

## Supreme Court of Canada to Hear Fracking Case on Regulator Immunity

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On April 30, 2015 the [Supreme Court of Canada granted leave to appeal with costs to Jessica Ernst for her claim against Alberta Energy Regulator \(“AER”\)](#). The leave decision from Canada’s top court comes after Alberta’s Court of Appeal dismissed Ms. Ernst’s appeal of the lower court decision which held that Alberta’s Energy Resources Conservation Board (now the AER) is immune from private civil claims and certain Canadian Charter of Rights and Freedoms challenges.

In 2007, Ms. Ernst brought an action against EnCana Corporation for damage to her water supply allegedly caused by EnCana’s hydraulic fracturing (“fracking”) activity. In 2011, Ms. Ernst amended her statement of claim to include [Alberta Environment and Sustainable Resource Development](#) (“ASRD”). Ms. Ernst claimed ASRD owed her a duty to protect her water supply and failed to address her complaints about EnCana.

The Supreme Court of Canada will consider the [September 15, 2014 Alberta Court of Appeal decision](#) that dealt with Ms. Ernst’s claim against AER for “negligent administration of a regulatory regime” connected to her claims against EnCana. Ms. Ernst also claimed damages for breach of her freedom of expression under the *Charter*. She alleged that AER refused to accept communications from her during regulatory proceedings.

Alberta’s Court of Appeal held that AER does not owe a private law duty of care to protect individual landowners. Even if AER owed the requisite duty, Alberta’s Court of Appeal held that such an action is barred by the immunity clause under section 43 of the *Energy Resources Conservation Act*. Alberta’s Court of Appeal also held that section 43 barred Ms. Ernst’s *Charter* claim for a personal remedy and upheld the constitutional legitimacy of protecting a regulator from liability for damages.

If successful at the Supreme Court of Canada, Ms. Ernst’s claim against AER will be sent back to the lower court for reconsideration.

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