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The Alberta Energy Regulator in the Post-Information World: Best-in-Class?

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Statement Commented On: *Alberta Energy Regulator Public Statement 2017-01-13*

As readers will know, on Friday January 13, 2017 the Supreme Court of Canada released its decision in *Ernst v Alberta Energy Regulator*, 2017 SCC 1 (CanLII) and our colleague Jennifer Koshan set out what the Court actually decided in her Die Another Day: The Supreme Court's Decision in *Ernst v Alberta Energy Regulator* and the Future of Statutory Immunity Clauses for *Charter* Damages comment posted to ABlawg on Monday January 16. Our comment here critically reflects on the Public Statement issued by the Alberta Energy Regulator (AER) on Friday the 13th on the *Ernst* decision. This statement reads like the work of a spin doctor and harms the credibility of the AER as a 'best-in class regulator'. In our view the Public Statement is inappropriate, contains inaccuracies, and should be rescinded by the AER.

For ease of reference, we begin by reproducing the AER Public Statement in its entirety:

> Calgary, Alberta (Jan 13, 2017)… Today's Supreme Court of Canada (SCC) decision is an important one to regulators across the country. This was an important decision affecting the ability of regulators to carry out their responsibilities, which was evident in the participation of other provinces in the proceeding in support of the AER.
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> The decision has validated the position held by the AER that the claims against the AER's predecessor, the Energy Resources Conservation Board (ERCB), should be dismissed. 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. The Court recognized that permitting the claim would hinder the AER's ability to carry out its statutory duties effectively and in the public interest.
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> The AER appreciates that the courts at all levels took the time to carefully consider this important matter and in each instance issued clear, well-reasoned decisions.
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> The Alberta Energy Regulator ensures the safe, efficient, orderly, and environmentally responsible development of hydrocarbon resources over their entire life cycle. This includes allocating and conserving water resources, managing public lands, and protecting the environment while providing economic benefits for all Albertans.

At the outset, we think it is worth asking whether it is appropriate for the AER – as a quasi-judicial tribunal - to make a public statement such as this in relation to the outcome of legal proceedings to which it was a party. Our review of entries listed on the AER Media Centre

reveals only one other such Public Statement issued by the AER, and that was in relation to the Alberta Court of Queen's Bench decision in *Redwater Energy Corporation (Re)*, 2016 ABQB 278 (CanLII). The Redwater public statement is more of a matter-of-fact announcement that the AER would be appealing the decision. The proceedings in Redwater are also of a very different nature than those which are the subject of the *Ernst* decision. The Ernst proceedings are, at their core, allegations that the AER acted punitively. One might think that a quasi-judicial tribunal, accused of acting like a bully, would be happy to let these sort of proceedings end quietly in its favour. But apparently not.

This Public Statement on the *Ernst* decision is long on self-vindication and short on facts. Most problematic is that the AER incorrectly states the Supreme Court has cleared it of wrongdoing in its dealings with Jessica Ernst. We set out each of the AER's incorrect statements about the *Ernst* decision below.

The Court did not find there was a breach of Ms. Ernst's Charter rights. Wrong. The Supreme Court made no finding at all on a breach of the *Charter* in the *Ernst* decision. The *Charter* issue brought by Jessica Ernst was that the AER breached her section 2(b) right to freedom of expression by refusing to communicate with her unless she agreed to refrain from speaking publicly. But the proceedings before the Supreme Court deal with the AER's motion to strike Jessica Ernst's *Charter* claim for damages because of the immunity clause in section 43 of the *Energy Resources Conservation Act*. As Jennifer Koshan points out in Die Another Day the majority of the Court does not even speak to section 2(b) of the *Charter*. Only the dissenting justices mention section 2(b), and they note that Jessica Ernst had raised a novel yet viable claim that the AER had limited her freedom of expression. Because this was an appeal from a motion to strike, the Supreme Court was obliged to take the facts pleaded as true, so it would have been beyond the scope of the case for the Court to rule on a breach of Jessica Ernst's freedom of expression.

The Court made no findings of negligence on the part of the AER or its predecessor the ERCB. Wrong again, or at the very least highly misleading. There is no finding one way or another on negligence in the *Ernst* decision. Indeed in multiple places the Supreme Court notes the Alberta Court of Appeal struck Jessica Ernst's claim in negligence against the AER. The Supreme Court could not be clearer about the negligence non-issue with its statement at the very beginning of the decision (at para 8) where the majority (in the result) confirms that negligence was not in dispute before it: "There is now no dispute that the Board does not owe Ms. Ernst a common law duty of care; her claim in negligence was struck out for that reason and the affirmation of that order by the Court of Appeal has not been appealed: 2014 ABCA 285, 2 Alta. L.R. (6^{th}) 293." In other words, the issue of negligence was not before the Supreme Court; to suggest that the Court made no findings of negligence suggests that it made a finding of "no-negligence". That is simply not the case and to suggest otherwise is misleading (just as it would be to say the Court made no findings of breach of contract).

The Court recognized that permitting the claim would hinder the AER's ability to carry out its statutory duties effectively and in the public interest. Wrong again. As Jennifer Koshan points out in Die Another Day only 4 of the 9 Supreme Court judges (Justice Cromwell et al) found that *Charter* damages "could never be an appropriate and just remedy for *Charter* breaches" by the AER. This finding was based as much on the lack of an evidentiary record as it was on the merits, i.e. the availability of judicial review and the "governance concerns" that opening the AER to *Charter* damages would compromise its ability to perform its statutory responsibilities. A majority of the Supreme Court held that either this governance consideration

could not be addressed before determining the constitutionality of the immunity provision, which was dismissed because of lack of notice (Justice Abella at para 123) or actually rejected the application of the governance consideration because the AER was not acting in its adjudicative capacity when it limited Jessica Ernst's freedom of expression (Chief Justice McLachlin et al in dissent at paras 168 – 172).

The AER Public Statement is inaccurate and misleading, and is not the sort of action we would expect a quasi-judicial tribunal to consider appropriate. The Public Statement harms the credibility of the AER and is not in keeping with the status of a "best-in-class regulator", something to which the AER purports to strive. According to the report prepared for the AER's Best-in-Class Project by the Penn Program on Regulation, entitled *Listening, Learning, and Leading: A Framework for Regulatory Excellence*, regulatory excellence comprises three core attributes (Executive Summary at ii):

> (1) Utmost Integrity. This is about much more than just a lack of corruption; it is also about the regulator's commitment to serving the public interest, to respecting the law, and working with duly elected representatives.
> (2) Empathic Engagement. This is about transparency and public engagement, but also about how respectfully the regulator and its personnel treat regulated entities, affected landowners, and other concerned citizens.
> (3) Stellar Competence. This is about the actual delivery of outcomes that maximize public value and the capacities built and actions taken to achieve a high level of performance.

The Report notes that achieving the first attribute requires a regulator to hold itself to the highest standard of integrity by, amongst other things, initiating and contributing to productive public dialogue on issues relevant to the regulator's mission. Productive public dialogue needs to be based on accurate information. Taking the unusual step of issuing a Public Statement about the *Ernst* decision and framing the decision in a way that is incorrect and misleading does not further productive public dialogue. It is also hard to envision how this serves the public interest. We do not think a best-in-class regulator would even consider issuing this Public Statement, and we urge the AER to rescind it.

This post may be cited as: Shaun Fluker & Sharon Mascher "The Alberta Energy Regulator in the Post-Information World: Best-in-Class?" (18 January, 2017), online: ABlawg, http://ablawg.ca/wp-content/uploads/2017/01/Blog_SF_SM_Ernst_AER_Statement.pdf