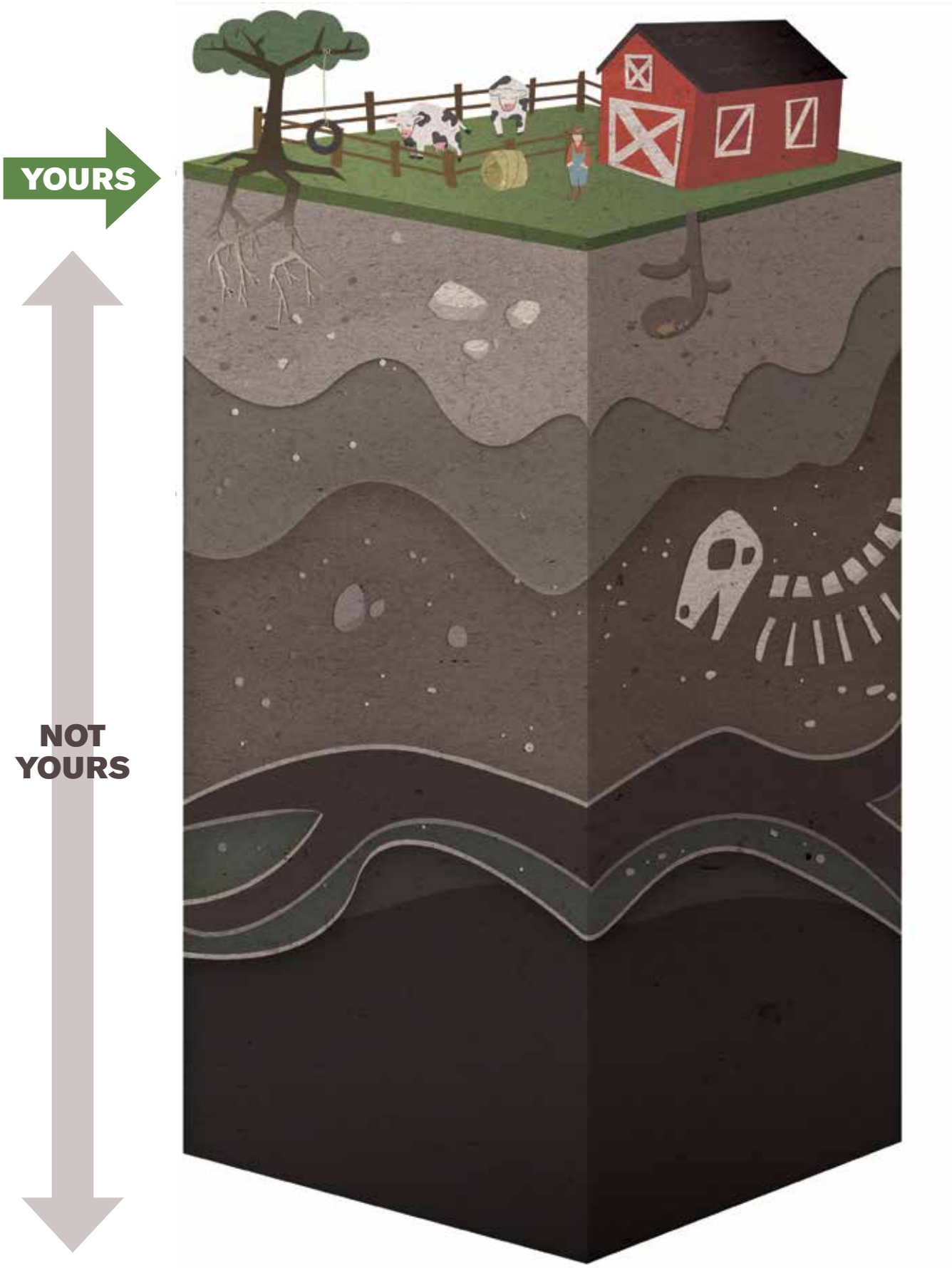

SAMANTHA LUCY

Landowner Rights

How Big Oil trumps private *and* public good

By FRED STENSON

ALBERTA SCENARIO. A FAMILY pays off its city mortgage and decides to move to an acreage. They buy a place and settle into country living. An oil company fracks near their home. Soon after, they notice their water does not taste right.

Alberta families who believe they have been harmed by industrial activity usually assume they have property rights that are being violated. Many believe the government will help them, at least in gaining compensation. The truth is that Canada's Constitution and the Canadian Charter of Rights and Freedoms are silent on property rights.

As Canadians, we think we have property rights because it is a natural thing to assume in a democratic nation. Property ownership is a gauge of our security and a storehouse for our savings. Professors Eran Kaplinsky and David Percy, authors of the Alberta Land Institute's *A Guide to Property Rights in Alberta*, describe assumptions we make about the property we own: that we will be able to use and enjoy it, develop it as we desire, exclude others from it and sell it to whomever we please. But in Canada the ultimate right over property belongs to the Crown. The government can do with our property more or less as it pleases.

Many Canadian federal and provincial statutes affirm the Crown's right to take or use property for the public good. If land is needed for an airport, government can expropriate. When the Crown leases mineral rights—to an oil company, for example—the usual practice is for a company landman to negotiate access with the surface rights owner. Payment is offered but refusal to allow access isn't an option. If the owner will not play, the government can grant the oil company a right of access. The same goes for plants, pipelines and transmission lines.

Most of us understand expropriation for the public good; **roads and utilities must go somewhere.**

On some level, most of us understand expropriation for the public good. When a city needs infrastructure, it often has no choice but to expropriate someone's property. Roads and utilities must go somewhere. Alberta, with a relatively small population compared to its land area, depends on natural resources for public funds. In return for royalties, industry gets access.

Some of us will be unlucky enough to be in the way of infrastructure or industrial projects and will be called on to sacrifice. The alternative—and the US system with constitutional property rights defines that alternative—is for people to be allowed to refuse. Even in the US, however, the government has a power of "eminent domain" that can overrule property rights.

Government also needs Crown power over property to carry out policy. A recent example was emergency action to save the sage grouse from being wiped out in Canada. To

protect sage grouse, the provincial government in 2013 took back private grazing rights on the birds' breeding grounds. If we think expropriation is "government against the little guy in support of corporations," many would feel it is unfair. If it means protecting an endangered species, more of us are comfortable with it.

The truth is that a system like Alberta's only functions smoothly if the government's and citizens' definitions of "public good" are the same. A lack of common understanding leads to confrontation. Many Alberta landowners feel the province's regulatory bodies reflexively choose industry over property owners and therefore public trust has eroded. To protect the enjoyment of their property, their health, and their property value, owners feel forced to do battle with their own government.

In recent years one Alberta landowner's struggle with an oil company and the Alberta government stands out above the rest, partly because of the incredibly stubborn determination of the complainant. Jessica Ernst's failure to get satisfaction for the pollution of her water supply after fracking has grown into a seven-year lawsuit. To understand Ernst's situation—and the many similar to hers—we need to understand first how Alberta property rights came to be so lopsidedly pro-industry.

The system only functions **if the government and citizens define "public good" the same way.**

IT STARTS WITH MINERAL RIGHTS. AT A GLANCE, the biggest difference between land ownership in the US and Canada is that most American landowners own surface and mineral rights together (called freehold), while most Canadians own surface rights only. The simplest answer as to why this is so is that Crown ownership is a British tradition that Canada followed when it became a nation. The US achieved nationhood by violent rebellion against British rule. Hence, Americans own freehold rights and Canadians do not.

Some privately owned mineral rights do exist in Canada, usually where ownership predates nationhood (Ontario, Quebec, the Maritimes). By the time Alberta became a province (1905), homesteaders were limited to owning surface rights. In Alberta today, the province owns 81 per cent of mineral rights and the federal government owns 9 per cent. The remaining 10 per cent of mineral rights in private hands is the result of old deals such as freehold property given to the Canadian Pacific Railway as part of the company's original agreement with Canada. Those mineral rights are now owned by Encana Corporation.

In Alberta's first four decades as a province, mineral rights were not avidly sought after. Except for gas at Medicine Hat and oil at Turner Valley, Alberta was considered barren of petroleum. Imperial Oil punched many dry holes to prove that—but then came Leduc. Imperial's 1947 oil strike just south of Edmonton ushered in a new concept of Albertan resource wealth. The key that unlocked Leduc unlocked many reservoirs. After 1947, Alberta mineral rights were golden.

Oil dragged Alberta out of a post-war economic abyss. The Social Credit government found itself at the helm of a fast-growing province with money piling up in its coffers. It is not so surprising that Alberta's government felt beholden to oil companies for its prosperity.

In the 1950s and 1960s, oil ruled Alberta. When a company wanted to drill, build or run a pipeline, farmers were pushed aside. That treatment could be rough. When a 1960s sour gas plant south of Pincher Creek malfunctioned (the gas literally eating the high-grade steel meant to contain it), families downwind were regularly dosed with poisonous hydrogen sulphide. Pigs died at such a rate that the farmers gave up on pork production. Families with sick children moved away. When an Alberta government health study found no serious health risks, local families started a lawsuit that was settled 12 years later.

This out-of-court settlement was important in that farmers had pushed a big oil company to pay. Otherwise the victory was moral only. Government did not admit its health study was flawed. Industry did not admit it had killed or sickened anyone or anything.

In these ways, the compact between oil and government was forged. Politically, the only upheaval came in 1971 when Peter Lougheed's Progressive Conservatives defeated Social Credit and brought in tougher oil and gas regulations. The PCs have run Alberta ever since. Those who say nothing has changed point to oil. Alberta remains a one-trick, one-resource pony.

ALL THIS MAY BE MASKING A contradictory-sounding truth: that Alberta has changed too much not to change. In the three generations since Leduc, Alberta's population has grown from 800,000 to over four million. Calgary and Edmonton grew past the million mark, as rural domination turned to urban domination. While many Albertans vote PC and work for oil companies, Albertans generally are not the same people who were buoyed by the 1950s oil-tide. We are less grateful. After having "barrelled" through its conventional oil supply, with little in the bank to show for it, Alberta's government shifted focus to higher-cost, environmentally destructive bitumen. In recent years, the oil sands has not balanced Alberta's books either, because of a sweet royalty deal Ralph Klein gave oil sands developers in the 1990s. While Norway used North Sea oil royalties to save $829-billion (about a million Norwegian kroner per citizen), Alberta has saved $17.4-billion from its entire conventional oil resource. Having duped itself in the oil sands, the province has charged into its third petroleum frontier: hydraulic fracturing. When Albertans hear it said that oil companies love doing business in low-tax Alberta, it turns us cynical. The public good has long since become the industry good.

The oil sands has been an environmental and public relations disaster for Alberta, but fracking may wind up being the petroleum frontier that shakes Alberta hard enough to alter its fundamentals. Fracking is farm-by-farm, acreage-by-

acreage property invasion. Much of it is done in the acreage belt around cities and towns. This time, industry is not just battling farmers or "radical environmentalists"; it is in conflict with people who often purchased rural property with proceeds from careers in the oil industry—the kind of middle class Albertans who put the PCs in office. Real estate studies show that fracking on or near your land can reduce sale value by as much as 25 per cent. Income studies show that most Canadians hold their retirement savings in real estate. Combine these and you have an attack on middle-class worth, on Albertans' hopes for their future.

Albertan Jessica Ernst on her 2014 court win: "The decision means we can stand up and hold governments and regulators to account."

JESSICA ERNST MOVED TO HER acreage at Rosebud in 1998. She is a biologist who owns an environmental services company. Among her clients in the 1980s was PanCanadian (the company that merged with AEC to form Encana in 2002).

In 2003 Encana expanded a coalbed methane development in southern Alberta. An Encana brochure described the process as pumping nitrogen into coal seams to separate "cleats" in the coal and produce channels through which methane can flow. Some of those wells were drilled at Rosebud, and after shallow fracking took place near her home, Jessica Ernst's water changed suddenly. Her taps whistled; she could light the water on fire. Her dogs refused to drink it. Her skin burned when she showered. None of these problems had existed before.

Ernst called Encana about the water problem and was, she says, "dismissed within minutes." She was also troubled by incredible compressor noise during fracks, well above legal limits, and because of this separate issue, Encana offered to move her. When an *Edmonton Journal* article appeared about her water problem, Encana cancelled the relocation offer.

Ernst pursued her water problem with the Energy & Utilities Board. The EUB told a reporter that the regulator had tested Ernst's water and found no methane. This EUB person also told the reporter that Jessica was making up her story to get attention. Ernst says this conversation between EUB and a reporter happened before any government investigation of her water had taken place.

Something very similar happened when she took the issue to Alberta Environment. Ernst says that before Environment did any testing of her water, someone from that department told a reporter that her water problem was bacterial.

In 2005 the EUB cut off communication with Ernst, denying her access to their investigation and complaints process. The stated reason was a mention of the "Wiebo way" in an Ernst email. (Alberta farmer Wiebo Ludwig was convicted in 2000 of sabotaging oil and gas wells.) Ernst says that, in her email, she made it clear she was quoting a neighbour. Nonetheless, EUB decided what she had written constituted a "criminal threat of violence" that they reported to the RCMP.

Ernst's lawyer at the time thought she should apologize to the chair of the regulator. Ernst refused. "Only in cycles of abuse do victims think they should apologize when they get beaten up," was her comment. Much later, in 2006, a lawyer for the EUB told Ernst that they had never considered her a threat. This suggested the purpose had been to silence her.

WHEN ALBERTA ENVIRONMENT FINALLY DID investigate Jessica Ernst's water, she became convinced they were not doing so in good faith. In 2007 she resorted to the courts. Her $33-million suit was against Encana, ERCB and Alberta Environment for the contamination of her water and failures of regulation and investigation. (The EUB had become the ERCB in the interim.) She also contended that the decision by ERCB to ban her from their regulatory process denied her Charter right to free expression.

Ernst's life has been completely absorbed by this lawsuit and by communicating with people and media on fracking and water contamination. Efforts to undermine her credibility have been ongoing, including a whisper campaign about her sanity. When farmers asked oil company landmen about Ernst's problems with fracking, some said not to listen to her, that she was a crazy woman. A dirty business.

As Ernst's lawsuit proceeded, the Alberta Energy Regulator (formerly ERCB; formerly EUB) contended it "owed no duty of care" to protect anyone's groundwater in Alberta; also that an eco-terrorist's Charter rights could be violated by a regulator. (Although Ernst has never been charged by the RCMP, the word "terrorist" was applied to her in court documents filed by the Alberta Energy Regulator in 2012.) Alberta Environment argued that words such as "hazardous," "pollutants" and "contamination" should be removed from Ernst's statement of claim. This department also wanted removed any suggestions that Ernst's experiences were related to those of others claiming water contamination from fracking.

The Alberta government stands solidly behind its fracking industry. In February 2013, when confronting an NDP contention that domestic water supplies were being contaminated by fracking, Premier Alison Redford described the claims as "completely false." Industry and government had also operated in tandem in the 1960s, when southern Alberta farmers tried to sue for air pollution. No

KIM SILFVING

HOW THE WILDROSE PARTY GOT ITS THORNS

NOT LONG AGO THE WILDROSE WAS A non-factor in Alberta politics. In the 2008 election the party won zero seats. But their support rose sharply in 2009 after premier Ed Stelmach's royalty rate increases prompted oil companies to shift their donations to the Wildrose. At the same time, rural landowners were seething about Progressive Conservative government bills that they deemed fundamentally unfair to owners of private property.

Stelmach backed down on royalty increases, but the property bills remained. When elected leader of the Wildrose in October 2009, Danielle Smith tapped into the growing anger of landowners. "The government has embarked on a track that has the potential to be the biggest property rights grab in our province's history," she said, speaking to a crowd of 500 farmers, ranchers and other citizens who packed the Trochu Community Hall in March 2010 to hear her speak. "Instead of helping Albertans get ahead, they seem to be more interested in getting into power and staying in power."

The contentious bills included Bill 19, the *Land Assembly Project Area Act*; Bill 24, the *Carbon Capture and Storage Statutes Amendment Act, 2010*; Bill 36, the *Land Stewardship Act*; Bill 50, the *Electric Statutes Amendment Act, 2009*; and subsequently, in 2012 under premier Alison Redford, Bill 2, the *Responsible Energy Development Act*. For landowner rights groups, the implications of the bills were clear.

In Alberta, energy projects directly affect landowners more than any other sector of society. Landowners have few options for limiting industrial activity on their land; if they say no to an energy project, their property can be expropriated. As critics such as University of Calgary law professor Shaun Fluker and lawyer Keith Wilson point out, the new bills further curtailed private property rights and limited opportunities to participate in hearings on proposed development affecting private land.

"The disrespect to landowners," said Smith, a former director of the Alberta Property Rights Initiative, "was one of the biggest reasons I ran for the leadership of the Wildrose." The party's property rights policy statement promised that under a Wildrose government, Bills 19, 24 and 36 would be repealed and the party would move to entrench property rights protection in law.

During the 2012 election, most opinion polls predicted the Wildrose would form the next government. It didn't happen, though the party won 17 seats, almost all of them in rural Alberta. After the loss Smith continued to advocate for property rights. "My great ambition," she said in her first legislature speech as an MLA, "is for Alberta to lead the way in passing a constitutional amendment to entrench property rights in the Canadian Charter of Rights and Freedoms."

Two years later, in 2014, new PC premier Jim Prentice brought in Bill 1 to repeal Bill 19, which had been passed in 2009 but not proclaimed in force. Bill 1 is one page long and consists of a single sentence: "*The Land Assembly Project Area Act*, SA 2009 cL-2.5, is repealed." In his analysis of the legislation, U of C law professor Nigel Bankes wrote: "Despite all the pomp and circumstance surrounding the introduction of this Bill, legally, it changes nothing."

In response, in November 2014, Wildrose MLA Rod Fox introduced a private member's motion to enshrine property rights in the Constitution. "Instead of a sweeping repeal and rework of all of the flawed land use legislation passed in recent years," said Smith in support of Fox's motion, "Bill 1 is a half-hearted attempt to placate landowners."

The motion came to naught. On December 17, the same day that Bill 1 received Royal Assent and became law, Smith and eight other Wildrose MLAs, including Fox, crossed the floor to join the PC party.

At the time, Prentice and Smith released a statement of "aligned values and principles," which included "respecting property rights" and a policy to establish an "MLA-driven review of existing property rights legislation, including recommendations for improvement." What this will amount to remains to be seen, particularly after both Smith and Fox lost nomination battles to be PC candidates in the 2015 election.

Wildrose support skyrocketed in 2009 after rural landowners began seething about bills that they say favour industry.

Meanwhile, though badly damaged as a political force, the remaining members of the Wildrose continue to advocate for new property rights legislation. During question period in March, Wildrose MLA Shane Saskiw took the premier to task for a lack of action on a promised review of Bill 36. "The premier has broken many of his promises already," said Saskiw. "His Bill 36 review is well on its way to becoming just another broken promise."

ALBERTA LANDOWNERS COUNCIL

animal deaths were admitted then; no water contamination from fracking is admitted now.

During the years of Ernst's lawsuit, Alberta passed legislation that further weakened the rights of landowners. Bill 19 gave Cabinet the power to assemble land without expropriating it, to make it available later for uses such as pipelines and highways (a status that would greatly depress property value). Bill 36 confirmed that decisions about the use of private land could be made by Cabinet. Bill 50 removed protections for people living in the path of proposed power lines by moving the decision of whether such lines were needed to Cabinet (no public hearing). Rather than responding to public concerns, the government was creating new ways to keep the public out of the discussion.

In September 2013, Alberta chief justice Neil Wittmann ruled on Ernst's right to sue. He found the Alberta Energy Regulator immune from legal claims. In his summation, however, he supported Ernst's objection to the way the energy regulator had used the email mention of "Wiebo" to restrict her speech. He said she had been denied her opportunity to "register her serious and well-founded concerns."

In response to the finding that the Alberta Energy Regulator was immune from her claims, Ernst felt she had no choice but to appeal. "Justice Wittmann has ruled that ERCB has a duty to protect the public, but not me. I *am* the public."

More Albertans are coming forward with complaints—**and running into blockades from regulators.**

In 2014 government lawyers tried to strike Ernst's suit on grounds that it would lead to masses of litigation and cost the government "millions and billions." Though likely an exaggeration, it was true that more Albertans were coming forward with complaints about fracking—and were running into similar blockades from regulatory bodies. The Hawkwood ranching family from the Cochrane-Lochend area northwest of Calgary have been running a similar gauntlet to that of Jessica Ernst. They believe that flaring of solution gas at fracking sites has caused them health problems. When they approached AER, they were told go to Alberta Environment. Alberta Environment turned them away because they had 400 similar complaints from southern Alberta.

The Hawkwoods are part of a project called Alberta Voices (albertavoices.ca), which has filmed interviews with local landowners with industry-related concerns, a body of information available to the general public.

Any suggestion that Ernst's problems are non-existent, isolated or restricted to shallow fracking are contradicted by the number and geographical spread of similar complaints: Spirit River, Wetaskiwin, Cochrane, Ponoka, Didsbury—to name just a few Alberta sources.

The struggle by Alberta landowners to get fair treatment from oil companies and government has resulted in a proliferation of landowner groups. The issue is not always petroleum. Energy transmission lines too pose a threat to land value, not just where the line runs but everywhere within sight. Nearby owners suffer their losses without any hope of compensation. In Alberta the public purse pays for the lines and the power companies own them—a formula for over-building if there ever was one. Once again, the "public good" argument is tainted.

ARCHIVE: A critique of Nikiforuk's *Saboteurs* (May/Jun 2002)
albertaviews.ab.ca/archive

ON NOVEMBER 10, 2014, JESSICA Ernst was back in court before Justice Wittmann. The case had been underway since April 16, 2014. Now the judge was ready to rule—and Ernst came away with a victory.

While standing by his earlier decision that Alberta Energy Regulator was immune from prosecution, Wittmann ruled that Alberta Environment could be sued for failure to properly investigate: "I find that there is a reasonable prospect Ernst will succeed in establishing that Alberta owed her a *prima facie* duty of care." For the improper manner in which her claim had been attacked, Wittmann awarded Ernst triple her costs.

Ernst's response: "This is a big victory for water and for all Albertans. The decision means that landowners can stand up and hold governments and regulators to account." In another interview, she said, "There is still a lot of hell ahead. The government maintains that fracking is safe and that all methane contamination of water wells is natural. I think my lawsuit, which is built on corporate and regulatory data, will prove things differently." As for her belief that the ERCB denied her Charter rights, Ernst has applied to take that complaint to Canada's Supreme Court. The awarding of triple costs did not impress her, however, for it had cost her far more than the $9,000 awarded to protect her case from the attempts to have it thrown out.

Those who own property in Alberta are more accustomed to bad news than good. But the breakthrough in the Ernst case was one of three late-2014 "good news" land stories. In December the Alberta Electric System Operator ordered AltaLink to stop all activities on three electricity transmission projects that southern Alberta landowner groups had been fighting for some time. The justification for the lines—gathering wind power—will be re-evaluated.

A month before that, Alberta's new premier Jim Prentice (a property lawyer by background) repealed Bill 19, the odious land assembly law. In a November 17 speech from the throne, premier Prentice's government said it was signalling "the beginning of government's commitment to rebuild relationships with property owners in Alberta."

Many, like Jessica Ernst, will need to see it to believe it. ■

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