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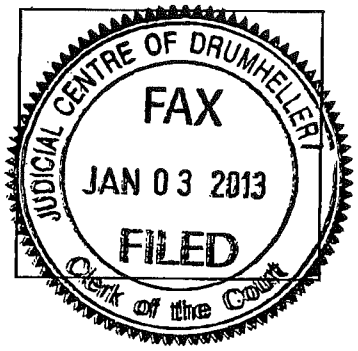

COURT FILE NUMBER	0702-00120
COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL CENTRE	DRUMHELLER
PLAINTIFF	JESSICA ERNST
DEFENDANTS	ENCANA CORPORATION ENERGY RESOURCES CONSERVATION BOARD and HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA

REPLY 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 is the Reply Brief (the "**Reply Brief**") filed on behalf of the Defendant ERCB, in response to the Brief of the Plaintiff (the "**Ernst Brief**"), filed December 21, 2012. The Ernst Brief was filed in response to the Brief of the ERCB (the "**ERCB Brief**"), filed on December 5, 2012.

2. Terms previously defined in the ERCB Brief will continue to be used in this Reply Brief.

3. With respect to the facts, it is the case that the Plaintiff has "brought claims... regarding alleged serious contamination of the Plaintiffs [sic] well water." The ERCB did not contaminate the Plaintiff's well water. Rather, the Plaintiff alleges that EnCana's fracturing activity contaminated her well water. "The Fresh Statement of Claim... alleges that the Plaintiff's well water became contaminated after the Defendant EnCana negligently drilled for shallow coalbed methane at dozens of wells surrounding... Ms. Ernst's... property." If she is correct, she has a complete remedy for the damage suffered as against EnCana. The ERCB does not engage in, and is not alleged to engage in, drilling for shallow coalbed methane.

   - Ernst Brief, paragraphs 1-2.

4. Ms. Ernst's claim against the ERCB consists of allegations that(1) "the ERCB was negligent in failing to take reasonable steps to protect her property from water contamination and other impacts caused by the oil and gas industry, including by negligently failing to conduct an adequate investigation and inspection in accordance with the ERCB's published inspection and enforcement scheme", and (2) that the ERCB breached Ms. Ernst's right to freedom of expression "by (a) punishing her for publicly expressing views that were critical of the ERCB and by (b) arbitrarily preventing Ms. Ernst from speaking to key offices within the ERCB."

   - Ernst Brief, paragraph 3.

5. The *Charter* issue in this case is not a challenge to the validity of any statute, and does not seek a declaration of invalidity in respect of any statute under s. 24 of the *Charter*. Rather, it is a claim that the conduct of a state actor violated a *Charter* right. "[P]unishing" Ms. Ernst, whether "for publicly expressing her views" or for any other reason, is an act. It is not an omission. That claim must be struck, or judgment in respect of it must be entered. There are additional reasons offered in the ERCB Brief for striking the *Charter* claim, or entering judgment in respect thereof.

   - Ernst Brief, paragraph 93.

6. "[A]rbitrarily preventing" Ms. Ernst from "communicating with key offices within the ERCB" is an act. It is not an omission. That claim must be struck, or judgment in respect of it must be entered. There are additional reasons offered in the ERCB Brief for striking the *Charter* claim, or entering judgment in respect thereof.

   - Ernst Brief, paragraph 93.

7. Ms. Ernst sues the ERCB in negligence. Negligence requires a duty of care, a breach of that duty, a causal link and resulting damage. Each of those elements are lacking in this case. The ERCB owes a public duty of care, not a private duty of care. If there is a private duty of care, as alleged by Ms. Ernst, her characterization of it is that "the ERCB was negligent in failing to take reasonable steps to protect her property from water contamination". That is not an allegation of an omission. It is an allegation that the steps taken by the ERCB were not reasonable. That refers to an act. It is the Plaintiff, not the ERCB, that restricts the immunity to acts. If that interpretation is accepted, the Statement of Claim is overly broad. It must state that the ERCB did nothing, and this Court must be clear that if the ERCB did anything, even if it did so negligently, that would not form part of this claim. The question will then become whether the ERCB did anything. If it did anything, it is immune from suit. If it did nothing, the suit on what it did not

do can proceed, there can be a determination as to whether that somehow forms part of a private duty, and then whether there was a breach, a causal link and resulting damage. At present, the Plaintiff is minimizing the scope of her claim when addressing the Court on this Application. If the immunity does not extend to omissions, the Court must ensure that the Statement of Claim is so limited. Failing that certainty, the Court would be allowing a claim to proceed when even the Plaintiff says that any act done cannot succeed as against the ERCB.

8. Further, if the ERCB owes Ms. Ernst a private duty of care, as she claims, she says that the ERCB's breach of it occurred "by negligently failing to conduct an adequate investigation and inspection". She is not claiming that there was no investigation or inspection, but that it was done inadequately. That is an act, not an omission. Again, the same issue regarding the scope of the claim arises. A breach of a duty of care for an inadequate investigation is an act for which the ERCB has immunity. While not the subject of this Application, if Ms. Ernst's "well water became contaminated after the Defendant EnCana negligently drilled for shallow coalbed methane at dozens of well's surrounding... Ms. Ernst's... property", there is no causal link between the alleged wrong and the damage claimed. That causal link exists, if at all, in respect of Ms. Ernst's claim against EnCana.

- Ernst Brief, paragraph 2.

9. The Plaintiff seeks to minimize the scope of the ERCB's immunity under s. 43 of the *ERCA*. Section 43 provides that no action may be brought against the ERCB (1) in respect of any act or thing done purportedly in pursuance of any Act that the Board administers, (2) in respect of any act or thing done purportedly in pursuance of... the regulations under any of those Acts, (3) in respect of a decision of the Board, (4) in respect of a direction of the Board, and (5) in respect of an order of the board. If the Plaintiff is right that omissions are not immune from suit, those must be omissions that were not as a result of a decision, order or direction of the ERCB. On the Plaintiff's alleged exception for omissions, which the ERCB disagrees with, the claim would still have to be narrower than it is at present.

- *Energy Resources Conservation Act*, RSA 2000, c E-10 at s 43 **[ERCB Book of Authorities, December 5, 2012, Volume 2, Tab 43].**

II. THIS IS AN APPROPRIATE MATTER FOR SUMMARY JUDGMENT

10. At paragraphs 9 to 15 of the Ernst Brief, the Plaintiff argues that the ERCB's Application for Summary Judgment cannot succeed because the ERCB has not filed affidavit evidence in support of its Application, and cannot rely solely on the pleadings, statutes, regulations and other public documents. The plaintiff only refers to Rules 7.2 and 7.3 in this regard. However, the Plaintiff's failure to advance any proper causes of action can, and must, be established by relying simply on statutes, regulations and public documents for which no affidavit evidence is required. This arises under Rule 3.68(1), which allows the Court to strike or to enter judgment (see R. 3.68(1)(a) [striking] and (c) [judgment]). Rule 3.68(2)(b) is the Rule that allows the Court to strike or to enter judgment if "a commencement document... discloses no reasonable claim". Under Rule 3.68 the Court must look at the Statement of Claim, the legislation and the regulations, along with the law in relation to those. The Court must then conclude whether there is a cause of action at law. The public duty of care evident from the legislation will be a factor speaking against there being a cause of action. The ERCB's immunity from suit will be a factor speaking against there being a cause of action. The Application arising under Rule 3.68 is not based on evidence, and cannot be. It is not an Application that considers available defences, but whether the claim as pleaded can succeed having regard to the law.

- Ernst Brief, paragraphs 9 to 15, citing *Canada (Attorney General) v Lameman*, [2008] 1 SCR 372 at paragraph 11 [**Ernst Book of Authorities, Volume 1, Tab 2**].
- Alberta *Rules of Court*, Alta Reg 124/2010, rr 3.68 7.2, and 7.3 **[ERCB Supplemental Book of Authorities, Tab 10]**.

11. The Plaintiff further argues that the question of whether she has pleaded valid causes of action in law is not appropriate for an application for summary judgment. Whether a valid cause of action is pleaded arises principally under Rule 3.68. However, this issue is also relevant to the Application under Rule 7.2. Rule 7.2 deals with summary judgment based on admissions, records and "other evidence". As stated in the ERCB Brief at paragraphs 43 and 44, if no proper cause of action is pleaded against the ERCB, it is plain and obvious that the action cannot succeed and has no prospect of success. There is authority for this proposition:

> 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.

In addition to seeking summary judgment based on the absence of a cause of action against it, the ERCB also seeks summary judgment based on admissions, records and "other evidence". The ERCB is relying on the pleadings of the Plaintiff. It can do so expressly under Rule 7.2(a). The ERCB is relying on records. It can expressly do so under Rule 7.2(b). The records relied on do not require an Affidavit to prove their authenticity. The records are statutes, regulations, and public documents of a government agency. An Affidavit is not required under Rule 7.3. Rather, the ERCB may expressly rely on "other evidence to the effect that the grounds have been met" (Rule 7.3(2)). It is this evidence, reviewed at length in the ERCB's Brief, that the ERCB relies upon in this Application. Principally, the ERCB asserts that the legislation makes it clear that the ERCB owes a public duty of care and is immune from suit. That evidence satisfies the ERCB's burden that there is no genuine issue for Trial. That is all that the ERCB must do. The evidentiary burden then shifts to Ms. Ernst, as the ERCB explains in its Brief. The authorities on the subject make it clear that, once the applicant's evidentiary burden is met, the burden shifts to the Respondent. Her onus must be met with evidence. She has submitted none.

- Ernst Brief, paragraphs 11-4.
- ERCB Brief, paragraphs 40-4.
- *Condominium Corp No 0321365 v 970365 Alberta Ltd*, 2012 ABCA 26 at para 43, 2012 CarswellAlta 58

[ERCB Book of Authorities, December 5, 2012, Volume 1, Tab 7].

12. The issue of evidence should not be blurred in terms of when the Court is to consider evidence (see, for example, the Ernst Brief at paragraph 26, where she states that the pleadings "must be taken as proved"). On the Application under Rule 3.68, evidence is not to be considered. Rather, the facts in the pleadings are taken as true, the law is considered, and there is a determination as to whether there is a cause of action. No evidence is considered, or admissible, on behalf of either party. The Court must first determine which parts of the Statement of Claim plead facts, and which plead evidence. Those parts that plead evidence must be struck first, and should not be considered on the Application under Rule 3.68. No facts other than those properly pleaded are considered. Those facts should not be enhanced or diminished.

13. On the Application under Rule 7.2, while the pleadings frame the matters in issue, they are not presumed to be true. If pleadings were deemed to be evidence on a summary judgment Application, every Plaintiff would apply for summary judgment based on nothing more than how cleverly they drafted their pleadings. If the ERCB establishes any basis that would defeat the Action or any part of it, the onus shifts to Ms. Ernst to prove otherwise. She cannot rely on her pleadings to respond to the evidence. The Defendant can rely on admissions in the pleadings. Beyond those admissions which the Defendant is prepared to accept on the Application, the pleadings are mere allegations. Ms. Ernst cannot claim that any of those are admissions in her favour. It does not work that way. She certainly cannot rely on matters not pleaded, and which she has chosen not to put in evidence, to explain her claim. She must rely on the evidence.

14. Therefore, the Application to strike or for judgment under Rule 3.68 and the Application for Summary Judgment under Rule 7.2 each require independent analyses. Each has its own process which must be considered independently. The ERCB seeks relief under Rule 3.68, and in the alternative under Rule 7.2.

15. The Plaintiff, in her Brief, suggests the ERCB bears the onus of disproving each and every issue raised by Ms. Ernst in her Statement of Claim (see paragraphs 12 and 13). There is no authority for that proposition. The ERCB could readily admit much of the Plaintiff's claim and still succeed in showing that there is no cause of action or that it is plain and obvious that the Plaintiff's claim will fail. The mere fact that Ms. Ernst has pleaded something does not lead to the conclusion that if the allegation is true she would be entitled to a remedy as against the ERCB. The ERCB may readily agree with the description of the parties, the length of trial, and a number of facts - none of which lead in themselves to judgment. At its essence the ERCB's Application is quite simple. The ERCB says that the Statement of Claim does not disclose a cause of action because the legislation makes it clear that the ERCB has a public duty, not a private one, and, even if a private duty is owed by the ERCB, because the ERCB is immune from suit. The ERCB further says that Ms. Ernst's claim cannot succeed, and that the ERCB should have summary judgment, because the legislation makes it clear that the ERCB has a public duty, not a private one, and, even if a private duty is owed by the ERCB, because the ERCB is immune from suit. The ERCB has satisfied its onus by clarifying the public nature of its duty, and the immunity provision. The onus has now shifted to Ms. Ernst. She has submitted no evidence to meet her onus. Summary judgment must therefore be granted.

- Ernst Brief, paragraphs 12-3.

16. At paragraph 10 of the Ernst Brief, the Plaintiff argues that the ERCB documents cited throughout the ERCB Brief (such as ERCB Orders and Directives) do not meet evidentiary requirements that allow them to be properly before the court as evidence without a supporting affidavit. The Plaintiff argues that the *Alberta Evidence Act*, RSA 2000, c A-18, grants no such right.

- Ernst Brief, paragraph 10.

17. Section 28 of the *Alberta Evidence Act* provides:

> Copies of statutes, official gazettes, ordinances, regulations, proclamations, journals, orders, appointments to office, notices of them **and other public documents** purporting to be printed by or under the authority of the Parliament of Great Britain and Northern Ireland or of the Imperial Government or by or under the authority of the government or of any legislative body within any of Her Majesty's realms and territories shall be admitted in evidence to prove the contents of them. [emphasis added]

Section 28 provides that public documents are to be admitted for the proof of their contents. Although section 28 provides no clear definition of "other public documents," those words, and the section as whole, should be given a fair, large and liberal construction.

- *Alberta Evidence Act*, R.S.A. 2000, c A-18, s. 28 **[ERCB Supplemental Book of Authorities, Tab 1]**.
- *Kazemi v Harms*, 1995 CarswellAlta 515 at paras 1 & 5, 37 Alta LR (3d) 362 (QB) **[ERCB Supplemental Book of Authorities, Tab 2]**.

18. Section 28 is a statutory enactment intended to replace the common law exception to the rule against hearsay related to public documents. The public document exception was discussed by Murray J. in *Alberta Commercial Fishermen's Assn v Opportunity (Municipal District) No 17*:

> There is, however, a public document exception. In *R. v. Bellman*, [1938] 3 D.L.R. 548 (N.B.C.A.), Baxter C.J. held that navigational charts were admissible under a common law exception to the rule against hearsay. He noted at p. 4 (QL version) that "here we are dealing with public documents,

prepared by officers of the Crown for a public purpose unconnected with the determination of any person's right to anything represented upon the document". His Lordship also noted at p. 8:

> I have never understood that accuracy was a test of admissibility. I always supposed and think still that after a document has been admitted in evidence its accuracy may be questioned.

The other two judges on the panel concurred with Baxter, C.J.'s ruling on admissibility; Harrison, J. saying at p. 11:

> The reasons for the admission of such documents are as follows: —
>
> (1) It is highly expedient to dispense with proof of such official publications by public officials. A great waste of time of public officials would be involved if they were liable to be called upon to prove the making of all government maps, charts, and other official documents.
>
> (2) There is a substantial guarantee of the trustworthiness of such public documents which takes the place of cross-examination because: — (a)it is to be presumed that public officers do their duty and (b) the fact that such documents are open to public inspection results in the exposure and correction of any errors therein.

- *Kazemi v Harms*, *supra*, at paras 1 & 5 **[ERCB Supplemental Book of Authorities, Tab 2]**.
- *Alberta Commercial Fishermen's Assn v Opportunity (Municipal District) No 17*, 2001 CarswellAlta 546 at para 53, 289 AR 47 (QB) **[ERCB Supplemental Book of Authorities, Tab 3]**; citing *R v Bellman*, 1938 CarswellNB 10 at paras 19, 37-40, [1938] 3 DLR 548 (NBCA) **[ERCB Supplemental Book of Authorities, Tab 4]**.

19. The ERCB documents at issue are public documents within the meaning of section 28 of the *Alberta Evidence Act.* The ERCB documents were created pursuant to the ERCB's authority under, *inter alia*, section 20 of the *ERCA*. The ERCB documents are available to the public at large, and were prepared by the ERCB for a public purpose, namely, regulating the development of Alberta's energy resources. As stated in *R v Bellman*, there is an inherent trustworthiness to such public documents which takes the place of cross-examination. As such, public documents are admissible without evidence.

- *Daum v Schroeder*, 1996 CarswellSask 440 at paras 8, 10, 12, 16 & 19, 146 Sask R 142 (QB) **[ERCB Supplemental Book of Authorities, Tab 5]**.
- *Alberta Commercial Fishermen's Assn v Opportunity (Municipal District) No 17*, supra, at para 54 **[ERCB Supplemental Book of Authorities, Tab 3]**.
- *Energy Resources Conservation Act, supra,* at s 20 **[ERCB Book of Authorities, December 5, 2012, Volume 2, Tab 43].**
- *R v Bellman*, *supra* at paras 19, 37-40, 50 **[ERCB Supplemental Book of Authorities, Tab 4]**.

20. In *Daum v. Schroeder*, the plaintiff presented a Statistics Canada survey compiled from statistical data prepared by the department. The Court held that the survey was admissible without evidence under the public documents exception to the rule against hearsay, because the survey had a public objective, was open to public access, and was prepared under a public duty (the *Statistics Act*) which authorized the department to collect and publish such material. As such, the Court held that an inquiry as to the truth of facts and conclusions recorded in the survey was unnecessary. In *Kazemi v Harms*, Rooke J. admitted public documents (government income surveys) without evidence pursuant to section 29 (now section 28) of the *Alberta Evidence Act.* Rooke J. held that the surveys were public documents undertaken by public officials and were therefore admissible. These cases are analogous to the present matter. The ERCB documents at issue enjoy the inherent trustworthiness which takes the place of cross-examination. Following *R v Bellman,* it is presumed that the public officers at the ERCB do their duty in making official documents. Moreover, the ERCB documents are open to public inspection, which results in the exposure

and correction of any errors therein. In this context, the ERCB documents are admissible without a supporting affidavit or other evidence.

- *Daum v Schroeder*, 1996 CarswellSask 440 at paras 8, 10, 12, 16 & 19, 146 Sask R 142 (QB) **[ERCB Supplemental Book of Authorities, Tab 5]**.
- *Kazemi v Harms, supra*, at paras 1-7 **[ERCB Supplemental Book of Authorities, Tab 2]**.

III. THIS CASE IS NOT ANALOGOUS TO THE "NEGLIGENT IMPLEMENTATION OF AN INVESTIGATION SCHEME" CASES

21. At paragraphs 20 to 27 of the Ernst Brief, the Plaintiff argues that the private duty of care the ERCB purportedly owes to her falls within a category of cases in which a duty of care has been previously found in law. Specifically, the Plaintiff claims that the purported duty of care is analogous to that found in the "negligent implementation of an inspection scheme" cases. The Plaintiff argues that this duty arises out of the principle that once a government agency has established an investigation or inspection mechanism at an operational level, it must carry out the mechanism responsibly and without negligence. The Plaintiff cites a number of cases in which such a duty of care has been found, and argues that these cases feature similar circumstances to the case at bar. The Plaintiff's reliance on these cases is far broader than the cases allow. Further, the mere fact that some agencies owe a private duty of care, does not lead to the conclusion that the ERCB does.

- Ernst Brief, paragraphs 20-7.

22. The present matter is not analogous to the "negligent implementation of an inspection scheme" cases. The duty of care found in the inspection scheme cases requires a direct, not a mediated, relationship between the statutory body and the plaintiff – a relationship notably absent from the present facts. This point is well described in *Heaslip Estate v Mansfield Ski Club Inc*, a case cited by the Plaintiff as "particularly helpful in defining the established category of negligence applicable to a public authority." The case is helpful to the Plaintiff only in that, on the application to strike, the agency in that case was found to be potentially liable. The attributes that resulted in that potential liability differ fundamentally from the present case.

- *Heaslip Estate v Mansfield Ski Club Inc*, 2009 ONCA 594, 96 OR (3d) 401 **[Ernst Book of Authorities, Volume 1, Tab 11].**
- Ernst Brief, paragraphs 23-4.

23. In *Heaslip Estate v Mansfield Ski Club Inc*, the plaintiff sustained serious injuries tobogganing. Shortly after arriving at the hospital, physicians requested air ambulance dispatch to transfer the plaintiff to another hospital. The Crown had adopted a policy for air ambulances that gave priority to those with life-threatening injuries, even if another patient had to be diverted. Medical Air Transport Centre ("MATC"), operated by the Crown, contacted the physician and advised him that the air ambulance would not be available for two hours. The physician cancelled the request for air ambulance and the plaintiff died while being transferred to hospital via regular ambulance. A nearby air ambulance that could have transferred the plaintiff to an appropriate hospital was carrying a patient with non-life threatening injuries. The plaintiff's estate brought an action against the province of Ontario in negligence, on the basis that it failed to prioritize the plaintiff's medical needs and send an air ambulance to transport him to a hospital capable of treating his injuries. The Ontario Court of Appeal set aside an order dismissing the claim against the Crown, but held at paragraphs 19-20:

> This case is distinguishable from cases like *Cooper* and *Attis*. In those cases, **the plaintiffs suffered harm at the hands of a party involved in an activity subject to regulatory authority, and then alleged negligence on the part of the governmental authority charged with the duty of regulating the activity that gave rise to the plaintiff's loss. *Cooper* and *Attis* hold that such plaintiffs have no**

> **direct relationship with the governmental authority and can assert no higher claim to a duty of care than any other member of the public.**
>
> The claim asserted here does not rest solely upon a statute conferring regulatory powers, as in *Cooper* and *Attis*, but is focused instead on the specific interaction that took place between Patrick Heaslip and Ontario when the request for an air ambulance was made. In this case, **the relationship between Patrick Heaslip and the governmental authority is direct, rather than being mediated by a party subject to the regulatory control of the governmental authority**. [emphasis added]

- *Heaslip Estate v Mansfield Ski Club Inc, supra*, at paragraphs 17-20 **[Ernst Book of Authorities, Volume 1, Tab 11].**

24. To be clear, even *Heaslip Estate v Mansfield Ski Club Inc* recognizes that *Cooper* is the law. *Heaslip Estate* is the exception. As the Court of Appeal in *Heaslip Estate* noted, in *Cooper*, the plaintiffs suffered harm "at the hands of a party involved in an activity subject to regulatory authority". An example would be if Ms. Ernst, a Plaintiff, suffered harm at the hands of EnCana, "a party involved in an activity subject to regulatory authority". The regulatory authority in this example would be the ERCB. As the Court of Appeal of Ontario noted in *Heaslip Estate,* "***Cooper* and *Attis* hold that such plaintiffs have no direct relationship with the governmental authority and can assert no higher claim to a duty of care than any other member of the public."** In the example used here, Ms. Ernst can assert no higher claim to a duty of care than any other member of the public - that being a public duty of care, not a private one. In the present matter, any relationship between the Plaintiff and the ERCB is mediated, not direct. If the Plaintiff suffered any harm, that harm was at the hands of a party subject to the ERCB's regulatory authority, and not the ERCB itself. Any relationship between the Plaintiff and the ERCB is mediated by parties subject to the ERCB's regulatory authority. Regardless of how the ERCB exercised its regulatory authority, if the damage was caused by EnCana, a regulated party, there is no relief available to Ms. Ernst as against the ERCB.

- *Heaslip Estate v Mansfield Ski Club Inc, supra*, at paragraphs 17-20 **[Ernst Book of Authorities, Volume 1, Tab 11].**

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

26. The New Brunswick Court of Appeal decision in *Adams v Borrel* was also cited by the Plaintiff as featuring similar circumstances to the present matter. In *Adams v Borrel,* a potato virus was discovered in tobacco fields in Ontario. Agriculture Canada decided to eradicate the virus and three potato growers were compensated. Agriculture Canada later changed its method from eradication of the virus to restrictions on potato farmers. A group of potato farmers brought an action alleging that they suffered losses and damage due to the negligence and actions of the federal government. The Court of Appeal held that a duty of care between the government and the farmers arose once Agriculture Canada made the policy decision to inspect and identify the source of the virus. Agriculture Canada owed the farmers a *prima facie* duty of care to carry out its investigation properly. Notably, if the ERCB in the present case had a duty to do something properly, and did so improperly, it can rely on its immunity from suit.

- *Adams v Borrel*, 2008 NBCA 62 at paras 41-44, 336 NBR (2d) 223 **[Ernst Book of Authorities, Volume 1, Tab 6].**
- Ernst Brief, paragraph 23.

27. As in *Heaslip Estate v Mansfield Ski Club Inc*, the relationship between Agriculture Canada and the potato farmers was direct, and not mediated. Agriculture Canada had a statutory mandate to detect crop disease, and had specifically decided to investigate and eradicate the potato virus at issue. The potato farmers did not suffer harm at the hands of a party regulated by Agriculture Canada, but at the hands of Agriculture Canada itself. If Ms. Ernst suffered a harm at all, that was a harm suffered at the hands of EnCana - a regulated party. As stated above, any relationship between the Plaintiff and the ERCB is mediated, and as such, *Adams v Borrel* is distinguishable from the present matter.

- *Adams v Borrel, supra* at paras 41-44 **[Ernst Book of Authorities, Volume 1, Tab 6].**

28. The Plaintiff also claims that *Fullowka v Royal Oak Ventures Inc.* features similar circumstances to the present matter. In *Fullowka v Royal Oak Ventures Inc.,* a striking miner evaded security at a mine and set off an explosive device that killed nine miners. After the bombing, the Crown ordered closure of the mine. This step was not taken earlier because the acting chief mine inspector had received legal advice that he did not have the authority to close the mine. The families of the murdered miners commenced actions against, *inter alia*, the Crown, for negligently failing to prevent the murders. The Supreme Court of Canada held that there was a sufficiently close and direct relationship between the mine inspectors and the miners that gave rise to a *prima facie* duty of care, on the basis that the mine inspectors had a statutory duty to inspect the mine and to order the cessation of work if they considered it unsafe. In exercising this statutory power, the inspectors had been physically present in the mine on many occasions, had identified specific and serious risks to an identified group of workers and knew that the steps being taken by management and the security firm to maintain safe working conditions were ineffective. Moreover, the Court held that there were no residual policy considerations on which to decline to impose a duty of care on the government, and that the proposed duty of care did not expose the Crown to indeterminate liability. The Court engaged in an in depth discussion of proximity, which, given the relevance to the present matter, should be set out at length:

> In the case of the mining safety regulators and the miners, the closeness of the relationship is somewhere between that in *Hill*, on the one hand, and *Cooper* and *Edwards* on the other. Under the *MSA* [*Mining Safety Act*], the onus for maintaining mine safety is on the owner, management and employees of the mine. Section 2 of the *MSA* imposes on management the duty to take all reasonable measures to enforce the Act and on workers the duty to take all necessary and reasonable measures to carry out their duties according to the Act. Under s. 3, the owner is to ensure that the manager is provided with the necessary means to conduct the operation of the mine in full compliance with the *MSA* and under s. 5(3), the manager, or the competent person authorized by the manager, is to personally and continually supervise work involving unusual danger in an emergency situation. A worker has the right to refuse to do any work when he or she has reason to believe that there is an unusual danger to his or her health or safety (s. 8(1)(a)) and is to report the circumstances to the owner or supervisor (s. 8(2)). A worker acting in compliance with these provisions is protected against discharge or discipline for having done so (s. 8(9)). **Thus, much as the regulatory schemes at issue in *Cooper* and *Edwards* put the onus on lawyers and mortgage brokers to observe the rules, the scheme set out in the *MSA* puts the onus on mine owners, management and workers to observe safety regulations. The role of the mining inspectors is essentially to see that the persons who have the primary obligation to comply with the MSA — mine owners, managers and workers — are doing so. In that sense, their role is analogous to the roles of the Law Society and the Registrar of Mortgage Brokers discussed in *Edwards* and *Cooper*.**
>
> **However, the relationship between the inspectors and the miners was considerably closer and more direct than the relationships in issue in *Edwards* or *Cooper*.** While no single factor on its own is dispositive, there are three factors present here which, in combination, lead me to this conclusion.

> **The persons to whom mining inspectors are said to owe a duty — those working in the mine — is not only a much smaller but also a more clearly defined group than was the case in *Cooper* or *Edwards*. There, the alleged duties were owed, in effect, to the public at large because they extended to all clients of all lawyers and mortgage brokers.**
>
> In addition, the mining inspectors had much more direct and personal dealings with the deceased miners than the Law Society or the Registrar had with the clients of the lawyer or mortgage broker in *Edwards* and *Cooper*. As pointed out in *Hill*, in considering whether the relationship in question is close and direct, the existence, or absence, of personal contact is significant. The murdered miners were not in the sort of personal contact with the inspectors as the police in *Hill* were with Mr. Hill as a particularized suspect. **However, the relationship between the miners and the inspectors was much more personal and direct than the relationship between the undifferentiated multitude of lawyers' clients and the Law Society as considered in *Edwards* or the undifferentiated customers of mortgage brokers as considered in *Cooper*.** As the trial judge found in this case, visits by inspectors to the mine during the strike were "almost daily" occurrences, official inspections were conducted and at any time a tour of the mine was required, the inspector would be accompanied by a member of the occupational health and safety committee (para. 256). There was therefore more direct and personal contact with miners than there was with the clients in either *Cooper* or *Edwards*.
>
> Finally, **the inspectors' statutory duties related directly to the conduct of the miners themselves. This is in contrast to the Law Society in *Edwards* or the Registrar in *Cooper* who had no direct regulatory authority over the claimants who were the clients of the regulated lawyers and mortgage brokers.** [emphasis added]

- Ernst Brief, paragraph 23.
- *Fullowka v Royal Oak Ventures Inc*, 2010 SCC 5 at paras 41-5, [2010] 1 SCR 132 [**December 5, 2012 ERCB Book of Authorities, Volume 1, Tab 16**].

29. The Court's comments in *Fullowka v Royal Oak Ventures Inc.* are material to the present matter. Although the Plaintiff may argue that her contact with the ERCB is consistent with the facts in *Fullowka v Royal Oak Ventures Inc.*, the Court's comments demonstrate that the scope of the duty remains highly relevant. If it would necessarily be owed to everyone, it is a public duty. If the regulatory duty applies to a small group only - the mine inspector for a specific mine owing a duty to the workers at that specific mine - it may be the smaller and more defined group that the Court speaks of. Where, as in the present case, the duty would be owed to everyone, the case is akin to *Cooper* and *Edwards.* The interactions between the mine inspector and the miners were also of a more specific and direct nature than those at issue in the present matter, which are limited to Ms. Ernst lodging complaints with the ERCB and some more passive points of contact.

30. Moreover, the proximity in *Fullowka v Royal Oak Ventures Inc.* was not based simply on specific interactions between the mine inspectors and the miners. Proximity was grounded in the statutory duties of the mine inspectors, which related directly to the conduct of the miners themselves at the mine in issue. The Court held that such statutory duties were <u>in contrast to</u> circumstances in which a government agency has no direct regulatory authority over the claimants who suffered harm at the hands of the regulated body. In the present matter, the ERCB's statutory duties are owed to the public at large. The ERCB has no regulatory authority over the Plaintiff.

- *Fullowka v Royal Oak Ventures Inc, supra* at paras 41-5 [**December 5, 2012 ERCB Book of Authorities, Volume 1, Tab 16**].

31. The Court further held in *Fullowka v Royal Oak Ventures Inc.*, that the persons to whom mining inspectors owed a duty – mine workers – was a smaller and more defined group than would be the case in circumstances where a duty would be owed to the public at large. If a private duty of care was found in

the present matter, the ERCB would effectively owe a private duty of care to any and all individuals who could be adversely affected by oil and gas development in Alberta. The Plaintiff argues that she is in a relationship of sufficient proximity with the ERCB to ground a private duty of care. The Plaintiff claims that this proximity is based on four factors:

(a) the specific and continued interaction between Ms. Ernst and the ERCB;

(b) representations made by the ERCB which encouraged reliance by rural landowners on its investigation/enforcement scheme;

(c) the nature of the involved interests of rural landowners; and

(d) the establishment of a specific and operationalized investigation/enforcement scheme under the ERCB statute directed at protecting the rights of rural landowners.

Of the four factors listed by the Plaintiff, only the first relates to the particular relationship between the Plaintiff and the ERCB. With respect to the other three factors, there is no distinction between the ERCB's relationship with the Plaintiff and the ERCB's relationship with any other member of the public. In effect, the Plaintiff argues that the ERCB is in a relationship of sufficient proximity to ground a private duty of care with all members of the public who contact the ERCB. In this context, the private duty alleged by the Plaintiff would effectively be owed to the public at large, because it would extend to an undifferentiated multitude of individuals who choose to contact the ERCB.

- Ernst Brief, paragraph 38.
- *Fullowka v Royal Oak Ventures Inc*, *supra* at paras 41-5 [**ERCB Book of Authorities, December 5, 2012, Volume 1, Tab 16**].

32. The facts of *Cooper v Hobart* are more analogous to the present matter than any of the inspection scheme cases cited by the Plaintiff. In *Cooper v Hobart*, a registered mortgage broker was investigated by the Registrar of mortgage brokers and the broker's licence was suspended. The plaintiff, one of over 3,000 investors who had advanced money to the broker, brought an action against the Registrar on the basis that the Registrar breached the duty of care allegedly owed to the plaintiff and other investors. The plaintiff alleged that the Registrar was negligent in failing to oversee the conduct of the broker, failed to suspend the broker's licence until more than a year after the Registrar was aware of violations of the *Mortgage Brokers Act*, and failed to notify the investors that the broker was under investigation. The Supreme Court of Canada held that, despite the Registrar's statutory powers of investigation, there was insufficient proximity to ground a private duty of care:

> Sections 5 and 6 of the Act cover the investigatory powers of the Registrar. **Pursuant to s. 5, the Registrar may, and on receipt of a sworn complaint must, investigate any matter arising out of the Act or Regulations.** In pursuit of this purpose, the Registrar may examine any records and documents of the person being investigated. He may summon witnesses and compel them to give evidence on oath or otherwise and to produce records, property, assets or things in the same manner as the court does for the trial of civil actions. Section 7 allows the Registrar to "freeze" funds or securities where he has made or is about to make a direction, decision, order or ruling suspending or cancelling the registration of a person under the Act. He may also apply to the court for an appointment of a receiver, or a receiver and manager, or trustee of the property of the person.
>
> [...]
>
> Finally, s. 20 exempts the Registrar or any person acting under his authority from any action brought for anything done in the performance of duties under the Act or Regulations, or in pursuance or intended or supposed pursuance of the Act or Regulations, unless it was done in bad faith.

> The regulatory scheme governing mortgage brokers provides a general framework to ensure the efficient operation of the mortgage marketplace. The Registrar must balance a myriad of competing interests, ensuring that the public has access to capital through mortgage financing while at the same time instilling public confidence in the system by determining who is "suitable" and whose proposed registration as a broker is "not objectionable". All of the powers or tools conferred by the Act on the Registrar are necessary to undertake this delicate balancing. **Even though to some degree the provisions of the Act serve to protect the interests of investors, the overall scheme of the Act mandates that the Registrar's duty of care is not owed to investors exclusively but to the public as a whole.**
>
> Accordingly, we agree with the Court of Appeal per Newbury J.A.: even though the Registrar might reasonably have foreseen that losses to investors in Eron would result if he was careless in carrying out his duties under the Act, there was insufficient proximity between the Registrar and the investors to ground a *prima facie* duty of care. **The statute cannot be construed to impose a duty of care on the Registrar specific to investments with mortgage brokers. Such a duty would no doubt come at the expense of other important interests, of efficiency and finally at the expense of public confidence in the system as a whole.** [emphasis added]

- *Cooper v Hobart,* 2001 SCC 79 at paras 46, 48-50, [2001] 3 SCR 537 [**ERCB Book of Authorities, December 5, 2012, Volume 1, Tab 9**].

33. *Cooper v Hobart* is analogous to the present matter in that it involved a mediated, and not direct, relationship between the plaintiff and the statutory regulator. The regulator was charged with overseeing a party (the mortgage broker) which caused harm to the plaintiff (the investor). The Registrar in *Cooper v Hobart* had statutory powers of investigation, and was required by the Act to conduct an investigation if a sworn complaint was received. However, the Registrar's statutory powers of investigation did not convert the Registrar's public duties into a private duty of care owed to any investor who lodged a complaint with the Registrar. The Registrar's duties, like those of the ERCB, extended beyond powers of investigation and included public duties related to the regulation of the industry as a whole. This is distinct from the duties at issue in the investigation scheme cases cited by the Plaintiff, which are focused on the safety of a differentiated group of individuals. It should also be noted that the Registrar in *Cooper v Hobart*, like the ERCB, was protected by a statutory immunity clause.

34. The present matter is also analogous to the Supreme Court of Canada decision in *Edwards v Law Society of Upper Canada,* in which the plaintiffs were members of a group of alleged victims of fraud. The plaintiffs had met a selling agent who encouraged them to purchase gold and advised them that their funds would be paid into a solicitor's trust account, where the funds would be held in trust by the solicitor. The plaintiffs paid more than $300,000 US in bank drafts into the trust account. The plaintiffs eventually learned that no mines existed and no gold was ever produced. The Law Society of Upper Canada commenced an investigation following receipt of a letter regarding the unorthodox use of the solicitor's trust account (the complaint was not sent by any of the investors). The plaintiffs brought an action for damages against, *inter alia*, the Law Society of Upper Canada. The Supreme Court of Canada upheld the decision to strike out the claim against the Law Society of Upper Canada, and held that the case was not analogous to any category of cases in which a duty of care had previously been recognized. The Court further held that no private duty of care existed between the Law Society of Upper Canada and the plaintiffs, despite the Law Society's statutory powers of investigation:

> With reference to the Act, it is apparent that the Law Society regulates the legal profession. Specifically, its responsibilities include the admission standards of the profession (beginning at s. 27), the continuing education of its members (s. 60) and the formulation and enforcement of a code of professional ethics. The appellants argued that a private law duty of care to persons who deposit moneys into a solicitor's trust account, as members of the public, can be inferred from the Law

> Society's statutory public interest mandate. In particular, it is alleged that the Law Society's investigative and disciplinary powers over its members (beginning at s. 33), ground this duty to persons such as the appellants in the present case. We disagree. The *Law Society Act* is geared for the protection of clients and thereby the public as a whole, it does not mean that the Law Society owes a private law duty of care to a member of the public who deposits money into a solicitor's trust account. Decisions made by the Law Society require the exercise of legislatively delegated discretion and involve pursuing a myriad of objectives consistent with public rather than private law duties.

The investigation powers of the Law Society in *Edwards v Law Society of Upper Canada*, like those of ERCB, were aimed at the protection of the public as a whole, and therefore could not ground a private duty of care.

- *Edwards v Law Society of Upper Canada,* 2001 SCC 80 at para 14, [2001] 3 SCR 562 **[ERCB Book of Authorities, December 5, 2012, Volume 1, Tab 12]**.

35. As in *Edwards v Law Society of Upper Canada* and *Cooper v Hobart*, although the ERCB is tasked with ensuring that oil and gas development occurs in a safe manner, it is also tasked with a myriad other duties, as described in paragraphs 79-88 of the ERCB Brief. Specifically, section 4 of the *Oil and Gas Conservation Act* provides:

> 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.

Section 2 of the *Energy Resources Conservation Act* provides:

> 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.

- *Oil and Gas Conservation Act*, RSA 2000, c O-6 at s 4 **[ERCB Book of Authorities, December 5, 2012, Volume 2, Tab 45].**
- *Energy Resources Conservation Act, supra,* at s 2 **[ERCB Book of Authorities, December 5, 2012, Volume 2, Tab 43].**

36. The ERCB must balance all of the duties imposed on it by its governing statutes. As in *Cooper v Hobart* and *Edwards v Law Society of Upper Canada*, this is a delicate balance which precludes finding a private duty of care owed to a specific individual. Statutory powers of investigation do not, without more, create a private duty of care between a government agency and individuals who may be harmed by the industry subject to the agency's authority. That the ERCB may have statutory powers of investigation is not a sufficient basis upon which to find that the present matter is analogous to the inspection scheme cases. Moreover, the relationship between the Plaintiff and the ERCB is mediated, not direct. In any event, the ERCB is protected by a statutory immunity clause.

- *Energy Resources Conservation Act, supra,* at s 43 **[ERCB Book of Authorities, December 5, 2012, Volume 2, Tab 43].**

IV. THERE IS INSUFFICIENT PROXIMITY BETWEEN THE PLAINTIFF AND THE ERCB TO GROUND A PRIVATE DUTY OF CARE

37. As stated above, the Plaintiff argues that there are four factors which demonstrate sufficient proximity between her and the ERCB on which a private duty of care may be grounded:

(a) the specific and continued interaction between Ms. Ernst and the ERCB;

(b) representations made by the ERCB which encouraged reliance by rural landowners on its investigation/enforcement scheme;

(c) the nature of the involved interests of rural landowners; and

(d) the establishment of a specific and operationalized investigation/enforcement scheme under the ERCB statute directed at protecting the rights of rural landowners.

Each factor will be discussed in turn.

- Ernst Brief, paragraph 38.

(ii) Specific Interactions between the Plaintiff and the ERCB

38. The Plaintiff argues that specific interactions between a claimant and a statutory authority are an important factor in establishing proximity, and will often be sufficient to establish proximity in and of themselves. In support of this proposition, the Plaintiff cites the Supreme Court of Canada's Decisions in *Fullowka v Royal Oak Ventures Inc.* and *Knight v Imperial Tobacco Canada Ltd.*

- Ernst Brief, paragraphs 39-42.

- *Knight v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at paras 43-50, 335 DLR (4th) 513 **[Ernst Book of Authorities, Volume 1, Tab 13].**
- *Fullowka v Royal Oak Ventures Inc, supra* at paras 41-5 **[ERCB Book of Authorities, December 5, 2012, Volume 1, Tab 16]**.

39. Although the Court stated in *Fullowka v Royal Oak Ventures Inc.* that the existence or absence of personal contact is significant in a proximity analysis, it was not the only basis upon which a private duty of care was found. Moreover, the Court held that the relationship between the miners and the mine inspectors was of a much more personal and direct nature than that between the undifferentiated multitude of clients at issue in *Cooper v Hobart* and *Edwards v Law Society of Upper Canada.* As stated above, the inspectors visited the mine almost daily, and inspectors would be accompanied by a member of the occupational health and safety committee of the mine. This personal and specific interaction was also present in *Hill v Hamilton-Wentworth (Regional Municipality) Police Services Board*, which concerned the relationship between a police officer and an individual suspect under investigation.

- *Fullowka v Royal Oak Ventures Inc, supra* at paras 41-5 **[ERCB Book of Authorities, December 5, 2012, Volume 1, Tab 16]**.
- *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, 2007 SCC 41, [2007] 3 SCR 129 **[Ernst Book of Authorities, Volume 1, Tab 12]**.

40. In short, the specific and personal interactions contemplated by the Court are of a more personal and involved nature than merely lodging complaints with a regulator, reading brochures or attending public meetings. The specific interactions which the Plaintiff claims ground a private duty of care are limited to the Plaintiff contacting the ERCB regarding alleged water contamination issues on her property. As discussed above, in order to ground a private duty of care, specific interactions must be akin to those found in *Fullowka v Royal Oak Ventures Inc.* or *Hill v Hamilton-Wentworth (Regional Municipality) Police Services Board,* which are far more significant than the interactions alleged in the present matter. As discussed above, the relationship between the Plaintiff and the ERCB is much more analogous to those at issue in *Cooper v Hobart* and *Edwards v Law Society of Upper Canada*, in which no private duty of care was found. In any event, as stated in the ERCB Brief, a private duty of care cannot arise out of specific interactions if such a duty is negated by statute. The ERCB's governing statutes clearly negate the imposition of a private duty of care between the plaintiff and the ERCB, even if such a duty is alleged to arise out of specific interactions between the parties.

- ERCB Brief, paragraphs 49 to 52.

(iii) Representations made by the ERCB

41. At paragraph 43 of the Ernst Brief, the Plaintiff argues:

> [r]epresentations made by a public authority, and the reliance placed on the authority, are particularly important considerations in the proximity analysis. Where a government agency has encouraged reliance on it by repeatedly asserting that it is protecting specific classes of individuals from harm, as occurred in this case, such representations will ground a finding of proximity.

The Plaintiff further argues that when a government agency makes public representations which suggest that the agency is acting specifically in the interests of the particular group of people rather than in the public interest, such representations may "amount to a public acknowledgment of a private duty of care."

- Ernst Brief, paragraphs 43-4.
- *Sauer v Canada*, 2007 ONCA 454 at para 62 **[Ernst Book of Authorities, Volume 1, Tab 15]**.

42. The Plaintiff claims that the ERCB made numerous public representations regarding what individuals adversely impacted by the oil and gas industry could expect from the ERCB and its investigation and

enforcement scheme. Although the Plaintiff has not pleaded the particulars of such ERCB representations, the Plaintiff's descriptions of the alleged public representations cannot reasonably suggest that the ERCB acts specifically in the interests of the Plaintiff, or others in similar circumstances, rather than in the public interest. An ERCB statement suggesting that it investigates and responds to public complaints cannot reasonably give rise to an assumption that the ERCB will act in the interests of complainants, rather than in the public interest. Indeed, the ERCB Compliance Assurance Directive (Directive 19), states that the ERCB's investigation and enforcement processes are to be undertaken in the public interest:

> The Compliance Assurance program and processes of the Energy Resources Conservation Board (ERCB/Board) support the ERCB's mission to ensure that the discovery, development, and delivery of Alberta's resources take place in a manner that is fair, responsible, **and in the public interest**. Under the Compliance Assurance program, three activities are used to facilitate efficient and effective compliance: education, prevention, and enforcement.
>
> The ultimate goal of the ERCB Compliance Assurance program **is to ensure compliance with the requirements that are written, monitored, and enforced on behalf of all Albertans**. Compliance ensures that resource activity within the province is conducted in a manner that **protects public safety,** minimizes environmental impact, ensures effective conservation of resources, and ensures stakeholder confidence in the regulatory process.
>
> This directive specifically focuses on the prevention and enforcement aspects of compliance assurance and applies to all ERCB requirements and processes. [emphasis added]

As such, the alleged public representations cannot amount to a public acknowledgment of a private duty of care, and therefore cannot ground the necessary proximity upon which a private duty of care may be found.

- Ernst Brief, paragraph 45.
- *Sauer v Canada*, 2007 ONCA 454 at para 62 **[Ernst Book of Authorities, Volume 1, Tab 15]**.
- ERCB, *Directive 19: Compliance Assurance*, September, 2010, pp 1-2 **[ERCB Book of Authorities, December 5, 2012, Volume 3, Tab 48]**.

(iv) Private Property and Safety Issues Involved

43. At paragraphs 47 to 49 of the Ernst Brief, the Plaintiff argues that the nature of the interests involved in the present matter is a significant factor in the proximity analysis. The Plaintiff argues that if the ERCB does not implement or enforce proper regulations, oil and gas development could have detrimental impacts on individuals who reside near oil and gas operations. The Plaintiff argues that rural landowners who live near oil and gas facilities rely on the ERCB to inspect and enforce requirements. In support of this proposition, the Plaintiff cites the Supreme Court of Canada's Decision in *Rothfield v Manolakos*.

- Ernst Brief, paragraphs 47-9.

44. The Plaintiff has cited no authority for the proposition that the importance of the interests involved is a relevant factor in establishing sufficient proximity to ground a duty of care. Indeed, any matter involving a statutory regulator will, necessarily, involve various important interests. As such, this factor has no relevance to a proximity analysis.

(v) Regulatory and Legislative Scheme

45. At paragraphs 50 to 55 of the Ernst Brief, the Plaintiff argues that the ERCB passed a number of regulations and requirements aimed at the protection of groundwater and protecting private property. The Plaintiff further argues that the ERCB established a compliance and enforcement scheme which included procedures for receiving and investigating public complaints, inspecting oil and gas operations, and enforcement and remedial actions in relation to oil and gas companies.

- Ernst Brief, paragraph 50-55.

46. The Plaintiff cites *Heaslip Estate v Mansfield Ski Club Inc.* for the proposition that once a government establishes and operationalizes a policy, it may be liable for a failure to act in accordance with that policy where the failure caused harm to the Plaintiff. The Plaintiff argues that the claim in *Heaslip Estate v Mansfield Ski Club Inc.* was allowed to proceed to Trial on the basis that there was a negligent failure to respond to a request for a government service in accordance with the government's established policy. However, as discussed above, *Heaslip Estate v Mansfield Ski Club Inc.* involved the availability of an air ambulance, which was operated by the Crown. A policy was in place to prioritize the most seriously injured individuals in the delivery of air ambulance services. The claim in *Heaslip Estate v Mansfield Ski Club Inc.* was based on the Crown's failure to prioritize the Plaintiff's medical needs in direct contravention of a specific policy.

- Ernst Brief, paragraph 53-4.
- *Heaslip Estate v Mansfield Ski Club Inc, supra,* at paragraphs 17-20 **[Ernst Book of Authorities, Volume 1, Tab 11].**

47. As stated above, *Heaslip Estate v Mansfield Ski Club Inc.* is not applicable to the present matter. The relationship at issue in *Heaslip Estate v Mansfield Ski Club Inc.* was a direct relationship between the Plaintiff and the Crown. In the present matter, the Plaintiff allegedly suffered harm at the hands of a party involved in activity which is subject to the regulatory authority of the ERCB. The Plaintiff and the ERCB have only a mediated, and not a direct, relationship, and as such there is insufficient proximity upon which to ground a private duty of care.

48. The Plaintiff further argues that the ERCB's "statutory purposes are specifically directed to protect the interests of landowners with oil and gas operations located on or near their land, and not just the undifferentiated public." In support of this assertion, the Plaintiff cites the ERCB's obligations to secure safe practices of oil and gas operations, and to control pollution at oil and gas operations, "two concerns that are, by their very nature, local and specific, not merely broad and general." The Plaintiff argues that it is "therefore clear that an immediate purpose of the legislative scheme must be to protect specific local landowners with oil and gas operations located on or near their land."

- Ernst Brief, paragraph 55.

49. However, as discussed in the ERCB Brief, the ERCB's legislative scheme is not aimed specifically at protecting local landowners with oil and gas operations located on or near their land. Rather, the ERCB's statutory scheme is clear that any duties imposed on the ERCB are owed to the public as a whole. The Plaintiff's arguments contradict the plain wording of the ERCB's governing statutes, which do not create proximity sufficient to ground a private duty of care.

- ERCB Brief, paragraphs 78-88.

V. THE ERCB'S PUBLIC DUTIES WOULD CONFLICT WITH A PRIVATE DUTY OF CARE

50. At paragraphs 56 to 64 of the Ernst Brief, the Plaintiff argues that there are no conflicting duties which are sufficient to negate finding a private duty of care. To be clear, it is not necessary to find conflicting alleged private and existing public duties in order to find that the ERCB has only public duties. The Plaintiff argues that a public authority can simultaneously owe private and public duties. In support of this proposition, the Plaintiff cites *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, in which the police were found to owe a private duty of care to a particularized individual under investigation, while also owing a duty to the public to prevent crime. The Plaintiff further argues that "it is only in circumstances where there is a **manifest and irreconcilable** conflict between the statutory public duty and the *prima facie* private duty that the private duty should be negated" (emphasis added). This, of

course, presumes a private duty exists in the first place. This also ignores the fact that, in *Hill,* the relationship was not a mediated one, but a direct one.

- Ernst Brief, paragraphs 56-64.
- *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board, supra*, at para 20 **[Ernst Book of Authorities, Volume 1, Tab 12]**.

51. The Plaintiff provides no support for the notion that only a manifest and irreconcilable conflict between public and private duties negates the finding of a private duty of care. Rather, as the Court stated in *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board,* a private duty of care will be negated when the conflict between public and private duties, considered together with relevant policy considerations, gives rise to "a real potential for negative policy consequences". As such, it is a real potential for negative policy consequences – and not a manifest and irreconcilable conflict between a public and private duty – that will negate the imposition of a private duty of care.

- Ernst Brief, paragraph 57.
- *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board, supra*, at para 20 **[Ernst Book of Authorities, Volume 1, Tab 12]**.

52. As stated above, and in the ERCB Brief, a private duty of care would undoubtedly conflict with the ERCB's public duties, and would give rise to the real potential for negative policy consequences. The ERCB's governing statutes unequivocally state that the ERCB owes a duty to the public as a whole. The ERCB has broad purposes that extend beyond compliance assurance and enforcement. These purposes range from the conservation of energy resources in Alberta, to appraising energy resources in Alberta, to providing for the economic, orderly and efficient development in the public interest of the oil and gas resources of Alberta. The ERCB has public duties related to the development of Alberta's oil and gas reserves, the assessment of proposals for development and exploration, and the regulation and expansion of oil and gas development. The ERCB's compliance directive states that the ERCB's investigation and enforcement processes are to be undertaken in the public interest. The imposition of a private duty of care between the ERCB and individuals impacted by or opposed to oil and gas development would have wide-ranging and detrimental impacts on oil and gas development in Alberta. If a private duty of care was imposed on the ERCB vis-à-vis any individual who claims to be adversely affected by oil and gas development in Alberta, the ERCB would be unable to carry out its public mandate. In this context, the imposition of a private duty of care would conflict with the ERCB's overarching public duties, and pose a real potential for negative policy consequences.

- ERCB Brief, paragraphs 78-88.
- ERCB, *Directive 19: Compliance Assurance*, September, 2010, pp 1-2 **[ERCB Book of Authorities, December 5, 2012, Volume 3, Tab 48]**.

VI. THE PLAINTIFF'S CLAIMS RELATE TO ACTIONS NOT OMISSIONS

53. The Plaintiff argues that her claims relate to exclusively to omissions, and not actions, of the ERCB, and as such, the ERCB cannot rely on the statutory immunity clause set out in section 43 of the *ERCA*. However, as stated in the ERCB Brief, a plain reading of many of the Plaintiff's claims relate to acts taken by the ERCB. The Plaintiff claims, *inter alia,* that the ERCB did not respond *reasonably* to her complaints, did not take *reasonable steps* with respect to the EnCana Wells, did not *adequately* inspect her complaints, did not conduct *adequate* ground water testing, and did not *promptly* inform the Plaintiff of potential contamination. A plain reading of these allegations demonstrates that the Plaintiff's claims relate to acts, and not omissions. A failure to act reasonably or adequately is not an omission. Indeed, on the Plaintiff's logic, any ERCB action claimed to be unreasonable or inadequate would be deemed an omission, and not an act. Such an approach would lead to the absurd conclusion that, if the Plaintiff's interpretation of

section 43 of the *ERCA* were accepted, section 43 of the *ERCA* would never have any application. The Plaintiff has now had four opportunities to plead a cause of action, and a claim that is not barred by a statutory immunity. Clearly, she will not do so. Rather, she argues that her claims are about "omissions", when drafted as acts. At the very least, those parts of the Statement of Claim that refer to acts must now be struck or dismissed. With respect, some consideration must be given to the fact that the Defendants have spent a great deal of time and money attempting to correct and augment clearly deficient pleadings.

- Fresh Statement of Claim, paragraphs 36 & 40.
- Ernst Brief, paragraphs 80-82.
- ERCB Brief, paragraphs 115, 125-6.

54. The Plaintiff cites a number of Alberta statutes for the proposition that the Alberta Legislature will specifically immunize omissions when it intends such a result. However, references to omissions in other Alberta statutes does not indicate that the Legislature intended to exclude omissions from section 43 of the *ERCA*. As the Supreme Court of Canada held in *ATA v Alberta (Information and Privacy Commissioner)*:

> The ATA argues that the principle of statutory interpretation, *expressio unius est exclusio alterius*, leads to the conclusion that an extension must be made before the expiry of 90 days: when the legislature intended to allow an extension to be made either before or after the expiry of a time period; it said so expressly. The now repealed s. 54(5) *PIPA* authorized a court to "on application made either before or after the expiry of the period referred to in subsection (3) [i.e., 45 days], extend that period if the court considers it appropriate to do so". According to the ATA, absence of such language in s. 50(5) *PIPA* necessarily implies that the legislature did not intend for the Commissioner to be able to extend the period for completion of an inquiry "before or after" the 90-day period has expired (Factum, at para. 76).
>
> This argument, while having some merit, is far from determinative. As Justice Berger pointed out, there are also many statutory provisions in Alberta that expressly restrict extensions to those granted before expiry of a time period (at para. 57), citing *Credit Union Act*, R.S.A. 2000, c. C-32, s. 13; *Expropriation Act*, R.S.A. 2000, c. E-13, s. 23, *Garage Keepers' Lien Act*, R.S.A. 2000, c. G-2, s. 6(3); *Insurance Act*, R.S.A. 2000, c. I-3, s. 796; *Land Titles Act*, R.S.A. 2000, c. L-4, s. 140; *Legal Profession Act*, R.S.A. 2000, c. L-8, s. 80(3); and *Loan and Trust Corporations Act*, R.S.A. 2000, c. L-20, s. 257). I agree with Justice Berger that, "when ... the provision is silent as to when an extension of time can be granted, there is no presumption that silence means that the extension must be granted before expiry" (para. 58). I am therefore unable to conclude that the *expressio unius* principle renders the adjudicator's interpretation unreasonable.

- *ATA v Alberta (Information and Privacy Commissioner)*, 2011 SCC 61 at paras 65-6, [2011] 3 SCR 654 **[ERCB Supplemental Book of Authorities, Tab 6]**.
- Ernst Brief, paragraphs 72-75.

VII. THE ERCB'S PURPORTED EXCLUSION OF THE PLAINTIFF FROM THE ERCB'S COMPLAINTS PROCESS WAS NOT A PUNITIVE ACTION WHICH VIOLATED HER *CHARTER* RIGHTS

55. At paragraphs 96 to 101 of the Ernst Brief, the Plaintiff argues that the ERCB breached her *Charter* right to free expression by punitively excluding her from its public complaint process in retaliation for her criticism of the ERCB. The Plaintiff claims that the ERCB took punitive action against her for her public criticism of the ERCB, which included reporting her to the RCMP, barring her from communicating with certain ERCB staff, and excluding her from the ERCB complaints process. The Plaintiff further claims that the purpose of these ERCB actions was to punish the Plaintiff for her criticism and restrict her future speech. If that is so, the ERCB undertook "acts" and is immune from suit in respect of those. The Plaintiff cites *Ross v New Brunswick School District No 15* for the proposition that punitive action as a response to expression is a clear violation of section 2(b).

- Ernst Brief, paragraphs 96-101.
- *Ross v New Brunswick School District No 15*, [1996] 1 SCR 825 at para 57, 133 DLR (4th) 1 **[ERCB Supplemental Book of Authorities, Tab 7]**.

56. In *Ross v New Brunswick School District No 15*, Ross was a teacher who during his off-duty time, published and distributed documents and pamphlets featuring anti-Semitic and discriminatory comments. A parent of a Jewish child in the School District filed a complaint with the New Brunswick Human Rights Commission, alleging the School District had discriminated against him and his child in provision of services on the basis of religion and ancestry. A Board of Inquiry found that Ross' comments denigrated the faith and belief of Jewish people, and that the School District was in breach of the *Human Rights Act* in failing to discipline Ross in a meaningful way. The Board of Inquiry ordered the School Board to place Ross on a leave of absence without pay for 18 months, appoint him to a non-teaching position during that period if one became available, and terminate his employment at the end of 18 months if he had not accepted a non-teaching position. The Order also required the School Board to terminate Ross' employment if he published or wrote for the purpose of publication anything that mentioned a Jewish or Zionist conspiracy or attacked followers of the Jewish faith. Ross applied for Judicial Review, and the matter was appealed to the Supreme Court of Canada. The Supreme Court considered whether the Order directing the School Board to remove Ross from a teaching position infringed section 2(b) of the *Charter*. The Court held that Ross' writings and statements constituted expression within the meaning of section 2(b). The Court further held that the Order was intended to remedy the discrimination in the school system, but had the effect of preventing Ross from publically espousing his views while he was employed as a public school teacher. The Court also held that the Board "focused on providing relief in crafting its Order, and sought, as much as possible, to avoid punitive effects."

- *Ross v New Brunswick School District No 15, supra* at para 100 **[ERCB Supplemental Book of Authorities, Tab 7]**.

57. The facts of the present matter are not analogous to *Ross v New Brunswick School District No 15.* Ross' employment stood to be terminated if he espoused his anti-Semitic views publically. Although the Supreme Court of Canada did not characterize it as punitive, the Order included serious consequences related to Ross' livelihood for expressing his views in public. Conversely, the Plaintiff never faced punitive consequences for espousing her views publically, and on the Plaintiff's own facts, continued to engage in such conduct after the purported punitive action - the ERCB's purported decision to cease communication with her after it learned of the "the only way is the Weibo way" comment. The Plaintiff was free to, and did, contact the ERCB after the ERCB purportedly ceased communications with her.

- Fresh Statement of Claim, paragraphs 42 – 58.

58. The Plaintiff also cites *Haydon v R* and *Pridgen v University of Calgary*, for the proposition that punitive action in response to expressive activities violates section 2(b). In *Haydon v R*, the Applicants were employed with Health Canada as Drug Evaluators. They were reprimanded for breaching the duty of loyalty they owed to their employer following comments they made during an appearance on a national television program regarding the drug review process within Health Canada. The employees applied for Judicial Review, and the Federal Court held that although the reprimand violated their section 2(b) rights, such violations were justified under section 1. In *Pridgen v University of Calgary*, two undergraduate students posted negative comments about a professor on a social networking website. A University Review Committee found the students' conduct to be non-academic misconduct, and imposed discipline which included probation, an apology letter, and a requirement that the students refrain from posting or circulating defamatory material about the professor and the University. On judicial review, the Court held that the effect of the Review Committee's decision was to sanction the Applicants and prohibit them from publically espousing their views regarding the professor.

- *Haydon v R*, [2001] 2 FC 82 at paras 2, 21-25, 62 & 89, 192 FTR 161 **[ERCB Supplemental Book of Authorities, Tab 8]**.
- *Pridgen v University of Calgary*, 2010 ABQB 644 at paras 2, 5-8, & 75, 497 AR 219 **[ERCB Supplemental Book of Authorities, Tab 9]**.

59. These cases are also distinguishable from the present matter. The employees in *Haydon v R* were reprimanded for speaking publically on an issue directly related to their employment with Health Canada. The students in *Pridgen v University of Calgary* were sanctioned by the University for non-academic misconduct after posting comments on a public website, and required to refrain from making public comments defaming the University. In both cases, the individuals made public comments which resulted in sanction, including a requirement to refrain from making further public comments. As stated above, in the present matter, the ERCB did not seek to limit the Plaintiff's public comments on any particular issue. The Plaintiff never faced punitive consequences for expressing her views publically, and on the Plaintiff's own facts, continued to do so after the purported punitive action by the ERCB. The Plaintiff continued to contact the ERCB after the ERCB purportedly ceased communications with her.

- Fresh Statement of Claim, paragraphs 42 – 58.

60. Given that the ERCB's purported decision to cease communication with the Plaintiff had no effect on the Plaintiff's ability to express her views relating to oil and gas development in Alberta, either publically or to the ERCB, it is unclear how the Plaintiff's section 2(b) rights are engaged at all. The Plaintiff's right to free expression is not engaged by the refusal of a statutory regulator to respond to her communications. Any other finding would effectively constitutionalize the form and content of ERCB responses to public complaints or requests.

VIII. THE ERCB DID NOT RESTRICT THE PLAINTIFF'S RIGHT TO FREE EXPRESSION

61. At paragraphs 102 to 103 of the Ernst Brief, the Plaintiff argues that the ERCB restricted and constrained her ability to communicate with key offices of the ERCB, thereby breaching her section 2(b) rights. The Plaintiff claims that the ERCB restricted her communications by discontinuing communications with her, and instructing staff to avoid further contact. The Plaintiff claims that these actions were prohibitive and constraining, and prevented her from "effectively raising her concerns to the very office within the ERCB that had the mandate and capability to address her concerns." Again, these are acts, not omissions. Even using the Plaintiff's restrictive interpretation of the ERCB's immunity, the ERCB is immune from suit on this issue.

- Ernst Brief, paragraphs 102-3.

62. However, the alleged ERCB actions did not, in fact, prohibit or restrict the Plaintiff's right to free expression. As stated above, on the Plaintiff's own facts, the Plaintiff was free to, and did, continue to contact the ERCB after the purported decision to exclude her from the ERCB complaint process. The Plaintiff also continued to express her views relating to the ERCB and oil and gas development publically. The Plaintiff was never restricted from expressing herself. As stated in the ERCB Brief, 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. However, section 2(b) does not guarantee a right to effective, two-way communication with an audience, nor does it guarantee specific and satisfactory responses from an audience.

- Fresh Statement of Claim, paragraphs 42 – 58.
- ERCB Brief, paragraphs 135-6.

IX. THE ERCB'S REFERENCE TO THE COMMENT "THE ONLY IS THE WAY IS THE WEIBO WAY" IS PROPER, MATERIAL AND RELEVANT TO THE PLAINTIFF'S *CHARTER* CLAIMS

63. At paragraph 108 of the Ernst Brief, the Plaintiff argues that costs should be awarded against counsel for the ERCB pursuant to Rule 10.50 of the Alberta Rules of Court. The Plaintiff argues that references to the comment "the only is the way is the Weibo way," in the ERCB Brief were "irresponsible accusations in an improper form and for an improper purpose" and as such, is conduct deserving of costs. Rule 10.50 of the Alberta Rules of Court provides:

> 10.50 If a lawyer for a party engages in serious misconduct, the Court may order the lawyer to pay a costs award with respect to a person named in the order.

- Ernst Brief, paragraph 108.
- Alberta *Rules of Court*, *supra*, r 10.50 **[ERCB Supplemental Book of Authorities, Tab 10]**.

64. The Plaintiff argues that the situation is analogous to the Manitoba Court of Queen's Bench decision in *Eblie v Yankoski*. That case involved an Application to expunge portions of an Affidavit in support of a Motion which related exclusively to procedural and property issues in a family law matter. The expunged paragraphs, which related to claims of slander and breaches of protection orders, were found to be irrelevant to the subject matter of the Motion. The Court ordered costs to be paid by the lawyer on the basis that the expunged paragraphs were "completely and utterly irrelevant, scandalous, frivolous and vexatious". The Plaintiff argues that the present matter is analogous to *Eblie v. Yankoski*, in that it is "difficult to accept that these materials were not prepared and filed for an improper purpose, namely to prejudice the mind of the court against the opposite party."

- *Eblie v Yankoski*, 2007 MBQB 106 at paras 24-26, [2007] 8 WWR 697 **[ERCB Supplemental Book of Authorities, Tab 11]**.
- Ernst Brief, paragraph 108.

65. The facts of *Eblie v Yankoski* are not analogous to the present matter. The expunged paragraphs at issue in *Eblie v Yankoski* were irrelevant to the Motion, which related exclusively to procedural and property issues. The comment "the only way is the Weibo way" is hardly irrelevant to the present matter, given that the remark is at the very heart of the Plaintiff's *Charter* claims. Indeed, the Plaintiff makes reference to the Weibo Ludwig comment **in the Fresh Statement of Claim**. That the Plaintiff argues that the comment was scandalous, frivolous, vexatious, irrelevant and irresponsible begs the question as to why counsel for the Plaintiff saw fit to set out the comment in full in both the Amended Statement of Claim and the Second Amended Statement of Claim. That the Plaintiff wishes to distance herself from it at this stage of the proceedings does not transform the comment into one which is irrelevant, scandalous, frivolous, vexatious, irresponsible or improper. It is merely inconvenient. This *ad hominem* attack on the ERCB's counsel is unwarranted. The Plaintiff calls the ERCB counsel's reference to the Plaintiff's apparent endorsement of "the Weibo [Ludwig] way" irrelevant, scandalous, frivolous, vexatious, irresponsible and improper, and submitted for an improper purpose. Yet the Plaintiff refers to her very own Weibo Ludwig comment in the Fresh Statement of Claim. This Application is in respect of the Fresh Statement of Claim. It seeks to strike it or for judgment in respect of it. That necessarily entails referring to the Fresh Statement of Claim. The Plaintiff seeks relief against the ERCB's counsel, which is available only in the event of "serious misconduct". The Plaintiff maintains that her comments, which appear to endorse the activities of Wiebo Ludwig, could not reasonably be taken as a threat - she is not that kind of person. Apparently, however, the ERCB's counsel should stop referring to **what the Plaintiff said and pleaded**, or face the threat or personal and professional consequences. It is very respectfully submitted that there is nothing untoward in referring to the Plaintiff's pleadings and what is on the Court file in this Application.

- Fresh Statement of Claim, paragraph 47.
- Amended Statement of Claim, paragraph 114.

- Second Amended Statement of Claim, paragraph 114.

X. THE CHARTER DOES NOT GUARANTEE A RIGHT TO BE LISTENED TO

66. In paragraphs 109 to 114 of the Ernst Brief, the Plaintiff argues that she "does not seek to force her message on a captive audience," but "merely wished to communicate with the ERCB in the same manner as everyone else." She argues that the pertinent question at issue in the present matter is:

> ... can a government agency, having established a public complaints mechanism and invited members of the public to participate in it, arbitrarily restrict one individual from such communication?

- Ernst Brief, paragraphs 109-114.

67. As the Plaintiff states in the Ernst Brief, captive audience cases relate to the principle that expression must be compatible with the function or intended purpose of the forum of the expressed activity. Threats of violence are not compatible with the function or intended purpose of the public ERCB complaints process, and are not protected expression in any event.

- Ernst Brief, paragraph 112.
- *Irwin Toy Ltd v Quebec (Attorney General)*, *supra,* at para 43 **[ERCB Book of Authorities, December 5, 2012, Volume 1, Tab 20]**.

68. Moreover, contrary to the Plaintiff's claims, she did not express her concerns to the ERCB "in an entirely appropriate manner" or "in a manner that had no negative effects of the functioning of the ERCB or anyone else." Indeed, any purported exclusion from the ERCB public complaints process was not arbitrary, but a result of the comment "the only way is the Weibo way." The ERCB took this comment seriously, reported it to the RCMP and ceased communication with the Plaintiff. The Plaintiff, in effect, claims that she is entitled to make threats which could impact the ERCB, its licensees and the Alberta public as a whole, and then continue to force her message onto ERCB staff. The Plaintiff does not have a *Charter* right to force the staff of the ERCB to listen to her, particularly in such circumstances.

- Ernst Brief, paragraphs 109-114.

69. Finally, as stated above, the purported decision to exclude the Plaintiff from the ERCB complaints process did not, in fact, restrict the Plaintiff's expression. The Plaintiff continued to express her views to the ERCB, and publically, to various individuals and groups. What the Plaintiff claims is that her right to free expression was breached because the ERCB did not respond to her communications. As stated in the ERCB Brief, the Plaintiff has no right to be listened to, and no right to a specific response from the ERCB.

- Fresh Statement of Claim, paragraphs 42 – 58.
- ERCB Brief, paragraphs 135-6.
- *Ontario (Attorney General) v Dieleman*, 1994 CarswellOnt 151 at paras 637-8, 20 OR (3d) 229 (Gen Div) **[ERCB Book of Authorities, December 5, 2012, Volume 1, Tab 27]**.

XI. THE PLAINTIFF HAS ASSERTED A POSITIVE RIGHT

70. At paragraphs 115 to 126 of the Ernst Brief, the Plaintiff argues that she has not asserted a positive rights claim, but merely the right to engage in expression in a forum which is open to all members of the public. The Plaintiff correctly states that positive rights cases are characterized by situations wherein:

> the government creates by statute a particular forum for expression, and the right claimed depends on that statutory framework to enable the right, a claim for a positive right to access to this particular statutory forum may be worthy of Charter protection, but only in the limited circumstances as defined in *Baier*.

However, the Plaintiff then argues that her *Charter* claim does not relate to a positive right which requires government support.

- Ernst Brief, paragraphs 115-126.

71. The facts of the present matter clearly demonstrate that the Plaintiff's *Charter* claims undoubtedly assert a positive right. Following *Baier v Alberta*, the Plaintiff claims that the ERCB must act to support or enable her expressive activity - her participation in the ERCB complaint process. As stated in the ERCB Brief, the Plaintiff's claim does not relate to expressive activity in which she would otherwise be free to engage without the need for government support or enablement. The ERCB complaints process exists only by virtue of government enablement.

- *Baier v Alberta, supra*, at paras 20-23 & 35 **[ERCB Book of Authorities, December 5, 2012, Volume 1, Tab 3]**.
- ERCB Brief, paragraphs 65-7, 140-5.

72. Moreover, the Plaintiff has not addressed the *Dunmore* criteria set out in *Baier v Alberta*. As discussed in detail in the ERCB Brief, the Plaintiff cannot satisfy the *Dunmore* criteria for the protection of a positive right. Briefly, the Plaintiff's claims are grounded in her access to a particular statutory regime – the ERCB's public complaints process – and not in a fundamental freedom of expression. Further, the Plaintiff has not demonstrated that her purported exclusion from the ERCB's complaints process interfered with her freedom of expression. The relevant issue is not whether the Plaintiff's purported exclusion interfered with lodging complaints with the ERCB, but whether the purported exclusion interfered with her expression on the subject matter of the complaints - the Plaintiff's concerns surrounding oil and gas development in Alberta. The Plaintiff continued to express herself on this issue after the purported exclusion, both to the ERCB and to other groups, individuals and organizations.

- ERCB Brief, paragraphs 65-7, 140-5.
- *Baier v Alberta, supra*, at paras 30, 44-55 **[ERCB Book of Authorities, December 5, 2012, Volume 1, Tab 3]**.
- Fresh Statement of Claim, paragraphs 42 – 58.

73. The Plaintiff argues that the positive rights analysis in *Baier v Alberta* is only relevant when legislation gives rise to a platform for expression. It is not relevant, the Plaintiff argues, when the right at issue is a pre-existing right that is later incorporated into a statutory regime. The Plaintiff argues that she has always "had the right to express her concerns regarding the oil and gas industry to various branches of government." While the Alberta Legislature created a statutory framework which provides for the ERCB public complaints process, this statutory framework did not add to or modify the Plaintiff's prior right of communication. It merely directed the office to which such a communication should be made. The Plaintiff relies on the Alberta Court of Appeal decision in *Cunningham v. Alberta (Minister of Aboriginal Affairs and Northern Development)* for this proposition.

- Ernst Brief, paragraph 123.

74. In *Cunningham v. Alberta (Minister of Aboriginal Affairs and Northern Development)*, one of the issues before the Court (although the Court declined to rule on it) was whether a claim regarding the right to belong to and participate in a Métis community established by the *Métis Settlements Act* was founded in a fundamental freedom or was seeking access to a statutory regime. While a pre-existing Métis community referenced in a statute may be a legislated reflection of what was in existence prior to the statute's passage, such facts are distinguishable from the present matter. The ERCB public complaints process is nothing more than a statutory creation. Indeed, the ERCB itself is a creature of statute. Given

that the ERCB exists only by virtue of its governing statutes, the ERCB public complaints process cannot merely be a legislated reflection of what was in existence prior to the creation of the ERCB.

- *Cunningham v. Alberta (Minister of Aboriginal Affairs and Northern Development)*, 2009 ABCA 239 at paras 54-7, 457 AR 297 **[ERCB Supplemental Book of Authorities, Tab 12]**; rev'd by *Cunningham v. Alberta (Minister of Aboriginal Affairs and Northern Development)*, 2011 SCC 37, but not on this point **[ERCB Supplemental Book of Authorities, Tab 13]**.

75. The Plaintiff cites *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component*, for the proposition that the Supreme Court of Canada has cautioned against finding a positive rights claim simply because some government involvement underlies the right at issue. In *Greater Vancouver Transportation Authority*, the Respondents alleged that the Appellant transit authorities' policies prohibiting political advertising on public transit vehicles violated their right to free expression. The Court held that expression in public places invariably involves some form of government support, and that public places are often created or maintained by government legislation or action.

- Ernst Brief, paragraphs 125-6.
- *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component*, 2009 SCC 31 paras 34-5 **[Ernst Book of Authorities, Volume 2, Tab 39]**.

76. The Court's decision in *Greater Vancouver Transportation Authority* is distinguishable from the case at bar. The Plaintiff is not merely seeking to express herself by means of an existing platform that she is entitled to use without undue state interference. The ERCB has not sought to restrict the Plaintiff's expression in a public park, on a public street, or any other means of expression the government need not provide. As the Supreme Court held at paragraph 35:

> When the reasons in *Baier* are read as a whole, it is clear that "support or enablement" must be tied to a claim requiring the government to provide a particular means of expression. In *Baier*, a distinction was drawn between placing an obligation on government to provide individuals with a particular platform for expression and protecting the underlying freedom of expression of those who are free to participate in expression on a platform (para. 42). Consequently, the Transit Authority's interpretation of the notion of a positive rights claim is overly broad and was in fact rejected in *Baier*. The respondents seek the freedom to express themselves – by means of an existing platform they are entitled to use – without undue state interference with the content of their expression. They are not requesting that the government support or enable their expressive activity by providing them with a particular means of expression from which they are excluded.

- *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component, supra,* para 35 **[Ernst Book of Authorities, Volume 2, Tab 39]**.

77. On the Plaintiff's own facts, the support or enablement that the Plaintiff seeks would require the ERCB to provide her with a particular means of expression – the ERCB public complaints process. This would place an obligation on the ERCB to provide the Plaintiff with a particular platform for expression. The Plaintiff's purported exclusion from the public complaints process did not affect her freedom to express herself on the issue of oil and gas development in Alberta, only her expression within a particular statutory platform. Section 2(b) does not guarantee access to any particular statutory platform including the ERCB's complaints process. The Plaintiff is claiming a positive right and cannot satisfy the *Dunmore* criteria for the protection of such a right. As such, section 2(b) is not engaged.

XII. THE PLAINTIFF'S CHARTER CLAIMS ARE BARRED BY THE *LIMITATIONS ACT*

78. At paragraphs 133 - 136 of the Ernst Brief, the Plaintiff submits that the ERCB's limitations argument cannot succeed because there are insufficient facts on record to support such an argument. As stated in

the ERCB Brief, the facts set out in the Fresh Statement of Claim demonstrate that the material fact on which the Plaintiff's *Charter* claims are based – the purported decision to exclude her from the ERCB complaint process – were set out in the November 24, 2005 letter from Mr. Reid. In this context, the applicable two year limitation period commenced prior to December 3, 2007, when the Plaintiff filed her Statement of Claim. In response, the Plaintiff argues that the Fresh Statement of Claim pleads only that the letter was dated November 24, 2005, and is silent on the issues of when the letter was sent, received or read by Ms. Ernst.

- Ernst Brief, paragraphs 133-6.
- ERCB Brief, paragraphs 146-9.

79. Sections 3(1) and 3(5) of the *Limitations Act*, RSA 2000, c L-12 provide:

> 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.
>
> 3(5) Under this section,
>
> (a) **the claimant has the burden of proving that a remedial order was sought within the limitation period provided by subsection (1)(a)**, and
>
> (b) the defendant has the burden of proving that a remedial order was not sought within the limitation period provided by subsection (1)(b) [emphasis added].

- *Limitations Act*, RSA 2000, c L-12, ss 3(1)& (5) **[ERCB Supplemental Book of Authorities, Tab 14]**.

80. Pursuant to section 3(5)(a) of the *Limitations Act*, Ms. Ernst has the burden of establishing that her *Charter* claims against the ERCB were brought within the two year limitation period set out in section 3(1)(a). The Alberta Law Reform Institute Limitations Report, a precursor to the implementation of the *Limitations Act*, addressed the reasons underlying assigning the burden to the Claimant with respect to section 3(1)(a):

> Cl. 3(5)(a) departs from the requirement under the existing law. Under cl. 3(5)(a), the claimant carries the burden of proving that his claim was brought within the discovery period. There are three reasons for placing the burden of proof under the discovery rule on the claimant. First, when a claimant first knew something is based on his state of mind, and is a subjective matter peculiarly within his own knowledge. Second, the objective written or oral evidence of what a claimant was told will usually be more available to him than to the defendant. Third, the objective evidence about when a claimant ought to have discovered the requisite knowledge will also probably be more readily available to the claimant.

This provision is consistent with the law under other modern limitations statutes (see e.g., the 1982 *Uniform Act*, ss. 13(4) and the *B.C. Act*, s. 6(5)) although with some the issue is not free from doubt (see Report for Discussion No. 4 at p. 137).

- *Limitations Act, supra,* ss 3(1)& (5) **[ERCB Supplemental Book of Authorities, Tab 14]**.
- See also: *Crane v Brentridge Ford Sales Ltd*, 2007 ABQB 669 at para 20, 436 AR 22 **[ERCB Supplemental Book of Authorities, Tab 15]**.
- Alberta Law Reform Institute, Report No. 55, *Limitations* (1989) at p 74, paras 69-70 **[ERCB Supplemental Book of Authorities, Tab 16]**.

81. The onus is on the Plaintiff to establish that her *Charter* claims were brought in time. The letter upon which the Plaintiff's Charter claims are based was dated November 24, 2005, a date outside the relevant two year limitation period. The Plaintiff has not established that her claim was brought in time because she has not proffered evidence to establish that Mr. Reid's letter was not, nor ought to have been, discovered by the plaintiff by the exercise of reasonable diligence prior to December 3, 2005.

- *Central & Eastern Trust Co v Rafuse*, [1986] 2 SCR 147 at para 89, 31 DLR (4th) 481 **[ERCB Book of Authorities, December 5, 2012, Volume 1, Tab 6]**.

82. The Plaintiff argues in her Brief that she was in the Yukon from November 25 to December 3, 2005, and did not receive Mr. Reid's letter until she returned from her trip. She further states that "[i]f necessary", she will "in the future file an affidavit to that effect". There are obvious evidentiary issues associated with this claim. An intention to file evidence in future does not relieve the Plaintiff of her burden under section 3(5) of the *Limitations Act*.

- Ernst Brief, paragraph 136.

83. In any event, a limitation period begins to run when a claimant knew or *ought to have known* that a claim could be brought. Failing to open one's mail does not have the effect of suspending the relevant limitation period. If that were the case, limitations could be extended indefinitely by simply avoiding opening or receiving one's correspondence. The only provisions in the *Limitations Act* that provide for the suspension of a limitation period are sections 5 and 5.1, which relate to disability and minors:

> 5(1) The operation of the limitation periods provided by this Act is suspended during any period of time that the claimant is a person under disability.
>
> (2) The claimant has the burden of proving that the operation of the limitation periods provided by this Act was suspended under this section.
>
> 5.1(2) Except as otherwise provided in this section, the operation of limitation periods provided by this Act is suspended during the period of time that the claimant is a minor.

- *Limitations Act, supra,* ss 5 & 5.1 **[ERCB Supplemental Book of Authorities, Tab 14]**.
- *Central & Eastern Trust Co v Rafuse*, [1986] 2 SCR 147 at para 89, 31 DLR (4th) 481 **[ERCB Book of Authorities, December 5, 2012, Volume 1, Tab 6]**.

84. Sections 5 and 5.1 set out the only two circumstances in which a limitation period may be suspended. The *Limitations Act* does not provide for the suspension of a limitation period during a trip or other absence from the jurisdiction. As such, even if the Plaintiff was in the Yukon from November 25 to December 3, 2005, the limitation period was not suspended until she returned home. The limitation period began to

run when the Plaintiff could have read Mr. Reid's letter of November 24, 2012, a date which was prior to December 3, 2005. As such, her *Charter* claims are out time.

85. The Plaintiff further argues that the ERCB cannot argue that the Plaintiff brought her *Charter* claim outside the two year limitation period because the ERCB has not filed a Statement of Defence. The Plaintiff argues that a limitations defence must be pleaded, and as such, cannot be argued until a Statement of Defence has been filed.

86. Rule 7.2 of the new 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. [emphasis added]

- Ernst Brief, paragraph 137.
- Alberta *Rules of Court*, *supra*, Rule 7.2 **[ERCB Book of Authorities, December 5, 2012, Volume 2, Tab 41]**.

87. As stated in the ERCB Brief, under the former *Rules of Court*, a Statement of Defence had to be filed before a Defendant was permitted to make an Application for Summary Judgment (former Rule 159). However, Rule 7.2 allows an Order for Summary Judgment to be given "at any time in an action". A Statement of Defence need not be submitted prior to a Court granting summary judgment. Indeed, such a reading of Rule 7.2 is consistent with the requirements of Rule 1.2 of the Rules of Court, in that it provides for the identification of the real issues in dispute and the quickest means of resolving the claim at the least expense.

- ERCB Brief, paragraph 35.
- Alberta *Rules of Court, supra*, Rules 1.2 & 7.2 **[Tab 41 of the ERCB Authorities, filed December 5, 2012]**.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of January, 2013.

JENSEN SHAWA SOLOMON DUGUID HAWKES LLP

Per: _____

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

XIII. LIST OF SUPPLEMENTAL AUTHORITIES

1. *Alberta Evidence Act*, RSA 2000, c A-18.
2. *Kazemi v Harms*, 1995 CarswellAlta 515, 37 Alta LR (3d) 362.
3. *Alberta Commercial Fishermen's Assn v Opportunity (Municipal District) No 17*, 289 AR 47, 2001 CarswellAlta 546 (QB).
4. *R v Bellman*, [1938] 3 DLR 548, 1938 CarswellNB 10 (NBCA).
5. *Daum v Schroeder*, 146 Sask R 142, 1996 CarswellSask 440 (QB).
6. *ATA v Alberta (Information and Privacy Commissioner)*, 2011 SCC 61 [2011] 3 SCR 654.
7. *Ross v New Brunswick School District No 15*, [1996] 1 SCR 825, 133 DLR (4th) 1.
8. *Haydon v R*, [2001] 2 FC 82, 192 FTR 161.
9. *Pridgen v University of Calgary*, 2010 ABQB 644, 497 AR 219.
10. Alberta *Rules of Court*, Alta Reg 124/2010.
11. *Eblie v Yankoski,* 2007 MBQB 106, [2007] 8 WWR 697.
12. *Cunningham v. Alberta (Minister of Aboriginal Affairs and Northern Development)*, 2009 ABCA 239, 457 AR 297.
13. *Cunningham v. Alberta (Minister of Aboriginal Affairs and Northern Development)*, 2011 SCC 37.
14. *Limitations Act*, RSA 2000, c L-12.
15. *Crane v Brentridge Ford Sales Ltd*, 2007 ABQB 669, 436 AR 22.
16. Alberta Law Reform Institute, *Report No. 55, Limitations* (1989).