

A SQUARE PEG FOR A ROUND HOLE:

Importing the
Governance and
Regulatory Scheme of
the Alberta Energy
Regulator to Ontario

INQUISITIVE ENERGY

By Karen J. Taylor, CFA, ICD.D

October 4, 2021

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The governance structure of the Alberta Energy Regulator (AER) was the inspiration for the governance structure recommended by the Ontario Energy Board Modernization Review Panel¹ and subsequently reflected in Ontario *Bill 87 – Fixing the Hydro Mess Act, 2019, S.O. 2019, c.6*. As per the discussion that follows, the adoption of this governance structure, as adapted may not be appropriate for an independent, quasi-judicial, economic regulator such as the Ontario Energy Board (OEB).

In addition, an analysis of the AER's regulatory scheme, including: (i) social regulation mandate; (ii) rules-based, command-and-control legislative and regulatory framework; (iii) lack of independence from government; (iv) marginalized quasi-judicial processes and limited natural justice rights; (v) reduced reliance on public interest tests; and (vi) limited regulatory policy discretion also suggests that this form of regulatory scheme is not fit for purpose by an economic regulator.

The AER² is the successor organization to three regulatory systems – Alberta Energy Resources Conservation Board (ERCB), Alberta Environment and Sustainable Resource Development, and certain activities domiciled within Alberta Energy relating to exploration approvals under part 8 of the *Alberta Mines and Minerals Act*³. Introduced to the Alberta provincial legislature on October 24, 2012, as *Bill 2: Responsible Energy Development Act* (REDA), the purpose of the Bill was to increase provincial competitiveness in attracting energy investment, largely through more efficient regulation⁴, in the context of historically high prices for oil⁵.

¹ Ontario Energy Board Modernization Review Panel. *Final Report*. October 2018.

² Energy development in Alberta has been subject to oversight since 1932 with the establishment of the Turner Valley Gas Conservation Board. Cecilia A. Low. *The AEUB: A short Chapter in Alberta's Long History of Energy & Utilities Regulation*. Canadian Institute of Resources Law. Number 105 – 2009.

³ Vlavianos, N. *An Overview of Bill 2: Responsible Energy Development Act – What are the changes and What are the Issues?* ABlawg.ca. November 15, 2012.

⁴ Driedzic, A. *Single Regulator or Franken-Child?* Environmental Law Centre News Brief. Volume 27. No.3. 2012.

⁵ Cushing, Oklahoma Daily WTI spot price FOB per barrel reached US\$118.71 on August 5, 2008 and averaged US\$91.91 over 2010 to 2014. U.S. Energy Information Administration.

I. Corporate Governance Structure

Description

The tabling of Bill 2 in October 2012 ushered in a new era for the governance of quasi-judicial regulatory agencies in Canada. It abandoned the unitary governance⁶ structure that had been the mainstay of Canadian regulators up to that point and reflected in the *Energy Resources Conservation Act* (ERCA). The key features of this unitary structure included⁷:

- Appointment of up to 9 members by the Lieutenant Governor in Council, one of whom shall be designated as chair, not more than two of whom may be designated as vice-chairs and the remainder of whom shall be designated as Board members⁸.
- Each Board member holds office during good behaviour for a term of 5 years and afterwards during the pleasure of the Lieutenant Governor in Council⁹. Remuneration of the members of the Board is determined by the Lieutenant Governor in Council but could be delegated to the Minister¹⁰.
- The Board was required to appoint a Chief Executive and determine the Chief Executive's powers, duties, functions, and compensation.
- Combined CEO and Board Chair with an integrated management structure and oversight was provided by the responsible Minister(s)¹¹.
- Board members performed both governance and quasi-judicial functions and could be engaged in the rule-making function of the regulator.

Bill 2 introduced a triumvirate structure for the new AER – a separate corporate board of directors, management led by a chief executive officer (CEO), and distinct adjudicative functions¹².

⁶ Heggie, B. *Governance Structure of Administrative Agencies*. Energy Regulation Quarterly. Volume 7, Issue 3. 2019. Page 17.

⁷ *Energy Resources Conservation Act*. Revised Statutes of Alberta 2000. Chapter E-10.

⁸ Ibid. Section 5(1).

⁹ Ibid. Section 5(2).

¹⁰ Ibid. Sections 5(5) and 5(6).

¹¹ Heggie, B. *Governance Structure of Administrative Agencies*. Energy Regulation Quarterly. Volume 7, Issue 3. 2019. Page 17.

¹² Ibid.

The AER's power, mandate and functions are governed under both the Ministry of Energy and the Ministry of Environment and Parks. When specifically referenced, the AER may also be governed by the Ministry of Indigenous Relations¹³. The responsibilities of each of the corporate board of directors, the chair, the CEO, adjudicative commissioners, and various representatives of government, for example minister(s), deputy-minister(s), committees, and other departments and agencies, are set out in Divisions 1 – 3 of REDA and in the Alberta Energy Regulator – Mandate and Roles Document.

Section 6(1) of REDA stipulates that the board is responsible for the general management of the business and affairs of the Regulator. Notwithstanding this specific designation of authority, virtually all of the functions of the board are subject to the review and approval of the relevant minister. These direct accountabilities are more plainly set out in the Mandate and Roles Document.

The Mandate and Roles Document provides:

- **Part 3.0 Roles and Responsibilities:**

- Ministers establish policies applicable to resource development and the AER, receive input from the AER on changes to its statutory powers, mandate, and functions, including legislation, regulations, directives, enactments, programs, or guidelines. Ministers recommend to Cabinet the appointment and reappointment of the members of the AER Board of Directors and roster of Hearing Commissioners. Annually review the AER's strategic plan and annual business plan to ensure strategic alignment with government policy.
- Deputy Ministers coordinate and work with the AER Chair and CEO, as appropriate, respecting the development and implementation of policy instruments, priorities, business plans, resources, budget, and other matters of mutual interest.
- Chair of AER Board works with the CEO and the Ministers in the development of long-term objectives and short-term targets to ensure shared outcomes are achieved. Works with the CEO of the AER to develop mechanisms to communicate with the Ministers and Deputy Ministers on items of mutual concern.
- CEO engages with the AER's key stakeholders to ensure it is positioned for success and credibility. Leads the AER's interactions with many government departments and agencies, and through the Government of Alberta Policy Management Committee and Project Management Office. The CEO also leads the AER's participation in the government's integrated resource management committees. Participates with the AER Chair, Board, Deputy Ministers and Deputy Minister of Indigenous Relations, in resolving key stakeholder issues to ensure shared outcomes

¹³ Taylor, K. *Jurisdictional Review of Energy Regulation by Province and Territory*. Council for Clean and Reliable Energy. July 2019. Page 9.

are achieved. Ensures timely information-sharing with government by ensuring the AER's information management systems and information technology systems accommodate and enable the open exchange of AER and government information. Ensures coordination of communication systems with Ministers' communication staff and AER staff so that proper planning, review, or collaboration can occur.

- **Part 3.6 Governance:** provides that the Board is accountable for making rules for the AER within the AER's statutory power, mandate, and functions. Through the Chair, the Board will work with the CEO to ensure alignment with government initiatives, providing information, advice, or recommendations as requested. Through the Chair, the Board will work with the CEO to promote the AER working closely with government departments, the Policy Management Committee, the Project Management Office, and agencies to achieve alignment of the AER's policy assurance functions with the government's policy development functions. Policy outcomes are set by government and are to be achieved by the AER's decision-making, compliance monitoring and enforcement mechanisms.
- **Part 3.7 Hearing Commissioners, including Chief Hearing Commissioner:** provides that in carrying out their adjudicative functions, commissioners make decisions independently in accordance with all applicable legislation, and in a manner consistent with relevant policies, directions, and programs of the government. Once finalized, decisions are to be communicated to the CEO to ensure the Chair, CEO and Ministers may be properly briefed prior to decision publication. The Chief Hearing Commissioner is responsible for assigning hearing panels to adjudicate matters referred to the Hearing Commissioners by the CEO on behalf of the AER.

Corporate Law Limitations

Although the imposition of a corporate governance structure was made in conjunction with the adoption and implementation of the recommendations of the Regulatory Enhancement Task Force¹⁴, there is no analysis in that document that assesses the superiority of this approach over other possible governance structures, including the unitary structure of the status quo.

A corporate governance structure has a number of limitations that reduces its possible effectiveness.

First, there is a significant difference between the notion of governance for a commercial corporate entity and governance for government. While established as a corporate entity, the AER is a creature of government in that it is mandated by statute to undertake the specific powers and authorities delegated to it by the provincial legislature. It is also a public agency pursuant to the *Alberta Agencies Governance Act*¹⁵ and its governance

¹⁴ *Enhancing Assurance: Report and Recommendations of the Regulatory Enhancement Task Force to the Minister of Energy*. Government of Alberta. December 2010.

¹⁵ *Alberta Public Agencies Governance Act*. Statutes of Alberta, 2009. Chapter A-31.5.

structure is consistent with the *Public Agency Governance Policy*¹⁶. The AER is a public agency that exercises adjudicative functions regarding applications for permits, licenses, approval, or other benefits, under energy or other specified enactments¹⁷.

According to the World Bank, governance for government includes¹⁸:

the process by which governments are selected, monitored, and replaced; the capacity of the government to effectively formulate and implement sound policies; and the respect of citizens and the state for the institutions that govern economic and social interactions among them. Included in this view of governance are dimensions relating to the quality of public services, the quality of the civil service and the degree of its independence from political pressures, the quality of policy formulation and implementation, and the credibility of the government's commitments to such policies.

Corporate governance, on the other hand, is concerned with the processes by which the board of directors supervises or oversees the management of the corporation, to whom the board has delegated broad power over the corporation's affairs. Corporate governance requirements arise from corporate legislation and common law, securities legislation and policies, stock exchange rules, and the expectations of shareholder advocacy groups¹⁹.

Second, corporate governance constructs do not contemplate the AER's accountability to the provincial legislature through the designated ministers. As described above, the views of AER's Board of Directors are not necessarily determinative with respect to governance process outcomes relating to strategy, budget, financial statements, personnel decisions including candidate selection and remuneration, and risk management. Final accountability rests with the provincial legislature and the AER's legislatively determined reporting and accountability documents and overall performance may be subject to additional testing and review by the Auditor General of Alberta and other government entities.

For example, the Auditor General is the legislated auditor of every provincial ministry, department and most provincial agencies, boards, commissions, and regulated funds. It is also mandated to provide independent assurance to the 87 Members of the Legislative Assembly of Alberta, and the people of Alberta, that public

¹⁶ *Corporate Governance of the Alberta Energy Regulator*. Alberta Energy Regulator. May 2021.

¹⁷ Lambrecht, K.N. Q.C. *Constitutional Law and the Alberta Energy Regulator*. Constitutional Forum. Volume 23, Number 2, 2014. Page 37.

¹⁸ *Policy Research Working Paper 5430*. The World Bank Development Research Group Macroeconomics and Growth Team. September 2010. Page 4.

¹⁹ Council for Clean and Reliable Energy. thinkingenergy.ca/initiatives/governance

money is spent properly and provides value.²⁰ An example of this function is the June 2021 Report of the Auditor General regarding the process to provide information about the government's environmental liabilities²¹.

Third, corporate law structures do not speak to the role of government as: (i) policy maker; (ii) effective shareholder; and (iii) the body with the authority to dictate the AER's statutory mandate by wielding the power to change it. In general, the provincial legislature has, at all times, the authority to make, change, or revoke the legislative framework of the AER. This includes all of the arrangements that exist in the *Alberta Public Agencies Governance Act*, the accompanying policies, REDA, any of its energy or other specified enactments, and the associated Bulletins, Directives and Manuals adopted by the AER to affect its mandate.

Fourth, the corporate law fiduciary duty and duty of care obligations of the Board of Directors are to the corporation. These duties are grounded in basic principles of good faith, stewardship and accountability²². Although the Supreme Court of Canada has confirmed that in determining whether they are acting in the best interest of the corporation, directors may consider the interest of various stakeholders, elaborating that the directors' fiduciary duty comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly²³. However, these duties do not reflect the mandate of the AER and principles that guide how it is required to effect its mandate, as discussed in the second part of this paper.

In addition, the AER's Board of Directors is required to adopt the strategic policies of government, even if there is potential harm to the corporation, either by reducing its capacity to perform its mandate or undermining the efficacy of the mandate. For example, the Alberta Red Tape Reduction Act mandated a government goal to reduce regulations by one-third, cut costs and inefficient processes, and speed up approvals. The Act sets four reduction targets for every ministry and agency: 5% requirement eliminations by March 2020, 12% by March 2021, 20% by March 2022 and 33% by March 2023²⁴. As a result of this initiative and a 51% reduction in administration fee revenue from industry due to continuing financial hardship, the AER has reduced its employment complement and number of field locations and offices each by 25%²⁵. Process innovation and changes to regulatory requirements have also delivered significant potential cost savings to Alberta's energy development industry²⁶.

²⁰ Auditor General of Alberta. *Process to Provide information About Government's Environmental Liabilities*. Report of the Auditor General. June 2021.

²¹ Ibid.

²² *Directors' Responsibilities in Canada*. Osler, Hoskin & Harcourt LLP and Institute of Corporate Directors. October 2014. Page 4.

²³ Ibid. Page 8.

²⁴ *AER Annual Report 2019/20*. Page 6.

²⁵ Employees and locations have declined from 1,200 and 15 as per the AER's *2017/18 Annual Report* at page 16 to 907 and 11, respectively as per the AER's *2020/21 Annual Report* at page 5.

²⁶ Canadian Association of Petroleum Producers estimates changes made pursuant to AER Directive 081: Water Disposal Limits and Reporting Requirements for Thermal In Situ Oil Sand Schemes could yield cost savings of up to \$273 million and annual incremental savings of approximately \$3.75 million. *AER Annual Report 2019/20*. Page 7.

Finally, corporate governance structures do not eliminate the need for continuing stewardship and oversight by government. Corporate governance structures are not a guarantee of effectiveness, as illustrated by the well-publicized failures at the AER that were the subject of three separate oversight reports²⁷.

Each of these shortcomings speaks to the marginalization of the AER's corporate board of directors and a narrowing of its effective mandate to ensuring that the expectations of government are reflected in the processes used by management to affect the day-to-day activities of the AER.

II. Key Characteristics of the AER's Regulatory Scheme

Social Regulator Not Economic Regulator

The AER is a social regulator. Social regulation deals with “the externalities and impacts of economic activity”²⁸. Generally, social regulation is concerned with issues such as environmental protection, health and safety, and consumer protection. It requires governments and/or policy making bodies to articulate acceptable standards and outcomes that have the effect of balancing the trade-offs between economic development, including resource exploitation, and environmental degradation and other broad quality of life issues, for which there is no monetary consensus on “value”.

Social regulation is usually redistributive – it imposes oversight mechanisms and costs on participants who operate in industries that are not characterized by market failures in order to protect a “diffuse public interest”²⁹. As a result, social regulation can be highly contentious, particularly with the industry group subject to oversight.

An additional dominant feature of social regulation is the use of risk-based approaches to ensure mandate risks have been managed down to policy levels whilst facilitating the desired economic activity. Indeed, as noted by Murray Smith, Alberta's energy minister from 2001 to 2004, the AER's predecessor the ERCB was “not there to say ‘no’. They're there to say to industry that you have to do it in such a way that you meet Alberta's standards of conservation and orderly development”³⁰. This approach has not changed with proclamation of Bill 2 and the establishment of the AER.

²⁷ *A report of the Public Interest Commission in relation to wrongdoings within the Alberta Energy Regulator*. Public Interest Commissioner. October 3, 2019; *Alberta Energy Regulator: An Examination of the International Centre of Regulatory Excellence*. Auditor General of Alberta. October 2019; *Report of the Investigation under the conflicts of Interest Act*. Office of the Ethics Commissioner Province of Alberta. June 14, 2019.

²⁸ Williams, Bruce A. and Albert R. Matheny. *Democracy, Dialogue, and Environmental Disputes: The Contested Languages of Social Regulation*. Yale University Press. 1998. Page 5.

²⁹ *Ibid.* Page 50.

³⁰ Jaremko, Gordon. *Steward: 75 Years of Alberta Energy Regulation*. Page 20.

The OEB is an economic regulator. Unlike the AER, the OEB regulates entities - public utilities - that operate in the presence of multiple market failures, notably failures of the functions of a competitive price system with respect to capital attraction, efficiency-incentive, consumer-rationing, and compensatory income transfer³¹. There is a significant body of literature relating to the regulation of public utilities and the role or purpose of regulation. Consistent with this body of work, the mandate of the OEB reflects key aspects of the four primary components of public utility regulation³²: control of entry, price fixing, prescription of quality and conditions of service, and the obligation to serve all customers under reasonable conditions.

Rules-Based, Command-and-Control Legislative and Regulatory Framework

The AER's legislative mandate³³ is to provide for the efficient, safe, orderly, and environmentally responsible development of energy resources in Alberta. It regulates a number of energy resource activities, including the disposition and management of public lands, the protection of the environment, and the conservation and management of water, including the wise allocation and use of water. The AER executes its mandate pursuant to a rules-based, command-and-control regulatory framework set out in various instruments that substantially limit independent discretion.

These instruments include: (i) legislation and the accompanying regulations and rules that set out its mandate, structure, powers, duties and functions; (ii) energy resource enactments that are the acts, regulations, and rules governing energy resource development in Alberta and are administered by the AER; (iii) specified enactments that include acts and regulations administered by the AER in respect of energy resource activities and also administered by Alberta government departments in relation to other kinds of activities; (iv) Ministerial Orders made pursuant to section 67 of REDA; and (v) Codes of Practice under the Water Act or the Environmental Protection and Enhancement Act³⁴.

In addition to these legislatively³⁵ determined requirements, and subject to the requirement that at least 120-days' notice is to be provided to the Minister³⁶, the AER has the authority to develop and implement Bulletins, Directives and Manuals. As of May 2019, the AER administered approximately 41,500 regulatory requirements, contained in 210 regulatory instruments³⁷.

³¹ Bonbright, J.C., A.L. Danielsen, D.R. Kamerschen. *Principles of Public Utility Rates*. Public Utilities Reports, Inc. 1988. Chapter 4.

³² Kahn, Alfred E. *The Economics of Regulation: Principles and Institutions*. Massachusetts Institute of Technology. 1988. Page 3.

³³ *Responsible Energy Development Act*. Chapter R-17.3. 2012. Section 2.

³⁴ <https://www.aer.ca/regulating-development/rules-and-directives/acts-regulations-and-rules>

³⁵ Including those delegated to the Lieutenant Governor in Council pursuant to s.68 of REDA.

³⁶ REDA. Section 22.

³⁷ Alberta Energy Regulator. 2020/21 Annual Report. Page 10.

On average over the 2013/14 to 2020/21 period³⁸, the AER received approximately 42,800 applications per annum, of which an average of 15 were referred to the Chief Hearing Commissioner for a panel assignment. An average of 4 panel hearings were held per annum and an average of 11 applications were referred to an alternative dispute resolution process. At the end of each fiscal year, an average of 9 hearing files remained active.

In fiscal 2020/21, approximately 80% of the applications received were considered “routine” and handled by automated processes³⁹. The AER uses a “tick box”, self-identification process by applicants and an integrated decision approach and a complex set of rules in its OneStop platform to automate routine (low risk) applications and forward non-routine (high-risk and more complex) applications to technical experts for review.

The AER also uses a number of ex-post inspections and audits to ensure that energy resource development is consistent with the legislative and regulatory framework. In fiscal 2020/21, 9,048 inspections and approximately 6,500 audits were conducted. The AER also conducts major investigations, which are designed to be tested and subject to court proceedings. Notwithstanding the AER’s ability to take compliance and enforcement action, its goal is to “work with companies to bring them back into compliance”⁴⁰.

Lack of Independence⁴¹ from Government

Despite the general norm⁴² that public agencies that exercise adjudicative functions “in subjects concerning security of the person or deeply entrenched private law rights are expected to have a high degree of independence”⁴³, critiques of Bill 2 noted the lack of independence and heavy reliance on the Supreme Court of Canada’s 2001 *Ocean Port v British Columbia*, 2001 SCC 52, as the legal basis to support the proposed framework⁴⁴.

³⁸ No data is publicly available for 2019/20. Alberta Energy Regulator *Annual Reports 2013/14, 2014/15, 2015/16, 2016/17, 2017/18, 2019/20, 2020/21. Hearing and ADR by Hearing Commissioner Summary: April 1, 2018, to March 31, 2019.* Alberta Energy Regulator.

³⁹ Alberta Energy Regulator. *2020/21 Annual Report.* Page 10.

⁴⁰ *Ibid.* Page 7.

⁴¹ Regulatory Independence is defined by the OECD as “protection from attempts to exercise undue control, curtail the roles and responsibilities of the regulator or intervene in the exclusive areas of responsibility for the regulator, such that regulators are guarded against some form of undue influence that seeks to change their behaviour and the outcomes of their regulatory decisions or activities”. Excerpt from: Holburn, G. and Karen Taylor. Blog: *Understanding Regulatory Independence.* August 14, 2019.

⁴² *Valente v. The Queen*, [1985] 2 S.C.R. 673 and *Bell Canada v. Canadian Telephone Employees Association* 2003 SCC 36.

⁴³ Fluker, S. *Bill 2 Responsible Energy Development Act: Setting the stage for the next 50 years of effective and efficient energy resource regulation and development in Alberta.* ABlawg.ca. November 8, 2012.

⁴⁴ *Ibid.* Page 3.

Commentors also pointed to specific sections of Bill 2 that illustrated the lack of independence. Most of the examples cited endured through the legislative process and remain in REDA, as fully proclaimed on February 26, 2014. Some of these sections include:

- Section 11 allowing the Lieutenant Governor in Council to establish a roster of Hearing Commissioners, including a Chief Hearing Commissioner, and determine and remuneration of the Hearing Commissioners.
- Section 15 requiring the regulator in considering an application or to conduct a regulatory appeal, reconsideration, or inquiry, consider any factor prescribed by the regulations.
- Section 16 requiring the regulator to share information with the Minister, even if that information is personal information, subject to any kind of confidence, or is supplied in confidence.
- Section 20 requiring the regulator to act in accordance with any applicable Alberta Land Stewardship Act regional plan.
- Section 26 giving the Lieutenant Governor in Council broad authorities to make regulations that have consequential effects on the powers, duties, and functions of the regulator.
- Section 67 allowing the Minister to issue directions to the regulator providing priorities and guidelines to be followed in carrying out its powers, duties, and functions, and ensuring the work of the regulator is consistent with the programs, policies, and work of the Government in respect of energy resource development, public land management, environmental management, and water management.
- Section 68 allowing the Lieutenant Governor in Council to make rules in respect of any matter for which the regulator makes rules, providing that such rules would prevail in the face of inconsistency or conflict with those made by the regulator.

Any debate about whether the AER is independent of government is resolved by the Mandate and Roles Document⁴⁵ made between the AER and the Ministers of Energy and Environment and Parks. The AER is not an independent public agency, and it was not intended to be.

Key highlights of the Mandate and Roles Document that speak to this lack of independence include (not exhaustive):

⁴⁵ https://static.aer.ca/prd/2020-10/Secretariat_MandateRoles.pdf

- **Part 1.1 Context** stipulates that the principle of collaboration is a fundamental underpinning of the way the parties will work together and the AER's statutory powers, mandate and functions are governed by both the Ministry of Energy and Ministry of Environment and Parks. These Ministries and the Ministry of Indigenous Relations govern the AER's mandate to share information.
- **Part 2.1 Background and Legislation** provides that the Government of Alberta establishes policies, and the AER implements those policies. The AER is responsible for carrying out all administrative, regulatory, and adjudicative functions in accordance with all applicable legislation, any applicable Alberta Land Stewardship Act regional plan, government policies, and in accordance with any directions of the Ministers. The AER will work with the responsible Ministers to set its long-term objectives and short-term targets. The Ministers monitor whether the AER is acting within its statutory powers, mandate and functions and achieving its objectives and targets, including the requirement to establish an official internal Red Tape Reduction Task Force and related work plan. The Ministers provide written policy direction to the AER via legislation, regulation, written policies, ministerial orders, department correspondence and memoranda.
- **Part 2.2 Mandate** provides that the AER is a partner with government departments and agencies in integrated resource management, which requires reciprocal information sharing and cooperation among all participating government departments and agencies. The AER must use best efforts to ensure that its information management and technology systems accommodate and enable the free and open exchange of information between and among government departments and agencies involved in collaboration with the AER.
- **Part 2.3 Adjudicative Functions** provides that Hearing Commissioners must be the ones to conduct all hearings in respect of applications, regulatory appeals, and reconsiderations. The CEO of the AER may direct the Chief Hearing Commissioner to request hearing panels on certain issues or conduct hearings on an expedited basis. The Lieutenant Governor in Council may request that an inquiry be held by the AER or that a regulatory appeal, reconsideration or inquiry or other proceeding be held jointly with any agency, board, commission, or other body constituted in Alberta, or with a government department.

Marginalized Quasi-Judicial Processes and Limited Natural Justice Rights

Only a small percentage of the applications received by the AER result in a hearing before a panel of Hearing Commissioners⁴⁶. For those applications that are dispensed by the AER without a hearing, the natural justice rights of stakeholders are limited and include:

⁴⁶ As discussed previously, an average of only 15 applications were referred to the Chief Commission for a panel referral and an average of 4 panel hearings per annum were held over the 2013/14 to 2020/21 period, versus an average of 42,800 applications per annum over the same period.

- **Notice:** Section 31 of REDA provides that the regulator shall on receiving an application ensure that a public notice of the application is provided in accordance with the rules. Similarly, Section 7.2(2) of the Alberta Energy Regulator Rules of Practice⁴⁷ provide that where the regulator decides on an application without a hearing, notice of the decision shall be provided.
- **Right to File a Statement of Concern:** Section 32 of REDA and Section 6(1) of the Alberta Energy Regulator Rules of Practice provide that only a person who believes that the person may be directly and adversely affected by an application may file a statement of concern with the Regulator in accordance with the rules. However, the section 6.2(1) and (2) of the Rules of Practice also allow that a statement of concern may be disregarded if certain conditions are met or subject to the broad discretion of the regulator.
- **Right to Decision:** Section 33(2) provides that if the regulator makes a decision on an application without conducting a hearing, it is required to publish or otherwise make that decision publicly available.

Notably, unless an application is referred to the Chief Hearing Commissioner by the CEO on behalf of the AER, applicants and those permitted to file a statement of concern are not entitled to the full suite of natural justice rights, notably the right to make a submission to an impartial and unbiased decision maker or the right to a hearing before an impartial and unbiased decision maker. It is an open question whether the process to consider routine and non-routine applications that are not referred to the Chief Hearing Commissioner meet the basic standards of procedural fairness that ensure all parties to an issue are treated fairly⁴⁸.

If an application is heard by a panel of Hearing Commissioners, the natural justice rights of participants are limited in REDA to:

- **Right to Participate in a Hearing:** Section 34(3) provides that if the regulator conducts a hearing on an application, a person who may be directly and adversely affected by the application is entitled to be heard at the hearing.
- **Right to Decision:** Section 35(1) provides that the regulator shall, after the completion of a hearing on an application, make a written decision, with reasons, on the application within the time prescribed. Section 35(2) provides that notice of the decision must be given to the applicant and any person who participated in the hearing. Once the requirement in (2) is fulfilled, Section 35(3) requires that the decision, with reasons, be made publicly available.

However, the AER Rules of Practice expand the natural justice rights in hearings on applications in Part 2. In particular, the Rules of Practice stipulate that the Chief Hearing Commissioner establish a panel of one or more

⁴⁷ *Responsible Energy Development Act*. Alberta Energy Regulator Rules of Practice. Alberta Regulation 99/2013 as updated to and including Alberta Regulation 71/2018.

⁴⁸ *A Manual for Ontario Adjudicators (2000)*. Society of Ontario Adjudicators and Regulators. Toronto. Page 37.

hearing commissioners to conduct the hearing and issue notice within a defined period of time that must set out certain initial procedural details. The Rules of Practice also include provisions for public viewing of filed documents or obtaining copies of the application and other documents from the applicant. The Rules of Practice do not require that application documents be publicly available on a web-based system hosted by the AER. The Rules of Practice also provide for the participation of a broader group of persons in the hearing, subject to certain conditions.

The Rules of Practice are prescriptive and address the major procedural elements of a hearing before a panel of Hearing Commissioners, fulfilling the standard natural justice requirements for a quasi-judicial process⁴⁹, the two essential principles of which are the right to be heard and the right to an impartial decision maker. It is important to stress however, that the vast majority of applications considered by the AER are not afforded these rights as rules requiring a hearing are not triggered.

Reduced Reliance on Public Interest Test

REDA does not contain a public interest test, and this is a material change from the enabling legislation of its predecessor, the ERCB. Section 3 of the ERCA contained a public interest test and required the ERCB to consider whether the project is in the public interest, having regard to the social and economic effects of the project and the effects of the project on the environment⁵⁰. The ERCA also included, in Section 2, eight purposes or objects intended to inform the decision-making function of the ERCB in the face of conflicting interests. However, it appears that section 2 was not sufficient to mitigate the ambiguity created by the lack of a public interest definition in the ERCA that contributed “to long-standing criticisms of the test and frustrations with it due to vagueness, open-endedness and unpredictability”⁵¹.

The “public interest” is not an easily defined term. From an academic perspective⁵², it can be defined different ways:

- Common Interest:** an interest becomes public by virtue of its wide acceptance by all members of society.
- Majority Interest:** the public interest is that of majority rule; the greatest good for the greatest number determined quantitatively as the sum of individual interests.

⁴⁹ Ibid. Pages 38-51.

⁵⁰ *Energy Resources Conservation Act*. RSA 2000. Chapter E-10.

⁵¹ Vlavianos, N. *An Overview of Bill 2: Responsible Energy Development Act – What are the changes and What are the Issues?* ABlawg.ca. November 15, 2012. Page 3.

⁵² Hierlmeier, J.L. “*The Public Interest*”: *Can it Provide Guidance for the ERCB and NRCB?* *Journal of Environmental Law and Practice*. August 2008. Pages 282-289.

Balance of Interests:	the public interest is drawn out through a process of negotiation or compromise to balance competing interests.
Superior Standard:	the public interest is defined in relation to a standard based on either morality or science.
Economic Interest:	public interest is defined in terms of the consumer majority, rather than a simple majority. It maintains that economic growth, wealth maximization and resource efficiency are desirable goals and therefore in the public interest.
Shared Values:	the public interest is a vague but valuable term that refers to policy debate in pursuit of a fundamental set of shared values.
Procedure:	decisions and outcomes will be in the public interest as long as the appropriate procedures have been followed in reaching a decision. The focus is on public participation and ensuring that the widest possible range of interests will be consulted during the decision-making process. It is not based on substantive content.
Indefinable or Meaningless:	the public interest is either an indefinable concept or so vague that it is effectively meaningless because no one public interest theory provides enough specificity so that the term can be used to guide a decision-maker's discretion.

Similarly, there is no definitive judicial view, however key principles pertaining to the “public interest” in relation to section 3 of the ERCA include⁵³:

- “In the public interest” is a flexible concept that must be given content appropriate to the circumstances at the relevant time. The circumstances include the legislative and policy context.
- The scope of the public interest in the context of section 3 of the ERCA is meant to be broad and should not be interpreted restrictively.
- Assessing the public interest requires balancing competing interests and or concerns.
- The ERCB has a positive obligation to take steps to assess the public interest.
- Unless and until the Alberta Court of Appeal finds otherwise, it would be prudent for the Board to explicitly refer to its public interest deliberations in its decisions.

⁵³ Low, C.A. *The “Public Interest” in Section 3 of Alberta’s Energy Resources Conservation Act: Where Do We Stand and Where Do We Go From Here?* Canadian Institute of Resources Law Occasional Paper #36. September 2011. Pages 17 and 18.

- The ERCB’s jurisdiction to make orders in the name of the public interest is not unlimited. It must be exercised within the applicable legislative context.

Rather than define the “public interest” for regulatory purposes and provide guidance in either a preamble or legislative objects, the concept was removed from REDA⁵⁴. Sections 2 and 3 of the ERCA were ostensibly replaced by section 2 of REDA, which sets out the mandate of the AER and requires it to provide for the efficient, safe orderly and environmentally responsible development of energy resources in Alberta and in respect of defined energy resource activities, to regulate in accordance with energy resource enactments, including REDA and the regulations, and specified enactments.

In addition, the elimination of the public interest test takes with it two essential elements of the test that are evident in both the academic and judicial discussions on the concept. First, the procedural element and second, the substantive element that involves balancing competing interests.

Limited Regulatory Policy Discretion

Although REDA gives the AER the power to do all things that are necessary for or incidental to the carrying out any of the duties or functions that form its mandate⁵⁵, the AER is precluded from taking action on matters necessary to carry out its mandate but are not specifically authorized in REDA or any of its associated energy resource enactments, without approval of the Lieutenant Governor in Council⁵⁶.

Similarly, section 3.2.1 of the AER’s Mandate and Roles Document specifically states that it is the Ministers who are responsible for the policies applicable to resource development and the AER. It is the Ministers who are to inform the AER of government policies and directions which effect of the work of the AER. The AER is required

⁵⁴ Public interest considerations remain in *the Coal Conservation Act Revised Statutes of Alberta 2000 Chapter C-17* (sections 4(c), 8.1(2)), *Coal Conservation Rules Alberta Regulation 270/1981* (sections 55(b), 57(3) and 59(3)), *Gas Resources Preservation Act Revised Statutes of Alberta 2000 Chapter G-4* (sections 8 and 14), *Oil and Gas Conservation Act Revised Statutes of Alberta 2000 Chapter O-6* (sections 1(ddd)(v), 4(c), 41,(1) and 106(1)), *Oil Sands Conservation Act Revised Statutes of Alberta 2000 Chapter O-7* (sections 3(b), 3(g), 10(3)(a), and 11(3)(a)), *Oil and Gas Conservation Act/Oil Sands Conservation Act/Responsible Energy Development Act Curtailment Rules Alberta Regulation 214/2018* (section 2(c)), *Pipeline Act Revised Statutes of Alberta Chapter P-15* (sections 4(a), 33(1), and 51(1)), *Pipeline Act Pipeline Rules Alberta Regulation 91/2005* (section 80(1)(c)(i)), and *Oil and Gas Conservation Act Orphan Fund Delegated Administration Regulation Alberta Regulation 45/2001* (section 5.1(c)). In general, “public interest” is not defined in these energy resource enactments. Section 3 of the *Responsible Energy Development Act General Regulation* provides that for the purposes of considering an application or to conduct a regulatory appeal, reconsideration or inquiry in respect of an energy resource activity under these energy resource enactments, the AER is to consider: (i) the social and economic effects of the energy resource activity; (ii) the effects of the energy resource activity on the environment; and (iii) the impacts on a landowner as a result of the use of the land on which the energy resource activity is or will be located.

⁵⁵ *Responsible Energy Development Act Statues of Alberta, 2012. Chapter R-17.3*, section 14(1).

⁵⁶ *Ibid*, section 14(2).

to provide the Ministers 120-days' written notice before making a rule pursuant to REDA or any other energy resource enactment⁵⁷.

The AER is expected to operate as part of the government's integrated resource management and collaborate with government departments and other agencies to fulfill its mandate⁵⁸. It is the government that owns the policy development function, and it is the responsibility of the AER to ensure its policy assurance functions align with policy⁵⁹. In short, the government of Alberta establishes policies, and the AER implements those policies⁶⁰, consistent with the recommendations of the Regulatory Enhancement Task Force⁶¹.

The AER's lack of independent regulatory policy discretion has a number of consequences.

First, the AER does not have the latitude to address energy resource enactment policy gaps identified in the course of its work. This results in the use of and reliance on by the AER of ex-post mechanisms to correct or mitigate outcomes from regulatory approvals that use decision processes with known policy deficiencies, either by design or as a result of changed circumstances.

Second, because government is deep into the technical specifics of the regulatory framework and the AER is expected to work collaboratively with government and responsibly with the regulated community, the AER executes its mandate in a politicized environment and is subject to capture by the community it regulates.

Third, where a policy gap is identified and brought to the attention of government, it will remain unresolved, often for years, until government crafts an appropriate policy response via legislation and/or directs the AER to design rules that comport with the government's approach. Litigation is often required to precipitate a policy response by government.

Fourth, it is an open question whether the AER, by the virtue of its regulatory scheme as described above, fetters its discretion to decide by lacking the independence and ability to develop and implement policy in the context

⁵⁷ Ibid, section 22.

⁵⁸ *Alberta Energy Regulator – Mandate and Roles Document*. June 2020. Page 3.

⁵⁹ Ibid. Page 11. "Policy Development" includes the analysis and development of policy options around resource development. It is through policies that the government establishes directions, priorities, and outcomes. "Policy assurance" is the component that implements policies and regulates upstream oil, gas, oil sands, and coal development activities to achieve the policy outcomes of government. It includes decision-making, compliance monitoring, and enforcement mechanisms.

⁶⁰ Ibid. Page 3.

⁶¹ *Enhancing Assurance: Report and Recommendations of the Regulatory Enhancement Task Force to the Minister of Energy*. Government of Alberta. December 2010.

of the applications that come before it and by relying solely on government policy to resolve the public interest tests associated with applications in REDA's accompanying energy resource enactments.

These features are illustrated by a number of well-publicized events and decisions:

- **Cumulative Effects Policy:** July 9, 2013 approval of the Shell Canada Energy Application relating to the Jackpine Mine Expansion Project, which included 22 conditions and 88 recommendations. The latter were concerned with addressing the need for the implementation of the Lower Athabasca Regional Plan on an urgent basis⁶²; a cumulative effects management framework - including appropriate mechanisms for identifying and managing regional environmental cumulative effects, appropriate guidelines and thresholds, and mitigation mechanisms including conservation offsets; and guidelines to assess, manage and mitigate cumulative effects on aboriginal traditional land use, rights, and culture.
- **First Nations Honour of the Crown and On-going Reconciliation:** April 24, 2020 Court of Appeal Decision (2020 ABCA 163) *Fort Mckay First Nation v Prosper Petroleum Ltd.* in which the court vacated the AER's June 2018 decision to approve the Rigel bitumen recovery project, on the basis that the AER erred by failing to consider the honour of the Crown and refusing to delay approval of the project until the Fort McKay First Nation and the government of Alberta completed the negotiations that began in 2003 to develop a Moose Lake Access Management Plan to address the cumulative effects of oil sands development on the First Nation's Treaty 8 Rights.
- **Liability Management Policy:** In January 2019, the Supreme Court of Canada issued its decision in *Orphan Well Association v Grant Thornton Ltd.* (Redwater).⁶³ The government of Alberta announced a new liability management framework in August 2020 in response to: Redwater; industry-wide financial hardship resulting from low commodity prices; increases in the number of inactive wells⁶⁴; additional high-profile litigation, producer defaults, enforcement actions, and novel applications – examples of

⁶² Approved by the Alberta government August 22, 2012, and effective September 1, 2012.

⁶³ 2019 SCC 5 (*Redwater*). In this seminal decision the Court made a number of key findings: (i) the AER is not a creditor; (ii) a trustee in bankruptcy is not empowered to walk away from the environmental liabilities of the estate it is administering; (iii) Alberta's regulatory regime is not in conflict with the Bankruptcy and Insolvency Act; (iv) end-of-life obligations are not provable claims in bankruptcy; (v) clarifies the test to determine whether a particular regulatory obligation amounts to a claim in bankruptcy; (vi) claims that are not provable in bankruptcy remain an obligation that the bankrupt had to discharge to the extent it has assets; (v) proceeds of the sale of assets could not be paid to its secured creditor, but had to be used to address its "end-of-life" obligations; and (vi) reaffirms the polluter pay principle.

⁶⁴ The number of inactive wells increased from approximately 60,000 in 2009 to 97,000 at the end of 2020. Source: alberta.ca/oil-and-gas-liabilities-management.aspx and *Inactive Well Compliance Program. Year Two Final Report*. AER. July 2017.

which include Sequoia Resources Corp.⁶⁵, Trident Exploration Corp.⁶⁶, Aeraden Energy Corp.⁶⁷, and Shell Canada/Pieridae Alberta⁶⁸; and declining public and investor confidence in the sufficiency and stringency of the government's liability management policies and the associated regulatory framework.

The new framework is intended to accelerate the responsible reclamation of oil and gas sites and ensure a cleaner environment, while improving Alberta's competitiveness to attract oil and gas investment. The framework remains under development; however it includes the following key features⁶⁹: (i) more support for struggling operators; (ii) replacement of the AER's licensee liability rating system with a licensee capability assessment system that will be ex-ante and allow the AER to be more pro-active; (iii) mandate minimum annual closure spending; (iv) allow landowners to nominate sites on their land; (iv) establish a panel to determine how best to address sites that were abandoned, remediated or reclaimed before current standards were put in place and the operator's liability has lapsed; and (v) expand the mandate of the Orphan Well Association, as per the previously announced legislative initiative.

III. Conclusion

Although the governance structure of the AER was the inspiration of the new governance structure for the OEB, it does not appear to have been an appropriate choice. Corporate governance constructs do not anticipate or accommodate the complex relationship between an agency and the government, the legislature, and the

⁶⁵ August 8, 2018 Public Statement of the AER President and CEO relating to Sequoia Resources Corp.'s plan to cease operations without decommissioning more than 4,000 wells, pipelines, and facilities, and having abandonment, reclamation and other facilities liabilities costs of more than approximately \$220 million⁶⁵; and the subsequent decision of the Alberta Court of Appeal (2021 ABCA 16), which builds on the principle of polluter pay and the need for greater public accountability with respect to environmental obligations inherent in asset retirement obligations.

⁶⁶ May 1, 2019 AER news release indicating that Trident Exploration Corp. has advised the AER that it does not have the funds to operate its infrastructure or enter into creditor protection. As a result, they have decided to walk away, leaving more than 4,400 wells without an operator and asset retirement liabilities of approximately \$329 million.

⁶⁷ November 27, 2020, enforcement warning letter from the AER to Aeraden Energy Corp. regarding reclamation certificate application deficiencies identified on or about November 22, 2018, and the cancellation of 59 reclamation certificates on January 3, 2019.

⁶⁸ May 13, 2020 Letter Decision of the AER denying a joint application by Shell Canada Limited and Pieridae Alberta Production Ltd. that sought to split existing approvals at the sites in order to facilitate the separation of regulatory liability for historic SulfinoTM and certain other substances from all other remediation and reclamation liabilities. The AER determined that the application was inconsistent with the reclamation requirements of the Environmental Protection and Enhancement Act (EPEA) and contrary to the concept of joint and several liability that is also an underlying principle in various provisions of the EPEA. The AER also found that the proposal would be contrary to the AER's mandate under section 2(1)(a) of REDA – to provide for the efficient, safe, orderly, and environmentally responsible development of energy resources in Alberta through its regulatory activities.

⁶⁹ Cameron, K., B. Gilmour, S. Ridge. *Alberta Announces New Liability Management Framework*. Bennett Jones. August 4, 2020.

court⁷⁰. There is nothing in a corporate governance framework that reduces the need for effective oversight by government or changes the agency's accountability to the legislature.

In addition, while the regulatory scheme of the AER may be appropriate for a social regulator tasked with ensuring that energy resource development occurs in a manner consistent with the Alberta government's environmental, health and safety, and land-use policies, it is not an appropriate one for an agency with the OEB's mandate. As a quasi-judicial tribunal with statutory authority to develop regulatory policy to inform its work and apply its discretion in matters relating to the private law interests of customers and public utilities, it is expected to be independent from government. As result, the regulatory scheme of the AER is simply not an appropriate one.

As illustrated in the *Jurisdictional Review of Energy Regulation by Province and Territory*⁷¹, no two energy regulators are alike, by mandate or structure. It is essential that the governance structure and regulatory scheme of each agency reflect its mandate and accountabilities and be seen to be appropriate by the public who are subject to its determinations.

⁷⁰ Heggie, B. *Governance Structure of Administrative Agencies*. Energy Regulation Quarterly. Volume 7, Issue 3. 2019.

⁷¹ Taylor, K. *Jurisdictional Review of Energy Regulation by Province and Territory*. Council for Clean and Reliable Energy. July 2019. <https://thinkingenergy.ca/wp-content/uploads/2021/03/Jurisdictional-Review-of-Energy-Regulation-by-Province-and-Territory-Karen-Taylor-CCRE-Vice-Chair-July-2019.pdf>