We all make mistakes. But do we learn from them? The Supreme Court of Canada found procedural error in *Ernst v. Alberta Energy Regulator*, 2917 SCC 1. A profound related message was repeated. This critical message appears to be lost on many of those who should heed it the most.

The high court correctly found the obvious. Ms. Ernst should not have mounted a collateral attack on Alberta law, which is forum shopping. No citizen, administrative body, or judge may do so. Ms. Ernst is no more entitled to a free pass than anyone else. The Rule of Law must be consistently applied.

The judicial rule against collateral attack is designed to prevent a person from avoiding the repercussions of: (1) a provision of law; or, (2) any aspect of an existing binding decision (of an administrative body or court). The common law rule protects our basic rights and democratic principles. Only elected bodies may pass or amend laws.

Direct challenge methods of seeking review and variance of administrative decisions are acceptable procedure. The majority opinion in the *Ernst* case is that Ms. Ernst should have sought judicial review of Alberta Energy Regulator (“Regulator”) decisions rather than suing the protected Regulator.

Minority opinions concurred. Collateral or indirect methods of challenging a law or decision are to be prevented. Judicial review, reconsideration, or regulatory appeal proceedings are acceptable direct (legal) methods of seeking to have an administrative decision reviewed (for cogent errors or for other reasons, such as change of circumstance).

Prohibited collateral attack improperly occurs regularly in proceedings of the Regulator. The Supreme Court did not find the body made no errors. The tribunal simply found the procedure chosen by Ms. Ernst was inappropriate. Improper collateral attacks on the provisions of section 1(a) of the *Alberta Bill of Rights* and the safety and property rights guaranteed thereby, are commonplace in Regulator proceedings.

Reaction to the Supreme Court Decision is surprising. It is also somewhat understandable. Language used in judicial decisions is familiar to the legal profession, but is largely misunderstood by the public. So are oil and gas laws under collateral attack.

Understand the Judicial Rule Against Collateral Attack

Judicial review, appeals, and reconsiderations, provide for review of administrative decisions to present absurd or repugnant results. Reflected is the basic fact that we err. This is applicable to employees of the Regulator and operators, judges, and others.

Ms. Ernst was simply required to fight her battles another day, in another procedurally acceptable way. Fuss being made over the decision is unjustified. The core essence of minority and majority decisions, overlooked, is what is important:

No double standards. The oil company must also refrain from mounting collateral attacks. The Regulator may not condone collateral attack by its employees, an operator, or any member of the public in its proceedings. These are the essential elements of the profound message in paragraph 114 of the written decision in the *Ernst* case:

“Ms. Ernst’s approach represents not only an improper collateral attack on s. 43’s constitutionality, it is a dramatic jurisprudential development with profound implications for judicial and quasi-judicial decision-makers across Canada....”

Section 43 of the applicable statutes confers immunity from civil actions (law suits) on the Regulator and its employees. No such immunity is enjoyed by the holders of Regulator licenses. The appeal decision was neutral on the merits of Ms. Ernst’s various complaints. Justice was not denied or brought into disrepute. Rather the simple decision is justice must be pursued down other acceptable avenues.

Answers to Alberta oil and gas woes lie in the profound decision of the Supreme Court. Various failures to properly interpret safety, well and facility abandonment, and environmental regulations, constitute condoning of “forum shopping” or collateral attack. Operators are improperly allowed to do precisely that which Ms. Ernst and other Albertans could not do. There are avenues, not being followed, to vary any right. Observance of the rule of law by all is required. The oil industry, property rights, safety, human lives, taxes, democracy, and much more, depend on this.
Trump Card: The Rule of Law

There are limits to the authority or jurisdiction of all government decision makers. This is evident in recent US federal court decisions rendered before the ink was dry on the Supreme Court of Canada’s decision in Ernst, with one significant difference: US President Donald Trump may have authority to impose travel bans by way of executive order, or to effectively amend existing US immigration laws. Those opposed to the executive decisions of the US Administration directly challenged those decisions in court. Some collateral attack in airports was reported. The reason that there is a judicial rule that no decision maker or tribunal may legally refuse a challenge to their jurisdiction is to keep decision makers from exceeding their legal powers or jurisdiction.

The Regulator possesses no discretion whatsoever to effectively amend the Alberta Bill of Rights, the Surface Rights Act, the Land Titles Act, the statute that created and governs the Regulator, the environmental laws the Regulator is newly charged with administering, or certificates of title held by surface and mineral owners, or inherent rights they represent.

Courts of competent jurisdiction may strike aspects of law that are unconstitutional. The Regulator has no such inherent jurisdiction. Indeed Alberta administrative bodies are prohibited from hearing or making decisions on true constitutional issues, for obvious reasons (they are not courts).

The Legislative Assembly of Alberta, not the Regulator, amends Alberta laws. The Regulator appears to have somehow misinterpreted its roles related to drafting and recommending regulations for consideration by legislators, and enforcing the provisions of existing regulations. The Regulator finds on a regular basis that it is not in the public interest to ensure oil and gas producers abide by the terms and conditions of licenses and approvals or existing regulations. This is akin to deciding that suspensions of operator licenses for drunk driving are not in the public interest.

Injustice is never in the public interest. Whether an injustice is caused by an irresponsible Alberta oil and gas operator, an irresponsible government decision maker, Donald Trump, or a misguided law suit, only transparent, fair, just, and well-reasoned decisions of courts and administrative bodies are ultimately in the public interest.

Unreasonable and incorrect decisions are reviewable. When a decision maker or tribunal exceeds its authority or jurisdiction, the decision is rendered a nullity at law. The same applies to a decision made without regard to the principles of natural justice. However, pursuant to the rule against collateral attack, the most flawed decision is as binding on the parties benefiting or negatively affected by it as the most impeccably made decision, until the flawed decision is overturned by due process of law.

Perspective

From the perspective of some Alberta citizens and companies, presumably including detractors from the decision of the Supreme Court of Canada in Ernst, it is in the public interest not to enforce Alberta oil and gas regulations. The perspective of these folks might be: So what if landowners bear a bigger burden than other citizens do, provided the oil and gas industry generates employment, royalties, and taxes?

From the perspective of others, possibly including the Regulator, the Surface Rights Board has the ball. Disputes over the quantum of surface rights compensation may be settled by the Surface Rights Board. However, landowners must prove, and are expected to mitigate, their losses.

From the perspective of those who have studied and applied the rule against collateral attack, and attempted to mitigate their losses by requesting the Regulator to enforce the terms and conditions of well and other licenses, and to interpret and apply the laws of Alberta, the system is broken and has all but collapsed. The verdict is not yet in on the effectiveness of the experiment that is the Regulator.

From the perspective of the Supreme Court, the Regulator is a quasi-judicial body. In reality many Regulator decisions are not remotely reached in a quasi-judicial fashion. The Regulator has administrative and quasi-judicial functions that must be kept separate—that are two separate conversations.

In a democracy, the correct perspective is that which is based on the rule of law and the relevant facts
The Elephant in the Room

Administrative bodies such as the Regulator exist for several reasons. One is to provide people like Ms. Ernst with access to expert, low cost, expedient administrative or quasi-judicial decision making - so they need only turn to the judicial system in the most unique of circumstances. *The Regulator has lost sight of this principle. The minority judicial opinions related to Ms. Ernst’s appeal bid failure did not.*

In reality the vast majority of Regulator decisions are not made in a quasi-judicial fashion at all. Moreover, the system relies heavily on a concept called “kitchen table” meetings or “participant involvement”, whereby industry members are to explain the nature of operations to, and to attempt to work things out with, adversely affected stakeholders related to project approvals administered by the Regulator.

The Regulator has a roster of hearing commissioners. However, in reality very few Regulator decisions are made by way of quasi-judicial methods employed by these commissioners. The process involving commissioners is essentially to review decisions made by other more expedient, often arbitrary, processes.

Proper Review and Variance of Administrative Decisions

Contrary to what Regulator decisions and policy imply, administrative decisions are not always final. The messages in Ernst and related collateral attack case law (see Appendix) are the following:

- one must choose a correct or legally acceptable direct challenge process in seeking to have an existing decision reviewed;
- when there is more than one competing body, one must have regard to the rule against collateral attack in deciding which body to apply to for various forms of relief;
- one must have regard to the nature of existing binding decisions; and,
- the body that receives an application for relief must also have regard to the foregoing.

The reason judicial reviews are conducted is to prevent absurd results of administrative decisions, particularly those expediently made without a hearing. This is obviously the same reason legislators included provisions of law that similarly provide for readily accessible internal review proceedings. Decisions made without legal authority (jurisdiction) or unjustly are particularly subject to review.

Thousands of Approvals and Amendments are expeditiously and optimistically issued annually. This is acceptable and justifiable only because adversely affected parties have undeniable rights of review, and because internal reviews are to occur in a similarly low cost, expert, expedient fashion, pursuant to internal review processes such as “reconsideration” and “regulatory appeal” (internal review procedures).

When the Regulator arbitrarily denies stakeholders their guaranteed rights to challenge the body’s jurisdiction, or to request the Regulator to review a potentially flawed decision, administrative law principles are defeated. The Regulator is effectively forcing adversely affected persons to the court system, while it expeditiously, unjustly, and unfairly grants benefit to industry participants.

Relaying on the rule against collateral attack, the Surface Rights Board stamps out right of entry orders to ensure oil and gas projects are not delayed by stakeholders concerns the Regulator is deemed to have dealt with. Optimistic Regulator approvals lead to even more optimistic, separate, decisions (see page 4).

The Author sympathizes with the plight and dilemmas Ms. Ernst was faced with. It seems she simply considered and attempted all possible legal solutions to problems no Albertan should have to face alone, when under collateral attack by ill-conceived decisions or plans devised by Regulator employees.

The Author has no doubt that Ms. Ernst’s rights were abused. She is not alone. However, there are no entitlements to deviation from the rule of law in retaliation. This applies to her options as to redressing Regulator decisions as well as to how the Regulator may have treated Ms. Ernst.

Robert Burns said it all, which applies to review of administrative decisions to prevent absurd results, and to Ms. Ernst’s failed attempt to sue the Regulator (translated):

“The best laid schemes of Mice and Men often go awry.”

The concept of why proper review of administrative decisions is of paramount importance, and the sad reality in Alberta, are satirized on page 4. Note that judicial appeal or review of administrative decisions are likened to a bulldozer that can destroy means of injustice.
The Lighter Side
Exceptions to the Rule Against Collateral Attack

In Quebec (Attorney General) v Laroche, 2002 SCC 72 (CanLII), [2002] 2 SCR 708 at para 74, the Supreme Court held that fraud or apparent defect on the face of an authorization were found to be exceptions to the collateral attack rule. The Regulator refuses to review obvious defects in licenses identified by direct challenge methods.

Alberta Energy Regulator: Best in Class?

The Alberta Energy Regulator seeks to be "best in class". (see AER website link below). The body is excellent at making expeditious decisions as to tens of thousands of applications for authorizations to conduct oil and gas activities. Many of these authorizations are also expediently reviewed and varied, often arbitrarily, at the approval holder’s request.

The Responsible Energy Development Act (REDA) does not differentiate between applications filed by industry and other stakeholders. The Regulator does, most improperly. Amendments of approvals requested by industry are not treated or counted as requests for review by “reconsideration” (see Sections 42-45 of the REDA).

Until the Regulator remedies the injustice that requests for review and variance of flawed approvals made by non-industry applicants are treated differently, achievement of the best in class goal shall not be realized. Advertising that the Regulator desires to be “best in class” does not make it so. Transparent, expert, decision reviews are reliable indicators of “best in class” status.

The obvious solution is for the Regulator to adopt rules for internal review (by reconsideration) of existing decisions as other bodies such as the Alberta Utilities Commission (and Surface Rights Board have done). Co-operative proceedings involving two or more bodies (Section 18(1) of the REDA) will reduce collateral attack. Related Rules have been drafted and shall be proposed. LINK

Appendix: Additional Judicial Authority on Collateral Attack

Supreme Court of Canada

Frank A. Togstad et al. v. Surface Rights Board et al., 2015 CanLII 81621 (SCC)

Court of Appeal of Alberta

Windri่อ Ranches v. Alberta (Surface Rights Board), 1986 ABCA 158 (CanLII) at paras 5 and 21
Togstad v. Alberta (Surface Rights Board), 2015 ABCA 192 (CanLII) at para 7
(Note: Included in Togstad above was the appeal of Kure v. Alberta (Surface Rights Board) referenced below).

Court of Queen’s Bench of Alberta

Encana Corporation v. Campbell, 2008 ABQB 234 (CanLII) at para 16
Mueller v. Montana Alberta Tie Line, 2011 ABQB 738 (CanLII) at paras 23 and 42
Kure v. Alberta (Surface Rights Board), 2014 ABQB 572 (CanLII) at paras 23 - 26
Togstad v. Alberta (Surface Rights Board), 2014 ABQB 485 (CanLII) at para 14

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