

THE TROUBLE WITH  
CATHOLIC HOSPITALS

ERNST VS. ALBERTA'S  
POST-TRUTH REGULATOR

SID MARTY REMEMBERS  
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NEW PERSPECTIVES FOR ENGAGED CITIZENS // APRIL 2017

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*by Max Fawcett*

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political staff paid  
with public money?

*by Graham Thomson*



## Betrayed

### The Jessica Ernst decision.

Friday, January 13, 2017, was not Jessica Ernst's lucky day. That's the day the Supreme Court of Canada handed down a non-decision in her legal battle against the Alberta Energy Regulator (AER)—a government-appointed agency responsible for getting oil and gas development right.

But Ernst won a victory of sorts: She got the AER to show its true colours. That same day, the agency posted a smug and tone-deaf media release congratulating themselves. Among other things, the release stated: "The court did not find there was a breach of Ms. Ernst's Charter rights, and made no findings of negligence on the part of the AER or its predecessor the ERCB."

That statement was a complete and almost certainly deliberate misrepresentation of the legal decision. The Supreme Court actually chose to be silent on Ms. Ernst's Charter rights and never addressed the question of negligence. If ordinary citizens were the audience for that media release, the AER's gloating and post-truthy response makes no sense. But we weren't the audience.

Where the AER is concerned, it was never about us. The AER is staffed by oil-industry insiders and entirely funded by oil and gas revenues. They know who butters their bread. Given the real audience for that media release, it wasn't tone-deaf at all; it was meant to reassure.

Jessica Ernst may have lost her legal battle, but she got the AER to prove that it is—as has long been argued by its critics—a captive agency almost fully in the service of the very industry it's supposed to regulate.

In the early 1990s the AER's predecessor, the Energy Resources Conservation Board, approved a number of coalbed methane wells around Ernst's home near Rosebud. Encana, which drilled the wells, used fracking to release methane from shallow coal seams. Water wells in the area promptly began to go sour. Ernst's was among them. Her taps began to spew foam. The bubbles were natural gas. She couldn't drink the water anymore—but she could light it on fire.

When a gas or oil company contaminates groundwater in Alberta, they usually cut private deals to make the problem disappear. In exchange for cash, a new water well or a commitment for trucking potable water in from far away, the landowner signs a non-disclosure agreement with the company. With no public record of the transaction, the industry and its regulator continue blithely to assure us that no evidence exists of oil and gas drilling poisoning our groundwater.

Ernst, however, wouldn't play the cover-up game. She refused to sign a non-disclosure agreement. She refused to be bullied by threats from lawyers. She kept asking awkward questions. She simply refused to behave like a nice, tame



Albertan properly subservient to Big Oil.

Finally the agency simply slammed the door on her. For months, Ernst was denied all access to a public agency set up to address public concerns. So she sued them. The AER insisted they can't be sued, because their enabling legislation grants them immunity. By the time the case migrated up the judicial food chain to the Supreme Court of Canada, Ernst added another complaint: that her rights under Canada's Charter of Rights and Freedoms had been violated by the regulator.

January's decision was a close split. Four justices said Ernst should have simply sought a judicial review of the original well approvals. Another rejected her case because, in his view, the Charter rights question had been added too late and should have been considered by lower courts first. Combined, the five were a majority; they dismissed Ernst's case on technicalities without looking at the evidence.

Chief Justice Beverley McLachlin and three other justices, however, found in support of Ernst. The dissenting justices pointed out that while the AER might be immune from liability for regulatory decisions "...there is nothing in the record which indicates that the board was acting in an adjudicative capacity in this case... here, the impugned conduct is said to have been punitive in nature." Exactly. Jessica Ernst is an Albertan

who had the gall to stand up for her rights. The majority ruling dodged the question of whether the AER—appointed to impartially consider and respect the interests of all Albertans—abused its powers in locking her out.

So the core issue was never decided. But instead of a sophisticated and respectful response, the AER's self-congratulatory media release conceded nothing to those of us who expect them to keep our water safe. Why?

Because that media release wasn't written for us. It was written for the oil and gas industry that captured the regulator years ago. The message to the AER's corporate buddies was: "Don't worry about uppity Albertans. We've still got your back, and nothing's going to change."

Jessica Ernst fought for all of us. We lost. And we learned just how alone we really are. ■

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