the ERCB. Rather, the remedies available to the Plaintiff in respect of the ERCB would be those available on judicial review. The Plaintiff did not pursue those well-known, clearly established remedies. Instead, she has chosen to pursue relief precluded by the Legislature. The Plaintiff is bound by the laws enacted by the Legislature. She is, nonetheless, left with any claims that she can establish as against Encana.

(ii) No reasonable cause of action or meritorious claim can arise out of paragraphs 24-58, 81-84 and 87 of the Fresh Statement of Claim

95. Paragraphs 24 and 25 of the Fresh Statement of Claim provide:

> 24. The ERCB is the government agency responsible for overseeing and regulating the oil and gas industry, including all aspects of CBM development. In particular, the ERCB is exclusively tasked with licensing gas wells, and enforcing significant legislative and regulatory provisions that are intended to

protect the quality and quantity of groundwater supply from interference or contamination due to oil and gas development, including CBM Activities.

25. These legislative and regulatory provisions are contained in, among other sources, *Oil and Gas Conservation Regulations*, Alta. Reg. 151/1971; *Guide 65: Resources Applications for Conventional Oil and Gas Reservoirs* (2003); *Guide G-8: Surface Casing Depth — Minimum Requirements* (1997); *Guide 9: Casing Cement, Minimum Requirements; Guide 56: Energy Development Application Schedules* (2003); and *Informational Letter IL 91-11: Coalbed Methane Regulation* (1991).

None of the legislative and regulatory provisions that the Plaintiff refers to in paragraph 24 of the Fresh Statement of Claim impose a private duty of care on the ERCB to any particular individual, including the Plaintiff. In the absence of a private duty of care, the Plaintiff has no reasonable cause of action in negligence against the ERCB.

96. Further, nothing in any of the sources the Plaintiff refers to in paragraph 25 of the Fresh Statement of Claim can support a finding that the ERCB owes a private duty of care to the Plaintiff. For instance, r. 3.061 of the *Oil and Gas Conservation Regulations* provides:

> 3.061 A licensee of a well that is completed above the base of groundwater protection, other than a water well or a well that is part of a water recycle program, shall operate the well in accordance with Directive 044: Requirements for Surveillance, Sampling, and Analysis of Water Production in Hydrocarbon Wells Completed Above the Base of Groundwater Protection.

This regulation cannot be read so as to support a finding of a private law duty of care on the ERCB to the Plaintiff. In the absence of a duty of care between the ERCB and the Plaintiff, no cause of action can arise out paragraph 25 of the Fresh Statement of Claim.

- *Oil and Gas Conservation Regulations*, *supra*, at s 3.061 **[Tab 46]**.
- ERCB, Guide 65: Resources Applications for Conventional Oil and Gas Reservoirs (2003) **[Tab 53]**.
- ERCB, Guide G-8: Surface Casing Depth - Minimum Requirements (1997) **[Tab 54]**.
- ERCB, Guide 56: Energy Development Applications and Schedules (2003) **[Tab 52]**.
- ERCB, *Informational Letter IL 91-11*: *Coalbed Methane Regulation* (1991) **[Tab 55]**.

97. Further, the legislative and regulatory provisions that the Plaintiff refers to in paragraphs 24 and 25 of the Fresh Statement of Claim are all covered by the statutory immunity clause in section 43 of the *ERCA*. Specifically, section 43 exempts the ERCB from liability for any acts done in pursuance of any act it administers or any regulations, decisions, orders or directives. As such, even if the ERCB was negligent in conducting its duties under any of the legislative and regulatory provisions contemplated by the Plaintiff, any claims arising therefrom cannot succeed because section 43 grants immunity to the ERCB. As such, paragraphs 24 and 25 of the Fresh Statement of Claim should be struck for failing to disclose a reasonable cause of action. Even with the facts pleaded taken to be true, the flaw in the claim is plain, obvious and beyond doubt, the claim is hopeless, and there is no amendment that can correct the flaw. The issue is a question of law that can be determined at this time. Such a determination will satisfy the requirements of Rule 1.2 of the Alberta *Rules of Court* in facilitating the quickest means of resolving the claim at the least expense - not only in the ERCB's interests, but also in the Plaintiff's interests whether or not she properly appreciates what these are.

- *Energy Resources Conservation Act*, *supra*, at s 43 **[Tab 43]**.

98. In the alternative, Summary Judgment should be granted in favour of the ERCB in respect paragraphs 24 and 25 of the Fresh Statement of Claim because any claim based on the legislative or regulatory provisions referred to in paragraphs 24 and 25 is covered by the blanket immunity set out in section 43 of the *ERCA*. As such, any claim arising out of paragraphs 24 and 25 of the Fresh Statement of Claim is

without merit. The basis of the claim is the ERCB's alleged private duty to the Plaintiff. Regardless of whether that private duty is alleged to arise out of the ERCB's statutory scheme, or out of specific interactions with the Plaintiff, such a duty is excluded by the Legislature, and coupled with a comprehensive immunity from such a claim. It is plain and obvious that there is no genuine issue for trial. The ERCB has satisfied the legal onus of showing no genuine issue for trial. The evidentiary onus next shifts to the Plaintiff to demonstrate that the ERCB owes her a private duty of care, can be sued for breaching that private duty of care, and breached that private duty of care.

- *Energy Resources Conservation Act, supra*, at s 43 **[Tab 43].**

99. Paragraph 26 of the Fresh Statement of Claim provides:

> 26. In or before 1999, the ERCB used its statutory powers to establish a detailed Compliance Assurance Enforcement Scheme, which included set procedures for receiving and investigating public complaints, inspecting oil and gas operations to ensure that licenses were in compliance with all applicable rules, and taking appropriate enforcement and remedial action against oil and gas companies when non-compliance occurred. This scheme was operationalized through the Operations Division of the ERCB, and specifically both through the ERCB's Compliance, Environment and Operations Branch, and its Public Safety / Field Surveillance Branch. The ERCB's Operations Division operates numerous Field Offices located throughout Alberta.

100. Although the Plaintiff has not set out the source of the detailed Compliance Assurance Enforcement Scheme the ERCB is alleged to have established, there is nothing in any act the ERCB administers or any regulation, decision, order or directive that could give rise to a finding that the ERCB owes a private duty of care to the Plaintiff in respect of its enforcement process. If the Public Safety/Field Surveillance Branch of the ERCB owed a private duty of care to the Plaintiff by virtue of the enforcement process described by the Plaintiff, such a duty would have to be expressly set out in an ERCB administered Act, Regulation or Directive. No such private duty of care is set out in any relevant source. Moreover, any private duty that is alleged to arise out of the Plaintiff's specific interactions with the enforcement process is negated by the ERCB's governing statutes. In the absence of a private duty of care between the ERCB and the Plaintiff, no cause of action in negligence can arise out of paragraph 26 of the Fresh Statement of Claim.

- *Energy Resources Conservation Act, supra*, at s 43 **[Tab 43].**

101. Further, section 43 of the *ERCA* exempts the ERCB from liability for any act done in pursuance of any ERCB administered Act, Regulation or Directive. As such, even if the ERCB or the Public Safety/Field Surveillance Branch were negligent in implementing the enforcement process described by the Plaintiff, section 43 exempts the ERCB from liability. As such, paragraph 26 of the Fresh Statement of Claim should be struck for failing to disclose a reasonable cause of action.

- *Energy Resources Conservation Act, supra*, at s 43 **[Tab 43].**

102. Even with the facts pleaded taken to be true, the flaw in the claim is plain, obvious and beyond doubt, the claim is hopeless, and there is no amendment that can correct the flaw. The issue is a question of law that can be determined at this time. Such a determination will satisfy the requirements of Rule 1.2 of the Alberta *Rules of Court* in facilitating the quickest means of resolving the claim at the least expense.

103. In the alternative, Summary Judgment should be granted in favour of the ERCB in respect of paragraph 26 of the Fresh Statement of Claim. It is plain and obvious that no meritorious claim can arise out of paragraph 26 of the Fresh Statement of Claim because no private duty of care is owed to the Plaintiff from the ERCB. Further, even if the ERCB or the Public Safety/Field Surveillance Branch was negligent in conducting its compliance or enforcement programs, section 43 of the *ERCA* exempts the ERCB from liability. The basis of the claim is the ERCB's alleged private duty. Such a duty is excluded by the

Legislature, and coupled with a comprehensive immunity from such a claim. It is plain and obvious that there is no genuine issue for trial. The ERCB has satisfied the legal onus of showing no genuine issue for trial. The evidentiary onus next shifts to the Plaintiff to demonstrate that the ERCB owes her a private duty of care, can be sued for breaching that private duty of care, and breached that private duty of care.

- *Energy Resources Conservation Act, supra,* at s 43 **[Tab 43].**

104. Paragraphs 27 and 28 of the Fresh Statement of Claim provide:

> 27. The ERCB made numerous public representations regarding what individuals adversely impacted by oil and gas activities could expect from the ERCB's enforcement branches and field offices and from its published investigation and enforcement compliance mechanisms. In particular, the ERCB represented that:
>
> (a) the ERCB ensures that water and agricultural lands are protected from adverse impacts caused by oil and gas activities;
>
> (b) the ERCB specifically protects all freshwater aquifers from adverse impacts caused by oil and gas activities;
>
> (c) ERCB Field Offices are responsible for, and do in fact, inspect oil and gas operations to ensure compliance with all applicable standards, specifications and approval conditions;
>
> (d) ERCB field staff investigate and respond to all public complaints to ensure that appropriate action is taken; and
>
> (e) when non-compliance is identified, the ERCB triggers an established policy for ERCB enforcement action.
>
> 28. These representations had the effect of, and were intended to, encourage and foster reliance on the ERCB by Ms. Ernst and other landowners. In particular, Ms. Ernst relied on the ERCB to prevent negative impacts on groundwater caused by oil and gas development; to respond promptly and reasonably to her complaints regarding impacts on her well water potentially caused by CBM Activities; and to take prompt and reasonable enforcement and remedial action when breaches of regulations or other requirements were identified.

105. Although it is unclear what "public representations" the Plaintiff refers to in paragraphs 27 and 28 of the Fresh Statement of Claim, the Plaintiff presumably refers to the ERCB's investigation and enforcement process, which arise out of sections 94-110 of the *OGCA,* related regulations, and other ERCB directives, as set out above, and as are included in the ERCB's Book of Authorities.

- *Oil and Gas Conservation Act, supra,* at ss 94-110 **[Tab 45].**
- *Oil and Gas Conservation Regulations, supra* **[Tab 46].**
- ERCB, Guide 65: Resources Applications for Conventional Oil and Gas Reservoirs (2003) **[Tab 53].**
- ERCB, Guide G-8: Surface Casing Depth - Minimum Requirements (1997) **[Tab 54].**
- ERCB, Guide 56: Energy Development Applications and Schedules (2003) **[Tab 52].**
- ERCB, *Informational Letter IL 91-11: Coalbed Methane Regulation* (1991) **[Tab 55].**
- ERCB, *Informational Letter (IL) 99-4: EUB Enforcement Process, Generic Enforcement Ladder, and Field Surveillance Ladder* **[Tab 56].**
- ERCB, *Directive 19: Compliance Assurance*, September, 2010 **[Tab 48].**
- ERCB, *Directive 27-Shallow Fracturing Operations-Restricted Operations*, August 2009 **[Tab 49].**
- ERCB, *Directive 035: Baseline Water Well Testing Requirement for Coalbed Methane Wells Completed Above the Base of Groundwater Protection* **[Tab 50].**
- ERCB, *Directive 044: Requirements for Surveillance, Sampling, and Analysis of Water Production in Hydrocarbon Wells Completed Above the Base of Groundwater Protection* **[Tab 51].**

106. There is nothing in sections 94 to 110 of the *OGCA* to support a finding that the *OGCA* imposes a private duty of care on the ERCB. There is also nothing in any of the Regulations or Directives cited by the Plaintiff to support a finding that the ERCB owes a private duty of care to any particular individual, including the Plaintiff. Further, representations made to the public at large do not constitute specific interactions which could give rise to a private duty of care. In the absence of a private duty of care between the ERCB and the Plaintiff, no cause of action in negligence can arise under paragraphs 27 and 28 of the Fresh Statement of Claim.

107. Further, section 43 exempts the ERCB from liability for anything done in pursuance of any Act it administers or any regulations, directives, orders or decisions. Even if the ERCB fostered reliance on it through the public representations alleged by the Plaintiff, and even if public representations could be construed as specific interactions between the Plaintiff and the ERCB, the ERCB is exempt from liability pursuant to section 43. As such, paragraphs 27 and 28 of the Fresh Statement of Claim should be struck for failing to disclose a reasonable cause of action.

- *Energy Resources Conservation Act, supra,* at s 43 **[Tab 43].**

108. Even with the facts pleaded taken to be true, the flaw in the claim is plain, obvious and beyond doubt, the claim is hopeless, and there is no amendment that can correct the flaw. The issue is a question of law that can be determined at this time. Such a determination will satisfy the requirements of Rule 1.2 of the Alberta *Rules of Court* in facilitating the quickest means of resolving the claim at the least expense.

109. In the alternative, Summary Judgment should be granted in favour of the ERCB in respect of paragraphs 27 and 28 of the Fresh Statement of Claim. It is plain and obvious that no meritorious claim can arise out of paragraphs 27 and 28 because no private duty of care is owed to the Plaintiff from the ERCB. As discussed above, none of the Acts, regulations, directives, orders or decisions administered by the ERCB give rise to a private duty of care. Further, no private duty of care can be argued to have arisen by virtue of public representations made by the ERCB to the Plaintiff and other landowners. Representations made to the public at large do not constitute specific interactions which could give rise to a private duty of care. Moreover, even if public representations could be construed as specific interactions between the Plaintiff and the ERCB, any private duty is negated by the ERCB's statutory scheme, as discussed above. Section 43 of the *ERCA* exempts the ERCB from liability. As such, the claim is without merit. The basis of the claim is the ERCB's alleged private duty. Such a duty is excluded by the Legislature, and coupled with a comprehensive immunity from such a claim. It is plain and obvious that there is no genuine issue for trial. The ERCB has satisfied the legal onus of showing no genuine issue for trial. The evidentiary onus next shifts to the Plaintiff to demonstrate that the ERCB owes her a private duty of care, can be sued for breaching that private duty of care, and breached that private duty of care.

- *Energy Resources Conservation Act, supra,* at s 43 **[Tab 43].**

110. Paragraphs 29 to 37 of the Fresh Statement of Claim provide:

> 29. Prior to engaging in CBM activities, EnCana submitted to the ERCB license applications for the EnCana Wells. The ERCB knew that EnCana intended to engage in new and untested CBM Activities at the EnCana Wells at shallow depths underground located at the same depths as in-use freshwater aquifers, including the Rosebud Aquifer. Despite this knowledge, the ERCB licensed the EnCana Wells without taking adequate steps to ensure that EnCana would take proper precautions to protect freshwater aquifers from contamination caused by shallow CBM Activities.
>
> 30. Between 2001 and April 1, 2006, with the knowledge of the ERCB, EnCana conducted shallow CBM Activities at dozens of EnCana Wells in close proximity to the Rosebud Aquifer and the Ernst Water Well, as detailed above.

31. On or before January 2005, the ERCB knew that various landowners who rely and depend upon the Rosebud Aquifer had made several complaints regarding possible contamination of well water supplied by the Rosebud Aquifer. These complaints also raised concerns about possible connections between potential water contamination and local oil and gas activities.

32. In or around late 2005 and throughout 2006, Ms. Ernst attempted to engage in direct and personal interactions with the ERCB on the specific issue of water contamination at her property and to register her concerns regarding specific EnCana wells. During this period, Ms. Ernst attempted to use ERCB's publicized compliance and enforcement mechanisms. Ms. Ernst specifically interacted with various employees of the ERCB including, among others, Mr. Neil McCrank, the then-Chairman of the ERCB; Mr. Richard McKee, a senior lawyer at the ERCB; and Mr. Jim Reid, Manager of the ERCB's Compliance and Operations Branch.

33. As a result of Ms. Ernst's direct interaction with the ERCB, the ERCB knew that Ms. Ernst had serious and substantiated concerns regarding her water and oil and gas development including that:

    (a) the quality of her well water had suddenly radically worsened in 2005 and 2006;

    (b) there was good reason to believe that the radical change in her water was specifically linked to EnCana's CBM Activities at the EnCana Wells; and

    (c) EnCana had breached ERCB requirements while conducting CBM activities at the nearby EnCana Wells.

34. On or before March 2006, the ERCB knew that EnCana had perforated and fractured directly into the Rosebud Aquifer.

35. In or around 2006, the ERCB knew that Alberta Environment had conducted tests on Ms. Ernst's well water indicating that her water was contaminated with various chemical contaminants, and contained very high levels of methane.

36. Despite clear knowledge of potentially serious industry-related water contamination and knowledge of potential breaches of ERCB requirements, the ERCB failed to respond reasonably or in accordance with its specific published investigation and enforcement process. Instead, the ERCB either completely ignored Ms. Ernst and her concerns, or directed her to the ERCB's legal counsel, Mr. McKee, who in turn refused to deal with her complaints.

37. Despite serious water contamination necessitating truck deliveries of safe water to the Plaintiff's household and to other landowners who also depend upon the Rosebud Aquifer, the ERCB did not conduct any form of investigation into the causes of contamination of Ms. Ernst's well water or the Rosebud Aquifer.

111. The ERCB actions alleged by the Plaintiff in paragraphs 29 to 37 of the Fresh Statement of Claim all arise out of Acts administered by the ERCB, or ERCB regulations, directives, orders or decisions. The ERCB jurisdiction to grant well licenses arises pursuant to section 18 of the *OGCA*:

> Granting of licence
>
> 18 (1) On receiving an application for a licence, the Board may grant the licence subject to any conditions, restrictions and stipulations that may be set out in or attached to the licence or it may refuse the licence.
>
> (2) When the Board has refused a licence, the Lieutenant Governor in Council, in the Lieutenant Governor in Council's discretion, may review the application and may direct the Board to issue the licence.
>
> (3) The Board shall keep a record of licences granted.

- *Oil and Gas Conservation Act, supra*, at s 18 **[Tab 45]**.

112. As stated above, the ERCB's investigation and enforcement process arises out of sections 94-110 of the *OGCA*, related regulations, and other ERCB directives. Specifically, the ERCB is authorized to conduct investigations pursuant to, *inter alia*, section 94 of the *OGCA*, which provides:

> 94 Except where otherwise provided, the Board has exclusive jurisdiction to examine, inquire into, hear and determine all matters and questions arising under this Act.

The ERCB is empowered to enforce Orders pursuant to section 105 of the *OGCA*, which provides:

> 105(1) For the purposes of the enforcement of any order made by it, the Board may
>
> (a) take any steps and employ any persons the Board considers necessary,
>
> (b) forcibly or otherwise enter on, seize and take control of a well or facility, together with the whole or part of the movable and immovable property in, on or about the well or facility or used in connection with or pertaining to the well or facility, together with records of ownership and operation pertaining to the well or facility,
>
> (c) discontinue all production or take over the management and control of a well or facility,
>
> (d) in the case of a well, plug the well at any depth and take any steps the Board considers necessary to prevent the flow or escape of oil, gas, crude bitumen, water or any other substance from any stratum that the well enters, and
>
> (e) in the case of a facility, take any steps the Board considers necessary to prevent the flow or escape of oil, gas, crude bitumen, water or any other substance from the facility.
>
> [...]

- *Oil and Gas Conservation Act, supra*, at ss 94-110 **[Tab 45]**.
- See also: *Oil and Gas Conservation Regulations, supra* **[Tab 46]**; ERCB, Guide 65: Resources Applications for Conventional Oil and Gas Reservoirs (2003) **[Tab 53]**; ERCB, Guide G-8: Surface Casing Depth - Minimum Requirements (1997) **[Tab 54]**; ERCB, Guide 56: Energy Development Applications and Schedules (2003) **[Tab 52]**; ERCB, *Informational Letter IL 91-11: Coalbed Methane Regulation* (1991) **[Tab 55]**; ERCB, *Informational Letter (IL) 99-4: EUB Enforcement Process, Generic Enforcement Ladder, and Field Surveillance Ladder* **[Tab 56]**; ERCB, *Directive 19: Compliance Assurance*, September, 2010 **[Tab 48]**; ERCB, *Directive 27-Shallow Fracturing Operations-Restricted Operations*, August 2009 **[Tab 49]**; ERCB, *Directive 035: Baseline Water Well Testing Requirement for Coalbed Methane Wells Completed Above the Base of Groundwater Protection* **[Tab 50]**; ERCB, *Directive 044: Requirements for Surveillance, Sampling, and Analysis of Water Production in Hydrocarbon Wells Completed Above the Base of Groundwater Protection* **[Tab 51]**.

113. There is nothing in the *OGCA* or any other ERCB regulations, orders or directives to support a finding that the ERCB owes a private duty of care to any particular individual, including the Plaintiff. Further, no private duty of care can be argued to have arisen by virtue of the Plaintiff making complaints to the ERCB via the ERCB's investigation and enforcement process. Making complaints to a public body does not constitute specific interactions which could give rise to a private duty of care. Moreover, even if making complaints could be construed as specific interactions between the Plaintiff and the ERCB, any private duty is negated by the ERCB's statutory scheme, as discussed above. In the absence of a private duty of care between the ERCB and the Plaintiff, no cause of action in negligence can arise under paragraphs 29 to 37 of the Fresh Statement of Claim.

114. Further, section 43 exempts the ERCB from liability for anything done in pursuance of any Act it administers or any regulations, directives, orders or decisions. Even if the ERCB "failed to respond

reasonably or in accordance with its specific published investigation and enforcement process," as alleged by the Plaintiff, it is exempt from liability pursuant to section 43. As such, paragraphs 29 to 37 of the Fresh Statement of Claim should be struck for failing to disclose a reasonable cause of action.

- *Energy Resources Conservation Act, supra*, at s 43 **[Tab 43].**

115. It is anticipated that the Plaintiff may argue, as she did in her Brief filed with respect to the April 26, 2012, Application, that section 43 of the *ERCA* does not immunize the ERCB for any omissions or things not done in pursuance of any Act it administers or any regulations, directives, orders or decisions. However, the Plaintiff's claims against the ERCB do not relate to omissions, but rather to acts taken by the ERCB. In paragraph 36 of the Fresh Statement of Claim, the Plaintiff claims that the ERCB "did not respond reasonably or in accordance with its specific published investigation and enforcement process." This does not indicate an omission, but a failure to act in accordance with the Plaintiff's expectations. Further, the investigation and enforcement processes to which the Plaintiff refers are discretionary processes. As such, even if the ERCB did not investigate her complaints, it exercised its discretion in making such a determination. Such an exercise of discretion is an act or a decision, not an omission, and is therefore covered by section 43 of the *ERCA*. What is at issue is not the ERCB omitting or failing to act in the context of an investigation or enforcement process, but exercising its discretion in a process which is entirely discretionary. As such, the ERCB is exempt from liability pursuant to section 43. As such, paragraphs 29 to 37 of the Fresh Statement of Claim should be struck for failing to disclose a reasonable cause of action.

- Brief of Argument of Jessica Ernst in support of the April 26, 2012 Application at paras 64-69.

116. Even with the facts pleaded taken to be true, the flaw in the claim is plain, obvious and beyond doubt, the claim is hopeless, and there is no amendment that can correct the flaw. The issue is a question of law that can be determined at this time. Such a determination will satisfy the requirements of Rule 1.2 of the Alberta *Rules of Court* in facilitating the quickest means of resolving the claim at the least expense.

117. In the alternative, Summary Judgment should be granted in favour of the ERCB in respect of paragraphs 29 to 37 of the Fresh Statement of Claim. It is plain and obvious that no meritorious claim can arise out of paragraphs 29 to 37 because no private duty of care is owed to the Plaintiff from the ERCB. As discussed above, none of the Acts, regulations, directives, orders or decisions administered by the ERCB give rise to a private duty of care. Further, no private duty of care can be argued to have arisen by virtue of the Plaintiff making complaints to the ERCB via the ERCB's investigation and enforcement process. As stated above, making complaints to a public body does not constitute specific interactions which could give rise to a private duty of care. Moreover, even if making complaints could be construed as specific interactions between the Plaintiff and the ERCB, any private duty is negated by the ERCB's statutory scheme. Section 43 of the *ERCA* exempts the ERCB from liability. As such, the claim is without merit. The basis of the claim is the ERCB's alleged private duty. Such a duty is excluded by the Legislature, and coupled with a comprehensive immunity from such a claim. It is plain and obvious that there is no genuine issue for trial. The ERCB has satisfied the legal onus of showing no genuine issue for trial. The evidentiary onus next shifts to the Plaintiff to demonstrate that the ERCB owes her a private duty of care, can be sued for breaching that private duty of care, and breached that private duty of care.

- *Energy Resources Conservation Act, supra*, at s 43 **[Tab 43].**

118. Paragraphs 38 to 41 of the Fresh Statement of Claim provides:

> 38. At all material times, the ERCB owed a duty to the Plaintiff to exercise a reasonable standard of care, skill and diligence in taking reasonable and adequate steps to protect her well water from foreseeable contamination caused by drilling for shallow methane gas; to conduct a reasonable investigation after contamination of her water was reported; and to take remedial steps to correct the damage caused.

39. The ERCB breached this duty, and continues to breach this duty, by failing to implement the ERCB's own specific and published investigation and enforcement scheme; failing to conduct any form of investigation; and arbitrarily preventing the Plaintiff from participating in the usual regulatory scheme.

40. Particulars of the ERCB's negligence include:

    (a) failing to take reasonable steps to ensure that the EnCana Wells licensed by the ERCB would not pose a serious risk of contamination to the Plaintiff's underground freshwater sources, including the Rosebud Aquifer;

    (b) failing to adequately inspect and investigate known and/or credible allegations of water contamination of Plaintiff's underground freshwater sources, including the Rosebud Aquifer, and of the possible link between such contamination and the EnCana Wells licensed by the ERCB;

    (c) failing to adequately inspect and investigate known and/or credible allegations of breaches of oil and gas requirements under the jurisdiction of the ERCB at the EnCana Wells;

    (d) failing to use available enforcement powers to stop CBM Activities that were causing contamination of the Plaintiff's underground freshwater sources, including the Rosebud Aquifer and to remediate water contamination and other harms caused by oil and gas industry activity that had already occurred;

    (e) failing to implement the ERCB's established and publicized enforcement and investigation scheme;

    (f) failing to conduct adequate groundwater testing and monitoring;

    (g) failing to investigate potential long-term impacts of CBM Activities on the Rosebud Aquifer; and

    (h) failing to promptly inform the Plaintiff of potential contamination of the Rosebud Aquifer and of the potential risks posed by such contamination to the Plaintiff's health, safety and property.

41. The ERCB's various omissions as listed above were taken in bad faith.

119. The Plaintiff alleges that the ERCB owed her a duty to exercise a reasonable standard of care with respect to the protection of her well water contamination, and any related investigations. However, as stated above, there are only two sources of any such duty.

120. First, a private duty could arise by virtue of the ERCB's statutory scheme, which includes the Acts, regulations, directives, orders or decisions administered by the ERCB. As stated above, ERCB's investigation and enforcement process arises out of sections 94-110 of the *OGCA*, related regulations, and other ERCB directives. The ERCB is authorized to conduct investigations pursuant to, *inter alia*, section 94 of the *OGCA*, which is set out above. There is nothing in the *OGCA* or any other ERCB regulations, orders or directives to support a finding that the ERCB owes a private duty of care to any particular individual, including the Plaintiff, pursuant to its statutory regime. Although these Acts, regulations, directives, orders or decisions may indicate that the ERCB owes a duty of care to the public as a whole, there is no basis upon which to find that these sources impose a private duty of care on the ERCB to any particular individual, including the Plaintiff. Further, section 6(1) of the *ERCA* (as set out above) expressly sets out the duty of care applicable to the ERCB. Section 6(1) imposes a duty on the ERCB to the public as a whole, but does not contemplate a private law duty of care to any specific individual, including the Plaintiff. As stated above, by expressly imposing a public duty on the ERCB, the legislature excluded the imposition of a private duty of care.

- *Oil and Gas Conservation Act, supra,* at ss 94-110 **[Tab 45].**
- *Energy Resources Conservation Act, supra,* at s 6 **[Tab 43].**
- *Oil and Gas Conservation Regulations, supra* **[Tab 46].**
- ERCB, Guide 65: Resources Applications for Conventional Oil and Gas Reservoirs (2003) **[Tab 53].**
- ERCB, Guide G-8: Surface Casing Depth - Minimum Requirements (1997) **[Tab 54].**
- ERCB, Guide 56: Energy Development Applications and Schedules (2003) **[Tab 52].**
- ERCB, *Informational Letter IL 91-11: Coalbed Methane Regulation* (1991) **[Tab 55].**
- ERCB, *Informational Letter (IL) 99-4: EUB Enforcement Process, Generic Enforcement Ladder, and Field Surveillance Ladder* **[Tab 56].**
- ERCB, *Directive 19: Compliance Assurance*, September, 2010 **[Tab 48].**
- ERCB, *Directive 27-Shallow Fracturing Operations-Restricted Operations*, August 2009 **[Tab 49].**
- ERCB, *Directive 035: Baseline Water Well Testing Requirement for Coalbed Methane Wells Completed Above the Base of Groundwater Protection* **[Tab 50].**
- *Yugraneft Corp v Rexx Management Corp, supra,* at para 39 **[Tab 39].**

121. Second, a private duty of care could arise by virtue of specific interactions between the Plaintiff and the ERCB. However, as stated above, lodging complaints through a public complaints process is not a sufficient basis upon which a private duty of care can arise. In the absence of a private duty of care between the ERCB and the Plaintiff, no cause of action in negligence can arise under paragraphs 38 to 41 of the Fresh Statement of Claim.

122. Further, section 6(1) of the *ERCA* (as set out above) expressly sets out the duty of care applicable to the ERCB. Section 6(1) imposes a duty on the ERCB to the public as a whole, but does not contemplate a private law duty of care to any specific individual, including the Plaintiff. As stated above, by expressly imposing a public duty on the ERCB, the legislature excluded the imposition of a private duty of care.

- *Energy Resources Conservation Act, supra,* at s 6 **[Tab 43].**
- *Yugraneft Corp v Rexx Management Corp, supra,* at para 39 **[Tab 39].**

123. Further, section 43 exempts the ERCB from liability for anything done in pursuance of any Act it administers or any regulations, directives, orders or decisions. As such, paragraphs 38 to 41 of the Fresh Statement of Claim should be struck for failing to disclose a reasonable cause of action.

- *Energy Resources Conservation Act, supra,* at s 43 **[Tab 43].**

124. It is anticipated that the Plaintiff may argue, as she did in her Brief filed with respect to the April 26, 2012, Application, that section 43 of the *ERCA* does not immunize the ERCB for any omissions or things not done in pursuance of any Act it administers or any regulations, directives, orders or decisions. However, the Plaintiff's claims against the ERCB do not relate to omissions, but rather acts taken by the ERCB.

- Brief of Argument of Jessica Ernst in support of the April 26, 2012 Application at paras 64-69.

125. In paragraph 40 of the Fresh Statement of Claim, the Plaintiff particularizes the ERCB's alleged negligence, none of which indicate an omission on the part of the ERCB, but an act from which the ERCB is immune from liability. Specifically, the Plaintiff claims that the ERCB "failed to take reasonable steps" to ensure the EnCana wells would not pose a risk of contamination, failed "to adequately inspect" her complaints, "failed to conduct adequate groundwater testing," and failed to "promptly inform" her of potential contamination. These allegations do not indicate omissions on the part of the ERCB, but a failure of the ERCB to act in accordance with the Plaintiff's expectations.

126. The Plaintiff also claims in paragraph 40 that the ERCB failed to use its enforcement and investigation scheme with respect to her complaints. However, the investigation and enforcement processes to which the Plaintiff refers are discretionary processes. As such, even if the ERCB did not investigate her

complaints, it exercised its discretion in making such a determination. Such an exercise of discretion is an act, not an omission, and is therefore covered by section 43 of the *ERCA*. What is at issue is not the ERCB omitting or failing to act in the context of an investigation or enforcement process, but exercising its discretion. As such, the ERCB is exempt from liability pursuant to section 43. Moreover, section 43 does not limit immunity to acts done by the ERCB in good faith. Rather, section 43 is a blanket immunity in favour of the ERCB, in respect of any acts done in pursuance of any Act it administers. The Legislature is entitled to enact such blanket immunities, and did so. As such, paragraphs 38 to 41 of the Fresh Statement of Claim should be struck for failing to disclose a reasonable cause of action.

127. Even with the facts pleaded taken to be true, the flaw in the claim is plain, obvious and beyond doubt, the claim is hopeless, and there is no amendment that can correct the flaw. The issue is a question of law that can be determined at this time. Such a determination will satisfy the requirements of Rule 1.2 of the Alberta *Rules of Court* in facilitating the quickest means of resolving the claim at the least expense.

128. In the alternative, Summary Judgment should be granted in favour of the ERCB in respect of paragraphs 38 to 41 of the Fresh Statement of Claim. It is plain and obvious that no meritorious claim can arise out of paragraphs 38 to 41 because no private duty of care is owed to the Plaintiff from the ERCB. As discussed above, none of the Acts, regulations, directives, orders or decisions administered by the ERCB give rise to a private duty of care. Further, no private duty of care can be argued to have arisen by virtue of the Plaintiff making complaints to the ERCB via the ERCB's investigation and enforcement process. Making complaints to a public body does not constitute specific interactions which could give rise to a private duty of care. Moreover, even if making complaints could be construed as specific interactions between the Plaintiff and the ERCB, any private duty is negated by the ERCB's statutory scheme, as discussed above. Section 43 of the *ERCA* exempts the ERCB from liability. As such, the claim is without merit. The basis of the claim is the ERCB's alleged private duty. Such a duty is excluded by the Legislature, and coupled with a comprehensive immunity from such a claim. It is plain and obvious that there is no genuine issue for trial. The ERCB has satisfied the legal onus of showing no genuine issue for trial. The evidentiary onus next shifts to the Plaintiff to demonstrate that the ERCB owes her a private duty of care, can be sued for breaching that private duty of care, and breached that private duty of care.

- *Energy Resources Conservation Act, supra*, at s 43 **[Tab 43].**

129. Paragraphs 42 to 58 of the Fresh Statement of Claim, which set out the Plaintiff's *Charter* claim, provide:

> 42. In its role as the government agency responsible for regulating all aspects of the oil and gas industry, the ERCB has established a specific forum and process for communicating with the public and hearing public complaints and concerns regarding the oil and gas industry.
>
> 43. The ERCB, as a public body, invited and encouraged public participation and communication in the regulatory process, including through both its Compliance and Operations Branch, and its Field Surveillance Branch. In particular, in communications directly with landowners located adjacent to oil and gas developments, the ERCB emphasizes the importance of public involvement in the regulation of oil and gas development in Alberta and strongly encourages such public participation.
>
> 44. The ERCB further frequently represented to such landowners that it is responsible for responding to and addressing all public complaints, including by investigating all such complaints.
>
> 45. Throughout 2004 and 2005, Ms. Ernst frequently voiced her concerns regarding negative impacts caused by oil and gas development near her home both through contact with the ERCB's compliance, investigation and enforcement offices, and through other modes of public expression, including through the press and through communication with institutions and fellow landowners and citizens.

46. Ms. Ernst was a vocal and effective critic of the ERCB. Her public criticisms brought public attention to the ERCB in a way that was unwanted by the ERCB and caused embarrassment within the organization.

47. Ms. Ernst pleads that as a result of, and in response to, her public criticisms, the ERCB seized on an offhand reference to Weibo Ludwig made by Ms. Ernst and used it as an excuse to restrict her speech by prohibiting her from communicating with the ERCB through the usual channels for public communication with the ERCB. These serious restrictions greatly limited her ability to lodge complaints, register concerns and to participate in the ERCB compliance and enforcement process. As a result, Ms. Ernst was unable to adequately register her serious and well-founded concerns that CBM Activities were adversely impacting the Rosebud Aquifer, and her groundwater supply.

48. In particular, in a letter dated November 24, 2005, Mr. Jim Reid, the Manager of the Compliance Branch of the ERCB, informed Ms. Ernst that he had instructed all staff at the Compliance Branch of the ERCB to avoid any further contact with her. Mr. Reid also notified Ms. Ernst that he had reported her to the Attorney General of Alberta, the RCMP and the ERCB Field Surveillance Branch.

49. On December 6, 2005, Ms. Ernst wrote to the ERCB to seek clarification of what was meant by Mr. Reid's comments, and what restrictions she faced when attempting to communicate with at the ERCB. This letter was returned unopened.

50. On December 14, 2005, Ms. Ernst wrote to Mr. Neil McCrank, the then-Chairman of the ERCB, to seek further clarification. Ms. Ernst did not receive a response.

51. On January 11, 2006, Ms. Ernst again wrote to Mr. McCrank and again asked for clarification. Mr. McCrank failed to provide any further clarification or explanation regarding the restriction of communication. Instead, Mr. McCrank directed Ms. Ernst to Mr. Richard McKee of the ERCB's legal branch. Mr. McKee continued to ignore, deflect and dismiss Ms. Ernst's request for an explanation regarding her exclusion from effective participation in the ERCB public complaints process and her request for the reinstatement of her right to communicate with the ERCB through the usual channels.

52. In his communications with Ms. Ernst, Mr. McKee, on behalf of the ERCB, confirmed that the ERCB took a decision in 2005 to discontinue further discussion with Ms. Ernst, and that the ERCB would not re-open regular communication until Ms. Ernst agreed to raise her concerns only with the ERCB and not publicly through the media or through communications with other citizens.

53. On October 22, 2006, Ms. Ernst again wrote to Mr. McCrank to request that she be permitted to communicate unhindered with the ERCB like any other member of the public. Specifically, Ms. Ernst requested the right to be able to file a formal objection to oil and gas development under the usual ERCB regulatory process for receiving such objections. Mr. McCrank did not respond to this request.

54. On March 20, 2007, 16 months after the original letter restricting Ms. Ernst's participation in ERCB processes, Mr. McCrank informed Ms. Ernst that she was again free to communicate with any ERCB staff.

55. Ms. Ernst pleads that Mr. Reid's letter and the subsequent restriction of communication were a means to punish Ms. Ernst for past public criticisms of the ERCB, to prevent her from making future public criticisms of the ERCB, to marginalize her concerns and to deny her access to the ERCB compliance and enforcement process, including, most importantly, its complaints mechanism.

56. Ms. Ernst pleads that the decision to restrict her communication with the ERCB, and the decision to continue such restriction, was made arbitrarily, and without legal authority.

57. Throughout this time, Ms. Ernst was prevented from raising legitimate and credible concerns regarding oil and gas related water contamination with the very regulator mandated by the

government to investigate and remediate such contamination and at the very time that the ERCB was most needed. Her exclusion from the ERCB's specific and publicized investigation and enforcement process prevented her from raising concerns with the ERCB regarding its failure to enforce requirements under its jurisdiction, including those aimed at protecting groundwater quantity and quality.

58. The ERCB's arbitrary decision to restrict Ms. Ernst's communication with the ERCB, specifically by prohibiting her from communicating with the enforcement arm of the ERCB, breached Ms. Ernst's rights contained in s. 2(b) of the Canadian Charter of Rights and Freedoms by:

    (a) punitively excluding Ms. Ernst from the ERCB's own complaints, investigation and enforcement process in retaliation for her vocal criticism of the ERCB, thereby punishing her for exercising her right to free speech; and

    (b) arbitrarily removing Ms. Ernst from a public forum of communication with a government agency that had been established to accept public concerns and complaints about oil and gas industry activity, thereby blocking her and preventing her from speaking in a public forum that the ERCB itself had specifically established to facilitate free speech.

130. Presumably, the compliance and enforcement process referred to in paragraphs 42 to 58 are those set out in sections 94-110 of the *OGCA*, related regulations, and other ERCB order and directives, as discussed above.

- *Oil and Gas Conservation Act, supra*, at ss 94-110 **[Tab 45].**
- *Oil and Gas Conservation Regulations, supra* **[Tab 46]**.
- ERCB, Guide 65: Resources Applications for Conventional Oil and Gas Reservoirs (2003) **[Tab 53].**
- ERCB, Guide G-8: Surface Casing Depth - Minimum Requirements (1997) **[Tab 54].**
- ERCB, Guide 56: Energy Development Applications and Schedules (2003) **[Tab 52].**
- ERCB, *Informational Letter IL 91-11*: *Coalbed Methane Regulation* (1991) **[Tab 55].**
- ERCB, *Informational Letter (IL) 99-4: EUB Enforcement Process, Generic Enforcement Ladder, and Field Surveillance Ladder* **[Tab 56].**
- ERCB, *Directive 19: Compliance Assurance*, September, 2010 **[Tab 48]**.
- ERCB, *Directive 27-Shallow Fracturing Operations-Restricted Operations*, August 2009 **[Tab 49]**.
- ERCB, *Directive 035: Baseline Water Well Testing Requirement for Coalbed Methane Wells Completed Above the Base of Groundwater Protection* **[Tab 50]**.

131. Paragraphs 42 to 58 of the Fresh Statement of Claim relate to the Plaintiff's claims pursuant to section 2(b) of the *Charter*. The Plaintiff's claims arising out of paragraphs 42 to 58 appear to be that the ERCB breached the Plaintiff's right to free expression by excluding the Plaintiff from the ERCB's complaints procedure as a punishment for her criticism of the ERCB, and arbitrarily removing the Plaintiff from a public forum of communication with the ERCB. Any claims arising out of paragraphs 42 to 58 of the Fresh Statement of Claim do not disclose a reasonable cause of action against the ERCB and must be struck.

132. As described in paragraph 47 of the Fresh Statement of Claim, the Plaintiff alleges that the ERCB seized on an offhand reference she made about Weibo Ludwig and used it as an excuse to prohibit her from communicating with the ERCB. Although the Plaintiff neglected to set out in the Fresh Statement of Claim the nature of the reference to Weibo Ludwig which caused the ERCB to cease communications with her, the comment was included in the Second Amended Statement of Claim. Specifically, the ERCB ceased communications with the Plaintiff after it discovered her comment that "the only way is the Weibo way." Presumably, "the Wiebo way" references both Wiebo Ludwig's notorious penchant for bombing oil and gas wells, which Ludwig was convicted of in 2000, and the blowing up of six EnCana gas pipelines, which Ludwig was arrested under suspicion of in 2010.

- Second Amended Statement of Claim, paras 114.

133. The ERCB purportedly ceased communications with her after it learned she had commented that "the only way is the Weibo way." While the Plaintiff can attempt to gloss over the significance of this comment, it must be remembered that the comment was not made in a vacuum. Rather, it was made in the context of numerous violent acts of eco-terrorism against oil and gas development in Alberta, many of which were undertaken by Weibo Ludwig. The ERCB is required to take such threats seriously. Indeed, that the ERCB reported this threat to the RCMP demonstrates the seriousness with which ERCB took the threat. By ceasing communications and reporting the Plaintiff to the RCMP, the ERCB was responding appropriately to a real threat of violence. The ERCB ceased communication in order to protect its staff, the Alberta public and the Alberta oil and gas industry from further acts of eco-terrorism.

134. The Plaintiff fails to appreciate the significance of her comment and the role it played in the ERCB's decision to cease communication with her. It should also be noted that because the Plaintiff's comment was a threat of violence, it is not entitled to protection under section 2(b) of the *Charter*.

135. The Plaintiff claims in paragraphs 42 to 58 of the Fresh Statement of Claim that the ERCB breached her right to free expression because it prevented her from communicating with the ERCB. However, paragraphs 42 to 58 demonstrate that the Plaintiff continued to contact the ERCB after it ceased communications with her. In this context, it appears that the Plaintiff'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 Plaintiff found satisfactory.

136. As stated above, the right to free expression does not guarantee the right to be listened to. The *Charter* does not guarantee an audience and, as such, it does not require a statutory regulator such as the ERCB to be that audience. Further, given that the Plaintiff's right to free expression does not guarantee an audience, it can hardly guarantee a response, let alone a prescribed response, from an audience. The Plaintiff's right to free expression cannot require the ERCB to communicate with the Plaintiff, or provide her with a specific or particular response. Such a requirement would effectively constitutionalize the form and content of ERCB responses to public complaints or requests.

- *Ontario (Attorney General) v Dieleman, supra,* at paras 637-8 **[Tab 27].**

137. In this context, any claims arising out of paragraphs 42 to 58 of the Fresh Statement of Claim do not disclose a reasonable cause of action against the ERCB. As such, paragraphs 42 to 58 of the Fresh Statement of Claim must be struck.

138. In the alternative, Summary Judgment should be granted in favour of the ERCB in respect of the claims arising out of paragraphs 42 to 58 of the Fresh Statement of Claim. It is plain and obvious that there is no merit to any claims arising out of paragraphs 42 to 58 because, as stated above, the Plaintiff's right to free expression was not breached by the ERCB. The Plaintiff does not enjoy a right to be listened to, and the Plaintiff's right to free expression does not guarantee a particular response from an audience.

- *Ontario (Attorney General) v Dieleman, supra,* at paras 637-8 **[Tab 27].**

139. In the further alternative, Summary Judgment should be granted in favour of the ERCB in respect of the claims arising out of paragraphs 42 to 58 of the Fresh Statement of Claim. It is plain and obvious that there is no merit to any claims arising out of paragraphs 42 to 58 because the Plaintiff is claiming a positive right, and cannot satisfy the criteria for the protection of such a right.

140. As stated above, the analysis relating to a positive rights claim first requires an analysis of whether the activity in question is a form of expression and whether the Plaintiff is making a positive rights claim. If so, the claim must be grounded in a fundamental freedom of expression rather than in access to a particular ERCB statutory regime. The Plaintiff must then demonstrate that the exclusion from the ERCB's statutory regime has the purpose or effect of a substantial interference with her freedom of expression, and, finally, the Plaintiff must demonstrate that the ERCB is responsible for her inability to exercise the fundamental

freedom. The Plaintiff cannot satisfy these criteria, and as such, it is plain and obvious that there is not merit to her *Charter* claims.

- *Baier v Alberta, supra*, at para 30 **[Tab 3]**.

141. Even if it is accepted that the Plaintiff's communication with the ERCB was a protected form of expression, the Plaintiff's claims cannot succeed on any of the subsequent criteria set out in *Baier v Alberta*. First, there is no doubt that the Plaintiff's claims relate to a positive right. Following *Baier v Alberta*, the Plaintiff claims that the ERCB must act to support or enable an expressive activity – her participation in the ERCB complaint process. The Plaintiff's claim does not relate to an expressive activity in which she would otherwise be free to engage, without any need for any government support or enablement, because the ERCB complaints process is a government enabled process. In this context, it is clear that the Plaintiff's claim is related to a positive right.

- *Baier v Alberta, supra*, at paras 20-23 & 35 **[Tab 3]**.

142. It is also plain and obvious that the Plaintiff cannot satisfy the three *Dunmore* criteria set out in *Baier v Alberta*. First, the Plaintiff's claims are grounded in access to a particular statutory regime - the ERCB's public complaints process - and not in a fundamental freedom of expression.

- *Baier v Alberta, supra*, at paras 30, 44-55 **[Tab 3]**.

143. Second, the Plaintiff simply cannot demonstrate that any exclusion from the ERCB's complaints process substantially interfered with her freedom of expression, that is, her *freedom to express herself regarding oil and gas development in Alberta.* Following *Baier v Alberta*, the relevant issue on this point is not whether the purported exclusion interfered with lodging complaints with the ERCB, but rather whether the exclusion interfered with expression on the subject matter of those complaints, namely, the Plaintiff's concerns surrounding oil and gas development in Alberta. As stated above, the Fresh Statement of Claim demonstrates that Plaintiff continued to express herself on this issue after the purported exclusion, both to the ERCB and to other individuals, groups and organizations.

- *Baier v Alberta, supra*, at paras 30, 44-55 **[Tab 3]**.

144. Third, the Plaintiff cannot demonstrate that the ERCB is responsible for her inability to exercise her freedom to express herself on matters related to oil and gas developments, because she never lost the ability to exercise such freedom. On the Plaintiff's facts, she continued to express herself on this issue after the purported exclusion by the ERCB, both to the ERCB and to other individuals, groups and organizations.

- *Baier v Alberta, supra*, at paras 30, 44-55 **[Tab 3]**.

145. In this context, Summary Judgment should be granted in favour of the ERCB in respect of the claims arising out of paragraphs 42 to 58 of the Fresh Statement of Claim. As stated above, the Plaintiff is claiming a positive right, and cannot satisfy the criteria for the protection of such a right. Section 2(b) does not guarantee a right to any particular statutory platform, including the ERCB complaints process. Restrictions on the Plaintiff's access to the ERCB complaint process simply does not engage section 2(b). As such, it is plain and obvious that there is no merit to any claims arising out of paragraphs 42 to 58.

- *Baier v Alberta, supra*, at para 55 **[Tab 3]**.

146. In the further alternative, Summary Judgment should be granted in favour of the ERCB in respect of the claims arising out of paragraphs 42 to 58 of the Fresh Statement of Claim. It is plain and obvious the claims arising out of paragraphs 42 to 58 cannot succeed because they were brought outside the applicable limitations period. On the facts set out in the Fresh Statement of Claim, it is clear that the

Plaintiff's *Charter* claims pertain to matters that arose prior to December 3, 2005 and were known or ought to have been known by the Plaintiff on or before December 3, 2005. As such, with respect to the Plaintiff's *Charter* claims as set out in paragraphs 42-58 of the Fresh Statement of Claim, the Statement of Claim was filed beyond the applicable limitation period set out in the *Limitations Act*, RSA 2000, L-12.

147. In paragraph 48 of the Fresh Statement of Claim, the Plaintiff states that she was advised that the ERCB was ceasing communications with her in a letter dated November 24, 2005:

> In particular, in a letter dated November 24, 2005, Mr. Jim Reid, the Manager of the Compliance Branch of the ERCB, informed Ms. Ernst that he had instructed all staff at the Compliance Branch of the ERCB to avoid any further contact with her. Mr. Reid also notified Ms. Ernst that he had reported her to the Attorney General of Alberta, the RCMP and the ERCB Field Surveillance Branch

148. The Plaintiff's *Charter* claims are based on the purported decision by the ERCB to exclude her from the ERCB complaint process by the ERCB, as stated in paragraphs 55 and 56 of the Fresh Statement of Claim:

> Ms. Ernst pleads that Mr. Reid's letter [of November 24, 2005] and the subsequent restriction of communication were a means to punish Ms. Ernst for past public criticisms of the ERCB, to prevent her from making future public criticisms of the ERCB, to marginalize her concerns and to deny her access to the ERCB compliance and enforcement process, including, most importantly, its complaints mechanism.
>
> Ms. Ernst pleads that the decision to restrict her communication with the ERCB, and the decision to continue such restriction, was made arbitrarily, and without legal authority.

149. On the Plaintiff's own facts, the purported decision to exclude her from the ERCB complaint process took place on or before November 24, 2005, more than two years before the Plaintiff filed her Statement of Claim. A cause of action arises for the purpose of limitation periods when the material facts on which the action is based have, or ought to have, been discovered by the plaintiff, by the exercise of reasonable diligence. The Plaintiff discovered the material fact on which her *Charter* claims are based – the decision to exclude – in the November 24, 2005 letter from Mr. Reid. The applicable two year limitation period, therefore, started to run prior to December 3, 2005. In this context, therefore, Summary Judgment should be granted in favour of the ERCB with respect to paragraphs 42 to 58 of the Fresh Statement of Claim. It is plain and obvious that the claims contained in these paragraphs cannot succeed, because, by operation of law, the ERCB is entitled to immunity pursuant to the *Limitations Act*.

- *Limitations Act*, RSA 2000, c L-12, s 3(1) **[Tab 44]**.

150. It should be noted that, in the present Application, the ERCB's limitations arguments are restricted to the Plaintiff's *Charter* claims as set out in paragraphs 42 to 58 of the Fresh Statement of Claim. However, should the Plaintiff's claims against the ERCB not be struck out or otherwise disposed of pursuant to the present Application, the ERCB intends to challenge the balance of the Plaintiff's claims on the basis that they were brought after the expiration of the applicable limitations periods.

151. Paragraphs 81 to 84, and 87 of the Fresh Statement of Claim provide:

> 81. The Plaintiff suffered damages as a result of the Defendant EnCana's negligence, creation of a nuisance, breach of the rule in *Rylands v. Fletcher*, and trespass; as a result of the Defendant ERCB's negligence and breach of the Plaintiffs Charter rights; and as a result of the Defendant Alberta Environment's negligence as described above.
>
> 82. For greater clarity, general damages suffered by the Plaintiff include but are not limited to:
>
> (a) substantial reduction in the value of the Ernst Property due to the initial and continuing contamination of the Property's water supply and the corresponding loss of use of the Property's water well;

(b) loss of use of the Property and loss of amenity associated with the Property including that caused by the initial and continuing contamination of the Property's water supply;

(c) environmental damage to Property that the Plaintiff, owing to her strongly held environmental beliefs, particularly values for its natural environmental qualities; and

(d) mental and emotional distress and worry caused by living in a house that is at risk of exploding, and caused by the knowledge and reasonable concern that the Plaintiff, her family and her friends had, unbeknownst to them, consumed and bathed in water containing unknown and likely dangerous contaminants with unknown potential health effects.

83. For greater clarity, special damages include but are not limited to:

(a) disbursements associated with securing replacement water sources;

(b) disbursements associated with research and investigation into the Plaintiff's water contamination issues, including costs associated with travel, scientific testing, `Access to Information' requests, and hydrogeologists' reports.

84. The actions of EnCana, the ERCB and Alberta Environment, as detailed above, amount to high-handed, malicious and oppressive behaviour that justifies punitive damages. In relation to the Defendant EnCana, it is appropriate, just and necessary for the Court to assess large punitive damages to act as a deterrent to offset the large financial gains that EnCana derived from reckless and destructive resource development practices in the Rosebud region.

87. The Plaintiff Jessica Ernst claims from the Defendant Energy Resources Conservation Board:

(a) general damages in the amount of $500,000.00;

(b) special damages in the amount of $100,000.00;

(c) aggravated damages in the amount of $100,000.00;

(d) punitive and exemplary damages in the amount of $10,000,000.00;

(e) damages in the amount of $50,000.00 under section 24(1) of the Canadian Charter of Rights and Freedoms, Part i of the Constitution Act, 1982 being Schedule B to the Canada Act 1982(U.K.), 1982, c.11;

(f) prejudgment interest pursuant to the Judgment Interest Act, R.S.A. 2000, c. J-1 and amendments thereto;

(g) postjudgment interest pursuant to the Judgment Interest Act, R.S.A. 2000, e. J-1 and amendments thereto;

(h) costs; and

(i) such further and other relief as seems just to this Honourable Court.

152. As set out above, none of the Plaintiff's claims against the Defendant ERCB disclose a reasonable cause of action. As such, the Plaintiff's demand for relief in paragraphs 81 to 84, and 87 of the Fresh Statement of Claim should be struck.

- *A (S) (Trustee of) v S (M), supra,* at paras 17-20 **[Tab 1].**

153. For the reasons set out above, none of the claims advanced by the Plaintiff in the Fresh Statement of Claim disclose a reasonable cause of action against the ERCB. As such, paragraphs 24-58, 81-84 and 87 of the Fresh Statement of Claim should be struck. In the alternative, Summary Judgment should be granted in favour of the Defendant ERCB because it is plain and obvious there is no merit to any of the claims advanced by the Plaintiff against the ERCB.

V. IN THE FURTHER ALTERNATIVE, FURTHER AND BETTER PARTICULARS SHOULD BE ORDERED FOR PARAGRAPHS 27, 29, 31, 32, 45, 47, 51 AND 52.

154. If the Court does not strike paragraphs 24-58, 81-84 and 87 of the Fresh Statement of Claim for failing to disclose a reasonable cause of action, or grant Summary Judgment in favour of the ERCB, then the ERCB requests that, in the alternative, the Court order particulars for paragraphs 27, 29, 31, 32, 45, 47, 51 and 52 of the Fresh Statement of Claim in order to allow the ERCB to properly defend the claims brought against it.

A. LAW

155. Rule 3.61 of the Rules of Court states:

> 3.61(1) A party on whom a pleading is served may serve on the party who served the pleading a request for particulars about anything in the pleading.
>
> [...]

- Alberta *Rules of Court, supra,* r 3.61 **[Tab 41].**

156. The purpose of an application for particulars and the function of particulars in a proceeding are as follows:

> The function of particulars is stated in *Halsbury's Laws of England* (4th Ed.) Vol. 36, para. 38, as follows:
>
> > The function of particulars is to carry into operation the overriding principle that the litigation between the parties, and particularly the trial, should be conducted fairly, openly and without surprises, and incidentally to reduce costs. This function has been stated, namely either to limit the generality of the allegations in the pleadings, or to define the issues which have been tried and for which discovery is required. Each party is entitled to know the case that is intended to be made against him at the trial, and to have such particulars of this opponent's case as will prevent him from being taken by surprise. Particulars enable the other party to decide what evidence he ought to be prepared with and to prepare for the trial.

- *Oceatain Investments Ltd v Canadian Commercial Bank*, [1983] 51 AR 364, 1983 CarswellAlta 431 at para 7 (QB) **[Tab 26]**.

157. There are a number of specific functions and reasons that a party is entitled to particulars, including:

1. to inform the other side of the nature of the case they have to meet as distinguished from the mode in which that case is to be proved...;
2. to prevent the other side from being taken by surprise at the trial...;
3. to enable the other side to know what evidence they ought to be prepared with and to prepare for trial...;
4. to limit the generality of the pleadings...;
5. to limit and define the issues to be tried, and as to which discovery is required...;
6. to tie the hands of the party so that he cannot without leave go into any matters not included.

- *Gulf Canada Ltd v "Mary Mackin" (The)*, [1984] 1 FC 884, 1984 CarswellNat 23 at para 3 (Fed CA) **[Tab 17]**; cited with approval in *Welco Expediting Ltd v Harris*, [1995] 8 WWR 428, 1995 CarswellAlta 237 at para 30 (Alta QB) **[Tab 38].**

158. It is apparent that particulars have multiple uses. The primary reasons to order particulars are to allow a Defendant to properly defend against the allegations made and to ensure that he is not taken by surprise

at trial. Particulars also serve to save time during the litigation process by ensuring that all of the parties know the issues in contention.

- *Oceatain Investments Ltd v Canadian Commercial Bank, supra*, at para. 9 **[Tab 26]**.

159. The Defendant is entitled to know the particulars of the Plaintiff's claim. The Defendant does not know and cannot be expected to know the facts the Plaintiff is relying upon. Furthermore, the more broad the claim and the greater the number of allegations made, the more important it is that the Defendant have details and particulars of the facts alleged against him:

> And if a statement of claim covers a large topic or more than one specified transaction, the defendant does not know which of the many things he has done is in issue. Nor whether the complaint is something which someone else did, or no one did. The question is one of natural justice: notice of the claim which the defendant has to meet.

- *Stoney Tribal Council v R*, 2005 ABCA 204 at para 5, 2005 CarswellAlta 773 **[Tab 35]**.

B. ARGUMENT

160. In this context, the ERCB requests an Order for following particulars:

Paragraph 27: The dates on which the ERCB made "numerous public representations regarding what individuals adversely impacted by oil and gas activities could expect from the ERCB's enforcement branches and field offices and from its published investigation and enforcement compliance mechanisms," and the names and job descriptions of the ERCB staff members who made such representations;

Paragraph 29: The dates upon which "EnCana submitted to the ERCB license applications for the EnCana Wells";

Paragraph 31: Details of the complaints made by "various landowners" to the ERCB on or before January 2005, "regarding possible contamination of well water supplied by the Rosebud Aquifer" which "also raised concerns about possible connections between potential water contamination and local oil and gas activities," including the dates on which the complaints were made, and the names of the "various landowners" who made the complaints;

Paragraph 32: The dates in 2005 and 2006 on which the Plaintiff "attempted to engage in direct and personal interactions with the ERCB on the specific issue of water contamination at her property and to register her concerns regarding specific EnCana wells";

Paragraph 45: The dates in 2004 and 2005 on which the Plaintiff was in contact with the ERCB regarding "negative impacts of the oil and gas activity development near her home both through contact with the ERCB's compliance, investigation and enforcement offices, and through other modes of public expression, including through the press and through communication with institutions and fellow landowners and citizens," and the nature of these communications; if the communications were made to the ERCB, the names and job descriptions of the ERCB staff members she dealt with; if the communications were made to other institutions or organizations, the names of these organizations and the content of the communications; if the communications were made to fellow landowners or citizens, the names of these landowners or citizens.

Paragraph 47: Details of Ms. Ernst's reference to Wiebo Ludwig, the date upon which this Wiebo Ludwig comment was made, and the context surrounding the comment;

Paragraph 51: The dates on which Mr. McKee deflected or dismissed the Plaintiff's "request for an explanation," and the nature of such deflections and dismissals;

Paragraph 52: The dates on which Mr. McKee "confirmed that the ERCB took a decision in 2005 to discontinue further discussion" with the Plaintiff and stated that the ERCB would not communicate with her until she agreed to "raise her concerns only with the ERCB and not publicly through the media or through communications with other citizens";

161. If the Court does not strike the described paragraphs of the Fresh Statement of Claim for failing to disclose a reasonable cause of action or grant Summary Judgment in favour of the ERCB, then, in the alternative, the ERCB requests that the Court order particulars for paragraphs 27, 29, 31, 32, 45, 47, 51 and 52. In order for the ERCB to properly defend the claims against it, it requires the particulars set out above. Simply, a Defendant is entitled to know "who", "what", "where", "when" and "how" in respect of a claim against it.

VI. COSTS OF THE APRIL 26, 2012 APPLICATION SHOULD BE AWARDED TO THE ERCB FORWITH AND IN ANY EVENT OF THE CAUSE

162. Pursuant to Rule 10.29 of the Alberta *Rules of Court*, the general rule is that on an interim application, costs are payable forthwith, and in any event of the cause, to the successful party. Rule 10.29(1) provides:

> 10.29(1) A successful party to an application, a proceeding or an action is entitled to a costs award against the unsuccessful party, and the unsuccessful party must pay the costs forthwith, notwithstanding the final determination of the application, proceeding or action, subject to
>
> (a) the Court's general discretion under rule 10.31,
>
> (b) the assessment officer's discretion under rule 10.41,
>
> (c) particular rules governing who is to pay costs in particular circumstances,
>
> (d) an enactment governing who is to pay costs in particular circumstances, and
>
> (e) subrule (2).

- Alberta *Rules of Court*, Alta Reg 124/2010, r 10.29 **[Tab 41]**.

163. The ERCB was successful in its April 26, 2012 Application, and as such, costs of that application should be awarded to the ERCB forthwith and in any event of the cause. While some of the issues related to the present application are similar to those at issue in the April 26, 2012 application, the two applications are distinct and should be treated accordingly for the purposes of costs. The ERCB has had to bring a new Application as a result of the fact that the Statement of Claim challenged by the ERCB in the prior application no longer exists.

164. At the April 26, 2012 application, Madam Justice Veldhuis expressed highly negative views regarding the then existing Statement of Claim in this matter, which was then it its third iteration. Madam Justice Veldhuis ultimately directed that a new Statement of Claim be filed. The Plaintiff filed the Fresh Statement of Claim, which is the subject of the present Application, on June 25, 2012, pursuant to the Order of Madam Justice Veldhuis.

165. One of the grounds set out in the ERCB's April 26, 2012 Application was focused on striking a majority of paragraphs in the Statement of Claim because they were improper. That argument was exhaustively dealt with in the ERCB's Brief in support of that application. Madam Justice Veldhuis directed that the Plaintiff file a new Statement of Claim in order to rectify the fundamental flaws and improper content contained in that Statement of Claim. As a result of the direction of Madam Justice Veldhuis that the Plaintiff file a new Statement of Claim, the other Applications brought by the ERCB were never heard with respect to the previous Statement of Claim. Simply put, these Applications were never heard because the ERCB was successful on the first ground. As such, pursuant to Rule 10.29, the ERCB is entitled to Costs forthwith and in any event of the cause.

VII. RELIEF REQUESTED

166. The ERCB respectfully submits that paragraphs 24-58, 81-84 and 87 of the Fresh Statement of Claim should be struck for failing to disclose a reasonable cause of action.

167. In the alternative, the ERCB respectfully submits that Summary Judgment should be granted in favour of the Defendant ERCB. It is plain and obvious that there is no merit to any of the Plaintiff's claims against the ERCB.

168. In the further alternative, the ERCB respectfully requests that an Order issue:

(i) Requiring the Plaintiff to provide further and better particulars in relation to paragraphs 27, 29, 31, 32, 45, 47, 51 and 52, as described above;

(ii) Requiring the Plaintiff to provide such particulars to the ERCB within 15 days of the date of the Order, failing which paragraphs 27, 29, 31, 32, 45, 47, 51 and 52 will be struck, without further order of this Honourable Court; and

(iii) Granting the ERCB 30 days following receipt of the particulars within which to file its Defence.

169. The ERCB seeks its costs of this application on an indemnity basis to be paid forthwith and in any event of the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of December, 2012.

JENSEN SHAWA SOLOMON DUGUID HAWKES LLP

Per: _____

Glenn Solomon, Q.C.
Counsel for the Defendant/Applicant
Energy Resources Conservation Board

VIII. LIST OF AUTHORITIES

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22. *Manufacturers Life Insurance Co v Executive Centre at Manulife Place Inc*, 2011 ABQB 189, [2011] 11 WWR 833.
23. *Murphy Oil Co v Predator Corp*, 2004 ABQB 688, 365 AR 326.
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30. *R v Breeden*, 2009 BCCA 463, 248 CCC (3d) 317.

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34. *Smorag v Nadeau Estate (Trustee of)*, 2008 ABQB 714, 461 AR 156.
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