



Alberta Court of Appeal Upholds Regulator's Immunity in Fracking Case

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On September 15, 2014, Alberta's Court of Appeal dismissed Jessica Ernst's appeal of the lower court decision holding that Alberta's Energy Resource Conservation Board (the "Board") is immune from private civil claims and certain Charter challenges.

Jessica Ernst owns land near Rosebud, Alberta. In 2007, Ms. Ernst brought claims against EnCana Corporation, the province of Alberta and the Board. Ms. Ernst sued EnCana for damage to her water supply allegedly caused by EnCana's hydraulic fracturing ("fracking") activity. Ms. Ernst also sued the province of Alberta alleging that through its department of Alberta Environmental and Sustainable Resource Development (now replaced by the Alberta Energy Regulator) it owed Ms. Ernst a duty to protect her water supply and failed to adequately respond to her complaints about EnCana's fracking.

This Appeal dealt with Ms. Ernst's claim against the Board (now also replaced by the Alberta Energy Regulator) for "negligent administration of regulatory regime" related to her claims against EnCana. The Board has regulatory jurisdiction over the activities of EnCana. Ms. Ernst also had claimed damages for breach of her freedom of expression under the Canadian *Charter of Rights and Freedoms*. She alleged that the Board refused to accept communications from her during regulatory proceedings.

Alberta's Court of Appeal held that the Board does not owe a private law duty of care to protect individual landowners. The Court of Appeal stated that "any such private duty would distract the Board from its general duty to protect the public, as well as its duty to deal fairly with participants in the regulated industry." Further, even if there was a private law duty of care, any action against the Board was barred by the immunity clause under section 43 of the *Energy Resources Conservation Act* ("ERCA"). The Court of Appeal dismissed Ms. Ernst's argument that the Board failed to respond "reasonably" to Encana's activities and held that a tortious claim alleging an omission to act was barred by section 43 of the ERCA.

The Court of Appeal also held that section 43 barred Ms. Ernst's *Charter* claim for a "personal remedy". The Court of Appeal concluded that even if the Board effectively breached Ms. Ernst's freedom of expression, that "protecting administrative tribunals and their members from liability for damages is constitutionally legitimate."

The decision upholds the Alberta Energy Regulator's blanket legal immunity against tortious claims from landowners.

Ms. Ernst has requested leave to the Supreme Court of Canada.

Link to decision: <http://www.canlii.org/en/ab/abca/doc/2014/2014abca285/2014abca285.html>

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