

HISTORICAL CASE STUDIES OF FIVE CANADIAN ENERGY REGULATORS THROUGH THE LENS OF REGULATORY INDEPENDENCE

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OCTOBER 2021

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Positive Energy would like to thank the paper's reviewer, Shawn Denstedt, QC, Vice Chair Western Canada, Osler, for his helpful comments. Positive Energy team members Marisa Beck, Michael Cleland, Rowland Harrison and Monica Gattinger also helped shape this study from design to execution. Finally, thanks are owed to those who gave generously of their time and expertise participating in interviews for the research.

As is customary, any errors of fact or interpretation are the responsibility of the author.

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POSITIVE ENERGY FINANCIAL SUPPORTERS

We would like to thank the following organizations for their financial support:

Alberta Energy
Alberta Energy Regulator
British Columbia Oil and Gas Commission
British Columbia Utilities Commission
Canadian Association of Petroleum Producers
Canadian Electricity Association
Canadian Renewable Energy Association
Cenovus
Clean Resource Innovation Network
Ovintiv
Natural Resources Canada
Social Sciences and Humanities Research Council

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INTRODUCTION

Independent energy regulators have been vital to the public policy landscape for decades. Influenced by the “independent” commission model conceived in the U.S. in the late 1800s, these entities possess varying degrees of independence; that is, they have often been seen as being at arm’s length from politicians and governments, such that they can make decisions outside of short-term electoral concerns.

Furthermore, they have been seen as hubs of significant technical expertise within fields such as economics and engineering. Under this paradigm, Canadians and those in the sector have recognized these entities as reputable decision-makers and enforcers of necessary public interest considerations. Their actions affect all Canadians as they rule on everything from massive mega-project development to the marginal cents on an electricity bill.

However, in recent years and in many jurisdictions, the perception of these institutions has changed. They have been challenged by many complicated factors, including environmental imperatives; greater calls for public participation; expanding commitments related to the Crown’s duty to consult and accommodate with Indigenous Peoples; and greater political fragmentation and polarization. These are only some of the factors these entities have been challenged to address and they have affected how regulators perceive their roles and responsibilities.

Projects and initiatives like the Trans Mountain pipeline have become household names, brought into the public venue. The outcome has led to government and stakeholders questioning these regulators and their role, motives, and biases. Furthermore, the extent of their “independence” has been scrutinized with questions as to whether unelected experts should be making critical decisions that affect all Canadians.

So how have we gotten from there to here?

Regulatory bodies have not remained static since inception. In fact, their regulatory independence and the effectiveness of their decision-making have evolved over history. This evolution has been influenced by national and international societal and industry trends, political goals and motives, dramatic and controversial singular events, leadership by prominent individuals, the legislative framework and governance models, and jurisprudence. This includes influence from the various stakeholders in the public policy discourse including industry, environmental advocates, landowners, academics, public servants, politicians, Indigenous communities, courts and (of course) the regulators themselves. Additionally, their response has been further confounded across jurisdictions: regulators have reacted both similarly and differently to comparable challenges over time.

Extensive research has been conducted over the past year examining regulators and their independence as part of the University of Ottawa’s Positive Energy program and its “Policymakers, Regulators and Courts” Project.



This project is part of the Roles and Responsibilities research stream (see Box 1). The project included the following:

- [A literature review on regulatory independence](#)
- [A discussion paper based on preliminary research and analysis](#)
- [An energy expert workshop in fall 2020 based on the two aforementioned documents](#)
- [A report on the key takeaways from the workshop](#)
- [A synthesis report rolling up the key findings and conclusions from the entire project.](#)

This report, as a core component of this project, provides the history and evolution of five energy regulators in Canada. Exploring their evolution through the lens of regulatory independence, case studies have been produced on the Canada Energy Regulator (CER); the Alberta Energy Regulator (AER); the Ontario Energy Board (OEB); the Nova Scotia Utility and Review Board (NSURB); and the British Columbia Oil and Gas Commission (BCOGC). These regulators were selected to provide an analysis across jurisdictions that vary in such metrics as geography, energy economy, mandate, regulatory structure, political and stakeholder climates, and (most critically) history.

The studies provide detailed analysis and historical examination of how these organizations have evolved since inception, over the ensuing years, and how they may evolve into the future.

They examine the key economic, environmental, social, political, and technical circumstances, events, and decisions, as well as the contextual conditions that have shaped these organizations in relation to their independence and their effectiveness. They also analyze traits of independence and effectiveness at particular moments in time and how various stakeholders and the public have perceived these regulators.

In the upcoming decades, Canada's energy decision-makers will be faced with difficult, and in some cases existential, decisions. These include targets to meet net-zero greenhouse gas emissions by 2050 in the country. Yet questions remain over how Canada and its provinces will meet this goal and other public interest objectives. Furthermore, what role do independent regulators play in meeting these goals in the 21st century? How should we be viewing their regulatory independence with these considerations in mind?

We can learn a lot from history. Taking a historical approach and outlining the evolution of each regulator, this report provides insights for decisions-makers "looking forward by looking back."¹

The report begins with a rundown of the methodology used for this study, followed by a brief overview of what is meant when we refer to "independence." It then follows with five chapters of the case studies, discussing first the three more commonly studied jurisdictions at the federal level and in Alberta and Ontario. Then case studies of Nova Scotia and British Columbia follow. The regulators of these two jurisdictions have unique mandates, histories, and governance structures compared to the former three, thus providing a unique contrast.

1. Thomson, I.T.D. (2021). Key Moments in the History of Canadian Regulatory Independence [Blog post]. University of Ottawa Positive Energy. Retrieved from <https://www.uottawa.ca/positive-energy/news/key-moments-history-canadian-regulatory-independence>

BOX 1: POSITIVE ENERGY'S RESEARCH ON ROLES AND RESPONSIBILITIES

The second three-year phase of Positive Energy (2019-2021) aims to address the following question: How can Canada, an energy-intensive federal democracy with a large resource base, build and maintain public confidence in public authorities (federal, provincial, and territorial policymakers and regulators, Indigenous governments, municipal governments and the courts) making decisions about the country's energy future in an age of climate change?

Three fundamental questions form the research and engagement agenda. How can Canada effectively overcome polarization over its energy future? What are the respective roles and responsibilities among policymakers, regulators, the courts, municipalities and Indigenous governments, when it comes to decision-making about its energy future? What are the models of and limits to consensus-building on energy decisions?

Clearly articulating and strengthening roles and responsibilities between and among public authorities is one of the most pivotal but understudied factors shaping Canada's energy future in an age of climate change. Confidence of the public, investors and communities in government decision-makers – be they policymakers, regulators, courts, Indigenous governments or municipalities – is a critical success factor in Canada's ability to successfully chart its energy and emissions future.

Positive Energy's research and engagement over the last five years reveals that answering two questions will be fundamental to confidence in public institutions: Who decides? How to decide? Positive Energy's research and engagement also underscores that two core principles should inform answers to these questions: Informed Reform and Durable Balance.

The roles and responsibilities research programme includes projects in the following areas:

- Federal-provincial relations
 - [A research report examining evolving models and practices for intergovernmental relations over energy and climate](#)
 - [A comparative study of factors driving final investment decisions for liquefied natural gas facilities in British Columbia and Western Australia](#)
- Policy-regulatory-judicial relations
 - [A literature review on regulatory independence in Canada's energy systems: origins, rationales and key features](#)
 - [Historical case studies of federal and provincial regulators exploring the evolution of regulatory independence over time: synthesis report and case studies \(this report\)](#)
 - [Policy-regulatory relations: analyzing innovations in policy-regulatory relations to identify 'What Works?' \(research collaboration with CAMPUT\)](#)
 - [A case study of the expanded role of the federal cabinet in pipeline projects \(TC Energy's 2021 NGTL System Expansion\)](#)
- New imperatives in energy decision-making
 - Emerging technologies: interviews with provincial and municipal policymakers and regulators to identify the impact of emerging technologies on decision-making
 - [Public engagement: analyzing innovations in regulators' engagement practices to identify 'What works?' \(research collaboration with CAMPUT\)](#)





METHODOLOGY

As part of Positive Energy’s “Policymakers, Regulators and Courts” project, extensive research has been conducted over the past year examining Canadian regulators and their independence. This has included a literature review on regulatory independence;² a discussion paper based on preliminary research and analysis;³ an energy expert workshop in fall 2020 based on the two aforementioned documents;⁴ and a report on the key takeaways from the workshop.⁵ In addition to the study and work conducted for this project through these reports, the following outlines the methods conducted in the crafting of the five case studies. [A final report synthesizing the overarching findings and providing recommendations for decision-makers was released at the same time as this case study report.](#)

In May-June 2020, we engaged in informal discussions with energy experts familiar with some of the jurisdictions under review to gather a general idea of their regulatory context, evolution, and key themes. Over the summer, we also undertook exploratory literature reviews on the five jurisdictions to gather further understanding of the scope of literature and analysis already conducted on the regulators and/or any gaps.

Following approval by the University of Ottawa’s Research Ethics Boards, Positive Energy reached out to individuals knowledgeable about each of the five regulators for formal, semi-structured interviews. In total, 27 interviews took place between July 2020 and February 2021. Individuals were selected based on their past/present experience working for or interacting with the regulators in question. Additionally, attempts were made to ensure a breadth and depth of perspectives on the regulators and their energy landscape. These included perspectives from industry; environmental advocacy groups; the judiciary; consultants and hearing intervenors; academia; municipalities; other regulators within the studied regulator’s jurisdiction; and those working with Indigenous communities.⁶ The full list of interview participants who took part in the formal interviews is provided in Appendix A.

2. Thomson, I.T.D. (2020). A Literature Review on Regulatory Independence in Canada’s Energy Systems: Origins, Rationale and Key Features. University of Ottawa Positive Energy. Retrieved from https://www.uottawa.ca/positive-energy/sites/www.uottawa.ca.positive-energy/files/a_literature_review_on_regulatory_independence_in_canadas_energy_systems_final.pdf

3. Cleland, M., Thomson, I.T.D., and Gattinger, M. (2020). Policymakers, Regulators and Courts – Who Decides What, When and How. University of Ottawa Positive Energy. Retrieved from https://www.uottawa.ca/positive-energy/sites/www.uottawa.ca.positive-energy/files/policymakers_regulators_and_courts_-_who_decides_what_when_and_how_final.pdf

4. University of Ottawa Positive Energy. (2020). Policymakers, Regulators and Courts – Who Decides What, When and How. Retrieved from <https://www.uottawa.ca/positive-energy/content/policymakers-regulators-and-courts-who-decides-what-when-and-how-evolution-regulatory>

5. Thomson, I.T.D. (2021). What We Heard: A summary report of an October 2020 workshop on regulatory independence. University of Ottawa Positive Energy. Retrieved from https://www.uottawa.ca/positive-energy/sites/www.uottawa.ca.positive-energy/files/what_we_heard_ian_october_2020_final.pdf

6. The low number of interviews that could speak to the Indigenous perspective is a noticeable gap in providing a holistic perspective of the Canadian energy regulatory landscape. Invitations were made to several potential participants who could speak to the historical evolution of regulators from the Indigenous perspective; however, many were not able to participate. The author endeavoured to incorporate information on Indigenous affairs related to the historical evolution of these regulators. This includes the exploration of key court cases, the 1977 Berger Report, the evolution of the duty to consult and accommodate, and the relationship between Indigenous Peoples and Canada’s regulators.



Interviewees were asked how they defined regulatory independence, the evolution of the regulator(s) that the interviewee could speak to, the contextual conditions that shaped that evolution, the effects that such evolution had on the regulator's decision outcomes, effectiveness and public and investor confidence, and how regulatory independence may evolve in the future. Interview questions were provided in advance to interviewees and are included in Appendix B.

The value of the perspectives and information provided by the interviewees cannot be overstated and the author is grateful for their time and wisdom. We transcribed interview audio recordings, using transcription software, then coded and analyzed the data. Interviews informed the timeline and outline of the case studies, and the identification of key moments in the evolution of the regulators. When direct quotes from interviews are included, these are not attributed to individuals to protect confidentiality.⁷

These case studies are also further supplemented by research into the literature. This was to validate direction provided by the interviewees, determine outstanding critical moments in the historical evolution of the regulators, provide greater analysis of their regulatory independence and effectiveness, and overall provide a broader picture of the history of the five regulators. Research has come from a variety of sources. This includes (but is not limited to) academic law and political science journals, chapters and books, reports by royal commissions and by governments, think tanks and research institutes, media articles, press releases, legislation and parliamentary debates.

There are significant differences between research available for the jurisdictions in this report. While there is extensive literature about the federal energy regulator as well as Alberta's energy regulator, less has been written about the relatively new regulators of British Columbia and Nova Scotia. Additionally, research in the Ontario energy sector has mostly focused on the holistic electricity system or its past monopoly, Ontario Hydro. In these works, the OEB is discussed, yet is rarely the exclusive focus. Thus, there is some variability in the type and number of sources cited between case studies.

This is not the first study published about these regulators and the author would be remiss if he did not make mention some of the critical authors and researchers who came before him. In particular, he would like to refer to the works of David Breen, Hudson Janisch, Rowland J. Harrison, Peter Aucoin, G. Bruce Doern, Monica Gattinger, Earle Gray, Guy Holburn, Cecilia Low, Alastair Lucas, George Vegh, Nicki Vlavianos, Robert B. Warren, Murray Rankin, Ronald Daniels, Gordon Jaremko, Michael Trebilcock, Brady Yauch, Howard Windsor, Wally Brault, Sandy Carpenter, Patricia Burchmore and Christopher Jones, amongst others. These authors provided a strong foundation for the case studies.

7. Sometimes slight modifications were made to interviewee quotes for clarity or to protect confidentiality. Such changes are noted in brackets. However, the main point of what the participant stated remains unchanged.



DEFINING INDEPENDENCE

Before beginning the case studies, it is worthwhile to explain what is meant by “independence” in the context of Canadian regulatory history. There are different ways to define the independence of a regulator, such as within jurisprudence or in the day-to-day operations of the regulator itself; as well as many perspectives in how regulatory independence is discussed in research and literature.⁸ For this project, we asked interviewees how they define regulatory independence as a general concept. Responses varied, however four characteristics stood out:

1. *Characteristic One: Independence is in reference to the regulatory procedure and decision-making.*

Interviewees described independence often in relation to the regulator’s decision outcomes. That is, decisions should be based on a rigorous evidence-based process, incorporate appropriate expertise and knowledge, and be free of bias or interest. The participants repeatedly raised the concept that decisions and procedures must also be within the mandate of legislation. Last, the process should limit political interference (i.e., “unreasonable influence” from the executive, political short-termism); and decisions should be made with a long-term perspective. These ideas are related to the definition of “procedural independence.”⁹

2. *Characteristic Two: Independence is not absolute; and is relative from regulator to regulator and between functions.*

There are limits to the independence of a regulator; and in the Canadian context, as one participant stated, there is “no such thing as regulatory independence. . . .” Independence is also a relative term. Some regulators are more independent than others, varying between regulators and jurisdictions.

Additionally, some activities by regulators are more independent than others. For instance, some interviewees brought up the differences between a regulator’s adjudicative role versus policy role (i.e., the shaping of policies, rules and regulations for addressees to comply with) when defining independence. The former is easy to understand and is closer to judicial independence (which is explicitly defined), while the latter is less clear. We know what adjudicative independence is, but we don’t have a common definition of “policy arm’s length” independence.

8. For a greater discussion on regulatory independence, including the different ways of looking at independence, please see: Thomson, *supra* note 2.

9. Procedural independence may be defined “with reference to the process that is appropriate for its specific mandate and whether that process is protected from political interference, and not by whether the ultimate decision is beyond the political process.” For instance, a government imposing procedural constraints (i.e., time limits for applications) on how a tribunal fulfills its mandate may infringe on the tribunal’s procedural independence. Sources: Harrison, R.J. (2012-2013). The Elusive Goal of Regulatory Independence and the National Energy Board: Is Regulatory Independence Achievable? What Does Regulatory Independence Mean? Should We Pursue It? *Alberta Law Review*, 50(4), at 780.; Thomson, *ibid* at 21-22.



3. *Characteristic Three: Independence is relative to government and is “arm’s length.”*

Several participants brought up the relationship to government when characterizing regulatory independence. There was an acknowledgement that, despite independence, the government still establishes the legislative and policy framework and can still provide the main policies and direction to a regulator. Regulators are not independent from government policy-at-large; they are independent “from government” not “of government.” Further, the regulator still needs a relationship with government; they cannot be isolated. They must regulate within context and be sensitive to government issues, policy, and politics.

4. *Characteristic Four: Regulators need to be independent from the interests of all sides/actors in an issue, behave impartially, and make decisions free from real or perceived bias.*

This idea is related to characteristic two and three and to notions of “institutional bias” and independence “from others” (i.e., not just the government). Related to this point is the term, “regulatory capture.” Often associated with George Stigler’s “capture theory,”¹⁰ this term was mentioned predominately by interviewees with an environmental advocacy background.

Thus, independence can be defined not only from government, but also from the other critical actors in the system. Some observers see the job of the regulator as ensuring the industry being regulated performs in accordance with regulation and policy; the default is neither approval nor denial. Accordingly, the Organisation for Economic Co-operation and Development (OECD) more holistically describes that, at the core of regulatory independence is “the balance between the appropriate and undue influence that can be exercised through . . . interactions” with the regulator as the “referee” in a complex environment with different stakeholders in the policy arena.¹¹

Further to this characteristic is the importance of perception. Not only should the regulator be free from real bias, but also perceived bias. Indeed, the image of a regulator as independent under this definition is crucial, and “plays an integral role in maintaining public confidence in the regulator to deliver and perform its mandate.”¹²

The discussions with interviewees pointed to many of the broader challenges of regulatory independence in Canada, also described in the literature. For instance, how can a decision be long-term and outside of political short-termism (Characteristic 1), but also be sensitive to the policy/political/governmental context (Characteristic 3)?

10. Carrigan, C., and Coglianese, C. (2015). George J. Stigler, “The Theory of Economic Regulation,” in M. Lodge, E. C. Page, and S. J. Balla, eds., *The Oxford Handbook of Classics in Public Policy and Administration*. Oxford University Press.

11. OECD. (2016). *Being an Independent Regulator*. OECD Publishing, at 3.

12. Thomson, *supra* note 2 at 28.

Another challenge relates to the conflation of independence and effectiveness, and the importance of the actual quality of regulatory decisions. Ultimately, the degree to which independence is granted to an agency should depend more on their scope and remit. Independence is not the desired end, but the means to improving the mandate's effectiveness. Traits of effectiveness may incorporate a whole series of variables, such as timeliness, transparency, openness of public hearings, incorporation of non-economic considerations, and decision certainty.¹³

Thus, it is not merely to say that greater independence means greater effectiveness. In fact, better decisions and a more functional regulator could conceivably arise from granting it less independence, taking into account its mandate. Through this series of case studies, we will explore both the independence of regulators and how effective they were throughout their history, drawing on the characteristics of regulatory independence identified above.

13. This is further complicated by the fact that such traits differ in value between the stakeholders; an industry investor may see decision timeliness for projects as more critical for an effective regulator than an environmental advocate who values the ability to publicly participate in the regulator's hearing.





CASE STUDY ONE: THE CANADA ENERGY REGULATOR

INTRODUCTION

The Canada Energy Regulator (CER) is the federal energy regulator, which came into existence in 2019. Prior to 2019, the National Energy Board (NEB) was the federal energy regulator, overseeing the sector since 1959. In spite of its name and that of its predecessor, the regulatory authority of the CER is actually quite limited and does not extend to energy-at-large. The CER regulates and licenses the activities of interprovincial and international oil and gas pipelines and designed interprovincial power lines and electric utilities.

This includes the complete life cycle of an inter-provincial or international pipeline or power line project, including construction, operation, and abandonment; determining “just and reasonable” pipeline tolls and tariffs; and licensing oil/gas exports and imports. The CER includes a Commission, which, as a court of record, holds “powers, rights and privileges of a superior court.”¹ The mandate and authority of the CER is outlined under several acts, most notably, the *Canadian Energy Regulator Act*, the *Canada Oil and Gas Operations Act* and the *Canada Petroleum Resources Act*.

1. Canada Energy Regulator. (2021). *The Canada Energy Regulator's Enforcement Policy*. Retrieved from <https://www.cer-rec.gc.ca/en/safety-environment/compliance-enforcement/enforcement/enforcement-policy/the-canada-energy-regulators-enforcement-policy.html>



FORMATION, INDEPENDENCE AND REPUTATION (1959 - 1985)

On February 13, 1947, Imperial Oil made a major discovery of crude oil in Leduc, Alberta. This “Leduc No. 1” breakthrough marked the beginning of a rapidly growing industry in Canada.²

This discovery and subsequent discoveries prompted the construction of pipelines and, by relation, their adequate regulation. At the federal level, in 1949, pipeline regulation was legislated under the “hastily enacted” *Pipe Lines Act*.³ Modelled after the *Railway Act*, the already-established Board of Transport Commissioners was given the remit as the regulator of pipeline projects. Within only 38 days of being in force, the Board of Transport Commissioners approved Canada’s first interprovincial pipeline.⁴ However, this regulatory framework would be short-lived.

The National Energy Board (NEB) was established in 1959 under the *National Energy Board Act* (NEB Act). In what has been now extensively documented, the Board came about following a politically tumultuous series of events in 1956 known as the “Great Pipeline Debate.”⁵ The events revolved around the creation and financing of a Crown corporation to help build part of a TransCanada natural gas pipeline. The federal government, with a Liberal majority, was under strict financial deadlines to pass legislation establishing the Crown Corporation.

The events invoked “hot rhetoric” and appeals to “alleged American economic influence” and “Canadian Nationalism.”⁶ Ultimately, given the timeline, the government invoked closure on the debate and the bill passed swiftly. However, the outcomes of the debate displeased the public and contributed to the Liberal’s subsequent election loss in 1957 to Diefenbaker and the Conservatives.

Following the politically charged events, there was a desire for competent energy regulation to be insulated from the political process and interference; as one interviewee put it, “we needed an independent regulator to take care of pipeline decisions so they didn’t become politicized.” Two Royal Commissions in 1957 and 1958 appointed by the two different governments released reports recommending the establishment of a national energy authority. The former, the Report of the Royal Commission on Canada’s Economic Prospects (a.k.a., the Gordon Commission) was largely ignored by the incoming Conservative government. The latter Commission, the Royal Commission on Energy (a.k.a., the Borden Commission) was established by the Conservatives and would influence what would be the NEB Act and the federal regulator.

2. Gray, E. (2000). *Forty Years in the Public Interest: A History of the National Energy Board*. Douglas & McIntyre.

3. Lucas, A. R. (2018). The National Energy Board and Energy Infrastructure Regulation: History, Legal Authority, and Judicial Supervision. *Review of Constitutional Studies*, 23(1) at 28.

4. Lucas, *ibid* at 28.

5. Lucas, *ibid* at 28.

6. Lucas, *ibid* at 28.



The Borden Commission, in making its recommendations, was explicit in its desire for an independent oil and gas regulator:

*“The National Energy Board shall not be . . . subject to the direction of any specific Minister otherwise than as specified in the recommendations concerning the extent of the authority of the Board.”*⁷

In 1959, the *NEB Act* received Royal Assent and initiated the formation of the National Energy Board. While there was some initial confusion on how to square the independence of a quasi-judicial tribunal with parliamentary accountability (as witnessed during parliamentary debate on the legislation), the *NEB Act* was clear in providing the Board a great deal of flexibility and considerable powers to independently regulate energy in Canada.

Harrison describes in detail the several factors that contributed to the independence and effectiveness of the Board as a court of record with “powers of a superior court”:⁸

- The NEB had a broad public interest mandate: through its legislation, the Board was given wide discretion over its decisions, its determination of the public interest as well as the relevancy of issues to consider when reaching its decisions.⁹
- The Board had final decision-making authority: While cabinet (Governor-in-Council; GIC) had the authority to approve or reject NEB project approvals, it did not have the authority to review or amend an NEB certificate. Nor could cabinet approve a certificate if it had been already rejected by the Board. Thus, while a certificate required approval by the GIC, the NEB was the *de facto* decision-maker for approvals and the final decision-maker for rejections; NEB decisions were not recommendations to cabinet.

7. Royal Commission on Energy [Borden Commission]. (1958). *First Report*. Privy Council Office. at Recommendation 27.

8. *National Energy Board Act*, R.S.C. 1985, c. N-7, s.11.; Harrison, R. J. (2013). The Elusive Goal of Regulatory Independence and the National Energy Board: Is Regulatory Independence Achievable: What Does Regulatory Independence Mean: Should We Pursue It. *Alberta Law Review*, 50(4) at 764.

9. Furthermore, it is observed that the Board’s initial legislation was criticized for providing only vague policy principles and no energy policy guidance for the Board to follow. As Lester B. Pearson, then the Leader of the Opposition, put it, “the Board will have to develop such a policy if it wishes to use its powers consistently, according to specific principles.” Source: Pearson, L. B. (May 25, 1959). “National Energy Board.” *Library of Parliament*. 24th Parliament, 2nd session at 4001. Retrieved from https://parl.canadiana.ca/view/oop.debat.es_HOC2402_04/137?r=0&s=1



- There was a strong member appointment process and security of tenure: NEB Members were appointed for a seven-year term and held office during good behaviour.¹⁰ Additionally, they could only be removed “on address of the Senate and House of Commons.” This is the same appointment formula applied to Canada’s Supreme Court Justices.¹¹

Such features meant that the NEB possessed notable traits of judicial independence, institutional independence as well as individual independence for the board members. Such qualities of independence separated the NEB from other less independent federal regulators such as the Canadian Radio and Telecommunications Commission (CRTC) or Board of Railway Commissioners at the time.¹² Of note is that the NEB was modeled after Alberta’s independent Oil and Gas Commission Board, itself modeled after Texas’ independent railroad Commission.¹³

Given the issues of squaring regulatory independence with Canada’s parliamentary system, Harrison concludes the following regarding the 1959 NEB Act:

“[I]t is arguable that the NEB Act as originally enacted went as far as it is legally possible to go, subject to the supremacy of Parliament, to entrench the independence of a statutory, subordinate authority, in terms of both its formal, procedural independence and the finality of its decisions.”¹⁴

The NEB was unique not only in terms of its independence, but also in terms of the experimental advisory role it provided to government. Given that there was no Department of Natural Resources at the time, the NEB Act conferred responsibilities to the NEB to both study and review “specified energy matters” as well as to accept requests by the minister for advice and prepare studies on national energy topics.¹⁵

10. “During good behaviour” refers to the strength of the security of tenure for Board appointments by the GIC. If the tenure of the appoint is “during good behaviour,” this means that the appointment can only be removed for cause. Conversely, “during [or at] pleasure,” means that the GIC can remove the appointment at its discretion. Source: Government of Canada. (n.d.). *Governor in Council appointments*. Retrieved from <https://www.canada.ca/en/privy-council/programs/appointments/governor-council-appointments/general-information/appointments.html>

11. *National Energy Board Act*, *supra* note 8 at s.3(2); Harrison, *supra* note 8 at 764.

12. Janisch, H. (2012). The Relationship Between Governments and Independent Regulatory Agencies: Will We Ever Get It Right. *Alberta Law Review*, 49(4), at 807.

13. The U.S. model has been able to reconcile independent regulators to a much greater extent than in Canada. Source: Thomson, I. T. D. (2020). A Literature Review on Regulatory Independence in Canada’s Energy Systems: Origins, Rationale and Key Features. *University of Ottawa Positive Energy*. Retrieved from https://www.uottawa.ca/positive-energy/sites/www.uottawa.ca.positive-energy/files/a_literature_review_on_regulatory_independence_in_canadas_energy_systems_final.pdf

14. Harrison, *supra* note 8 at 758.

15. *National Energy Board Act*, *supra* note 8 at s.26(1); Harrison, *supra* note 8 at 769.



Some analysts saw issues with this advisory function in relation to the NEB's independence as a quasi-judicial tribunal. A 1977 Law Reform Commission study observed that such responsibilities damaged the independence; with board members taking part in committees or policy advice, their impartial adjudication could be affected by basing decisions on "political insights."¹⁶ Additionally, board members would essentially be serving as aides to cabinet, like departmental public servants. Thus, the Commission saw these functions as a detriment to the perceived independence and credibility of the Board:

"All agree that wide-spread suspicions generated by the combination of functions, whether well-founded or not, are extremely damaging to the NEB's credibility as an adjudicator. This in turn can reduce public as well as industry confidence in the Board and impair its ability to exercise its statutory mandate effectively."¹⁷

Indeed, it is interesting to note that many of the Board's earliest tasks dealt more with policymaking and less with its adjudicative role. In the Board's first annual report in 1960, it noted that "a great deal of time of the Board was devoted to the development of national oil policy."¹⁸ Additionally, Roland Priddle, a former NEB Chair, noted that during the 1960s, the Board seemed "overly involved on the policy side."¹⁹ He cites the fact that the Chairman took part in a task force on northern development despite the fact that the Board would have to deal with any northern oil pipeline applications.

However, notwithstanding some of the concerns raised by the Law Commission of Canada,²⁰ as noted above, the Board possessed significant independence and decision-making authority, more so than other federal agencies and regulators. Although there would be a few amendments over the ensuing decades, the NEB's conferred authority and substantial independence under the 1959 NEB Act would remain intact until 2012, lasting 53 years.²¹

16. Janisch, *supra* note 12 at 806.

17. Lucas, A. and Bell, T. (1977). *The National Energy Board: Policy, Procedure and Practice*. Law Reform Commission of Canada, at 35.

18. National Energy Board. (1960). *Report of the National Energy Board for the Year Ended 31 December 1960*. National Energy Board, at 2.

19. Priddle, R. (1999). Reflections on National Energy Board Regulation 1959-98: From Persuasion to Prescription and on to Partnership. *Alberta Law Review*, 37(2), at 530.

20. Lucas and Bell, *supra* note 17.

21. Harrison, *supra* note 8 at 761.



Additionally, cabinet never doubted the NEB's decisions and expertise. Over 53 years of existence, there appears to have only been one instance where cabinet withheld approval: in 1966 involving the TransCanada PipeLines Limited-Great Lakes Pipeline.²² Cabinet refused approval for the NEB certificate on concerns that the project would disrupt an all-Canadian pipeline route to eastern markets. Following a period of lobbying from industry and Alberta, a revised certificate was issued and approved addressing the government's concerns. According to Priddle, "In the 'lessons learned' department, it is clearly more trouble than it is worth to veto an NEB decision made after a public hearing."²³

Over the mid-to-late 20th century, the NEB had a well-regarded national and international reputation. It was perceived as an independent and fair adjudicator that would come to well-reasoned, fact-based decisions, as well as a stable institution in Canada's growing oil and gas economy. The Board's second Chairman Bob Howland said that the NEB was perceived to be "the smallest shop with the biggest clout in town."²⁴ Furthermore, after only a decade in operation, the Board had carved out "an exclusive policy and regulatory space" based on its technical competence, authority, and its role as the primary policy advisor on energy issues to the federal government.²⁵

One interviewee described this period and the well-regarded reputation of both the NEB and Alberta's Energy Resources and Conservation Board:

"The National Energy Board [...] was actually I think one of the most respected regulators in the world. And when I started my career, we had people come from around the world that wanted to see how the National Energy Board worked and how the old Energy Resources Conservation Board [...] worked [...] I'm not trying to be nostalgic, but I think they were generally viewed for a long time as making good decisions."

During this time, the NEB based its decisions and interpreted its broad public interest mandate on predominately economic or market-based considerations. The idea was that, through the lens of economics, decisions could be value-free, neutral, and objective. One can observe this in the way evidence was presented to the Board in an application, which often emphasized satisfying projected demand or the "economic multiplier" that a project would generate.²⁶

22. Harrison, *ibid* at 764.

23. Harrison further argued that with the 1966 decision, "[i]n both theory and reality, the Board was the final decision-maker with respect to issuing certificates." Sources: Priddle, *supra* note 19 at 528; Harrison, *ibid* at 764.

24. Dewar, E. (1980). 'Groping the Dark.' *Canadian Business*, at 30.

25. Doern G. B., and Gattinger, M. (2003). *Power Switch: Energy Regulatory Governance in the Twenty-First Century*. University of Toronto Press, at 98.

26. Lucas and Bell, *supra* note 17 at 22.



Some interviewees supported this economic lens over the way that decisions are currently being made in 2021. They noted that economic regulation provides greater certainty and stability in decision-making and, for industry proponents, does not go beyond the purview of the regulator's expertise in dealing with broader social and environmental considerations.²⁷

Additionally, Prosser describes this regulatory vision as one where regulators focus on maximizing economic efficiency while governments address social and distributive concerns. In this vision, independence is a crucial principle for the regulator.

However, other interviewees disagreed with this narrow economic lens because ultimately, economic decisions still require political judgments:

"There was a period [...] starting in the 70s and going to the early parts of this century where there was the argument that the regulator is simply providing a science of economics to make a decision and that it was value-free and neutral and objective. But I think there is a growing recognition that there's really no such thing [...] that economics is a lot more about assumptions and values and political judgment around things like the value of economic efficiency versus economic distribution."

This concept is more consistent with Prosser's second regulatory vision, whereby regulation incorporates different disciplines, taking into account economic as well as social/distributive factors into decision-making. In this vision, regulatory independence is less important and not a principle of institutional design.²⁸

Nevertheless, in the mid-to-late 20th century, the dominant vision at the NEB was that of purely economic regulation, leaving social and other policy objectives to governments. Indeed, the NEB during this time has been described as a fairly "closed regulatory shop" with only a limited number of stakeholders (predominately the affected provincial governments and industry proponents) engaging with applications.²⁹

Other stakeholders had difficulty gaining access to proceedings and expressing their perspective on a proposal.³⁰ As one interviewee stated:

"In the late 80s, there were no Indigenous groups that intervened. There were no environmental interests that intervened. The Board, through its own staff, addressed all of those issues."

27. Prosser, T. (2010). Introduction. In *The Regulatory Enterprise: Government, Regulation and Legitimacy*. Oxford, at 4-5.

28. Prosser, *ibid* at 5.

29. Doern and Gattinger, *supra* note 25 at 98.

30. Doern and Gattinger, *supra* note 25 at 100.



While the NEB took pipeline and energy facility safety seriously during the 20th century, the Board largely dismissed environmental considerations and evidence by environmental groups in their proceedings. This occurred despite the growth of conservation and environmental groups in the 1970s. In fact, the NEB resisted environmental groups on a number of high-profile proposals in Southern Ontario³¹ and in the North with such projects as the Mackenzie Valley Pipeline. Many of these groups, such as Pollution Probe, criticized the Board's proceedings as unfair and aimed to delay or disrupt Board proceedings.³² Internally, the NEB's Legal Branch argued in the 1970s that the Board's statutory jurisdiction did not allow for placing great weight on environmental evidence in decision-making. The Branch interpreted that, while environmental considerations fell within the Board's jurisdiction, the limit of its jurisdiction was reached "if it purports to deny an application solely on environmental grounds."³³ Additionally, such a denial would be based on a "wrong principle," and fail to take into account other relevant considerations.³⁴

Despite the creation of a new Environmental Group at the Board in 1972, the NEB remained in conflict with environmental groups over its decision-making. The Board also came into conflict with the newly created Department of Environment over jurisdiction and the Board's regulatory mandate, particularly with respect to proposed pipelines in the North in the 1970s.³⁵

In 1984, the Progressive Conservatives won the federal election. Led by Prime Minister Brian Mulroney, their victory supported efforts by the Board to focus on pro-market principles and deregulation. This move was trending in other jurisdictions at the time, including the U.S. and the U.K., and in the mid-to-late 90s also took hold in Nova Scotia, Alberta, Ontario and British Columbia. In 1985, the Mulroney government negotiated the Agreement on Natural Gas Markets and Prices (a.k.a., the Halloween Agreement), which set forth the deregulation of natural gas,³⁶ and the Western Accord, which removed crude oil price controls.³⁷ These agreements are said to have helped the Board "clear away the regulatory debris accumulated over the previous dozen years."³⁸ This emphasis on economic deregulation continued throughout the 80s and into the 1990s.

31. Priddle, *supra* note 19 at 532.

32. Lucas and Bell, *supra* note 17 at 30 and footnote 158.

33. Lucas and Bell, *ibid* at 31.

34. Lucas and Bell, *ibid* at 31.

35. Lucas and Bell, *ibid* at 30.

36. National Energy Board. (2015). *Market Snapshot: 30th Anniversary of the Deregulation of Canada's Natural Gas Prices*. Retrieved from <https://www.cer-rec.gc.ca/en/data-analysis/energy-markets/market-snapshots/2015/market-snapshot-30th-anniversary-deregulation-canadas-natural-gas-prices.html>

37. Government of Canada. (2013). *Why Canada Doesn't Regulate Crude Oil and Fuel Prices*. Retrieved from <https://www.nrcan.gc.ca/energy/fuel-prices/4601>

38. Priddle, *supra* note 19 at 543.



In summary, the NEB came into existence in a period where there was a desire to insulate important national energy decisions from political intervention. Despite an experimental advisory function, the initial 1959 legislation provided the NEB with substantive independence similar to the judiciary and flexibility to regulate in the public interest.

The NEB would develop a well-regarded reputation, regulating applications through a predominately economic lens. The Board largely dismissed other considerations, most notably environmental concerns from the growing environmental movement in the 1970s. In 1985, the Mulroney government, like other western governments at the time, would explore the deregulation of utilities at the federal level. This ethos would be maintained into the 1990s as the Board made its move out west to Canada's energy capital.



DEREGULATION, FRAGMENTATION AND A GROWING CONTEXT (1985 - 2012)

In the 1980s and 90s, the NEB continued to emphasize deregulation and improving regulatory efficiencies in carrying out its mandate. This included permitting – even encouraging – negotiated settlements over tolls between pipeline companies and customers without public hearings. The Board published guidelines for such settlements in the late 1980s. While the absence of public hearings may have compromised transparency, Priddle spoke highly of the innovation stating that “they have brought to an end a quarter-century of fractious adversarial public hearings relating to rate matters.”³⁹

In addition to streamlining the regulatory process, the Board also engaged in cutting inefficiencies by reducing the size of the organization. In the mid-80s, the number of NEB staff had been cut in half; by the mid-90s, the Board stood at roughly 270 employees.⁴⁰ There was also a reduction in the number of board members from 13 to a maximum of 9 board members, as well as a slight reduction in their overall budget in real dollars from the early 1970s to late 90s.⁴¹

The Board’s move from Ottawa to Calgary in 1991 sparked further internal and cultural changes. Today, energy is Alberta’s dominating sector; while less dominant in 1991, oil and gas still made up roughly a fifth of the province’s gross domestic product (GDP).⁴² The NEB’s move to Calgary replaced Ottawa’s public service bureaucracy with Calgary’s energy industry. As Doern and Gattinger (2003) put it, “[a]n NEB staff member in Calgary is likely to have lunch with an energy businessperson rather than . . . another bureaucrat.”⁴³ There were also many NEB staff who did not make the move from Ottawa to Calgary. Their positions were replaced by local talent who more conveyed “the business-oriented culture of the Calgary milieu.”⁴⁴ Their business-focus ethos, coupled with the federal focus on deregulation, led to greater attempts to streamline the regulator. In 1996, an internal restructuring saw the Board move from ten branches to five “process-based business units.”⁴⁵ The move to Calgary and subsequent culture changes, along with new self-financing tools that gave the Board greater financial independence⁴⁶ continued to push the Board towards a pro-market orientation and deregulation.

39. Priddle, *supra* note 19 at 546.

40. Doern and Gattinger, *supra* note 25 at 102.

41. Priddle, *supra* note 19 at 538; Doern and Gattinger, *ibid* at 102-103.

42. Anielski, M. (2002). The Alberta GPI: Economy, GDP, and Trade. *Pembina Institute*, at 31. Retrieved from https://www.pembina.org/reports/01_GPI_EconomyGDPandTrade_tchrpt.pdf

43. Doern and Gattinger, *supra* note 25 at 103.

44. Doern and Gattinger, *ibid* at 103.

45. National Energy Board. (1997). *Welcome to the Transformation*. National Energy Board.

46. The NEB operational costs were previously covered by federal budget appropriations. In its 1993 Annual Report, the Board observed that 85 percent of its funding was recovered through fees from the regulated industry. That said, the Board did not collect money directly from industry. The levy was paid directly to Ottawa and then budgeted to the Board in accordance with Treasury Board rules and policies. Source: National Energy Board. (1994). *Annual Report 1993*. National Energy Board, at 1-5.



Despite the Board's established reputation, these changes also marked the beginning of concerns that the regulator was developing too cozy a relationship with the regulated energy industry. Critics noted that the move to Calgary created a "petro culture" at the Board.⁴⁷ Canada is the only one of two industrialized democracies where the national energy regulator is not located in the capital, the other country being Norway.⁴⁸ Further concerns related to the Board being almost entirely funded by the energy industry. This is a common critique when a regulator possesses financial independence from government.⁴⁹ Thus, concerns over regulatory capture, with an institutional bias towards certain stakeholders (in this case the regulated industry), have become more prevalent over the years following the move to Calgary.

Throughout the 1990s, the Board would continue to engage in economic regulation, allowing market forces to decide the fate of energy projects. As in previous decades, the government did not interfere in the NEB's decisions on projects that were of great economic significance to Canada. Indeed, while there were declines in natural resource wealth at points in the 1990s, Canada's natural resource wealth, which measures the dollar value of selected natural resource stocks (including energy resources) stood at \$391 billion in 1990.⁵⁰

The NEB had independence from government with its decisions and was quite proud of its quasi-judicial adherence to the rule of law and consistent decision-making principles.

However, as the decades progressed into the 1990s and 2000s, concerns over social, environmental, and Indigenous interests grew in Canada and altered the Board's functions and effectiveness. These changes affected how the NEB interpreted its mandate and how it made decisions because they led to a redefinition of its jurisdiction in relation to other agencies.

The Board's description of its own mandate and goals expanded to include social and environmental considerations. The initial NEB Act enabled the Board to adjust its mandate to the changing social context. The Board's 1999 annual report to Parliament outlined the Board's purpose as the following:

"The National Energy Board's purpose is to promote safety, environmental protection and economic efficiency in the Canadian public interest while respecting individuals' rights within the mandate set by Parliament in the regulation of pipelines, energy development and trade. . . The Board's vision is to be a respected leader in safety, environmental and economic regulation."⁵¹

47. Eliesen, M. (2016, Sept. 9). National Energy Board is a Captured Regulator in Urgent Need of Overhaul. *The Narwhal*. Retrieved from <https://thenarwhal.ca/national-energy-board-captured-regulator-urgent-need-overhaul/>

48. Bird, S. (2017). The Policy-Regulatory Nexus in Canada's Energy Decision-making: From Best Practices to Next Practices. *University of Ottawa Positive Energy*. Retrieved from https://www.uottawa.ca/positive-energy/sites/www.uottawa.ca/positive-energy/files/interim_best_practices_discussion_paper.pdf; Norwegian Petroleum Directorate. (n.d.). *About us*. Retrieved from <https://www.npd.no/en/about-us/>

49. Rees, S. (2010). *Regulatory Capture* [Blog post]. Retrieved from <https://stephenrees.blog/2010/09/13/regulatory-capture/>

50. This continued to grow well into the 2000s. Source: Islam, K., and Adams, P. (2010). *Natural resource wealth, 1990 to 2009*. Statistics Canada. Retrieve from <https://www150.statcan.gc.ca/n1/pub/16-002-x/2010002/article/11284-eng.htm#ftn8>

51. National Energy Board. (2000). *1999 Annual Report*. National Energy Board, at 6. Retrieved from <http://publications.gc.ca/Collection/NE1-1999E.pdf>



It was becoming clear to the Board that it needed to broaden its public interest mandate. However, despite this reformulated mandate and the creation of initiatives such as the Environmental Management Program, some interviewees suggested that the NEB was less than welcoming to these changes: the Board did not want to move outside its “court of public record” philosophy (described as “a deep part of their culture”) nor did it wish to engage in trust-building with the public and stakeholders.

The growing importance of social and environmental considerations also led to greater fragmentation of decision-making jurisdiction away from the NEB. The NEB was created as an independent, single-shop agency to regulate energy at the federal level. It was viewed as a competent and expert agency, however, there were clear tensions with other agencies or departments when they appeared to encroach on the NEB’s jurisdiction. This was seen in the 1960s with the creation of the Department of Energy, Mines and Resources and was seen again in the 1990s in the domains of transportation safety and environmental assessments.

The Transportation Safety Board was created in 1990 as an independent agency with a mandate to advance transportation safety, including for pipelines. According to one interviewee, the Safety Board possessed some jurisdiction over the NEB in terms of transportation safety. This interviewee characterized the change as having been thrown in “at the last minute”, even though the NEB already had jurisdiction to investigate such matters. Again, according to this interviewee, the NEB wished to remove itself from under the Safety Board’s purview, as it was believed to have diminished the NEB’s decision-making authority.

Another critical area of decision-making fragmentation, whereby the Board’s previously centralized decision-making jurisdiction was usurped and given to other agencies, concerned the expansion of environmental assessments. In the late 1980s and early 1990s, federal courts determined that federal environmental assessment “guidelines” were law-like in nature, rather than a “discretionary, non-binding process for federal decision making.”⁵² Following these decisions, the government went about establishing a federal environmental assessment law. In 1995, the Canadian Environmental Assessment Act came into effect.⁵³ While the NEB had engaged in environmental policy prior to this, the new legislation required the Board to work closely with the Department of the Environment’s new Canadian Environmental Assessment Agency⁵⁴ (CEAA) to ensure efficient and non-duplicative joint review processes as well as effective environmental assessments.

52. Powell, B. H. (2014). *Environmental Assessment & the Canadian Constitution*. Alberta Law Foundation, Environmental Law Centre, at 9. <https://elc.ab.ca/media/94543/EAConstitutionBriefFinal.pdf>; Doern, G. B., and Conway, T. (1994). *The Greening of Canada*. University of Toronto.

53. Office of the Auditor General of Canada. (2009). *2009 Fall Report of the Commissioner of the Environment and Sustainable Development*, at 1.1. Retrieved from https://www.oag-bvg.gc.ca/internet/english/parl_cesd_200911_01_e_33196.html

54. Doern and Gattinger, *supra* note 25 at 108.



The new legislation outlined the different types of environmental assessments, and identified the Board as a “responsible authority.” These new responsibilities challenged the Board in multiple ways: (1) there was a steep learning curve given the different environmental assessment processes; (2) the NEB held a quasi-judicial role while the other ministerial departments involved in the joint review processes were more administrative in their decision-making; and (3) the NEB and the Department of Environment did not agree on what processes would work best in different applications.⁵⁵

In sum, under the new legislation, the NEB ceased being a fully independent regulator with a broad mandate to exclusively regulate energy projects. New institutions like the Canada Environmental Assessment Agency meant division of power in energy decision-making.

As the Board entered the 2000s, environmental considerations, including conservation and climate change, continued to alter how the NEB interpreted its mandate. There was also a growing national and international public anti-oil sands movement.

During this period, Indigenous participation and the Crown’s duty to consult also became a growing focus. Aboriginal legal activism in relation to the NEB and national energy projects coincided with the environmental movement in the 1970s. In 1977, the Berger Report, the final report of the Mackenzie Valley Pipeline Inquiry led by Justice Thomas R. Berger, examined the socioeconomic and environmental impacts of building a natural gas pipeline in Canada’s North. It was said to have galvanized support for the environmental and Indigenous activist movement.⁵⁶ The inquiry had more resources to engage in consultation than a typical NEB hearing at the time, and also placed greater weight on the concerns of Indigenous communities than the NEB’s decision on the project. While there are important differences between what a non-binding independent inquiry can produce compared to a quasi-judicial tribunal, the Berger report was nevertheless an important part of Indigenous law in Canada; it has been described as “ahead of its time”, especially in terms of understanding the legal potency of land claims by Indigenous groups in Canada’s North.⁵⁷

55. Doern and Gattinger, *ibid* at 109.

56. Popowich, M. (2007). The National Energy Board as Intermediary Between the Crown, Aboriginal Peoples, and Industry. *Alberta Law Review*, 44(4). 837-861.

57. Popowich, *ibid* at 850.



By the early 2000s, Canada's federal courts were re-evaluating the jurisprudence around Indigenous consultation and the Crown's duty to consult found in Section 35 of the Canadian constitution. Known as the "consultation trilogy", the three Supreme Court of Canada (SCC) cases of Haida Nation, Taku River and Mikisew Cree in 2004-2005 confirmed and expanded the Crown's duty to consult with Aboriginal peoples, as well as applied this duty to situations when Aboriginal peoples have a treaty with the Crown.⁵⁸ However, questions remained over the Board's role in this expansion. Established case law only dealt with the Board's fiduciary duty to Aboriginal peoples; in *Quebec (A.G.) v. Canada (National Energy Board)* in 1994, the SCC determined that the Board did not have a fiduciary duty given that it was a quasi-judicial body. Yet, with this expansion, it was not clear whether this precedent would hold. Given these developments, uncertainty would remain for many years. In 2008, industry stakeholders saw Aboriginal consultation as the "the most critical issue to be resolved" and that related uncertainty and risk were "a significant impediment to project implementation and to the business climate as a whole."⁵⁹ Interviewees emphasized that these changes in context and priorities with regards to the environment and Indigenous reconciliation significantly affected the NEB's operations.⁶⁰

How did the NEB respond to these emerging and growing challenges? Some interviewees identified a shift in the Board's conduct in the mid-to-late-2000s. Participants indicated that, instead of seizing the moment to become "more than just a court of public record", the NEB was inhibited by its culture and "hubris". This led to fear and bewilderment over the declining trust in the regulator to regulate effectively. For instance, in 2009, environmental groups had low trust in the NEB to effectively fulfill its environmental responsibilities.⁶¹ Additionally, some interviewees saw that the NEB was losing its world-renowned expertise to industry groups and the regulated energy companies; as one interviewee noted, while private industry was able to lean on hundreds of the best pipeline engineers, the NEB "were leaning on, you know, five guys to take a 20 per cent pay cut to go work at a regulator. [...] I'm sorry but you have to at some point say, 'how are you going to leapfrog excellence?'"

Additionally, the Board's workload was increasing significantly all "while the ground beneath the NEB... shifted dramatically with respect to certain stakeholders in the regulatory process."⁶² Interview participants from industry and the regulatory community also noted that the NEB faced new problems with application hearings. While hearings were becoming more transparent, they were also becoming bigger, more complex and time-consuming as more stakeholders wished to participate in an attempt to gain public licence with applications.

58. Popowich, *ibid* at 839.

59. Wallace, B. G. (2008). *Updated Final Report: CEPA 'Look-Back' Project* [Unpublished report], at 30.

60. As one interviewee stated: "the context has changed with respect to environment, Indigenous rights in particular... Indigenous rights and attention to Indigenous rights and environmental issues have certainly been a large part of that [change in context]."

61. Laufenberg, K., Powell, G. and Whittingham E. (2009) *NEB-ENGO Engagement Project: Overview and Recommendations* [Unpublished report].

62. Popowich, *supra* note 56 at 838.



Savage (2016) analyzed and criticized concerns about extensive public hearings, specifically in reference to the Northern Gateway Pipeline project.⁶³ Northern Gateway was a pipeline project proposed by Enbridge in 2006. The project was to run from the Alberta oil sands through northern B.C to Kitimat.⁶⁴ While Alberta's and federal governments supported the project, environmental activists were fervently against it. The joint panel to review the project application was established by the Minister of the Environment and the NEB Chair in January 2010. Over the length of the application process, Savage notes that "4,554 applications to make an oral presentation were received by the Joint Review Panel, 221 applications for registered intervener status were submitted, and another 5,582 people had already filed letters for comment."⁶⁵ Savage saw this significant level of engagement as a disruption tactic led by environmental non-profit organizations, with the goal of slowing down pipeline regulatory approvals tied to the oil sands. Such tactics were seen with other projects such as the Enbridge Line 9 Reversal Phase 1 Project pipeline in the early 2010s.⁶⁶

In addition to the Northern Gateway project beginning its application process with the NEB, in 2006, Stephen Harper was elected Prime Minister of Canada. Harper's election was notable in the history of Canada's energy and independent regulation for a few reasons. Over the years, he intervened more directly into the affairs of ostensibly arm's length federal regulators than previous governments.⁶⁷ This was seen with such instances as the Canadian Nuclear Safety Commission (CNSC) and its decision to shut down an isotope-production reactor in 2007 (also known as the Isotope Crisis);⁶⁸ and the CRTC in 2008 with its Usage Based Billing decision.⁶⁹

Analysis on this intervention has been mixed. While academics such as Janisch (2012) note that the government showed "a complete disregard to the legal regime which had been put in place. . ."⁷⁰ in reference to the CRTC decision, others argue that questionable actions taken (or not taken) by the regulator itself led elected officials to hold the regulator accountable for its decisions. With the CRTC and the CNSC, the allegation was that the regulators did not sufficiently consider the necessary wider societal context and impacts when coming to their expert decisions. As one interviewee put it, they were "regulating without context."

63. Savage, S. (2016). Bill C-38 and the Evolution of the National Energy Board: The Changing Role of the National Energy Board from 1959 to 2015. *Canadian Institute of Resources Law*. Retrieved from <https://prism.ucalgary.ca/bitstream/handle/1880/51110/EvolvingRoleOP52w.pdf?sequence=1&isAllowed=y>; Savage was at the Canadian Energy Pipeline Association at the time of her publication. She is now Minister of Energy in the Province of Alberta.

64. Government of Canada. (2021). *Northern Gateway Pipelines Project*. Retrieved from <https://www.nrcan.gc.ca/our-natural-resources/energy-sources-distribution/clean-fossil-fuels/pipelines/energy-pipeline-projects/northern-gateway-pipelines-project/19184>

65. Savage, *supra* note 63 at 9.

66. Savage, *ibid* at 9-10.

67. Sossin, L. (2008). The Puzzle of Independence for Administrative Bodies. *National Journal of Constitutional Law*, 26, 1-23.

68. Smith, J. (2009, May 26). Isotope crisis worse now: Ex-nuclear head. *The Toronto Star*. Retrieved from https://www.thestar.com/news/canada/2009/05/26/isotope_crisis_worse_now_exnuclear_head.html

69. Janisch, *supra* note 12 at 786.

70. Janisch, *ibid* at 786.



However, the important point to note here is that Harper was not afraid to intervene into regulators' decision-making and to pursue greater democratic accountability (the other side of the coin of regulatory independence) for expert regulators.

In addition to greater regulatory interventionism, Harper and the Conservatives made it clear that they supported pipeline projects and the need for a more efficient regulatory process for pipeline approvals. In 2007, the Major Pipelines Management Office (MPMO) was created to deal with delays and the "lack of coordination in Canada's regulatory system."⁷¹ As a horizontal initiative, the MPMO coordinates with several different federal departments and agencies, including the federal energy regulator.⁷² It has been described as the point of entry for the federal approval process with a desire to provide policy leadership and improve certainty, transparency, and timeliness of regulatory reviews. As one interviewee put it, its creation was intrinsically tied to issues at the NEB: "I felt that at the time, we were losing the independence of a regulator."

As the years went on, the Conservative government grew more frustrated with the pipeline regulatory process, the timeliness of hearings and anti-pipeline sentiment led by the environmental movement. In January 2012, Minister of Natural Resources, Joe Oliver penned an open letter to Canadians regarding the tactics by "environmental and other radical groups" in hijacking the regulatory system by stacking public hearings.⁷³ In the letter, Oliver also noted the timeliness of regulatory decisions:

"Anyone looking at the record of approvals for certain major projects across Canada cannot help but come to the conclusion that many of these projects have been delayed too long. In many cases, these projects would create thousands upon thousands of jobs for Canadians, yet they can take years to get started due to the slow, complex and cumbersome regulatory process."⁷⁴

This backdrop of a more complex regulatory system and hamstrung decision-making would lead to some of the biggest changes to the NEB's structure since its inception in 1959.

71. Government of Canada. (2007, Oct. 1). *Canada's New Government Launches Major Projects Management Office* [Press release]. Retrieved from <https://www.canada.ca/en/news/archive/2007/10/canada-new-government-launches-major-projects-management-office.html>

72. Government of Canada. (2018). *Major Projects Management Office Initiative (MPMOI)*. Retrieved from <https://www.nrcan.gc.ca/nrcan/transparency/reporting-accountability/plans-performance-reports/major-projects-management-office-initiative-mpmoi/21505>

73. Oliver, J. (2012, Jan. 9). *An Open Letter from the Honourable Joe Oliver, Minister of Natural Resources*. *Global News*. Retrieved from <https://global-news.ca/news/197214/an-open-letter-from-the-honourable-joe-oliver-minister-of-natural-resources/>

74. Oliver, *ibid*.



In summary, in the late 1980s and early 90s, the NEB emphasized deregulation and market-focused regulation and streamlined both its processes and the organization. Its move out to Calgary was a turning point, trading the public service bureaucracy for closer geographical proximity to the industry it regulated. The move fed growing concerns over regulatory capture. New agencies and legislation distributed decision-making authority over energy issues across multiple agencies and changed how the NEB pursued its mandate. However, interviewees questioned whether the NEB was actually interested in moving away from being just a court of public record. The expanding role of social and environmental considerations strained the organization as public hearings became more open, longer, larger and more complex. While still relatively independent, some observers questioned whether the NEB still possessed the necessary expertise to effectively address these unique challenges. In 2006, a new government grew concerned over the direction of the regulatory process for pipelines, as illustrated prominently by the hearings for the Northern Gateway pipeline. The new government was also not afraid to intervene with other agencies' operations. This context culminated in the amendments under Bill C-38, which fundamentally changed the structure of the NEB after 53 years.



C-38, PIPELINES AND MODERNIZATION (2012 - 2018)

In March 2012, Bill C-38, the *Jobs, Growth and Long-Term Prosperity Act* was introduced as part of the 2012 Budget. As an omnibus bill, there were several sweeping amendments made to the NEB Act, made in conjunction with the government's "Responsible Resource Development" policy.⁷⁵ While some saw these amendments as direct responses to issues surrounding the Northern Gateway hearing process, others saw these changes as inevitable given the growing complexity of the energy system in Canada, the growing importance of major pipeline projects for Canadian society, and the fact that the NEB's structure had been essentially unaltered for 53 years.⁷⁶ In reading out the Bill, Minister Oliver cited the need for greater accountability and clarity over decision-making for energy projects of economic and national importance:

"We believe that for major projects that could have a significant economic and environmental impact, the ultimate decision-making should rest with elected members who are accountable to the people rather than unelected officials. Canadians will know who made the decision, why the decision was made and whom to hold accountable."⁷⁷

Interviewees cited the 2012 amendments as a critical part of the NEB's history through the lens of independence. Additionally, the NEB itself observed that the amendments "included some of the most significant changes to the NEB Act since its implementation in 1959."⁷⁸ The 2012 changes affected the NEB's decision-making authority and critical aspects of its procedures, including the authority of the NEB Chair over individual board members.

As discussed previously, pre-2012, the NEB had finality over decisions: cabinet could only approve or reject but not amend a Board's decision, nor could cabinet approve a project that had been rejected by the NEB. In 2012, the NEB's role was re-defined so it was no longer the final decision-maker; rather the NEB would only make recommendations on applications to the GIC. Cabinet would have final authority over approval or denial of a project taking into consideration the NEB's recommendation. While the NEB would still issue licences, it would only do so following cabinet direction. In the event that the NEB rejected an application, the Board would still have to provide the terms and conditions which the project would have to satisfy in the event cabinet wished to approve the project.⁷⁹ Additionally, cabinet could also now send the decision back to the NEB to reconsider the application and to take into account any factors specified in a GIC order, as well as specify the time limit for the reconsideration.

75. Savage, *supra* note 63 at 12.

76. Harrison, *supra* note 8 at 758.

77. Oliver, J. (2012, May 2). "Jobs, Growth and Long-term Prosperity Act". Parliament of Canada. *House of Commons Hansard*. 41st Parliament, 1st Session at 7471. Retrieved from <https://www.ourcommons.ca/Content/House/411/Debates/115/HAN115-E.PDF>

78. National Energy Board. (2012). *Annual Report to Parliament*. National Energy Board, at 7. Retrieved from <https://www.cer-rec.gc.ca/en/about/publications-reports-annual-report/archive/2012/nlprpt2012.pdf>

79. Harrison, *supra* note 8 at 770-773.



The amendments also imposed procedural constraints through mandatory time limits for applications. The Board Chair now had the ability to both decide on time limits (not to exceed 15 months) and to enforce these limits. The Minister and GIC had greater authority to extend the time limit. The Chair was able to replace board members on applications should the time limits not be adhered to. The Chair also had authority to assign board members to panels and cases. This had previously been performed by the full Board.⁸⁰

There were also changes to the pipeline hearing process itself. Specifically, new restrictions limited interventions in a hearing to those who were directly affected by the proposal or offered relevant expertise. Additionally, the scope of consideration for the NEB in a hearing was narrowed to factors “directly related to the pipeline and to be relevant.”⁸¹ Lastly, changes made to the *Canadian Environment Assessment Act* meant that there would be no longer be joint review panels conducted by both the NEB and the CEAA. Rather if a CEAA-eligible project fell under the NEB’s jurisdiction, the NEB conducted the sole environmental assessment review; if it did not fall under the NEB’s jurisdiction, the CEAA conducted the assessment.

Thoughts on the amendments varied between affected stakeholders. Environmental advocacy organizations were swift in their criticism of the amendments, with concerns over regulatory capture by industry at the NEB.⁸² Conversely, resource industry associations such as the Canadian Energy Pipeline Association, were supportive of the changes to help ensure a “more effective, efficient and timely regulatory process.”⁸³

In terms of regulatory independence, some academics did not think much of the 2012 changes. Savage noted that case law and the Westminster system meant that the NEB’s independence was and never will be absolute and that the final decision of a proposal was always a political decision in the end. Rather, the independence of a Board comes from its ability to make decisions outside of political interference and not from the finality of the decisions.

80. Harrison, *ibid* at 773-776.

81. *National Energy Board Act*, RSC 1985, c N-7, s. 52(2)

82. Ecojustice. (2012). *Legal Backgrounder: The National Energy Board Act (1985)*. Retrieved from https://www.ecojjustice.ca/wp-content/uploads/2015/03/SEPT-2012_FINAL_NEBA-backgrounder.pdf; Pembina Institute. (2012, Jun. 19). Pembina reacts to passage of Bill C-38 [News release]. Retrieved from <https://www.pembina.org/media-release/2351>

83. Canadian Energy Pipeline Association. (2012, Mar. 29). *Canadian Energy Pipeline Association: Regulatory Reforms Focus on Issues Important to the Pipeline Industry* [News release].



Savage viewed the changes made by the Bill and criticism over regulatory capture at the Board at the time as overblown, yet acknowledged that the public now perceives the Board as less independent:

“But are these criticisms of the Board justified? Has anything really changed as a result of Bill C-38? An examination of each of the four main amendments under Bill C-38 has shown that the role of the Board has not fundamentally changed as a result of the streamlining of the process. But this is not the public view. The public tends to believe it is a ‘rigged game,’ a ‘gutted process’ and a regulator that is captured. There appears to be a growing divide between what Bill C-38 has actually changed and what special interest groups believe or would like. . . the public to believe has changed. This difference is fundamental.”⁸⁴

Others have been more critical of the 2012 amendments and the changes they have made to the perceived procedural and individual independence of the NEB and its board members. Harrison (2012) firstly notes, like Savage, that final decision-making authority does not need to be vested in the regulator for it to be independent. However, if independence means that decisions are independent “from the political level of government”, the changes negated the Board’s independence.⁸⁵

Secondly, in terms of perceived independence, the amendments and the change from decisions to recommendations meant that the Board “could be more susceptible to being influenced by what it perceived to be the likely final outcome.”⁸⁶ Thirdly, the restrictions on timelines could affect the independence of the NEB’s procedures to meet imposed deadlines and exercise expertise in coming to quality, fact-based decisions in the public interest. Lastly, granting more authority to the Chair (at the expense of the board members) hampers individual independence and a panel’s ability to be “master of their own procedure.”⁸⁷ Upon analyzing the 2012 changes, Harrison concludes with the following:

“The independence of the NEB must now be understood differently. The Board has a fundamentally different role with respect to applications for pipeline projects within its jurisdiction [. . .] Even within that redefined role, however, the Board’s independence has been seriously undermined by the imposition of time limits and the discretionary authority of the Chairperson to intervene in the process of an individual panel to ensure that those time limits are adhered to. Only experience will demonstrate whether the perception of the Board as being independent will be maintained within its new role and whether other elements of the recent amendments will be sufficient to hold Cabinet accountable for the ultimate decision-making authority that it has now assumed.”⁸⁸

84. Savage, *supra* note 63 at 30-31.

85. Harrison, *supra* note 8 at 776.

86. Harrison, *ibid* at 776.

87. Harrison, *ibid* at 777.

88. Harrison, *ibid* at 781.



Throughout the 2010s, major pipeline applications dominated newspaper headlines, and Canadian society was fiercely divided over whether the “social licence” for these projects should be granted. The four pipelines that divided Canada were Keystone XL, Northern Gateway, Energy East, and the Trans Mountain expansion pipeline. The significance that was placed on these projects and what they represented for Canada’s energy future and tackling greater societal problems like climate change placed the NEB at the heart of an existential argument as to what Canada wished to become as a nation. This is a long way from the economic lens that the NEB had applied almost exclusively in decades prior. Interviewees as well as the recent NEB Modernization Panel all noted that the NEB and now CER were/are not equipped to handle such substantive questions at their technocratic hearings.⁸⁹ These pipelines also sparked divisions among Canada’s provinces, with British Columbia, Alberta, and Quebec taking varying positions on the interprovincial projects.⁹⁰ Interviewees noted how these pipeline application processes shaped the evolution of the NEB and how they exemplified the declining effectiveness of the Board with respect to application timeliness. These pipeline projects contributed to declining public trust and investor confidence in Canada’s regulatory management.

Following the 2012 amendments, the NEB became aware of the growing public interest in these pipelines and their hearing processes. The NEB was also aware of concerns by some stakeholders over regulatory capture and the regulator’s close relationship with industry. Under the leadership of NEB’s CEO and Chair Peter Watson, the Board engaged in several initiatives to reach out and engage with the public and stakeholders. This included a cross-Canada initiative to “better understand what Canadians are thinking when it comes to pipeline safety and environmental protection”⁹¹ and setting up offices in both Montreal and Vancouver to further build relationships with local communities and stakeholders. Watson himself engaged in a speaking tour. In their annual report, the NEB emphasized its efforts on public engagement, stating that the Board “wants to make certain that Canadians know they have a regulator they can rely on.”⁹² One interviewee observed that the Board became more open and interactive with the public and stakeholders and now met directly with stakeholders. Previously, the regulator (as well as other regulators in Canada) referred stakeholders to the formal regulatory process as the sole way to engage with the Board.

89. Expert Panel on the Modernization of the National Energy Board. (2017). *Forward, Together: Enabling Canada’s Clean, Safe and Secure Energy Future*, at 18. Retrieved from <https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/pdf/NEB-Modernization-Report-EN-WebReady.pdf>

90. Bratt, D. (2021). *Energy-Environment Federalism in Canada: Finding a Path for the Future*. *University of Ottawa Positive Energy*. Retrieved from https://www.uottawa.ca/positive-energy/sites/www.uottawa.ca.positive-energy/files/energy_federalism_web.pdf

91. National Energy Board. (2014, Nov. 24). *NEB Chair Announced Cross-Canada Engagement Initiative* [News Release]. Retrieved from <https://www.newswire.ca/news-releases/neb-chair-announces-cross-canada-engagement-initiative-516524181.html>

92. National Energy Board. (2015). *Annual Report 2014 to Parliament*, at 3. Retrieved from <https://www.cer-rec.gc.ca/en/about/publications-reports/annual-report/archive/2014/nnlrprt2014-eng.pdf>



However, these very initiatives led to a further erosion of public confidence in 2015 and 2016 when board members met with Jean Charest at the NEB's Montreal office to discuss the Energy East pipeline.⁹³ As one interviewee put it, the Board was in the news "for all the wrong reasons" with Energy East. The proposed TransCanada pipeline would have carried oil from Alberta to refineries in Quebec and then on to New Brunswick. The 4,500 km route was also the largest ever pipeline proposed in Canada.⁹⁴ However, like the Northern Gateway and Trans Mountain, the project was opposed by some stakeholders including Indigenous communities, environmentalists, local landowners and municipalities. Conversely, the business community supported the project, citing its ability to export oil to international markets, increase profits and jobs, and promote domestic use of Canada's natural resources.⁹⁵ On January 15th, 2015, three NEB Board Members (two of which sat on the panel for the Energy East pipeline application) privately met with stakeholders. Included at this meeting was Jean Charest, a former Quebec premier who was then a lobbyist for TransCanada and the Energy East project.

The meeting of quasi-judicial board members with the project's industry lobbyist sparked public outrage and supported the growing perception that the post-2012 Board was "captured."⁹⁶ One interviewee laid the blame directly on the NEB: by taking this meeting with people "who clearly had a conflict of interest", the regulator was hit with "self-inflicted gunshot wounds." The original Energy East panel would ultimately recuse themselves from the application in September 2016 due to a reasonable apprehension of bias.⁹⁷ However, the damage was already done. The events cast doubt on both the independence of the NEB, the independence of its board members, and the fairness and objectivity of the Board's decision-making processes.

As noted, these pipelines were major policy decisions at a time when there was no consensus among stakeholders and the public. Additionally, as observed with Energy East, some stakeholders, particularly from environmental groups and Indigenous communities, started questioning the NEB's processes, legitimacy, and whether the NEB was capable of coming to fair, objective, and independent recommendations on these important issues.

93. De Souza, M. (2016, Aug. 29). What is the Charest affair and why should I care. *Canada's National Observer*. Retrieved from <https://www.nationalobserver.com/2016/08/29/analysis/what-charrest-affair-and-why-should-i-care>

94. De Souza, *ibid*.

95. De Souza, *ibid*.

96. Matthews, L. (2017). How to Restore Public Trust and Credibility at the National Energy Board. *C. D. Howe Institute*, at 11. Retrieved from https://www.cdhowe.org/sites/default/files/attachments/research_papers/mixed/Commentary%20479.pdf at 11.; *The Energy Mix*. (2016, Oct. 21). Four New NEB Appointees Will Consult Along Energy East Route. *The Energy Mix*. Retrieved from <https://www.theenergymix.com/2016/10/21/four-new-neb-appointees-will-consult-along-energy-east-route/>

97. Matthews, *ibid* at 5.



Groups that opposed the projects intervened by various means, including formal press releases calling for the suspension of projects and questioning the process; informal protests at proposed construction sites; and directly in the NEB hearing rooms.⁹⁸

This question of legitimacy over federal energy processes and decisions would extend to Canada's court system. Over time, stakeholders took their concerns to federal courts, questioning the legality and constitutionality of pipeline applications, NEB certificates, and the approval granted by the Order-in-Council. Of particular importance were court filings raising issues over the Crown's duty to consult and accommodate. Over the 21st century, Canada's courts would become more explicit about the duties of the Crown to honour Indigenous consultation and its obligations to adequately consult with Indigenous Communities. As previously noted, earlier case law held that the NEB did not have a fiduciary duty to Indigenous peoples because it was a quasi-judicial, independent arm's length body.⁹⁹

At this time, Indigenous considerations and consultation for proponents were dealt with through direct interventions in hearings (rather than the NEB having a specific Indigenous policy), or (beginning in the mid-90s) by placing responsibility for consultation on the private sector, with the government playing a limited role.¹⁰⁰

As discussed, new case law in the early 2000s expanded the Crown's Duty with Aboriginal Peoples.¹⁰¹ In 2002, the NEB released a Memorandum of Guidance on consultation with Aboriginal Peoples, which confirmed the Board's existing policy of consultation as the responsibility of the private sector. As Popowich stated, the Board had "ambivalence" and was not "seriously committed to changing its practices" from placing the onus on the private sector.¹⁰² While 2010's SCC case *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* considered "the role of a tribunal in determining an application for approval by a Crown agent," as the 2000s and 2010s progressed, uncertainties and questions remained regarding the regulatory tribunal's role in consultation.¹⁰³

98. The Canadian Press. (2017, Oct. 5). Controversial events in the history of TransCanada's Energy East Pipeline. *The Financial Post*. Retrieved from <https://financialpost.com/pmn/business-pmn/controversial-events-in-the-history-of-transcanadas-energy-east-pipeline>

99. *Quebec (A.G.) v. Canada (National Energy Board)*, [1994] 1 SCR 159 at para. 37.

100. Popowich, *supra* note 56 at 853-854.

101. *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511.

102. Popowich, *supra* note 56 at 853.

103. Adkins, S., Millen, R., and Nykolaishen, S. (2017). SCC Confirms the Role of Regulatory Tribunals in Aboriginal Consultation. *Blakes LLP*. Retrieved from <https://www.blakes.com/insights/bulletins/2017/scc-confirms-the-role-of-regulatory-tribunals-in-a>



In the mid-to-late 2010s, the courts' interpretation of Section 35 of the Constitution and the Crown's duty to consult played a substantial role in the quashing of pipeline certificates and evaluating government's and the NEB's decision-making process. In 2016, the Federal Court of Appeal (FCA) in *Gitxaala Nation v. Canada* [Gitxaala Nation] quashed the approval of the Northern Gateway pipeline project due to Canada not fulfilling its duty to consult (the FCA saying consultation fell "well short of the mark.")¹⁰⁴ The GIC could not have made the Order-in-Council to the NEB to issue a certificate unless Canada fulfilled "the duty to consult owed to Aboriginal peoples."¹⁰⁵ The court quashed the Order in Council and its certificate, sending the recommendation back to the government for "redetermination."¹⁰⁶

In 2017, the SCC confirmed that a regulatory tribunal decision may constitute "Crown conduct," and thus triggered the Crown's duty to consult.¹⁰⁷ Specifically, the SCC released two decisions¹⁰⁸ clarifying the NEB's duty to consult with Indigenous Peoples and that a regulatory tribunal decision "may constitute 'Crown conduct', triggering the Crown's duty to consult."¹⁰⁹ The two decisions clarified and dismissed concerns that consultation obligations would compromise a regulatory tribunal's quasi-judicial independence and their public interest mandate.¹¹⁰

The courts would continue to quash pipeline certificates in 2018 when the FCA released its decision on *Tsleil-Waututh Nation v. Canada (Attorney General)*. Like Gitxaala Nation, this FCA case overturned an Order-in-Council based on the failure of the Government of Canada to adequately consult with Indigenous communities. The FCA noted there was no "genuine and sustained effort to pursue meaningful, two-way dialogue."¹¹¹

As the 21st century progressed, there continued to be growing environmental, and Indigenous challenges that needed to be considered in the NEB's decision-making. In addition to these changes, there was a change in the political context with the defeat of Harper's Conservatives and election of a Liberal majority in November 2015. Led by Prime Minister Justin Trudeau, there was a stark shift in the direction of Canada's energy future. The Liberals made climate change and environmental policy a key part of their election platform, criticizing the 2012 Conservative amendments and their dilution of environmental regulatory processes. Additionally, the 2015 election itself brought pipelines and the NEB to the forefront of political debate, with questions concerning the Board's mandate and structure. Commentators saw this as an "ironic reversal" given that the Board's 1959 inception was to distance politicians from controversial pipeline issues.¹¹²

104. *Gitxaala Nation v. Canada* [Gitxaala Nation], [2016] 4 FCR 418, at para. 8.

105. *Gitxaala Nation*, *ibid* at para. 7.

106. Government of Canada, *supra* note 64.; *Gitxaala Nation*, *ibid* at para. 10.

107. Adkins, Millen and Nykolaishen, *supra* note 103.

108. *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, [2017] 1 SCR 1069.; *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, [2017] 1 SCR 1099.

109. Adkins, Millen and Nykolaishen, *supra* note 103.

110. Adkins, Millen and Nykolaishen, *ibid*.

111. *Tsleil-Waututh Nation v. Canada (Attorney General)*, [2018] FCA 153, at para. 756.

112. Wallace, R. (2018). The Tortuous Path to NEB Modernization. *Energy Regulation Quarterly*, 6(2). Retrieved from <https://energyregulationquarterly.ca/articles/the-tortuous-path-to-neb-modernization#sthash.aK2UQFr8.dpbs>



The result of the new government and direction also meant a differing perspective on major pipelines projects. By the time the Liberals came into office, several pipelines had spent years working their way through both the regulatory process and court litigation by various stakeholders. However, the Liberal government was aware of the declining public confidence in Canada's energy regulator and its process. Whereas the Conservatives supported all pipeline projects, the Liberals only supported some of the projects and were more sensitive to environmental and Indigenous concerns when determining support for a project. This is evidenced by a series of government decisions in 2016:

- In January 2016, Natural Resources Minister Jim Carr and Minister of Environment and Climate Change Catherine McKenna announced interim principles for pipeline reviews.¹¹³ These five principles included appeals for greater consideration of public and Indigenous peoples' perspectives and the assessment of direct and upstream greenhouse gas emissions.¹¹⁴

- In May 2016,¹¹⁵ Carr announced a "ministerial panel" to review the Trans Mountain pipeline to complement the NEB review and to "identify gaps and/or issues of concern of which the Government should be aware before deciding the fate of the pipeline approval."¹¹⁶ Some criticized this ministerial panel as "second-guessing" the NEB's quasi-judicial process, as the Board had already ruled on the pipeline in 2016 (however, as discussed earlier the courts ruled that the process was flawed.)¹¹⁷ This ministerial panel was in addition to an environmental assessment which took into account upstream greenhouse gas emission estimates for the project.¹¹⁸
- In June 2016, Carr announced his intention to establish an expert panel to advise on the "modernization" of the NEB, providing draft terms of reference.¹¹⁹

113. Government of Canada. (2016, Jan. 27). *Government of Canada Moves to Restore Trust in Environmental Assessment* [News release]. Retrieved from <https://www.canada.ca/en/natural-resources-canada/news/2016/01/government-of-canada-moves-to-restore-trust-in-environmental-assessment.html>; Government of Canada (2016). *Interim Measures for Pipeline Reviews*. Retrieved from <https://www.canada.ca/en/natural-resources-canada/news/2016/01/interim-measures-for-pipeline-reviews.html>

114. Birchall, C., and Davidian, G. (2016, Jan. 29). Federal Government Released New Interim Principles for Natural Resource Development Projects Currently Under Regulatory Review. *Mondaq*. Retrieved from <https://www.mondaq.com/canada/clean-air-pollution/462152/federal-government-releases-new-interim-principles-for-natural-resource-development-projects-currently-under-regulatory-review>

115. Government of Canada. (2016, May 17). *Trans Mountain Pipeline Expansion Project Ministerial Panel Named* [News release]. Retrieved from <https://www.canada.ca/en/natural-resources-canada/news/2016/05/trans-mountain-pipeline-expansion-project-ministerial-panel-named.html>

116. Ministerial Panel for the Trans Mountain Expansion Project. (2016). *Report from the Ministerial Panel for the Trans Mountain Expansion Project*. Retrieved from https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/pdf/16-011_TMX%20Full%20Report-en_nov2-11-30am.pdf

117. Wallace, *supra* note 112.

118. Government of Canada, *supra* note 113.

119. Government of Canada. (2017). *National Energy Board (NEB) Modernization Expert Panel: Draft Terms of Reference*. Retrieved from <https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/share-your-views/draft-terms-reference-neb.html>



- In August 2016, Minister McKenna appointed an expert panel to review the federal environmental assessment process.¹²⁰ This was in addition to Standing Committee reports examining habitat protection under the *Fisheries Act*¹²¹ and the role of the *Navigation Protection Act*¹²² respectively that were being conducted around this time.
- In early November 2016, Carr announced the five-member NEB Modernization Expert Panel.¹²³ The Panel was given a wide mandate to review the Board (discussed more below).
- Later in November 2016, the Trudeau cabinet approved two pipeline applications (Trans Mountain and Enbridge Line 3 pipelines) but rejected Northern Gateway, notwithstanding the previous 2014 NEB approval of the project. In rejecting Northern Gateway, the government emphasized environmental considerations and how the pipeline would take oil tankers through the “sensitive ecosystem” of the Great Bear Rainforest.¹²⁴

In announcing these decisions, many of the government’s press releases emphasized the need to establish greater “confidence” in Canada’s environmental and regulatory processes. Interviewees referenced several of these events in relation to the evolution of the NEB. However, they would often emphasize the negative impact these events had on investor confidence, affecting the timeliness and certainty of the regulator’s decisions through politicization of the process. Interviewees brought up “the complete failure of the regulatory process” with the Northern Gateway project, and how the government engaged in political interference by choosing not to uphold a previous government’s decision. One interviewee called it a “black eye” for Canada and its regulatory certainty.

Despite appeals for compromise between environmental initiatives and the approval of oil and gas projects by the Trudeau government, private investment in Canadian major natural resource projects at the federal level continued to decline over this period with an ineffective regulator at the centre.

120. Government of Canada. (2016, Aug. 15). *Government of Canada Moving Forward with Environmental Assessment Review* [News release]. Retrieved from <https://www.canada.ca/en/impact-assessment-agency/news/2016/08/government-of-canada-moving-forward-with-environmental-assessment-review.html>

121. Standing Committee on Fisheries and Oceans. (2017). *Review of changes made in 2012 to the Fisheries Act: enhancing the protection of fish and fish habitat and the management of Canadian fisheries*. Retrieved from <https://www.ourcommons.ca/Content/Committee/421/FOP0/Reports/RP8783708/foporp06/foporp06-e.pdf>

122. Standing Committee on Transport, Infrastructure and Communities. (2017). *A Study of the Navigation Protection Act*. Retrieved from <https://www.ourcommons.ca/DocumentViewer/en/42-1/TRAN/report-11/>

123. Government of Canada. (2016, Nov. 8). *Government of Canada Moves Forward With National Energy Board Modernization* [News release]. Retrieved from <https://www.canada.ca/en/natural-resources-canada/news/2016/11/government-canada-moves-forward-national-energy-board-modernization.html>

124. Government of Canada, *supra* note 64.



In late 2017, TransCanada announced the termination of its Energy East pipeline and Eastern Mainline projects;¹²⁵ and in 2018, the Federal Government purchased the Trans Mountain expansion from Kinder Morgan after the FCA had quashed its initial cabinet approval.¹²⁶ At the centre of this investor outflow was the NEB's flawed regulatory process and the actions taken by the Liberal government. Interviewees described the Board's new challenges with Indigenous consultation, environmental challenges such as upstream emissions, changing societal expectations, and a greater political interest in individual project decisions as contributing to a lack of predictability and certainty for investors and a decline in investor confidence.

The NEB Modernization Panel, appointed in November 2016, aimed to address these issues. It was given a wide mandate to review the Board. This included its governance, mandate and decision-making roles, tools for lifecycle regulation, Indigenous engagement, and public participation.¹²⁷ The goal was to modernize the regulator and "restore public trust."¹²⁸ Some noted that this was a difficult and challenging undertaking particularly under the timeframe of just a few months;¹²⁹ the Panel itself called it a "daunting task."¹³⁰

In May 2017, the NEB Modernization Panel released its report to the Minister of Natural Resources. The panel had consulted extensively with stakeholders and the public, and the report identified several of the challenges previously described, including "the risk of a lack of independence of the NEB from the industry it regulates."¹³¹ The Panel also observed the tension between an ostensibly independent regulator and cabinet over who should have final decision-making authority for major projects. The Panel noted that some stakeholders thought that the NEB should not decide over projects of national interest, while others thought that leaving these project decisions to independent experts would help in depoliticizing them.

125. TC Energy. (2017, Oct. 5). *TransCanada Announces Termination of Energy East Pipeline and Eastern Mainline Projects* [News release]. Retrieved from <https://www.tcenergy.com/announcements/2017/2017-10-05-transcanada-announces-termination-of-energy-east-pipeline-and-eastern-mainline-projects/>

126. Gibson, J. (2018, Aug. 30). With project in doubt, Kinder Morgan shareholders vote to sell Trans Mountain pipeline to Ottawa. *CBC News*. Retrieved from <https://www.cbc.ca/news/canada/calgary/kinder-morgan-canada-shareholders-vote-sale-trans-mountain-pipeline-1.4804503>

127. Expert Panel on the Modernization of the National Energy Board, *supra* note 89 at 3.

128. Expert Panel on the Modernization of the National Energy Board, *ibid* at 1.

129. The Panel was announced in early November 2016, with the report released on May 15th, 2017.

130. Expert Panel on the Modernization of the National Energy Board, *ibid* at 1.

131. Expert Panel on the Modernization of the National Energy Board, *ibid* at 35.



The Panel supported the former argument, determining that an independent regulator could not define what the national interest was:

“An independent body, using only evidence-based criteria is an alluring prospect, but through our deliberations we concluded that this notion would inevitably lead to questions of that body’s independence and competence whenever it made a decision with which any stakeholder had a significant disagreement, because there are no pre-determined criteria or set of rules that can satisfactorily adjudicate the types of tough decisions involved in major project approvals. We arrived at the inescapable conclusion that the Governor in Council must make the ultimate determination of whether or not a project is in the national interest after Indigenous Consultation and public engagement. Indigenous participants also told us that a Governor in Council decision-making role is important for them as a safety valve to provide an opportunity for political intervention if their rights are unduly infringed upon.”¹³²

The Panel made 46 recommendations to the Minister in its report. These recommendations included the creation of a new national energy regulator with a new governance model; the creation of an independent Canadian Energy Information Agency; a two-step project decision-making process with Natural Resources Canada to determine if a project is in the national interest before it goes to the regulator; and several recommendations related to the incorporation of Indigenous knowledge, the Crown’s duty to consult and giving Indigenous peoples “a nation-to-nation role in determining Canada’s national energy strategy.”¹³³

The government used these recommendations along with recommendations from the other environment-related reviews to craft Bill C-69, sweeping legislation titled “The Modernization of the National Energy Board and Canadian Environmental Assessment Agency.”¹³⁴ The announcement of C-69 in February 2018 introduced substantial changes to Canada’s regulatory and environmental assessment process. It would also mark the end of the NEB and the inception of the Canada Energy Regulator (CER).

132. Expert Panel on the Modernization of the National Energy Board, *ibid* at 56.

133. Expert Panel on the Modernization of the National Energy Board, *ibid* at 47.

134. McKenna, C. (2018, Feb. 8). “Impact Assessment Act”. Parliament of Canada. *House of Commons Hansard*. 42nd Parliament, 1st Session, at 16915. Retrieved from <https://www.ourcommons.ca/Content/House/421/Debates/260/HAN260-E.PDF>



In summary, the NEB underwent significant structural changes due to Bill C-38 in 2012. These amendments attempted to address issues with timeliness and participation in the NEB's regulatory processes. They impacted the NEB's perceived, procedural, and individual independence, shifting the Board from the final decision-maker on project applications to an advisory body to cabinet. As the 2010s progressed, pipelines dominated the energy discussion in Canada. Policy considerations such as Indigenous reconciliation and climate change influenced major project applications at NEB hearings. Perceived concerns over bias and regulatory capture, as exemplified by events surrounding Energy East, further diluted public confidence in the once-revered regulator. Concerns were raised as to whether the Board could be a fair, objective, and independent adjudicator.

Over time, stakeholders took their concerns to federal courts, questioning the legality and constitutionality of pipeline applications. These courts quashed several prominent pipeline projects in Canada, citing inadequate consultation with Indigenous Peoples. A new Liberal Government elected in late 2015 would further change the direction of pipelines and the NEB, as seen through a flurry of reviews and policies in 2016, including the NEB Modernization Panel. The Panel's recommendations led to the introduction of Bill C-69. However, investor confidence was low following the deaths of Energy East, Northern Gateway and government purchase of Trans Mountain.



THE CER, TRIPARTITE STRUCTURE AND FUTURE CONFIDENCE (2019 - FUTURE)

As noted in the previous section, C-69 introduced several changes to the federal energy regulatory process, repealing and replacing the NEB Act and the Canadian Environmental Assessment Act, 2012 with the Canadian Energy Regulator Act and the Impact Assessment Act respectively. On August 28th, 2019, the Impact Assessment Agency of Canada (IAA) replaced the CEAA, and the CER replaced the NEB, thereby ending the regulator's history of over 60 years.

Bill C-69 brought forth changes affecting the independence and effectiveness of the federal energy regulator. As outlined more extensively by Dixon et al., these changes included:

- A new governance model which separates administrative and adjudicative functions of the CER. Administrative and policy considerations are led by a Board of Directors and CEO while adjudicative functions are handled by a group of independent Commissioners.¹³⁵
- Commissioners assess projects on a broad range of environmental and socio-economic factors. While the NEB had already considered some of these factors, Bill C-69 now explicitly references some new factors, including sex and gender identity factors and international environmental agreements (e.g., the Paris Climate Accord).
- A reversion to the pre-2012 environmental assessment processes where federal joint review panels between the CER and IAA conduct impact assessments/reviews of projects. From 2012-2019, the NEB conducted environmental assessment for a project only if it was within its jurisdiction, and the Environmental Assessment Agency would conduct the assessment of any energy projects outside the NEB's jurisdiction. Additionally, C-69 expanded the criteria that will apply for any impact assessment by the agency or a review panel, as well as broadened the list of factors to be included in the assessment, including socio-economic, environmental, and biophysical factors.
- An increased emphasis on Indigenous interests in the operations of the CER Commission and the IAA. This includes performing their functions in a manner "that respects the Government of Canada's commitments with respect to the rights of Indigenous peoples of Canada"¹³⁶ and incorporating rights, knowledge, and interests of Indigenous peoples in project evaluation. The CER also established an advisory committee to improve Indigenous peoples involvement in major energy projects.

135. Dixon, E. W., LaBranche, B. N., Downey, B. K. and Chernos, M. B. (2020). Bill C-69: Introducing the Canadian Energy Regulator and the Impact Assessment Agency*. *Energy Regulation Quarterly*, 7(4). Retrieved from <https://www.energyregulationquarterly.ca/articles/bill-c-69-introducing-the-canadian-energy-regulator-and-the-impact-assessment-agency#sthash.6kTx8ltC.dpbs>

136. *Canadian Energy Regulator Act*, SC 2019, c 28, s 11(h).



- A re-expansion of public participation for project hearings from the 2012 amendments, with the CER having a broad, inclusive approach to public participation: “Any member of the public may, in a manner specified by the Commission, make representations with respect to an application for a certificate.”¹³⁷
- New timelines for the CER or IAA to review/ assess an application and the GIC to make a final decision. Concern has been raised over whether application certainty/timeliness would actually improve, given the additional factors that project assessments must consider and the expanded public participation requirements.¹³⁸
- A subtle, yet noteworthy, decision-making amendment annulling a 2012 change: The GIC can no longer accept a rejected (“negative”) application by the CER; rather cabinet must either also reject the project or asked that it be reconsidered.

A few elements of these amendments are examined in greater depth below.

First, is the new tripartite governance structure which separates adjudicative and administrative functions of the regulator. This corporate structure is a new trend among Canada’s energy regulators that was first introduced by the Alberta Energy Regulator in 2013 and has now been implemented federally and at the Ontario Energy Board. The NEB Modernization Panel recommended the new structure, noting that respondents were confused and dissatisfied with the previous model where the NEB’s Board acted as both a traditional board of directors and an adjudicative body. The Report also noted issues of accountability: “the very people who oversee the NEB’s performance are the same people who make its major decisions as members of the hearing panels.”¹³⁹ They noted that “most corporation and government entities” have a board of directors for strategic direction and oversight.¹⁴⁰

This new tripartite model was the subject of discussion for many interviewees and described as one of the more recent significant changes made to the Board affecting its independence. Some interviewees supported the new model, noting that the corporate structure provides greater individual independence for adjudicators. Furthermore, Commissioners can now focus on just the cases rather than try to also “steer an organization at the same time.”

137. Dixon et al., *supra* note 135.

138. Dixon et al., *ibid*.

139. Expert Panel on the Modernization of the National Energy Board, *supra* note 89 at 61.

140. Expert Panel on the Modernization of the National Energy Board, *ibid* at 61.



Conversely, others were critical of the tripartite model. They saw the new model as “complicated,” filled with additional political appointees, riddled with overlap/inefficiencies between the Board and executive roles, and confusing in regards to the accountability of CER staff:

“I don’t know what it’s like to live within the CER these days in terms of the number of masters that the regulatory [...] part of the organization has to report into, but I don’t think it’s necessary [...] If you start splitting that [the roles of Board Chair and CEO] up, you do run the risk of [...] inefficiencies within the process.”

Further issues of the tripartite model are highlighted by Harrison et al (2020). The authors state that the lack of a supervisory body at the former Board, where it only answered to its mandate (subject to limited judicial appeal), was a key structural element of the Board and was “integral to maintaining its position as a fully independent quasi-judicial tribunal.”¹⁴¹

Second is understanding what was *not* changed with the CER from the post-2012 NEB. The CER, like the post-2012-NEB, still provides just recommendations to cabinet which retains the final decision-making authority over an application. Major project decisions are still considered too significant along several (economic, environmental, social, etc.) dimensions to be left in the hands of an unelected independent regulator.

This notion was previously confirmed by Conservative Natural Resources Minister Joe Oliver in 2012, and reaffirmed by Minister of Environment and Climate Change Catherine McKenna during the Bill’s second reading in 2018:

“[T]he final decision on major projects will rest with me or with the federal cabinet, because our government is ultimately accountable to Canadians for the decisions we make in the national interest.”¹⁴²

Third, the changes brought new contextual factors – such as Indigenous reconciliation, climate change, and environmental policy – more explicitly into the processes of the new energy regulator. While the regulator did have the flexibility to address such considerations previously, they are now explicitly stated in its legislation. This new emphasis on contextual factors is consistent with Prosser’s second vision of regulation, where regulators, rather than acting independently and pursuing economic efficiency exclusively, act as “governments in miniature” and have responsibility for both economic and social distributive goals which are seen as inseparable.¹⁴³ Some interviewees highlighted this vision, noting that the links between government policy and the work of the federal energy regulator are now more integrated, particularly with regards to important policy goals such as economic development, Indigenous reconciliation, and climate change.

141. Harrison, R. J., McCrank, N., and Wallace, R. (2020). The Structure of the Canadian Energy Regulator: A Questionable New Model for Governance of Energy Regulation Tribunals. *Energy Regulation Quarterly*, 8(1). Retrieved from <https://www.energyregulationquarterly.ca/articles/the-structure-of-the-canadian-energy-regulator-a-questionable-new-model-for-governance-of-energy-regulation-tribunals#sthash.ObzSCHPN.I9Ym7OLi.dpbs>

142. McKenna, C. (2018, Feb. 14). “Impact Assessment Act”. Parliament of Canada. *House of Commons Hansard*. 42nd Parliament, 1st Session, at 17203. Retrieved from <https://www.ourcommons.ca/Content/House/421/Debates/264/HAN264-E.PDF>

143. Prosser, *supra* note 27 at 5-6.



The regulator has simply been thrown into the middle of what are ultimately government policy decisions. One interviewee emphasised the CER's lack of regulatory independence, claiming that the regulator is "with all due respect, nothing more than a government department when it comes to pipelines."

Different stakeholders reacted strongly to the legislation and the changes in the regulatory process. Whereas the 2012 changes sparked fury among environmental advocates and acclaim among industry, the opposite occurred with respect to Bill C-69. For instance, the Ecology Action Centre noted that the Bill "makes major improvements to certain aspects" of environmental assessment legislation.¹⁴⁴ In contrast, the Canadian Association of Petroleum Producers highlighted how the legislation would "drive away investment into Canada by making it extremely difficult to approve major projects like pipelines in the future."¹⁴⁵

The CER, with separate roles for the Board, CEO, and Commissioner, is now more than a year into its mandate. At the time of the interviews in 2020, many interviewees were either hesitant or pessimistic that the latest changes would improve the federal energy regulator and regulatory processes moving forward. They noted that the regulator has evolved such that the timeliness and certainty of its decisions are "out the window." Furthermore, while some saw the expansion of factors that the CER considers in its decisions as beneficial to effectively addressing existential issues like climate change, others highlighted how these new factors make the project application process longer and more complex:

"At the federal level [...] there's certainly a lot of momentum to continue to make the process more complex and deal with a greater breadth of issues... And it's going to take a government with a lot of resolve to change that. And at some point, maybe what changes it is investors just saying, 'enough's enough. I'm not going to pursue this project. I'm going to walk away' [...] Maybe if there is enough economic pain, that will change things. But my sense is that it's more likely to get worse than to get better."

144. Ecology Action Centre. (2019). *Bill C-69*. Retrieved from <https://ecologyaction.ca/c69>

145. Canadian Association of Petroleum Producers. (2018). *What is Bill C-69: New law to overhaul Canada's regulatory review process could drive away investment in Canada*. Retrieved from <https://context.capp.ca/energy-matters/2018/og101-what-is-bill-c69>



In terms of how public confidence in the federal energy regulator has evolved, many interviewees indicated that public confidence was still “very wounded.” Conversely, some thought that what much of the public is confused or “isn’t paying attention” to the issues surrounding the CER. More definitively, interviewees were especially pessimistic when it came to how investor confidence has been impacted by the changes to the federal regulatory regime:

“Investor confidence: it’s abhorrent. [...] You’ve had for the last 60 years some of the world’s best pipeline companies built in Canada and developed with that, some of the world’s best engineering and safety results. [...] And yet, what have we done? We’ve created the conditions where our own governments had to bail out its last threat of hope to Asian market trade by buying into Kinder Morgan (which used to be a great Canadian company and [now] it’s run out of Houston). You’ve had TransCanada having to change its name so that it can enter more and more into the US where there’s the only place where they’re going to make any money. They can’t [...] seem to function in Canada. And same with Enbridge [...].”

Why would either of those companies maintain their head office in Canada when 90 percent of their businesses in the US? And what does that do to Canadian excellence or our future hope? It’s absolutely a travesty. And as far as new investments look: forget it. Who would?”

Interviewees raised an additional factor, namely how the role of the courts will evolve in the future. Specifically, what will the courts’ role be in questioning GIC orders to grant pipeline certificates and the number of court cases tied to energy regulatory decisions and processes. As noted earlier, there have been a number of cases brought to Canada’s courts on GIC-approved pipeline certificates based on how thorough the Crown has exercised its duty to consult. In cases like *Tsleil-Waututh Nation et al. v. Attorney General of Canada et al*, and *Gitxaala Nation*, the FCA found that the Crown had not satisfied its obligation to consult with Indigenous Peoples.¹⁴⁶ In outlining their arguments, the FCA clarified the role of cabinet in the decision-making power: whereas previously cabinet did not believe it had the authority to amend conditions that had been recommended or to add new conditions, the FCA advised cabinet to review the recommendation report by the federal energy regulator in order to “strengthen” the regulator’s report. That is, the cases now invite cabinet to give “serious consideration . . . to whether any of the [National Energy] Board’s findings were unreasonable or wrong.”¹⁴⁷

146. Harrison, R. J. (2021). *The Expanded Role of the Federal Cabinet in Pipeline Projects: A Case Study of TC Energy’s 2021 NGTL System Expansion*. *University of Ottawa Positive Energy*, at 18. Retrieved from https://www.uottawa.ca/positive-energy/sites/www.uottawa.ca/positive-energy/files/the_expanded_role_final_web.pdf

147. *Tsleil-Waututh Nation v. Canada (Attorney General)*, supra note 109 at para. 757; Note: at the time of this ruling it was still technically called the NEB. However, as Harrison notes, the CER Commission structure/framework is similar to the role of the post-2012 NEB and such analysis therefore “would be expected to apply equally to the processing of similar applications that originated ab initio under the CER Act.” Source: Harrison, *ibid* at 8.



Where current jurisprudence surrounding courts' deference to Board decisions remains, the decisions related to the Crown's duty to consult has meant that cabinet has been encouraged by the court to "second guess the regulator."¹⁴⁸

Such analysis, outlined by Harrison (2021), was exemplified in his case study of the Nova Gas Transmission Limited (NGTL) Pipeline application.¹⁴⁹ The NGTL 2021 System Expansion project, a \$2.3 billion, 344 km natural gas pipeline project from northwest Alberta/northeastern B.C. to intra-Alberta and export markets, was recommended for approval by the CER in February 2020 and approved by cabinet in October 2020, directing the CER to issue a certificate. However, pursuant to the court's decisions, cabinet did not accept the CER's recommendations unconditionally but strengthened and added conditions to the certificate. These conditions were based on a government report regarding the disruption of caribou habitat and on Indigenous stakeholder engagement. Cabinet believed that the CER's conditions fell short to satisfy the Crown's duty to consult and accommodate. Harrison concluded that cabinet's actions raise concerns over the lack of transparency around the revised conditions. Cabinet had second-guessed/rejected the advice and expertise of their specialist tribunal (thus doubting its legitimacy) and disregarded requirements of procedural fairness.¹⁵⁰ While it is hard to predict how the CER will evolve in its role as the federal energy regulator, this case study suggests that the political executive at the cabinet level may expand its role as both the final decision-maker as well as in establishing project conditions, perhaps in a less transparent manner than the CER's quasi-judicial hearing process.

148. Harrison, *supra* note 146 at 5.

149. Harrison, *ibid.*

150. Harrison, *ibid* at 22.

In summary, the new CER possesses several features that make it different to the post-2012 NEB. This includes the Board's new tripartite model, expanded/explicit social and environmental considerations to be addressed in its processes, and a reversion to greater public participation. The establishment of the CER, however did not return final decision-making authority back to the regulator, suggesting a reaffirmation of the belief that major project decisions remain too significant to be left in the hands of an unelected independent regulator. Interviewees were hesitant or pessimistic about the CER's ability to resolve issues related to project uncertainty, decision timeliness, and the lack of investor confidence. Additionally, many saw the CER as less of an independent regulator and more as a glorified government department. While it is difficult to predict how the CER will evolve, a recent case study of the NGTL pipeline application suggests that cabinet may play a more empowered role in amending project application conditions without sufficient degrees of transparency and procedural fairness. The regulator, despite being born out of the intention of improving confidence in the federal regulatory process, may now have its decisions second-guessed by cabinet; something encouraged by the courts. This direct intervention by the political executive on CER decision-making in 2020 stands in stark contrast to the NEB's original conception and the independence conferred to the tribunal in 1959.



CONCLUSION AND KEY TAKEAWAYS

The NEB was born out of the “Great Pipeline Debate” in 1956. Its initial 1959 legislation was clear in creating a regulator with the type of independence seen in the judicial branch, possessing elements of structural independence and individual independence, including final decision-making authority and a strong security of tenure for board members. While the NEB also had an experimental advisory function that threw its independence into question, the Board was created with the desire to keep important pipeline decisions outside of the political realm. Over the decades, the NEB had a well-regarded reputation nationally and internationally. There are only a few singular instances where the government doubted the regulator’s decision. The Board at this time regulated along narrow economic guidelines. This led to conflicts with environmental organizations in the 1970s, because the NEB often de-emphasized environmental evidence in its decisions. As free-market values and deregulation progressed throughout the 1980s and 90s, the Board continued to highlight this economic, market-oriented lens in its decisions. The Board’s move to Calgary from Ottawa also added to a greater streamlining of its operations with a change in corporate culture and staff. It would also give rise to concerns over regulatory capture by the energy industry.

New legislation and agencies fragmented the NEB’s decision-making and how it pursued its mandate. Additionally, new social and environmental considerations made the organization more public, but also made hearings longer and more complex (as seen with the Northern Gateway application.) In the mid-2000’s, the new Conservative government grew concerned about the timeliness and direction of the regulatory process for pipelines. This new government, brought forth several structural changes to the NEB under the 2012 budget omnibus bill, *Jobs, Growth and Long-Term Prosperity Act*. The legislative amendments fundamentally changed the structure of the NEB after 53 years. In attempting to address matters around timeliness and public participation, the NEB’s perceived, procedural and individual independence was impacted, shifting the Board from the final decision-maker on project applications to a body making recommendations to cabinet.

As the 2010s progressed, pipelines came to dominate discussion in Canada. Policy considerations such as Indigenous reconciliation and climate change impacted major project applications at NEB hearings. As the NEB was at the centre of this debate, concerns over bias and regulatory capture became both more prominent and justified as exemplified with events surrounding Energy East. Concerns were raised whether the Board could be a fair, objective and independent adjudicator; public confidence was lost.



Over time, stakeholders took their concerns on pipeline applications to federal courts which quashed several prominent pipeline projects in Canada, citing inadequate consultation with Indigenous Peoples. A new Liberal Government elected in late 2015 changed the direction of the debate around pipelines and the evolution of the NEB, as several policies and reviews in 2016 illustrated, including the establishment of the NEB Modernization Panel. The Panel's report culminated in the legislation of Bill C-69. The Bill ended the NEB's 60-plus year run and marked the inception of the new CER. The CER had new features, including expanded/explicit incorporation of social and environmental considerations and a new tripartite governance structure. However the CER, like the post-2012 NEB, was still a recommending body to cabinet on pipeline applications. Major pipelines were now considered too significant for the political sphere *not* to intervene. Interviewees were skeptical or hesitant that the new CER would improve issues of effectiveness such as the lack of investor confidence and saw the CER simply as a government department. While it is difficult to predict how the CER will proceed, Harrison's 2021 case study suggests a continuation of greater political decision-making on pipeline actions, with cabinet authorized to directly amend project application conditions at the expense of transparency and procedural fairness. This empowered executive role stands in stark contrast to the NEB's inception in 1959 whereby pipelines decisions were independent and strictly outside of the political sphere.

The following are key takeaways from an analysis of the evolution of the NEB:

1. *The federal regulator lost public, investor, and now political confidence:* Over the decades, the federal regulator had, and subsequently lost public and investor confidence. Despite the creation of the new CER and new governance model, many experts including the interviewees believe the federal regulator no longer functions as an independent regulator like in decades prior. Concerns over regulatory capture grew with the NEB's move to Calgary in the early 90s, however the NEB appeared to hold certain biases towards environmental considerations much earlier. More recent events following the 2012 amendments with Energy East drove a further decline in confidence in the federal regulator as stakeholders began taking their concerns to the courts and as cabinet began playing a more direct role in individual decisions. The political executive is now empowered to "second-guess" the regulator's recommendations. The CER has its work cut out if it wishes to re-establish the glowing national and international reputation of the former NEB.



2. *Federal energy regulatory decisions are more complex and multi-variable:* The context of federal energy regulation is much more complex than it was at the NEB's inception. While the NEB's initial legislation provided flexibility to address these considerations in their processes, the new CER legislation explicitly requires the regulator to do so. One may argue that the Federal regulator could have done more to accept and adjust to the changing context earlier when the opportunities to adjust first arrived (as early as the 1970s with environmental considerations). However, regulatory decisions and how they are determined are now viewed as inseparable from political judgements; the regulator operates at the center of critical policy considerations. Gone are the days of the narrow lens of economic regulation and its related feature of regulatory independence.
3. *The significance of pipelines and who decides:* In the 1950s, the NEB had significant independence to insulate energy regulation and pipeline decisions from political interference. Much like why central banks are independent, independence was granted to the NEB because of the significance of energy decisions for Canada's prosperity and the realized detriments of politicization seen with the "Great Pipeline Debate." However, today, the importance of pipeline decisions is cited as the exact reason for why the political executive is now the decision-maker and the regulator is merely a recommending body.
4. *Given that electoral cycles affect how politicians make these decisions, this greater appeal to political decision-making and accountability comes with both benefits and costs.* While the executive may be better able to take into account the greater societal context, an independent regulator may be better able to ensure a stable and long-term decision-making framework. This must be kept in mind as an empowered political executive may become the convention moving forward (as seen with Harrison's 2021 case study).
5. *A forum for macro-level public policy discussion still does not exist:* In recent years, both stakeholders and the general public have not felt included on important, macro level policy planning. Part of the reason that stakeholders and the general public have taken their frustrations and grievances to technocratic NEB hearings, the courts, and directly to pipeline construction sites is because a forum where general public policy discussion can take place does not exist. This issue has previously been raised by the NEB Modernization Panel and with Positive Energy's 2020 Fall Workshop on Regulatory Independence. Interviewees further noted that calls for increased public participation and democratization affected the evolution of the federal regulator, as the NEB was not fully equipped to handle such macro-level policy discussions. Whether the CER has the capacity has yet to be seen. In any case, what is needed is a regularly scheduled, transparent forum to discuss key public policy issues (such as on climate change) with the public and stakeholders. Such a venue that has been absent all of these years.







CASE STUDY TWO: THE ALBERTA ENERGY REGULATOR

INTRODUCTION

The Alberta Energy Regulator (AER) is the current energy regulator for the province of Alberta, coming into existence in 2013. Alberta's energy regulator has gone through several names, remits, and transformations over the decades: the Petroleum and Natural Gas Conservation Board (PNGCB; 1938 to 1971), the Energy Resources Conservation Board (ERCB; 1971 to 1995), the Alberta Energy and Utilities Board (AEUB; 1995 to 2008), the ERCB again (2008 to 2013) and now the AER (2013 to present). The AER regulates the entire life cycle of oil, oil sands, natural gas and coal projects in the province.¹ As the single regulator for energy development in the province, the AER is concerned with project applications, compliance and enforcement of the industry, as well as environmental assessment and monitoring. The *Responsible Energy Development Act (REDA)* and its related regulations outline the AER's mandate, structure, and powers. The regulator also engages in the administration of energy resource enactments under other acts, rules and regulations, including the *Oil and Gas Conservation Act*, the *Pipeline Act*, the *Gas Resources Preservation Act*, and the *Environmental Protection and Enhancement Act*.²

Alberta's regulatory system also includes Alberta Utilities Commission (AUC), which is in charge of regulating public utilities. The history of Alberta's public utilities regulator is inherently intertwined with the evolution of its oil and gas regulator, most notably during a temporary merger in the 1990s. This case study predominately examines the evolution of the oil and gas regulator, however it will at times, explore the public utilities regulator where appropriate.

1. Alberta Energy Regulator. (2020). *What We Do*. Retrieved from <https://www.aer.ca/providing-information/about-the-aer/what-we-do>

2. Alberta Energy Regulator. (n.d.). *Acts, Regulations, and Rules*. Retrieved from <https://www.aer.ca/regulating-development/rules-and-directives/acts-regulations-and-rules>



EXPERTISE, AUTHORITY AND SUPPORT (1932 - 1992)

The history of Alberta's oil and natural gas regulator begins with the Turner Valley Gas Conservation Board (TVGCB), created in 1932. The TVGCB was created to address the waste of gas and the exploitation of the Turner Valley field at the time. The exploitation of the Field has been described as "out-of-control", as oil and gas operators were left to their own devices in an unregulated sector for several years.³ It was only in 1930 that Prairie Provinces were granted jurisdiction over their natural resources, under the Natural Resources Transfer agreements.⁴ Prior to this, the federal government neglected adequate regulation of Alberta's natural resources and the Turner Valley field; for instance, in 1926, the Federal Minister of the Interior would issue gas conservation regulations, but without enforcement procedures.⁵

Following the transfer of jurisdiction for natural resources, Alberta created the TVGCB to regulate the Turner Valley field. The mandate of the three-member Board was to regulate the Turner Valley's gas industry and promote conservation practices and reservoir management.⁶ The Board had authority to hire its own professional staff, to take "whatever measures were deemed necessary to implement a . . . well-testing process", and to take evidence under oath.⁷ Additionally, the Board had power to formulate orders that determined the total daily production at each well.

3. Breen, D. H. (1993). *Alberta's Petroleum Industry and the Conservation Board*. University of Alberta Press, at 653.; An estimated 6,000,000 cubic meters of natural gas per day was flared at Turner Valley for a decade before adequate regulatory intervention; Source: AEUB (2005). 2004 Year in Review.

4. Stefaniuk, J. (2019). Canada's Constitution and Natural Resource Development. *Thompson Dorfman Sweatman LLP*. Retrieved from <https://www.tdslaw.com/resource/canadas-constitution-and-natural-resource-development/>

5. Low, C. A. (2009). Energy and Utility Regulation in Alberta: Like Oil and Water?, Occasional Paper No. 25. *Canadian Institute of Resources Law*. Retrieved from <https://prism.ucalgary.ca/bitstream/handle/1880/47345/UtilityOP25w.pdf;jsessionid=96C6956E33BD0E7CFB854A01093BB391?sequence=1>

6. Breen, *supra* note 3 at 79.

7. Breen, *ibid* at 80



However, the Board was both ineffective as a regulator and disbanded within two years of its establishment. Most notable about the TVGCB was its philosophy of regulating oil and gas operators. As Low (2009) notes, under this Board, “the interests of the Alberta government and oil and gas operators were not aligned.”⁸ Faced with new regulation for well production limits, operators were concerned over revenue losses and were hostile and uncooperative in their interactions with the Board.⁹ The TVGCB had difficulty enforcing compliance of its conservation regulation; some companies, concerned over going insolvent because of the conservation measures, even brought legal action against the Board, challenging its authority and jurisdiction.¹⁰ Most notable was a case by Spooner Oils that challenged the Board’s first regulatory order. The Supreme Court of Canada ruled that the province’s conservation measure could not be enforced on certain lands, based on land agreements made prior to the 1930 federal transfer. This was seen as a major blow to the province’s conservation legislation and the TVGCB’s effectiveness.¹¹

In 1938, the province tried again to establish a conservation board, the Petroleum and Natural Gas Conservation Board (PNGCB). The PNGCB, created under the Oil and Gas Conservation Act, was granted a wider mandate to establish conservation measures in Alberta. Unlike the TVGCB, the new Board had authority to regulate conservation measures for the oil and gas industry across the province beyond the Turner Valley field.¹² Additionally, the PNGCB had jurisdiction over every producing well in the province, regardless of who sold its lease and whether the transfer was before or after 1930, thereby closing the legal loophole in the 1930 Natural Resources Transfer Agreements. As Breen (1993) notes “[u]niversal application was essential for any effective conservation program.”¹³

The Board also had a different regulatory philosophy compared to its predecessor. The PNGCB’s approach to establishing regulation was “cooperative and consensual” with industry, and the Board pursued its conservation mandate through “minimal direct industry intervention.”¹⁴ The Alberta Social Credit Government promoted this approach during the formative expansion of the resource sector in the 1950s and 60s.¹⁵

8. Low, *supra* note 5 at 13.; Oil and gas operators were views as emphasizing short-term profits without concern over the long-term potential for the province’s resources in the long-term.

9. Breen, *supra* note 3.; Low, *supra* note 5.

10. Breen, *supra* note 3 at 88.

11. Alberta Culture and Tourism. (n.d.). *Turner Valley Gas Plant*. Retrieved from <http://history.alberta.ca/energyheritage/turner-valley-gas-plant/history-of-the-turner-valley-gas-plant/challenging-times/the-provincial-government-and-conservation.aspx>

12. The Alberta government pursued a federal amendment to the 1930 natural resources transfer agreement legislation; while the new PNGCB did not suffer the same fate as its predecessor, pursuing the federal government with this amendment approved to be less straightforward and is a history in itself; for those interested, see Breen, *supra* note 3.

13. Breen, *supra* note 3 at 207.

14. Lucas, A. (2005). The Alberta Energy Sector’s Voluntary Approach to Climate Change: Context, Prospects, and Limits. In G. B. Doern (Ed.) *Canadian Energy Policy and the Struggle for Sustainable Development*. (pp. 293-310). University of Toronto Press. at 303.

15. Lucas, *ibid* at 293-310.



As a result, later resource regulators and industry actors had “considerable influence and substantive involvement in both policy and decisions.”¹⁶ While one can look back on this period with concern over industry capture of the regulator, it is worth noting that a regulator is only as effective as the compliance of its regulated addressees. The antagonistic TVGCB with its heavy-handed regulation¹⁷ was ineffective largely because industry was hostile and non-compliant to its rule. The experiences with Turner Valley in the early 1930s helped cultivate the new Board’s expertise and administrative procedures.¹⁸

The PNGCB possessed several features that gave it independence, such that conservation measures were in the hands of the experts and that board members could carry out their authority without undue political interference. Breen (1993) outlines some of these features granted to the Board, noting that “the most important elements of petroleum industry regulation from the Department of Lands and Mines” were now vested in “an independent board beyond the immediate reach of government. . .”¹⁹ The Board was able to acquire professional staff to pursue its mandate, to develop prescriptive regulations related to production well quantity and conditions (subject to cabinet approval), and to determine the crude supply necessary to meet market demand.

The Board also had “the coercive power of inquiry common to a court of law” with the right to summon witnesses and compel the production of evidence.²⁰ Additionally, Board officers and employees were not liable for actions carried out under its legislation, and appeal to the court was denied for any “action, decision, and order of the Board”, except on questions of law.²¹ Lastly, Breen observes that the section of the Act conferring power to the Board concludes with a clause granting the Board a wide range of authority “to prescribe rules and regulations as to the production, transportation, distribution or use of all or any petroleum products, and the uses which may be made thereof or the amount which may be produced transported or used, either generally or in any areas at any specified well or wells and for any specified purpose.”²²

The establishment of the PNGCB as an independent agency for Alberta’s conservation mandate occurred during the early years of the inception of “independent commission” administrative model. Independent administrative agencies were first created in late 19th century Midwest U.S. states driven by the disputes between farmers and railroad monopolies setting “abusive freight rates.”²³

16. Lucas, *ibid* at 301.

17. It was observed that the Board’s first regulatory measure were set at such that it threatened many companies output, invested capital and respective corporate “ruin.” (Source: Breen, *supra* note 3 at 86.)

18. Breen, *supra* note 3 at 544.

19. Breen, *ibid* at 128.

20. Breen, *ibid* at 127.

21. Breen, *ibid* at 145; it is noted however, that cabinet did have the authority to revoke or change any order by the Board. It is further noted that this limited appeal was a point of contention with industry.

22. Breen, *ibid* at 127-128; *Statutes of Alberta*, 1938, Ch. 15, s. 14(0).

23. Breen, *ibid* at 122.



There was a desire for an administrative mechanism that was more flexible than the legislature in addressing these disputes and possessed greater competency in addressing economic matters than the courts. Over time, there was a popular acceptance for such boards and for regulatory entities free from partisan influence, that could create neutral regulatory environments, retain significant expertise, and provide a faster and less expensive opportunity for recourse than the courts. Alberta was not hesitant to pursue an independent commission model with its Conservation Board, having created independent boards with the Provincial Board of Health and Board of Public Utilities Commissioners in 1905²⁴ and 1915 respectively.²⁵ Furthermore, the 1935 election victory of the Social Credit Party, whose underlying ethos emphasized giving greater authority to experts in addressing central economic issues, strengthened the push for an independent conservation Board.²⁶

The independence and authority granted to Alberta's boards was noted by Breen, who described the confidence that government had with this model in describing the independent Utility Board's commissioners:

"The panoply of powers vested upon the commissioners, especial the denial of right of appeal, seems at first glance to stand in contradiction to the democratic impulses traditionally ascribed to agrarian reformers. In truth, however, the assignment of such power represents not so much a contradiction as it does a testimony of the great faith Alberta legislators were prepared to place in the integrity of 'neutral' boards, which they held were more insulated from improper influence than the courts."²⁷

The Board's legislation illustrates the American influence over Alberta's energy regulation. As noted, the idea of regulation by an independent commission had its roots in the Midwest states and came to Alberta as early as 1905. The Conservation Board's legislation (in regard to the scope and activities of the Board) drew directly from the experiences of the U.S. resource states of Texas and Oklahoma. Specifically, the structure of the Board took inspiration from the Texas Railroad Commission,²⁸ with the PNGCB's first chairman, W.F. Knode, coming from the Railroad Commission itself.

24. It is of noted significance that Alberta's first independent Board came in the same year it became a province of Canada.

25. Breen, *supra* note 3 at 123-124.

26. Breen, *ibid* at 125.

27. Breen, *ibid* at 124-125.

28. Despite having "Railroad" in its title, the Texas Railroad Commission is the analogue energy regulator of the state.



This influence is important in the historical evolution of regulatory independence as the American model of regulation provides a relatively high degree of independence for regulatory agencies from the executive branch.²⁹ These agencies were aligned with the separation of powers found with the U.S. Constitution.

In 1947, the Leduc discovery transformed Alberta's oil and gas sector and created a "major national industry with international markets."³⁰ Following the discovery, the PNGCB expanded its presence in the sector. In 1950, the Board's legislation was revised to keep up with the rapidly evolving industry.³¹ The amendments more firmly consolidated the PNGCB's regulatory authority, with the Board given "significant general regulatory authority" compared to its previous legislation.³² This included new powers granting the Board an extensive policy-making role. For instance, the Board now had the ability to formulate regulations "governing the drilling, completion and abandonment of wells as it might see fit."³³ Previously, cabinet had held this regulatory tool, and the Board merely had an advisory role to the government's energy department. Additionally, it is observed that with these legislative amendments, industry stakeholders were consistently consulted and there were no big surprises when the amendments were brought forward.

The Alberta Court of Appeal, in its judgment on the case *Giant Grosmont Petroleums Ltd v. Gulf Canada Resources*, confirmed the Board's new, comprehensive mandate. The Court found that the Board did possess the authority to determine balance between resource development and preservation, concluding that:

"In keeping with the Board's comprehensive mandate to ensure the economic, orderly and efficient development of energy resources in the public interest, the Board has also been granted extensive powers to pass regulations to give effect to these purposes."³⁴

The Leduc Discovery and these expanded regulatory responsibilities pushed the Board to establish its expertise and technical strength.³⁵ As the decades progressed, the Board expanded its expertise (from 9 staff in 1938 to 209 in 1958) and budget (from roughly \$50K to \$1.4M in the same 20-year period).

29. Thomson, I. T. D. (2020). A Literature Review on Regulatory Independence in Canada's Energy Systems: Origins, Rationale and Key Features. *University of Ottawa Positive Energy*. Retrieved from https://www.uottawa.ca/positive-energy/sites/www.uottawa.ca.positive-energy/files/a_literature_review_on_regulatory_independence_in_canadas_energy_systems_final.pdf

30. Low, *supra* note 5 at 6.

31. Breen, *supra* note 3 at 306.

32. Breen, *ibid* at 307.

33. Breen, *ibid* at 307.

34. *Giant Grosmont Petroleums Ltd v. Gulf Canada Resources Ltd*, [2001] ABCA 174.

35. Breen, *supra* note 3 at 504.



Under the leadership of Dr. George Govier³⁶ (who had been a Professor and Dean of Engineering at the University of Alberta) in late 1940s and 50s, the Board developed a reputation as a hub for recruiting, retaining, and uplifting talented technical experts and engineers in the province.³⁷ During this time, the government provided the Board the necessary budget to ensure effective regulation of oil and gas.³⁸

In 1957, legislative amendments under the Oil and Gas Conservation Act refined the Board, further expanding its regulatory authority and renaming it the Oil and Gas Conservation Board (OGCB). The mandate of the Board was to conserve oil and gas resources, prevent their waste, and ensure safe and efficient conservation practices in the oil fields.³⁹ Additionally, the Board was to perform an advisory function to the minister of mines and minerals on pipeline applications, issue regulations and orders for production and drilling, conduct inspections, hold hearings, and prepare reports. The Board also “assessed and taxed oil and gas properties, to obtain revenue to cover half of expenses.”⁴⁰

Of note was industry involvement leading up to this legislation, particularly by the Canadian Petroleum Association (CPA). The CPA conducted extensive research and negotiated with the Board and government to lobby for industry-favoured amendments. This effort included developing a full draft bill for the government’s consideration and meeting with the Board regularly to argue their case. However, many of its demands remained unmet. Premier Ernest Manning played a vital role in ensuring “the maintenance of the Board’s undiminished authority. . . at this critical juncture.”⁴¹ While industry was still important in shaping the Board, political support was critical in maintaining the Board’s authority and independence from industry pressure. This continued government support, prevalent throughout Manning’s tenure, worked to the Board’s advantage. Until 1971, the OGCB was the regulator principally concerned with the exploration and production of oil and gas.

36. Govier joined the Board in 1948 and was Chair of the Board from 1962 to 1978. Source: Canadian Petroleum Hall of Fame. (2019). *George Govier*. Retrieved from <http://www.canadianpetroleumhalloffame.ca/george-govier.html>

37. Breen, *supra* note 3 at 504-507, 512, and 647.

38. Breen, *ibid* at 513.

39. Provincial Archives of Alberta. (2006). *An Administrative History of the Government of Alberta*. at 168. Retrieved from <https://open.alberta.ca/dataset/4ed54c63-8f0d-49b9-b83e-34b0c177952e/resource/1c436497-eb04-469b-948b-7b13e73ceca0/download/administrative-history-of-government-of-alberta.pdf>

40. Provincial Archives of Alberta, *ibid* at 168.

41. Breen, *supra* note 3 at 502.



The model of the Conservation Board influenced how other Canadian jurisdictions pursued energy regulation, including British Columbia and Saskatchewan. It would also influence the structure of Canada's first truly independent federal regulator, the National Energy Board (NEB). As described in the NEB case study, when the federal regulator was first formed in 1959 it featured key characters of judicial, structural and individual independence. According to Janisch, rather than being influenced by other federal agencies at the time, the NEB was modelled after Alberta's OGCB.⁴² Additionally, it was not only the structure, but the initial staffing and leadership from Alberta that influenced the early years of the national energy regulator. For instance, the NEB's first Chair was the former Chair of the OGCB, Ian McKinnon.⁴³

In these initial decades, the Conservation Board had its remit and authority expanded through legislative reform, developed its expertise and technical capacity, and maintained stable support from the provincial government. The Board's decision to place its headquarters in Calgary in its first year in 1938 helped reaffirm the city as the centre of the emerging industry in the mid-20th century, as well as reemphasize the Board's independence, being geographically separated from the Alberta Department of Lands and Mines, Petroleum and Natural Gas Division in Edmonton.⁴⁴

Additionally, the Board was not faced with the same court challenges and delays seen in U.S. jurisdictions, with it being essentially "court-proof" through the limiting appeals to questions of law. This allowed the Board to focus on technical matters related to its conservation procedures. Lastly, Breen observed the open, transparent nature fostered confidence in the Board, particularly from industry:

"Court challenge and delay are virtually unknown in Alberta, where conservation practice has had more to do with technical expertise at the Board than with legal expertise in court. Endowed with immense power, the Board was nonetheless cautious. Initially sensitive to industry and political objectives to its largely unassailable authority the Board was successful in cultivating the industry's reassurance through a formal commitment to continuous consultation and by its quick adoption of a hearings procedure that promoted board industry and public involvement."⁴⁵

In 1971, following a large-scale government review related to energy resource development, the government passed the *Energy Resources Conservation Act*.

42. As Janisch observes, "[i]t was not just that Ian McKinnon was an Albertan, nor that so many of his staff came from Alberta. They brought with them an Alberta model for an energy board, the Oil and Gas Conservation Board." Source: Janisch, H. (2012). *The Relationship Between Governments and Independent Regulatory Agencies: Will We Ever Get It Right? Alberta Law Review* 49(4), at 807.

43. Gray, E. (2000). *Forty Years in the Public Interest: A History of the National Energy Board*. Douglas & McIntyre. at 24.

44. Breen, *supra* note 3 at 131.

45. Breen, *supra* note 3 at 543.



The purpose of this review and subsequent legislation was to better coordinate resource development and “to bring under one administrative authority all aspects of the energy resources of Alberta, including the conservation and regulatory of energy resources, . . . the transmission of energy resources, and safety practices in the energy resources industries.”⁴⁶ Indeed, the government review identified a need for an increased role for energy resource management to adequately address environmental impacts from resource development.⁴⁷

In addition to renaming the OGCB the Energy Resources Conservation Board (ERCB), there was a continued expansion of the Board’s role and responsibilities to create a single-window, arm’s length agency. In addition to acquiring the OGCB’s responsibilities, the new ERCB was transferred administration of the *Pipe Line Act* and the *Coal Mines Regulation Act* as well as administration of the *Hydro and Electricity Energy Act* and *Coal Conservation Act*. This meant the ERCB had authority over the development and conservation of coal, and hydro and electric energy resources – responsibilities previously held by the Pipe Line Division and Mines Division within the Department of Mines and Minerals, and the Alberta Power Commission respectively.⁴⁸

1971 was also an important year for two contextual reasons. First, there was the formal recognition by the province that environmental issues required greater government attention through the formation of the Ministry of the Environment and ultimately reflected in more modern environmental legislation with the *Land Surface Conservation and Reclamation Act, 1973*.⁴⁹ This is in line with the growth of conservation and environmental groups seen in the 1970s. Second, there was a change in provincial government after 36 years from the Social Credit Party to the Progressive Conservative Party. However, the new Conservative government chose not to alter the ERCB in its initial years.⁵⁰ While the government and ERCB were said to work closely, the ERCB maintained its operations at an arm’s length. Despite large-scale resource decisions going to cabinet for approval, the Conservatives maintained the government’s confidence in the Board and upheld the convention established by the Social Credit Party to “rubber stamp” the Board’s expert decisions and not intervene in its decision-making:

“[T]he Conservatives upheld the Alberta regulatory tradition of dealing with decision reports as intact packages, an approach that denies even the most senior politicians the power to court favour with voters or companies by changing rulings, reasoning behind the rulings, or approval conditions.”⁵¹

46. *Bill 61: The Energy Resources Conservation Act*. (1971). 16th legislature, 4th session. Retrieved from https://docs.assembly.ab.ca/LADDAR_files/docs/bills/bill/legislature_16/session_4/19710211_bill-061.pdf

47. Low, *supra* note 5 at 8.

48. Bill 61, *supra* note 49.

49. Low, *supra* note 5 at 15.; Powter, C., Chymko, N., Dinwoodie, G., Howat, D., Janz, A., Puhmann, R., Richens, T., Watson, D., Sinton, H., Ball, K., Etmanski, A., Patterson, B., Brocke, L., and Dyer, R. (2012). Regulatory history of Alberta’s industrial land conservation and reclamation program. *Canadian Journal of Soil Science*, 92. Retrieved from <https://cdnsiencepub.com/doi/pdf/10.4141/cjss2010-033>

50. Jaremko, G. (2013). *Steward: 75 Years of Alberta Energy Regulation*. Energy Resources Conservation Board. Retrieved from https://static.aer.ca/prd/documents/about-us/Steward_Ebook.pdf

51. Jaremko, *ibid* at 3.



Interview participants confirmed many of the Board's described features during this period, including the ERCB's great expertise and political independence. Interviewees called this period of the 1970s the "golden age" of great technical expertise for the regulator. While the Board did not place significant focus on social aspects of resource development, the Board possessed "world class expertise." Interviewees observed that politicians would not intervene in the decisions of the Board and that political debate around the regulator and its decisions "just wasn't at play at all." They confirmed that, throughout the entire history of the ERCB, going to cabinet for approval of a decision was largely a formality. This description has parallels to the relationship held between the NEB and federal cabinet during the mid-20th century.

However, despite cabinet being a rubber stamp, throughout the mid-to-late 20th century, the government still regularly engaged and held a rapport with the Board. One participant noted that governments, up until the 1990s, provided their points of view on what constituted the public interest on energy resource development. This was seen as a helpful exercise that provided the unelected Board with a greater perspective on the government's perception of the public interest. The creation of the "Energy Committee" in 1971 exemplified this mutually beneficial relationship. The Committee included the premier, the departmental bureaucracy, and arm's length agencies including the ERCB, and its mandate was to liaison the various actors and advise cabinet on policy regarding energy resource administration.⁵² Furthermore in 1980, the ERCB and the Department of the Environment worked to minimize overlap and improve coordination related to provincial environmental review.⁵³

52. Bill 61, *supra* note 49.

53. Low, *supra* note 5 at 8.

Interviewees also said that the government made its views known to the Board if they were not happy with a regulatory decision. However, in upholding the government's long-held "regulatory tradition", the government would let the Board address and decide on controversial issues involving technical matters. Governments knew they could change the legislation, not the Board's individual regulatory decisions.

In summary, the early inception of Alberta's energy resource regulator began in the 1930's. The Conservation Board was borne out of necessity to impose conservation over unregulated oil fields previously under federal jurisdiction. Initial development with the TVGCB failed due to industry antagonism, non-compliance by operators and jurisdictional issues. The government would develop a more collaborative and consensual approach to regulation with the PNGCB. Taking inspiration from the American independent commission model of the late 19th century, the Board emerged as a competent, technical regulator shepherded by a government that maintained its support and confidence of the Board. Over the years, Alberta's Conservation Board expanded its remit and authority, keeping up with a rapidly growing resource sector. Later becoming the OGCB, and then the ERCB, the Board maintained key structural attributes and its perception as a respected arm's length, technical regulator free from undue political influence. These attributes of independence and effectiveness remained in place throughout the 20th century.



THE MERGER AND THE RE-SPLITTING (1992 - 2008)

In the early to mid-1990s, the ERCB underwent one of its more significant restructurings. In 1992, Ralph Klein was chosen by the Progressive Conservative Party of Alberta to replace retiring Premier Don Getty and become the 12th Premier of Alberta. Klein introduced greater fiscal restraint in Alberta with a desire to eliminate the province's deficit and debt. Indeed, in the early 1990s, both the federal and provincial governments faced pressure to address budgetary deficits and rising debt loads.⁵⁴ From 1992-1996, Alberta underwent "the Klein Revolution": a series of actions taken to eliminate the deficit within four years. During this time, several public services and programs were streamlined, cut, or privatized and Ministry budgets experienced an average cut of 20 percent.⁵⁵

Included in this "revolution" was the merger of the Public Utilities Board (PUB) and the ERCB into the Alberta Energy and Utilities Board (AEUB) in 1995. The rationale for the merger stemmed from "the desire to consolidate processes and save money."⁵⁶ In assessing the Ministry of Energy structure, the government wished to make the Ministry smaller and more integrated.

This included reducing the number of agencies that reported to it in order to "streamline the regulatory process and reduce overlap and duplication."⁵⁷ Additionally, it was desired to create a "one-window" regulatory process with the AEUB.

Low observes that the PUB and ERCB were similar in process and functionality: both relied on technical expertise, had well-established application processes, and possessed similar authority on inquiries and procedures for hearings.⁵⁸ However, they also had many differences. They held different mandates and specific areas of expertise, which (as affirmed via the courts) meant that their public interest considerations were different.⁵⁹ The two Boards regulated their respective sector(s) differently. Additionally, the Conservation Board with its extensive role in policy, was a policy-maker. In contrast, the PUB was predominately a "policy taker."⁶⁰

Observers characterized the merger (or "cost-cutting marriage of convenience"⁶¹) as not well thought out and ultimately, a purely political decision to find efficiencies.⁶²

54. Ogata, K. (2014). *The Mouse That Roared: The End of the Klein Revolution*. Canadian Association of Programs in Public Administration. Retrieved from <http://www.cappa.ca/images/resources/OgataMouseThatRoared-CAPPA%20Final.pdf>

55. Ogata, *ibid*.

56. Low, *supra* note 5 at 25.

57. Black, P. (1994, Feb. 28). "Main Estimates 1994-95." Legislative Assembly of Alberta. *Alberta Hansard*. 23rd legislature, 2nd session, at 290. Retrieved from https://docs.assembly.ab.ca/LADDAR_files/docs/hansards/han/legislature_23/session_2/19940228_2000_01_han.pdf

58. Low, *supra* note 5.

59. Low, *ibid* at 21-22.

60. Low, *ibid* at 25.

61. Jaremko, *supra* note 50 at 19.

62. Low, *supra* note 5.



With the *Alberta Energy and Utilities Act* coming to effect, the AEUB was created. Interestingly, the legislation had no purpose provisions and the ERCB and PUB as legal entities remained intact. Instead, the AEUB simply now possessed jurisdiction over “all matters that may be dealt with by the ERCB or the PUB.”⁶³ Further, key legislation in the *Energy Resource Conservation Act* and the *Oil and Gas Conservation Act* was not amended to reflect the merger.⁶⁴ Thus, the legal entities of the PUB and ERCB and their respective statutes remained in place, despite this new third regulatory body.

Additionally, consistent with the notion of fiscal restraint, a new funding formula for the Board’s budget was implemented cutting how much funding it received from the government and increasing the percentage of the budget to come from industry.⁶⁵ The Board would thus engage in more “financial independence” through industry fees.

During this time of amalgamation, there was one event that created concern over the political independence of the Board. In 1994, the Klein government arranged to have Ken Kowalski appointed as Chair of the AEUB. Kowalski was not like previous chairs, who came from industry/academia/public service. Rather, Kowalski was a politician.

This move sparked concern over a loss of independence and reputation at the Board, and there were calls to withdraw the political appointment. Notably, former ERCB Chair George Govier led the criticism and argued:

*“The appointment of a politician to the chairmanship of the combined board, however well qualified Kowalski might have been for his former duties, is little short of scandalous. [...] It disregards the tradition of technical competence and political independence of the board. It overlooks the well-qualified internal candidates. And, I believe, it will result in the loss of many highly qualified and experienced members and staff of the ERCB who see the stature of the board diminished and the opportunities for their professional growth and advancement seriously reduced [...]”*⁶⁶

Recognizing how much the public, industry, and government have all benefited from “the board’s competent and impartial regulation”, Klein withdrew Kowalski’s appointment a week later.⁶⁷

63. *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17, s.13.

64. Low, *supra* note 5 at 26.

65. Brownsey, K. (2005). Alberta’s Oil and Gas Industry in the Era of the Kyoto Protocol. In G. B. Doern (Ed.) *Canadian Energy Policy and the Struggle for Sustainable Development*. (pp. 200-222). University of Toronto Press, at 213.

66. Jaremko, *supra* note 50 at 19.

67. Jaremko, *ibid* at 19.



With the creation of the new AEUB, the Board underwent several internal restructurings in the first few years. The Board's first restructuring, four months after its inception in 1995, was to realize efficiencies and improve coordination. This reorganization was extensive, grouping PUB and ERCB staff into four divisions. The Board underwent a further restructuring in 1999, which reorganized it into nine units under the prominent leadership of AEUB Chair Neil McCrank. The purpose of this restructuring was to facilitate service delivery to its stakeholders and better reflect the Board's core processes.⁶⁸

There were areas where merging the two Boards helped resolve regulatory inefficiencies. For instance, merging permitted greater coordination regarding utilities regulation, as previously the ERCB had authority over utility facilities approval, while the PUB had authority over utility rates. However, overall, the regulator faced many internal challenges that came with merging a utility regulator and a resource development regulator.

First, the administrative styles of the PUB and the ERCB were difficult to reconcile.⁶⁹ As noted above, while the boards had similar processes and both relied on technical expertise, their mandates and how they regulated with regards to public interest considerations were fundamentally different.

Second, there were challenges related to AEUB's executive leadership and staffing. There were now difficulties in finding board members who had familiarity and experience "across the full range of the agency's jurisdiction."⁷⁰ This challenge came at a time when the size of the Board was contracting with fewer members on the AEUB than on the PUB and ERCB separately.⁷¹ This led to a loss in both corporate memory and experience, as well as an overall reduction of executive leadership as the Board's mandate and workload expanded. Lastly, the merger created cultural challenges. The ERCB's culture came to dominate the new Board and adjustments were needed, particularly for the smaller number of staff coming from the PUB.

In addition to internal structural challenges, in the mid-to-late 1990s and into the early 2000s, there were several external changes and challenges occurring in the energy sector. These changes affected the AEUB's workload, its independence and how it regulated the utilities and resource sectors.

On the electricity side, the government was pursuing restructuring and deregulation of its electricity sector at the time of the merger.⁷² Such an initiative required significant attention and resources from the new Board as it heard applications on new tariffs and engaged in new regulatory initiatives and responsibilities.

68. Doern G. B., and Gattinger, M. (2003). *Power Switch: Energy Regulatory Governance in the Twenty-First Century*. University of Toronto Press, at 137.

69. Brownsey, *supra* note 65 at 213.

70. Doern and Gattinger, *supra* note 68 at 138.

71. Several board members departed prior to the merger or retired. Source: Doern and Gattinger, *ibid* at 143.

72. Low, *supra* note 5 at 29; FindLaw. (2008). *Restructuring Canadian Electricity Markets*. Retrieved from <https://corporate.findlaw.com/law-library/restructuring-canadian-electricity-markets.html>



On the petroleum side, the AEUB had to address several sweeping challenges including a changing industry, new stakeholder tensions, new demands for environmental protection and public participation, and government demands for deregulatory and cost-saving measures. These challenges are elaborated below.

After decades of exclusively approving new energy projects in the province, the Board was now faced with “suspended, aging, and expanding” energy facility infrastructure as well as the decommissioning of “thousands and thousands of oil and gas wells.”⁷³ The industry was getting older and aging facility infrastructure required greater regulatory attention through enforcement and compliance procedures. As the AEUB described in 1994, among the many influences shaping energy regulations, “the maturing of Alberta’s petroleum sector is one of the most significant.”⁷⁴

Paradoxically, the industry continued to expand exponentially, growing from less than 100 companies in the 1970s to roughly 1,300 in the 1990s.⁷⁵ Many of these new companies were smaller operators where compliance was more of an issue; these companies either did not have the capacity/resources to comply with regulation, or they perceived the Board as a threat to their revenue and thus were less willing to comply.⁷⁶

Additionally, there were “surging levels of exploration and development activity” in Alberta, including the expansion of unconventional resource development (such as shale and “tight” oil and gas). This meant both a sharp increase in the number of applications the AEUB had to review over the years⁷⁷, as well as changes in how the Board ultimately regulated oil and gas.

There was also growing public activism around oil development and calls for greater public participation in the affairs of the Board. Multiple factors motivated this call for greater public involvement, including concern over safety and environmental externalities from resource development (such as sour gas drilling), concern over the maturing industry, and a broader societal trend towards greater citizen involvement in policy decision-making. Under pressure to include the general public as an important stakeholder, the Board started including the public in its policy development processes⁷⁸ and producing public education documents. It even revisited Board decisions that had triggered strong public concerns.⁷⁹

73. McInnis, J. (1992, Jul. 2). “Bill 214 Municipal Taxation Amendment Act.” Legislative Assembly of Alberta. *Alberta Hansard*. 22nd legislature, 4th session, at 1756. Retrieved from https://docs.assembly.ab.ca/LADDAR_files/docs/hansards/han/legislature_22/session_4/19920702_1430_01_han.pdf

74. Alberta Energy Resources Conservation Board. (1994). *Energy Alberta 1993*. at 19.

75. Doern and Gattinger, *supra* note 68 at 140.

76. Doern and Gattinger, *ibid* at 140.

77. The number of applications the Board had in 1996/1997 was 19,551; in 2004, there were 44,000 applications. Sources: Alberta Ministry of Energy. (1997). *1996/1997 Annual Report*.; Alberta Energy and Utilities Board. (2005). *2004 Year in Review*.

78. Alberta Energy Resources Conservation Board, *supra* note 74 at 19.; Doern and Gattinger, *supra* note 68 at 140.

79. Doern and Gattinger, *ibid* at 141.



Tied to growing calls for public engagement were rising tensions between landowners and resource developers. While this tension was always prevalent, during the 1990s and 2000s, it had increased in both the number of conflicts and their intensity. Doern and Gattinger (2003) note that this rise was partially due to the changing demographics of landowners who were now more financially sufficient and thus less willing to compromise with resource developers.⁸⁰

Conflicts would draw significant public and media attention witnessed through dramatic events. This included hundreds of acts of vandalism in oil and gas fields and “industrial sabotage” in northwestern Alberta; and the shooting and murder of Patrick Kent, an industry executive for KB Resources in 1998.⁸¹ In order to address both the increasing number of stakeholders as well as the intensity of conflicts around resource development, the Board developed rigorous public consultation guidelines for industry and negotiated settlement process guidelines.⁸²

Lastly, there was a growing demand for the AEUB to further integrate environmental factors into the Board’s decision-making processes. Much of the Board’s jurisdiction had direct environmental impacts and became increasingly subject to provincial and federal environmental regulations in the early-to-mid 90s. The growth of environmental and competitive regulatory regimes led to a decentralization in decision-making and the “de-insulating” the stand-alone regulator. The AEUB transformed into a more integrated, horizontal and networked regulator;⁸³ As stated by Doern and Gattinger, the Board was no longer a single-window regulator with its decision-making authority fragmented:

“As a sectoral regulator, it had been accustomed to a relatively impermeable decision-making sphere; that is, energy regulation was its responsibility, and it discharged this responsibility with a fair degree of independence. As horizontal issues, most notably the environment, have appeared on the regulatory landscape, the boundaries of the AEUB’s decision-making environmental have become far more porous.”⁸⁴

80. Doern and Gattinger, *ibid* at 141.

81. Doern and Gattinger, *ibid* at 141.; Cartwright, V. (2003). *To What Extent Does the Alberta Energy Resource Conservation Board’s Alternative Dispute Resolution Program Affect the Capacity, Opportunity and Volition of Landowners and the Oil and Gas Industry to Resolve Conflict?* [Master’s thesis, Queen’s University]. University of Victoria. Retrieved from https://dspace.library.uvic.ca/bitstream/handle/1828/1672/V_Cartwright_MA_Thesis_Final.pdf?sequence=1&isAllowed=y

82. It is also noted that the negotiated settlement process also came about budget constraints from government and thus finding new ways to reduce the Board hearings and “expenditure-intensive means of regulating.” Source: Doern and Gattinger, *ibid* at 145.

83. Doern and Gattinger, *ibid* at 152.

84. Doern and Gattinger, *ibid* at 152.



The combined effects of an evolving resource development sector, greater public engagement and landowner-industry tensions, decentralized decision-making, and the government's desire for fiscal restraint created a challenging regulatory environment for the newly merged Board from the mid-1990s onward. These challenges began to impact the Board's effectiveness including the timeliness of Board decisions.⁸⁵ However, despite these challenges, key attributes of the previous Conservation Boards persisted: the AEUB remained an agency of significant technical expertise, and the Board and its staff continued to have substantive authority to regulate in the public interest. Additionally, the Board continued to maintain a collaborative approach with the resource industry.

In the mid-1990s moving into the 2000s, interviewees familiar with the Board identified a marked shift in the relationship between government and the expert regulator. One participant noted that the government stopped providing the Board explicit policy direction on their interpretation of public interest. Indeed, although the 1995 merger had expanded the Board's mandate, the legislation did include any government directions on issues like sustainability, climate change and landowner-industry conflict. As Low observes, this would have no doubt frustrated the Board and its stakeholders.⁸⁶

For instance, the AEUB repeatedly called for a regional development strategy for oil sands areas by government to help the Board properly assess oil sands projects.⁸⁷ As one interviewee noted, this lack of guidance left regulators like the AEUB in a difficult situation:

"With that missing information, the regulator would have to interpret that component of the public interest and [...] if you ever got it wrong [...] then governments would come after you with a vengeance, accusing the regulator of all sorts of nefarious things and misinterpreting the public interest."

In addition to these on-going challenges for the AEUB, the pace of development, particularly in the oil sands, increased rapidly in the early 2000s and was forecasted to continue to increase. In the face of a rising number and complexity of project applications, some observers raised concerns over the Board's capacity and the government's capacity to adequately conduct environmental assessments on oil and gas projects.⁸⁸

85. Low (2009) observes that in 2003/2004 that, "[i]n spite of 'record levels of activity', the average turn-around time for routine facility applications is down." Source: Low, *supra* note 5 at 11.

86. Low, *supra* note 5 at 28 and 30.

87. N. Vliavianos. (2007). The Legislative and Regulatory Framework for Oil Sands Development in Alberta: A Detailed Review and Analysis, Occasional Paper No. 21. *Canadian Institute of Resources Law*. at 8. Retrieved from <https://dspace.ucalgary.ca/bitstream/handle/1880/47188/OP21Oilsands.pdf;jsessionid=71E9F8D8FB8DCF31DE5D33BCD5D4162F?sequence=1>

88. The Royal Society of Canada Expert Panel. (2010). Environmental and Health Impacts of Canada's Oil Sands Industry. *The Royal Society of Canada*, at 77-78.



Vlavianos (2007) identified several challenges plaguing the oil and gas regulatory and legislative framework during this period, which affected the effectiveness and independence of the regulator:

- The regulator was perceived as a “captive regulator” with board membership coming from the oil and gas industry and the Board being mostly financed through industry fees. Critics suggested that there was “institutional bias” and that the Board acted merely as a “rubber stamp” for oil and gas development. This bias was evidenced by comments made by high-level staff at the AEUB at the time.⁸⁹
- The legislative mandates of the AEUB and Alberta Environment (AENV) failed to clarify responsibilities for the environmental impacts of oil sands development. While the regulator and the department established a Memorandum of Understanding to address their respective responsibilities, the document did not resolve all issues and confusion remained.⁹⁰
- Issues with the Board’s public hearing process remained. In some instances, the Board still proceeded with – and often approved – applications, despite process problems such as failing to provide timely notice to landowners. This trivialized the public hearing process.⁹¹ Additionally, the Board made it difficult for public interest groups, environmental groups, and municipalities to contribute at hearings.⁹² Thus, as Vlavianos observed then, “certain aspects of the public interest may not be represented in the decision-making process.”⁹³
- Complexity over the legislative and regulatory system with AEUB and AENV approvals and monitoring was prevalent. Vlavianos, while noting that there would be some complexity due to the nature of the oil sands, observed that “the system should not be so unduly complex that even answers to basic questions are difficult to find... Such complexity likely reveals a number of uncertainties and ambiguities around the roles and mandates of the decision makers and the processes used in their decision making.”⁹⁴

89. Vlavianos, *supra* note 87 at 38-39.

90. Vlavianos, *ibid* at 57.

91. Vlavianos, *ibid* at 40.

92. Vlavianos, *ibid* at 66.

93. Vlavianos, *ibid* at 66.

94. Vlavianos, *ibid* at 59.



- The AEUB's broad discretion to interpret the public interest raised concerns. Such discretion, in Vlavianos' view, could "give the impression of an uncertain, unpredictable and non-transparent process." Additionally, some observers questioned whether the Board's members (i.e., unelected experts) possessed the ability to adequately deal with complex issues in the public interest related to social, economic and environmental effects.⁹⁵

Many of these issues manifested in the Board's hearing for the Alta-Link 500 Kv project and its response to public protests in 2006 and 2007. This hearing, for a proposed transmission line, drew concern and frustration from landowners due to issues related to fair and adequate consultation and proper notice and the "need" for a transmission line.⁹⁶ Further, contradicting pieces of legislation and occasional panel rulings "contributed to confusion, frustration, discontent and anger among the land owners."⁹⁷ This discontent cumulated in a series of hostile AEUB hearings in April 2007 with landowners interrupting, shouting, and shoving the AEUB staff and panel.⁹⁸

Retired Judge Perras, tasked with investigating the series of events, noted that the panel members and staff "had never dealt with such a fractious and persistently raucous crowd and did not have an adequate venue nor sufficient identifiable security present to control the proceedings. The panel and staff, particularly women, were feeling quite uncomfortable, fearful and intimidated by the unprecedented proceedings."⁹⁹

In response, the Board procured private security services for future proceedings. However, new issues arose when private security personnel took part in hearings covertly in plain clothes. Further, one security member developed a rapport with a group opposed to the project and received approval by the AEUB security to participate in a conference call held by this group in order to learn more about future disruptions. The events created public outrage, with allegations that the Board was "spying" on landowners.¹⁰⁰

95. Oil Sands Ministerial Strategy Committee. (2006). *Investing in Our Future: Responding to the Rapid Growth of Oil Sands Development*. Government of Alberta. Retrieved from <https://open.alberta.ca/dataset/debe6f74-ef28-4b74-8acd-2fd3db839984/resource/933124df-a553-41df-ae6e-0be4dc8275ce/download/3866546-2006-investing-future-responding-rapid-oil-sands-development.pdf>

96. Perras, D. W. (2007). *Examination of the Alberta Energy and Utilities Board Security Measures Related to the Alta Link 500 Kv Hearing*. Alberta Energy. at 3. Retrieved from <https://open.alberta.ca/dataset/5ed1bc1b-35f5-4862-866f-9d05f2950ff2/resource/9694468a-ac36-4e3c-af98-88dff9b47710/download/perras-report-2007.pdf>

97. Perras, *ibid* at 4.

98. This included "singing grannies." Source: Perras, *ibid* at 6.

99. Perras, *ibid* at 7.

100. Köhler, N. (2007, Jul. 9). Energy board can't hide its spying eyes. *MacLean's*. Retrieved from <https://archive.macleans.ca/article/2007/7/9/energy-board-cant-hide-its-spying-eyes>



The “AEUB Spying Scandal” led to two investigations by the Information and Privacy Commissioner and a retired Court of Queen’s Bench judge; the former observing that the actions broke privacy laws¹⁰¹ and the latter calling the authorization by the AEUB to have personnel participate in the conference call “repulsive.”^{102,103}

Most critically, the scandal further eroded public confidence in the Board and faith that the independent, quasi-judicial regulator was able to effectively regulate in the public interest. The Board faced negative media coverage and extensive public scrutiny.¹⁰⁴ As the Consumer Association of Canada put it, the Board was left with “an unfortunate black eye” and that “utility hearings are rarely the subject of dinner table conversations. . . .”¹⁰⁵ Insinuations that the Board was a “rubber stamp” of industry resource projects were refueled.

In response, AEUB executives resigned, and the Board revoked previous decisions made on the AltaLink 500 Kv project and disbanded its security unit. However, the perceived independence and effectiveness of the Board was lastingly damaged:

“The nature of and response to this incident. . . demonstrated the importance of assuring that the quasi-judicial board responsible for making the public interest determination on oil sands projects and recommendation to the Albert Cabinet not only consistently acts in a manner which fully respects the principles of natural justice, but can also be reliably perceived to do so.”¹⁰⁶

In June 2007, the Ministry of Energy announced the return to two separate energy regulators, marking an end to the AEUB.¹⁰⁷ Through the Alberta Utilities Commission Act, there was a return to the ERCB to regulate oil and gas resources and the new Alberta Utilities Commission (AUC) was formed to regulate electricity and utilities. The decision to re-split the regulation of energy resources and electricity has been described as abrupt, with little forewarning; for instance, government documents such as the Ministry of Energy’s 2005/06 Annual Report do not suggest a major split at the AEUB.

101. MacDonald, H. and Knight, M. (2007, Oct. 16). Spy scandal forces AEUB security chief to resign: Critics want energy minister to go next. *Edmonton Journal*. Retrieved from <https://www.pressreader.com/canada/edmonton-journal/20071016/282235186293898>

102. Perras, *supra* note 99.

103. The Royal Society of Canada Expert Panel, *supra* note 88.

104. MacDonald and Knight, *supra* note 101.

105. Canadian Business Online. (2007, Jul.). Beleaguered Alberta energy regulator faces three probes over spying. *The Electricity Forum*. Retrieved from <https://www.electricityforum.com/news-archive/jul07/Albertaenergyregulatorfacingthreeprobes>

106. The Royal Society of Canada Expert Panel, *supra* note 88.

107. Alberta Energy. (2007, Jun. 14). *Managing growth pressures: New bill to enhance Alberta’s energy regulatory structure* [Press release]. Retrieved from <https://www.alberta.ca/release.cfm?xID=216632BFA9378-930C-3DEF-65617928E4F93339>



In fact, stakeholders surveyed at the time did not have the appetite for wholesale change with the regulatory system, and that the government's push for an "Integrated Energy Vision" seemed more consistent with a single regulator.¹⁰⁸ It has been suggested that the controversy surrounding the spying scandal led to splitting the Board in order to "wipe the slate clean."¹⁰⁹ Indeed, opposition legislative members brought up the scandal and the convenient timing of its legislation and the dissolving of the AEUB.

Conversely, other observers argue that the purpose of the split was to acknowledge the different roles and characteristics of utility vs. resource regulation in Alberta and the specific complexities of these two growing industries.¹¹⁰ For instance, in the Bill's second reading, the Minister of Energy highlighted the growing activity in both the oil and gas industry and electricity infrastructure. Noting the high number of applications the single Board received (60,000 in 2006), the government justified its intention to refocus on transparency and an efficient regulatory framework by re-establishing two boards "with clear mandates, improved management, and fresh leadership..."¹¹¹

Regardless of the specific reasons for the split, it was clear that the government was aware of the challenges and issues plaguing the resource sector, including stakeholder responsiveness, regulatory capture, and the expanding caseload and complexity of applications. A return to the ERCB was seen as a fresh start and a separate - and "effective" - regulatory system.¹¹²

In summary, the "Klein Revolution" and attempts to increase efficiency brought about a merger between the ERCB and the PUB to create the AEUB. While there were some efficiencies, there were also some initial internal challenges the Board was faced with, including reconciling how the two Boards regulated differently with regard to the public interest, executive leadership, and culture. Additionally, greater external challenges facing the petroleum sector including a maturing resource sector, greater calls for public engagement, landowner-industry tensions and fragmented decision-making made for a challenging regulatory environment for the newly merged Board from the mid-1990's onward.

108. Low, *supra* note 5 at 32.; Responsible Electricity Transmission for Albertans. (2012, Jul. 16). Opposition to AltaLink's Western Alberta Transmission Line Continues [Blog post]. Retrieved from <https://retasite.wordpress.com/2012/07/16/opposition-to-altalinks-western-alberta-transmission-line-continues/>

109. Low, *ibid* at 33.

110. Alberta Ministry of Energy. (2008). *2007/2008 Annual Report*.

111. Knight, M. (2007, Nov. 15). "Second Reading: Bill 46: Alberta Utilities Commission Act." Legislative Assembly of Alberta. *Alberta Hansard*. 26th legislature, 3rd session. at 2004. Retrieved from https://docs.assembly.ab.ca/LADDAR_files/docs/hansards/han/legislature_26/session_3/20071115_1300_01_han.pdf

112. VanderBurg, G. (2007, Dec. 3). "Bill 46: Alberta Utilities Commission Act." Legislative Assembly of Alberta. *Alberta Hansard*. 26th legislature, 3rd session. at 2363. Retrieved from https://docs.assembly.ab.ca/LADDAR_files/docs/hansards/han/legislature_26/session_3/20071203_2000_01_han.pdf



Finally, during this time, the government failed to provide explicit policy direction on public interest questions. While the AEUB initially continued to be an agency of significant technical expertise with a collaborative approach with industry, weaknesses of this model began to show in the 2000s. These included a growing perception of the Board's regulatory capture by industry, a lack of clarity around the Board's mandate within an increasingly complex regulatory system, and emerging concerns about the effectiveness of the Board's public hearing processes. These issues climaxed in 2007 with the Alta-Link 500 Kv hearings and the "spying scandal." These events further diminished public confidence in the Board and faith that the independent, quasi-judicial regulator was able to effectively regulate in the public interest. In 2007, the AEUB was dissolved as the government announced a return to separate resource and utility regulators.



INDEPENDENCE AND EFFECTIVENESS IN QUESTION (2008 - 2019)

On January 1st, 2008, the 12-year “forced marriage” that was the AEUB ended. The Alberta Utilities Commission Act separated the AEUB into two regulatory entities: the AUC and the ‘new’ ERCB. The new ERCB assumed responsibilities for the regulation of fossil fuel development and pipelines, except gas utility pipelines. The AUC had authority over utilities rate regulation (i.e., electricity, gas, water), as well as the regulation of power plants, transmission lines, and gas pipelines. The AUC’s role was very different compared to that of its sole regulator predecessor, the PUB. The AUC had an expanded mandate, now overseeing the province’s deregulated competitive electricity market. Additionally, the government consolidated approval for energy utilities projects which meant that the AUC now had jurisdiction over the construction and operation of hydro-electric projects, power plants, transmission lines, and gas utility pipelines. These responsibilities were previously the purview of the ERCB.¹¹³

The intention behind this restructuring of responsibilities between the two regulators was to better allow the agencies “to focus on two distinct, expanding and increasingly complex segments of Alberta’s vibrant economy.”¹¹⁴ However, while the AUC has continued since this restructuring, the return to the ERCB as the province’s resource regulator was short-lived, from 2008 to 2012.

In 2010, the government launched an initiative to enhance Alberta’s competitiveness in attracting energy investment. The government was acutely aware of the importance of the sector for the province’s prosperity; as expressed in the government review, “[o]ver the next 25 years, upstream oil and gas development in Alberta has the potential to add \$2.5 trillion in new economic activity, and millions of person-years in jobs.”¹¹⁵

The competitiveness review highlighted several challenges to Alberta’s resource sector. These included more competition from other jurisdictions, the maturing of conventional oil and gas resources, economic volatility (observing the financial crisis), high costs associated with developing resources, structural market changes, and regulatory complexity. Observing regulatory complexity, the review noted that incremental layers of regulation led to an inefficient and complicated process with higher compliance costs for industry.¹¹⁶ Indeed, according to interviewees, the government had been growing frustrated with the regulatory framework and decisions as early as the 2000s.

Following the release of the review, the government initiated the Regulatory Enhancement Project (REP) and a Task Force to improve the province’s oil and gas regulatory system.¹¹⁷

113. Low, *supra* note 5 at 36

114. Alberta Ministry of Energy. (2008). *Energy Annual Report 2007-2008*. at 18. Retrieved from <https://open.alberta.ca/dataset/cbd7147b-d304-4e3e-af28-78970c71232c/resource/145db0c6-3cab-433e-8888-dfc860ef538b/download/6847119-2007-2008-alberta-energy-annual-report.pdf>

115. Alberta Ministry of Energy. (2010). *Energy Investment: A Framework to Improve Alberta’s Natural Gas and Conventional Oil Competitiveness*, at 1. Retrieved from <https://open.alberta.ca/dataset/15b8c590-9ccb-4246-b309-a5b209830e9a/resource/3b3aff95-8634-48be-883b-a3e90e97d827/download/energizinginvestment.pdf>

116. Alberta Ministry of Energy, *ibid* at 6.

117. Alberta Ministry of Energy. (2010). *Regulatory Enhancement Project: Technical Report*. Retrieved from <https://open.alberta.ca/dataset/7ed67e14-0254-4f11-af3c-2fdab2cd6797/resource/77eea38d-2d8d-4591-9fe9-ccc2e91914f5/download/6748861-2010-12-regulatory-enhancement-project-technicalreport.pdf>



The REP Task Force published a technical report in December 2010, which criticized the complexity of the regulatory system and the lack of coordinated decision-making across the various departments and agencies. The report stated that the various decision-makers (including the ERCB, AENV, Alberta Sustainable Resource Development [SRD], and Alberta Energy) were acting too independently of each other, specifically in relation to their “policy assurance functions.”¹¹⁸ This contributed to a lack of consistency and alignment among the agencies, creating a complex system with occasionally competing interests:

“... [T]he current system consists of three independent but largely uncoordinated regulatory agencies. While these agencies deliver regulatory functions in different policy areas, they deliver similar regulatory processes. This arrangement results in duplication of effort, and the need for project proponents to seek multiple authorizations or permits through multiple applications for a single project.”¹¹⁹

The report set forth a number of recommendations to reform Alberta’s energy regulatory landscape, including the establishment of well-defined public engagement processes and greater integration of natural resource policies. Most central was its recommendation for a single oil and gas regulatory body with all “policy assurance functions.”¹²⁰ This meant an expanded sole regulator that possessed functions and responsibilities then currently undertaken by AENV, SRD and the ERCB. The report argued that a single regulator with all the policy assurance functions tied to upstream oil and gas would create a less complex and more coordinated regulatory delivery processes, streamline operations, and ensure greater accountability and clarity throughout a project lifecycle. The single regulator would thus allow for greater efficiency and effectiveness, greater transparency and improved timeliness of decisions (“because there is a single decision, rather than multiple decision points.”)¹²¹

On December 31 2010, the REP Task Force would publish “Enhancing Assurance” further recommending “a single regulatory body with unified responsibility for policy assurance... of upstream oil and gas development activities.”¹²²

118. “Policy assurance functions” refers to components of the policy cycle that “assures” policy of the system. It refers to components such as site-specific decisions, compliance and enforcement mechanisms (source: Alberta Ministry of Energy, *ibid* at 14.)

119. Alberta Ministry of Energy, *ibid* at 26.

120. Alberta Ministry of Energy, *ibid* at 57.

121. Alberta Ministry of Energy, *ibid* at 57.

122. Regulatory Enhancement Task Force. (2010). *Enhancing Assurance: Report and Recommendations of the Regulatory Enhancement Task Force to the Ministry of Energy*, at 14. Retrieved from <https://open.alberta.ca/dataset/0dd94d5f-ca26-49c8-80cc-efdc63357d0c/resource/96811ba2-4755-416d-857a-bf-cc4db6b565/download/6169641-2010-enhancing-assurance-report-recommendations-2010-12.pdf>



With these reports, the government would accept and go about implementing its recommendations including the introductions of a one-window single regulator.¹²³ The research and publications from the REP would form the basis of Bill 2, the *Responsible Energy Development Act (REDA)* which was introduced in October 2012.

The context of the REP and the initial competitiveness review in the early 2010s is worth observing. According to interviewees, around this time the provincial government was growing frustrated with the regulatory process and its decisions. Government was acutely aware of the importance of the sector to assure prosperity. Additionally, the government was also aware of the growing negative perceptions of the province's industry, and specifically, the oil sands. The government wished to combat these negative perceptions and to re-establish Alberta as a best-in-class resource regulator; a reprise of the success seen with the OGCB or the original ERCB in the 1950s to early 90s.¹²⁴

As part of this effort, the government used the REP and the moment it created to push "regulatory diplomacy," whereby the government publicized its regulatory regime nationally and internationally to repair the regime's damaged image. In pursuing this vision, the government was said to be more forceful with the-then ERCB to expand into regulatory diplomacy. For instance, the government pressured the ERCB to participate in controversial international pipeline hearings like TransCanada's Keystone XL project.¹²⁵

There was pushback from the ERCB that they would not engage in public adjudicative hearings in other jurisdictions, stating correctly that it was beyond its mandate. Thus, there was growing conflict between the perception of an independent, quasi-judicial regulatory authority and the desire for increased regulatory diplomacy; one interviewee saw these events as a "downward spiral [...] of the independence of the regulator," precipitating the passing of *REDA*.

In December 2012, *REDA* received royal assent and over the next two years, the Act would be implemented in three phases to ensure operational certainty. The goals of the new legislation were to address the issues outlined in the REP and the competitiveness review including to "streamline process, reduce complexities, and increase Alberta's economic competitiveness."¹²⁶ Notably, this regulatory reform in Alberta came only one month following the Federal government's regulatory reforms to the NEB under their omnibus budget bill. *REDA* introduced many substantive changes to the province's regulatory system and its resource regulator. While a full discussion of all changes is beyond the scope of this case study, it is worth examining the major changes as they pertain to the Board's regulatory effectiveness and independence.

123. Sharma, R. (2013). *The Potential Consequences of the Alberta Energy Regulator on Stakeholders in the Resource Industry* [Unpublished master's thesis]. University of Calgary. Retrieved from <https://prism.ucalgary.ca/bitstream/handle/1880/51625/Sharma%2c%20Richa.pdf?sequence=1&isAllowed=y>

124. McFadyen, D. and Eynon, G. (2021). Risks of Failure in Regulatory Governance. *The School of Public Policy Publications*, 14(2). Retrieved from <https://www.policyschool.ca/wp-content/uploads/2021/01/Risks-of-Failure-McFadyen-Eynon.pdf>

125. McFadyen and Eynon, *ibid* at 5.

126. Nikolaou, N. (2012). An Overview of Bill 2: Responsible Energy Development Act – What are the Changes and What are the Issues? *The University of Calgary, Faculty of Law Blog on Developments in Alberta Law*. Retrieved from https://ablawg.ca/wp-content/uploads/2012/11/Blog_NV_Bill2_Overview_Nov2012.pdf



REDA established the new Alberta Energy Regulator (AER). The AER assumed roles and mandates of the ERCB, AENV, RSD as well as – to a limited extent – Alberta Energy with respect to exploration approvals. Compared to the ERCB, the AER received more authority over more legislation and regulation particularly related to environmental issues, including the Environmental Enhancement and Protection Act, RSA 2000, c-E12; the Public Lands Act, RSA 2000, c P-10; and the Water Act, RSA 2000, c W-3.¹²⁷

However, this expanded remit came with enhanced abilities for cabinet and the minister to intervene and be prescriptive in the regulatory framework. This has been observed through a several clauses in the legislation. For instance, section 16 of REDA requires the AER to disclose any information to the minister upon request.¹²⁸ Section 22 requires the AER to give notice to the minister prior to making any rules.¹²⁹ Lastly (and most critically), section 67 allows the Minister to give directions to the AER. Bruno (2015) conducted an in-depth analysis on this section, observing the benefits and issues with directive provisions, comparing REDA's directive provision with provisions seen with other regulators including the BC Oil and Gas Commission and the Ontario Energy Board.

He commented that while ministerial directives can provide timely guidance to regulators so as not to “compromise larger policy goals”, they also can pose several challenges. These include issuing directions intended to influence the context of an existing application before the agency; giving rise to greater lobbying efforts to influence the minister and overturn decisions reached in the regulator's more transparent process; and, overall, undermining the very reason why governments create independent regulators in the first place.¹³⁰

Additionally, directives via section 67 also originate from the Minister alone thus reducing accountability of the directives compared to if they originate from the full Lieutenant Governor-in-Council:

“While the power to issues directions may assure appropriate oversight and offer guidance within the broader policy framework of the Alberta Government, this type of provision may also cause difficulties concerning the ability of the Regulator to carry out its mandate with the required level of independence from the executive branch.”¹³¹

127. Nikolaou, *ibid* at 2.

128. Fluker, S. (2012). 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. *The University of Calgary, Faculty of Law Blog on Developments in Alberta Law*. Retrieved from https://ablawg.ca/wp-content/uploads/2012/11/Blog_SF_Bill2_Nov2012.pdf; *Responsible Energy Development Act*, R.S.A. 2012, c. R-17.3.

129. Ecojustice. (2013). *Legal Backgrounder: Bill 2: Responsible Energy Development Act*. Retrieved from <https://www.ecojjustice.ca/wp-content/uploads/2015/03/REDA-backgrounder-May-2013.pdf>

130. Bruno, G. (2015). Section 67 of the Responsible Energy Development Act: Seeking a Balance Between Independence and Accountability. *Alberta Law Review*, 52(4), at 835.

131. Bruno, *ibid* at 831.



REDA put in place a new, tripartite governance model for the AER.

This corporate-influenced model established a separate Board of Directors and Chair to handle the regulator’s administration and general direction; a Chief Executive Officer reporting directly to the Board Chair to oversee the day-to-day operations; and Commissioners/ Chief Hearing Commissioner to carry out applications subject to hearings, appeals and/or reconsiderations.¹³² Routine, non-hearing applications and their approval/ rejection can be conducted by staff (authorized by the Board.)¹³³

The AER was the first of Canada’s major energy tribunals to restructure its governance into the tripartite model with the Canada Energy Regulator and OEB following suit in the late 2010s and early 2020s respectively. The tripartite model, in relation to the new CER, was discussed extensively by interview participants.¹³⁴ However, Alberta’s tripartite model is notable for two specific reasons.

First, there has been concern over the appointment/removal process (or lack thereof) for Hearing Commissioners. Specifically, cabinet appoints Commissioners for an undefined term and sets their remuneration. Thus, the tenure of the Commissioner is “at pleasure” of cabinet. Fluker compares this to the tenure granted to ERCB Members, where members were given fixed five-year terms and could only be removed during that term on address to the legislative assembly. Fluker concludes that the lack of security of tenure for Commissioners means that the AER “fails the test for independence on security of tenure in the common law.”¹³⁵

Second, the rationale for the new governance model and the parsing out of adjudicative functions with Hearing Commissioners is unclear.¹³⁶ As Nikolaou asks bluntly, “why has the government decided to separate the hearing functions from the other functions of the AER?”¹³⁷ Legal experts hypothesized that the model gives the government more control over who decides on which applications go to hearing.¹³⁸

132. Bruno, *ibid* at 845; Nikolaou, *supra* note 126 at 5.

133. Nikolaou, *ibid* at 5.

134. Please see the NEB case study page for more on this debate of the tripartite model.

135. Fluker, *supra* note 128 at 2.

136. Harrison, R. J., McCrank, N. and Wallace, R. (2020). The Structure of the Canadian Energy Regulator: A Questionable New Model for Governance of Energy Regulation Tribunals? *Energy Regulation Quarterly*, 8(1). Retrieved from <https://energyregulationquarterly.ca/articles/the-structure-of-the-canadian-energy-regulator-a-questionable-new-model-for-governance-of-energy-regulation-tribunals#sthash.tclKM2Fz.dpbs>

137. Nikolaou, *supra* note 126 at 5.

138. Nikolaou, *ibid* at 5; Fluker, *supra* note 128.



REDA erased the references to “the public interest” found in previous ERCB legislation. The ERCB was to make decisions “in the public interest, having regard to the social and economic effects of the project and the effects of the project on the environment.”¹³⁹ While there had been criticism over the public interest test previously due to its unpredictability and ambiguity, some considered its removal in REDA “surprising.”¹⁴⁰ In its place, REDA introduced a number of factors related to the economic, social, and environmental impacts of the activity for the regulator to consider when making a decision. However, it was unclear how these decisions would be made in the absence of the public interest test, and if cabinet guidance might impose more direct intervention on factors for cases.¹⁴¹

Stakeholders called for a return to a public interest test and more certainty over the AER’s decision-making.¹⁴² However, early AER decisions illustrated that the public interest test was still very much in use in addition to the new decision factors. This is because public interest provisions had remained intact under related legislations, including the *Oil and Gas Conservation Act* and the *Oil Sands Conservation Act*.¹⁴³

REDA reshaped the processes for intervenors, application hearings, and the Crown’s duty to consult. AER now had greater discretion as to whether to hold a hearing, and the definition for standing was now narrower.¹⁴⁴ Also, concern was raised over provisions related to duty to consult with Indigenous Peoples and whether such provisions might lead to more delays and uncertainty.¹⁴⁵ The Pembina Institute later confirmed that, despite the AER making advances in developing rules related to standing, many of the same participation issues from the ERCB would be expected to continue and would be exacerbated with the AER due in part to REDA.¹⁴⁶ Interview participants expressed similar views:

“One of the objectives of the REDA legislation is to avoid protracted public hearings. You have to be a directly affected person to participate in a hearing, which is a very hard test to meet. So really, there are no public interest groups or environmental groups that are able to participate in any of the hearings because they cannot meet the ‘directly affected’ test.”

139. Nikolaou, *ibid* at 3.

140. Nikolaou, *ibid* at 3.

141. Nikolaou, *ibid* at 3.

142. Ecojustice, *supra* note 129 at 2.

143. Lawson Lundell LLP. (2013). *Energy Law Bulletin: Alberta’s New Energy Regulatory Regime Takes Shape* [Blog post]. Retrieved from <https://www.lawsonlundell.com/newsroom-news-637>

144. Thibault, B. (2013). *Launch of Alberta’s new single regulator leaves room for improvement* [Blog post]. Pembina Institute. Retrieved from <https://www.pembina.org/blog/launch-of-alberta-s-new-single-regulator-leaves-room-for-improvement>

145. Bankes, N. (2012). Bill 2 the Responsible Energy Development Act and the Duty to Consult. *The University of Calgary, Faculty of Law Blog on Developments in Alberta Law*. <http://ablawg.ca/2012/11/19/bill-2-the-responsible-energy-development-act-and-the-duty-to-consult/>

146. Way, N., Driedzic, A., and Kenyon, D. (2017). *Standing at Energy Regulators in Alberta: Issue Update and Recommendations*. Pembina Institute. Retrieved from <https://www.pembina.org/reports/standing-reform-report-2017.pdf>



"In terms of how the legislation is structured, it's clearly a policy decision on the part of the Alberta government to ensure that the vast majority of applications will be resolved without a public hearing and that if there is a public hearing there will be few participants."

Interviewees described *REDA* as a key moment in the history of the regulator as it pertains to regulatory independence and effectiveness. The government assumed a higher degree of control over the regulator through various provisions and directives. One participant stated the government looked less favourably on the role of independent regulators when designing *REDA*. Previously, the ERCB had a degree of "formal independence" from the executive branch with respect to adjudicative and regulatory decision-making.¹⁴⁷

While *REDA* was well received by those in industry,¹⁴⁸ the new legislation was not well-received by scholars, landowners and environmental associations.¹⁴⁹ For instance, both Ecojustice and the Environmental Law Centre called for the deletion of section 67 of *REDA* due to concerns over extensive ministerial interference.¹⁵⁰ There were also concerns by stakeholders over the initial appointments of Gerry Protti as Chair and Jim Ellis as CEO and their perceived pro-industry bias.¹⁵¹

The AER came into effect in July 2013. In October 2014, the AER received authority to conduct environmental assessments for all energy-related projects.¹⁵² Complete transition of previous agencies into the AER was not completed until 2015.

However, just as the AER began getting comfortable, there would be a shakeup in terms of government leadership in the province. In 2015, after more than four decades of Conservative rule, Alberta elected its first NDP government. Led by Premier Rachel Notley, the new government quickly announced a "rigorous" internal review of the energy resource regulator and its mandate.¹⁵³

147. Bruno, *supra* note 130 at 831.

148. CBC News. (2012, Oct. 25). Alberta energy industry welcomes single regulator. CBC News Calgary. Retrieved from <https://www.cbc.ca/news/canada/calgary/alberta-energy-industry-welcomes-single-regulator-1.1213732>

149. Nikolaou, *supra* note 126 at 1.

150. Bruno, *supra* note 130 at 845.

151. Ganley, M. (2020, June 1). Crisis of Confidence: A leadership scandal threatens the energy regulator's essential work. Alberta Views. Retrieved from <https://albertaviews.ca/crisis-of-confidence/>; An interviewee highlighted this idea with respect to independence from government, suggesting that government exhibited direct guidance to the regulator through "the appointments they may to senior positions and... to the board of directors."

152. Alberta Ministry of Energy. (2015). *Energy Annual Report 2014-2015*. Retrieved from <https://open.alberta.ca/dataset/cbd7147b-d304-4e3e-af28-78970c71232c/resource/bad16c64-6a69-4870-a911-2d46eb8b75ab/download/6847119-2014-2015-alberta-energy-annual-report.pdf>

153. Ewart, S. (2015, Sept. 23). Energy regulator deserves full-fledged review from provincial government. *The Calgary Herald*. Retrieved from <https://calgaryherald.com/business/energy/ewart-energy-regulator-deserves-full-fledged-review-from-provincial-government>



Notley, who had previously criticized the regulator’s “pro-industry mandate”, considered the AER’s two mandates – to promote energy resource development and enforce in environmental protection – as a source of conflict.¹⁵⁴

Thus, the Notley government suggested to divide the two mandates across different agencies. This potential pendulum shift back from a single-window regulator sparked concern given that the AER had just completed its re-organization from the previous restructuring.¹⁵⁵

Ultimately, government did not move forward with splitting the AER’s mandate. However, this event is worth observing as it exemplifies how the AER has been under the political spotlight since its inception.

In the early years of the AER, new leadership at the regulator began to move forward with greater emphasis on regulatory diplomacy, observed through the regulator’s strategic planning.

This included initiatives such as the Best-in-Class Project with the University of Pennsylvania’s Program on Regulation,¹⁵⁶ and as observed in the 2014/15 annual report:

“We have developed a national/international strategy, with a key element being to advance the AER’s credibility through ‘regulatory diplomacy,’ through which the AER demonstrates national and international leadership on regulating energy resources. Through regulatory diplomacy, we will create strategic alliances with our national and international stakeholders and work to influence, inform, and elevate provincial, national, and international energy regulation practices.”¹⁵⁷

The new regulator was aiming to increase trust and confidence in energy development in Alberta through proactive, regulatory advocacy. In pursuing these initiatives, the AER would create the International Centre of Regulatory Excellence (ICORE). These initiatives and emphasis on regulatory advocacy are said to have led to the conditions for the governance failures by the AER’s CEO and Chair, initially brought to light in mid-2018.

154. Henton, D. (2015, Jun. 23). Alberta Energy Regulator faces changes under NDP as Notley wants to review its mandate. *The Calgary Herald*. Retrieved from <https://calgaryherald.com/news/politics/alberta-energy-regulator-faces-changes-under-ndp-as-notley-wants-to-review-its-mandate>

155. “Regardless of whatever potential benefits may result from a split regulator, the uncertainty of a restructured provincial energy regulator – for the second time in less than three years – creates significant risk for energy companies, investors, and the province as a whole. It is also unclear whether such dramatic reform is necessary to achieve the new government’s goals.” Source: Borden Ladner Gervais LLP. (2015). *Separation Anxiety – Is a Divided Alberta Energy Regulator Around the Corner?* [Blog post]. Retrieved from <https://www.lexology.com/library/detail.aspx?g=4da092c2-137f-4694-9426-99311a55735f>

156. The multi-million-dollar project with the Ivey League School was launched to help define “best in class” and “find consensus on what makes a high-performing regulator”. The research was to guide the new regulator in establishing itself on the world stage. Source: Alberta Energy Regulator. (2015). *2014/15 Annual Report Executive Summary*, at 15. Retrieved from <https://static.aer.ca/prd/documents/reports/AERExecutiveSummary2015.pdf>

157. Alberta Energy Regulator, *ibid* at 15.



In summary, this section observed how the Alberta government, in a series of initiatives derived from research in the early 2010s, came to revamp the resource regulator under *REDA*. The legislation would create a single-window regulator with the aim to streamline regulatory processes and increase the provincial competitiveness. The new regulator, the AER, would take over the roles and mandates of three agencies - the ERCB, AENV, and RSD. In particular, this resource regulator would have an expanded role into environmental regulation. However, this expanded remit also came with enhanced abilities for cabinet and the Minister to intervene through a series of directive provisions. *REDA* would also impose a new tripartite governance structure on the Board; the first major energy tribunal in Canada to do so. *REDA* was viewed as a key moment in the resource regulator's history through the lens of independence, pushing the AER into a more politicized environment. During its initial years, the AER would also pursue "regulatory diplomacy" through such initiatives as the Best-in-Class Project with the University of Pennsylvania's Program on Regulation and ICORE. This latter initiative (and emphasis on regulatory advocacy) led to the conditions for our final section and the greatest controversy within the AER to-date.



ICORE AND THE FALL FROM GRACE (2018 - FUTURE)

2018 and 2019 were dramatic years in the history of Alberta's energy regulator that shaped many of the issues that the regulator faces today. In addition to record production levels, thousands of orphaned wells, unclaimed pipelines, tanks and access roads were creating significant, unfunded liabilities. Albertans felt strongly about the sector's influence, with the AER right at the centre: while industry criticized the regulator over red tape and timeliness, other groups including environmentalists and scholars accused the regulator "of letting the industry run rampant, of failing to ensure that cleanup doesn't fall to the public purse and of generally being captive to industry."¹⁵⁸

A series of governance failures by the AER's executive leadership (specifically, actions taken by its CEO Jim Ellis) were brought to light in 2018 by a whistleblower at the organization. In response to the severity of the whistleblower complaints, separate investigations were launched by the province's auditor general,¹⁵⁹ ethics commissioner¹⁶⁰ and public interest commissioner¹⁶¹ with their reports released in 2019.

While this case study does not go into full detail on the controversial events and the investigations, a synopsis is warranted.¹⁶² AER CEO Jim Ellis, mismanaged public funds at the AER to establish and support ICORE, a private consulting firm he established with one of the AER's vice-presidents. The goal was to "to create future employment or remuneration" for himself; he struck a memorandum of understanding between ICORE and the AER, whereby the regulator would provide human resources and technical expertise to his private firm. Ellis also established the ICORE Development Project within the AER, reassigning the regulator's employees to this project. The AER did not record time and resources associated with the project, nor recover any costs associated at the time. Additionally, Ellis aimed to conceal these expenses from the AER's Board and the Minister of Energy.¹⁶³ However, the AER's Chair, was "initially fully engaged with creating ICORE", looking for prominent individuals to sit on ICORE's board.¹⁶⁴

158. Ganley, *supra* note 151.

159. Auditor General of Alberta. (2019). *Alberta Energy Regulator – An Examination of the International Centre of Regulatory Excellence (ICORE)*. Retrieved from <https://www.oag.ab.ca/reports/aer-icore-oct-2019/>

160. Trussler, M. (2019). *Report of the Investigation Under the Conflicts of Interest Act*. Office of the Ethics Commissioner. Retrieved from <http://www.ethicscommissioner.ab.ca/media/2531/june-14-2019-allegations-involving-jim-ellis-ceo-alberta-energy-regulator-under-the-aer-code-of-conduct.pdf>

161. Office of the Public Interest Commissioner. (2019). *A Report of the Public Interest Commissioner in Relation to Wrongdoings Within the Alberta Energy Regulator*. Retrieved from <https://yourvoiceprotected.ca/wp-content/uploads/2019/10/2019Oct3-Public-Interest-Commissioners-Report-AER-ICORE.pdf>

162. For a greater synopsis and analysis, see: McFadyen and Eynon, *supra* note 124.

163. Ganley, *supra* note 151.

164. Trussler, *supra* note 160 at 18.



The three investigations were stern in their condemnation of the AER's executive leadership and the lack of effective oversight. The reports observed "gross mismanagement" and "willful and reckless disregard" of public funds, AER assets, and mismanagement of public service delivery by the CEO to support ICORE. Further, the CEO breached the Conflicts of Interest Act and failed to disclose real or apparent conflicts of interest with the AER's Board, noting the processes to protect conflict of interest had failed. Additionally, oversight by the AER's Board of Directors was ineffective, with regulatory experts suggesting they lacked the "expertise, focus, or detachment required to oversee the CEO."¹⁶⁵

The reports made several recommendations to improve the Board's oversight of the AER's executive, to establish a healthy corporate culture and empower staff. These investigations compounded upon further controversy and confusion surrounding varying internal and public-facing financial liabilities estimates provided by the Board in 2018.¹⁶⁶

While the AER has now implemented the recommendations from the investigations,¹⁶⁷ the events damaged both the regulator's public credibility as well as its perceived ability to competently regulate. As Ganley states, "whatever Ellis's fate or the cost to the public purse, the greater damage has been done to the notion of a regulator that is acting in the public interest."¹⁶⁸ It is observed that some of the AER's senior experts brought in to establish a "best-in-class" regulator fled the AER or were fired.¹⁶⁹ In 2018-2019, AER CEO Jim Ellis resigned and the Board Chair Gerry Protti completed his 5-year term.

The controversy and declining public trust in the regulator came when the province was undergoing another political change. In 2019, Alberta voted out its NDP government and voted in the new United Conservative Party (UCP). Led by Jason Kenney, the new government has not been shy about its support for the oil and gas industry and antagonism of those opposed to its growth. This has been most infamously observed through the creation of the Canadian Energy Centre (a.k.a. the "Energy War Room") in 2019. The Centre's purpose is to promote Alberta oil and defend the industry against "domestic and foreign-funded campaigns."¹⁷⁰

165. Harrison, McCrank and Wallace, *supra* note 136.

166. In 2018, the Board was under scrutiny by media over an internal document had the unfunded liability of abandoned orphan wells over \$200 billion from its public-facing. Sparking concern and confusion between the public and internal figure, the AER had to apologize. Source: McIntosh et al. (2018, Nov. 1). Alberta regulator apologizes for spooking public with \$260-billion cleanup cost estimate. *Canada's National Observer*. Retrieved from <https://www.nationalobserver.com/2018/11/01/news/alberta-regulator-apologizes-spooking-public-260-billion-cleanup-cost-estimate>

167. Alberta Energy Regulator. (2021). *2020/21 Annual Report*. Retrieved from <https://static.aer.ca/prd/documents/reports/AER2020-21AnnualReport.pdf>

168. Ganley, *supra* note 151.

169. Ganley, *ibid*.

170. Olsen, T. (2019). *The Canadian Energy Centre Aims to Tell Canada's Energy Story*. Canadian Energy Centre. Retrieved from <https://www.canadianenergycentre.ca/the-canadian-energy-centre-aims-to-tell-canadas-energy-story/>; Graney, E. (2019, Dec. 12). Alberta Premier Jason Kenney launches 'energy war room' to take on oil critics. *The Globe and Mail*. Retrieved from <https://www.theglobeandmail.com/canada/alberta/article-alberta-premier-kenney-launches-energy-war-room-to-take-on-oil/>



The UCP has also made its thoughts clear on the AER's executive leadership, despite the AER still being an independent quasi-judicial regulatory body. In campaigning, UCP "seized the opportunity" created by the ICORE controversy and pledged to replace the AER's Board if elected.¹⁷¹ The party even went so far as to accuse one of the board members of "economic sabotage" against Alberta's oil industry.¹⁷² The newly elected UCP government replaced members of the Board with interim members in fall of 2019.¹⁷³ The government has also reduced the Board's budget and staff by 200 employees during its time in office.¹⁷⁴

In addition to announcing the interim Board, in September 2019, Minister of Energy Sonya Savage announced another review of the AER "to identify enhancements to its mandate, governance and system operations. . ."¹⁷⁵ The purpose of the review emphasized principles of efficiency, industry competitiveness, predictably and leadership in resource development. These were similar principles that sparked the government's regulatory review in 2010-2012 leading to REDA.

The government further noted that timeliness was inferior to other resource jurisdictions like Texas despite the AER hiring more staff over the years.¹⁷⁶ Lastly, the government heard from stakeholders that there was lack of clear policy direction being provided to the regulator from government.¹⁷⁷

In consulting for the review, the government found that stakeholders did not want an overhaul of the AER. The result of the review was Bill 7, the Responsible Energy Development Amendment Act. These amendments to REDA gave government further authority over aspects of the regulatory process. Specifically, cabinet now had the ability to set maximum timelines for the AER to conduct its review of applications.¹⁷⁸ Thus, consistent with the original REDA legislation, the government granted itself more authority to direct the arm's length regulator.

171. Ganley, *supra* note 151.

172. The Canadian Press. (2018, Sept. 9). Alberta government to review energy regulator, replaces board members. *June Warren-Nickle's Energy Group*. Retrieved from <https://www.jwnenergy.com/article/2019/9/9/alberta-government-review-energy-regulator-replace/>

173. The Canadian Press, *ibid* at 173.

174. Ganley, *supra* note 151.

175. Government of Alberta. (2020). *Alberta Energy Regulator Review*. Retrieved from <https://www.alberta.ca/alberta-energy-regulator-review.aspx>

176. Government of Alberta. (2019, Sep. 6). *Promise made, promise kept on the Alberta Energy Regulator* [Press release]. Retrieved from <https://www.alberta.ca/release.cfm?xID=644204AFFDD87-B96A-D0CF-F64984DCC01E91AD>

177. The Alberta Minister of Environment, Jason Nixon: "We did see a bunch of spots where the regulator ended up almost in a frozen state because they had not heard from the government on policy issues." Source: Bellefontaine, M. (2020, May 28). Alberta energy regulator to face new timelines set by government. *CBC News*. Retrieved from <https://www.cbc.ca/news/canada/edmonton/alberta-energy-regulator-to-face-new-timelines-set-by-government-1.5587805>

178. Cherkawsky, M. and Barbero, M. (2020). Bill 7: Alberta Government Aims to Set Deadlines for AER Project [Blog post]. *Mondaq*. Retrieved from <https://www.mondaq.com/canada/energy-law/943840/bill-7-alberta-government-aims-to-set-deadlines-for-aer-project-approvals>



In its third reading, the Member on behalf of the Minister of Energy emphasized how the amendments would hold the AER to greater accountability:

*“The passing of this bill will help achieve one of our government’s key platform items: holding the Alberta Energy Regulator accountable for unnecessary delays in assessing project applications. It is vital for our government to restore predictability to the regulatory process without sacrificing rigour. The passage of this bill would provide certainty for producers investing in Alberta by addressing concerns about unnecessary delays as a result of needless red tape and ineffective processes in the AER’s review of project applications.”*¹⁷⁹

The context in which the AER operates today is vastly different than that of its 20th century predecessors. Interviewees brought up numerous contextual changes for the AER consistent with other Canadian energy regulators. Such factors include the increasing use of courts by stakeholders to intervene with decisions; the increasing impact of climate change and environmental pressures on Alberta’s oil sands; and the desire of Indigenous communities to have a more direct role in decision-making.

This latter contextual shift is exemplified in cases like *Fort McKay First Nation v Prosper Petroleum Ltd*, 2020, where the Alberta Court of Appeal found that the AER interpreted its public interest mandate too narrowly and failed to consider issues raised by Fort McKay First Nation.¹⁸⁰

Due to these changes in context, many interviewees said that it more complicated now for the AER and other Canadian regulators to achieve effectiveness with growing scope creep in an attempt to satisfy all stakeholders in the system. One participant, while noting that timeliness and complexity for large projects were problematic for both the proponent and the regulator, also said that it was not all “gloom and doom.” They observed that the AER has made “real strides” in utilizing automation to expedite aspects of its decision-making process for smaller and more routine applications. This is exemplified through the regulator’s “OneStop” platform which automates low-risk applications and forward high-risk/complex applications to technical experts for review.¹⁸¹

In contrast, another participant pointed out that, from an industry perspective, the regulatory process was more effective, certain, and timely. Indeed, industry stakeholders were enthusiastic about the latest amendments included in Bill 7.¹⁸²

179. Nally, D. (2020, Jun. 24). “Bill 7 Responsible Energy Development Amendment Act”. Legislative Assembly of Alberta. *Alberta Hansard*. 30th legislature, 2nd session, at 1636. Retrieved from <https://search.assembly.ab.ca/isysquery/34072d03-00f2-40ed-ae4f-fb7b86e91af1/7/doc/>

180. Sheehan, D., Burse, D., Cameron, K. and Zila, M. (2020). *Prosper Rigel Project Decision Overturned: Increased Complications for Project Development* [Blog post]. Bennet Jones LLP. Retrieved from <https://www.bennettjones.com/Blogs-Section/Prosper-Rigel-Project-Decision-Overturned-Increased-Complication-for-Project-Development>

181. Alberta Energy Regulator, *supra* note 167 at 10.

182. Government of Alberta. (2020, May 27). *Act holds AER accountable for timely application reviews* [Press Release]. Retrieved from <https://www.alberta.ca/release.cfm?xID=714526C68FD23-0596-155D-3F643CFC982ACA4F>



This same interviewee also indicated that the current government's appeals and "huge promises" to industry, with a desire to "turn back the engine of economic growth" have been futile due to low oil prices. They further stated that making the regulatory framework more effective was less critical now:

"I don't think right now [...] the regulatory burden is actually impacting decision-making much in Alberta's oil and gas sector because of the significantly depressed prices at the margin. Even if you were to take it from five days to three days for a turnaround on a well, who cares? Because nobody's drilling in Alberta right now. But I think it has eroded public confidence because we've seen so much being given to the oil and gas industry."

With the uncertainty created by the COVID-19 pandemic, record low oil prices and the U.S. becoming an exporter of fuel resources, the Alberta government is said to be "bending over backwards" to keep industry. This has included actions taken by the AER itself, effectively becoming the desired "advocate for the industry." One interviewee observed that the AER issued decisions that suspended environmental monitoring requirements for oil sands mining operations in May 2020. These decisions were made in response to the pandemic and aligned with the government's own environment monitoring suspensions. However, the decisions taken by the ostensibly expert regulator were said to have "little justification for granting such extraordinary relief from regulatory requirements."¹⁸³

183. Fluker, S. (2020). COVID-19 and the Suspension of Environmental Monitoring in the Oil Sands. *The University of Calgary, Faculty of Law Blog on Developments in Alberta Law*, at 1. Retrieved from <https://ablawg.ca/2020/05/07/covid-19-and-the-suspension-of-environmental-monitoring-in-the-oil-sands/>

184. Joannou, A. (2020, Jun. 23). Alberta environmental reporting and testing suspended due to COVID-19 to resume July 15. *The Edmonton Journal*. Retrieved from <https://edmontonjournal.com/news/politics/alberta-environmental-reporting-and-testing-suspended-due-to-covid-19-to-resume-july-15>

While the government and AER reimposed the requirements a few weeks later,¹⁸⁴ interviewees thought that the actions demonstrated "a disconnect from reality." They observed how the government and its desire to grow the oil and gas industry had resulted in pressures on the regulator to do things that "aren't necessarily in the public interest." Despite the desire to increase investor confidence and stability, there is concern over how much more government can give industry at the expense of public confidence, openness and transparency.

In summary, this concluding section has described the controversy surrounding the ICORE scandal at the AER in 2018/2019 and how the events highlight mismanagement of public funds and ineffective oversight of the AER. Executive leadership resigned, but the AER's public credibility was damaged. These events came at a time when Alberta elected the UCP to government. The UCP, seen as staunchly pro-industry, subsequently replaced the AER's Board and undertook another review of the AER's governance and operations. The result was further amendments to REDA, granting government new abilities to direct the timeliness for the regulator's applications. Looking into the future, the regulator is faced with increasing court challenges, greater calls to address climate change and achieving reconciliation with Indigenous peoples.



Coupled with uncertainty from the COVID-19 pandemic, low oil prices and the U.S. becoming a resource exporter, the government and its regulator have been described as “bending over backwards” to keep the resource industry in the province, with the AER acting more as an “advocate for the industry” rather than a neutral quasi-judicial regulator. Interviewees brought up the repeal of environmental monitoring regulation on the onset of the pandemic in May 2020 as evidence for this transition.

Thus, the mode of an independent expert regulator, which was revered through the 20th century, is no longer the desired model for Alberta’s energy regulator. We conclude with the thoughts of one participant:

“You can just see from the restructuring of the energy decision-making tribunals in Alberta over the years and how many times that has happened that the politicians want something different than a completely independent agency holding dozens of public hearings every year. They want to promote efficiency and don’t necessarily want lengthy adversarial processes slowing down energy development. So from that perspective, I think I would say there is more political interest in promoting the efficiency of the energy industry in Alberta than in engaging the broader public in the regulatory process.”



CONCLUSION AND KEY TAKEAWAYS

This case study has provided a history of Alberta's energy resource regulator through the lens of regulatory independence. Beginning in the 1930s, the Conservation Board was borne out of necessity to manage Alberta's previously unregulated oil fields which had been under federal jurisdiction for decades. Taking inspiration from the American independent commission model originating in the late 19th century, the Board would develop as a competent, technical regulator shepherded by a government that maintained support and confidence for the Board. Later becoming the ERCB in 1971, the Board would maintain key structural and perceived attributes as a respected arm's length, technical regulator free from undue political influence. Alberta's energy regulator sustained these attributes of independence and effectiveness through most of the 20th century.

In the 1990s, attempts to find efficiencies led to the merging of the utility and resource regulators to create the AEUB. While some efficiencies were made, there were initial internal challenges related to reconciling how the Board regulated with regard to the public interest, executive leadership, and culture. Additionally, the newly merged regulator also faced external challenges, including growing calls for greater public engagement, intensifying landowner-industry tensions, and fragmented decision-making.

While the AEUB initially continued to be an agency of significant technical expertise, weaknesses began to show in the 2000s. These included perceptions of regulatory capture, issues arising from confusing mandates, the growing complexity of the regulatory system, and problems with its public hearing processes.

This would culminate in 2007 with the AltaLink 500 Kv hearings and the "spying scandal", which lowered public confidence in the quasi-judicial regulator. In 2008, the AEUB was dissolved, and separate resource and utility regulators were created, with the return of the ERCB and the new AUC.

In the early 2010s, the government, under a series of initiatives and research examining competitiveness and regulatory complexity reorganized the resource regulator. Under REDA, the single-window AER was created with the aim to streamline regulatory processes and increase the provincial competitiveness. REDA was sweeping in its restructuring of the regulatory framework, expanding the remit of the resource regulator to include more environmental regulation; enhanced abilities for the executive to intervene through a series of directive provisions; and a new tripartite governance structure. In its initial years, the AER pursued regulatory diplomacy through initiatives such as the Best-in-Class Project and ICORE.



However, ICORE created great controversy with the CEO of the AER mismanaging public funds, highlighting an unhealthy corporate culture at the AER, and ineffective oversight by its Board. Executive leadership of the Board resigned and the AER's public credibility was further damaged. These events came at a time when Alberta elected the UCP to government. The UCP replaced the AER's Board and undertook another review of the AER's governance and operations. The review led to legislation that gave the government more authority over the AER's application processing timelines.

Looking to the future, the AER faces growing calls to address climate change, increasing court challenges and calls for greater Indigenous participation and reconciliation. Additionally, the pandemic, low oil prices, and the U.S. becoming a net resource exporter have created uncertainty for Alberta's oil and gas industry. Some of the AER's recent decisions, including the temporary repeal of environmental monitoring during the pandemic, suggest that it acts more as an "industry advocate" rather than a neutral quasi-judicial regulator. This is in stark contrast to the province's 20th century Conservation Boards.

The following are key takeaways from an analysis of the evolution of the AER:

1. *The Alberta resource regulator developed, maintained, and subsequently lost its reputation as a strong, independent, expert quasi-judicial regulator:* Much like the federal energy regulator, Alberta's Board developed itself as a competent regulator, capable of regulating in the public interest throughout the 20th century. Its reputation grew with the growing resource sector.

However, new complexities and challenges in the late 1990s and 2000s posed challenges for the Board. Various public scandals affected the confidence the public and government held with the Board. Concern remains whether the Board can still come to complex resource decisions in a fair, adjudicative and independent manner.

2. *Notions of resource competitiveness and "efficiency" have persistently driven regulatory reform:* In recent years, the government has been increasingly focused on improving the province's competitiveness and/or finding efficiencies in its regulatory framework. The outcome has been research, reform and reviews leading to sometimes quite sweeping and comprehensive changes to the resource regulator. There is a reason why stakeholders in 2019 told the government that broad reform to the AER was not needed. The resource regulator has gone through several name changes, mergers, and re-structuring, most often in the name of improving efficiency and competitiveness of the valued resource sector. In some cases, such exclusive focus on these principles has come at the expense of other important policy considerations, such as public engagement. The number and extent of reforms over the years are greater than seen with other Canadian regulators.

3. *The oil and gas industry has played a fundamental role in the evolution of AER:* For anyone familiar with Alberta, this should come as no surprise. However, it cannot be overstated: Alberta's first conservation Board failed mainly because of industry's non-compliance, and subsequent resource Boards succeeded because of their "cooperative and consensual" approach with industry. Reforms in later years stemmed from a desire to keep industry in the province, since private investment is flexible enough to move to other jurisdictions. The outcome has led to a less collaborative approach where the government and regulator act more as "industry advocates" rather than equal partners with industry. A return to more balanced relationship with industry, while no small task, could facilitate a greater balance of considerations in the province's regulatory framework. Under the lens of regulatory independence, the AER should not be an industry advocate, but an impartial and unbiased adjudicator.
4. *Stable support from different governments has been critical to maintaining the Board's reputation and long-term institutional memory:* Despite changes in government throughout the 20th century, elected officials were supportive of the resource regulators and their decisions, even if they disagreed. Additionally, the Board's leadership proved to be stable, with specific individuals such as George Govier remaining at the Board for decades and providing the Board with valuable institutional memory. Recent years have seen government doubt the legitimacy of the regulator, its leadership and its decisions, with the regulator constantly in the political spotlight. The fundamental effect has been instability and a revolving door of leadership at the regulator.





CASE STUDY THREE: THE ONTARIO ENERGY BOARD

INTRODUCTION

The Ontario Energy Board (OEB) has regulated the province's natural gas and electricity sectors since 1960 and 1999 respectively. Its duties include setting "just and reasonable" rates for generation, transmission and utilities; licensing the various companies, organizations, and stakeholders along the grid or pipeline, including the Independent Electricity System Operator (IESO); and implementing ministerial directives and priorities consistent with the government's Long Term Energy Plan (LTEP). Several provincial acts outline the Board's mandate and authority, the two most central being the *Ontario Energy Board Act, 1998* and the *Electricity Act, 1998*.¹

Recent structural changes in the 21st century to the Board characterise the evolution of its independence. While there were concerns with respect to the Board's effectiveness and independence in the mid-20th century, it was the significant structural changes in the late 1990s that created the modern-day electricity regulator, bringing the OEB into the visibly political sphere of provincial electricity policy. Further changes made by the provincial Liberals during their time in power saw the Board move from an independent regulatory entity closer to that of an agency implementing government policy. Despite a "modernization" of the OEB governance legislated in 2019, experts remain pessimistic over the OEB's future in being anything more than a technical implementor, especially given Ontario's political electricity past.

1. Ontario Energy Board. (n.d.) *Mission and Mandate*. Retrieved from <https://www.oeb.ca/about-us/mission-and-mandate>



THE ONTARIO FUEL BOARD AND THE OLD OEB (1960 - 1995)

The OEB was created in 1960 as a natural gas and oil regulator, responsible for production and distribution of fuels in the province.² The predecessor of the OEB was the Ontario Fuel Board, itself established in 1954. The Fuel Board combined the responsibilities of other government agencies at the time, such as the Natural Gas Commissioner, Natural Gas Referee and the Fuel Controller and was given broad powers to regulate the sector, including “control over production, storage, transmission distribution, sale, disposal, supply and use of natural gas.”³ The goals of the Fuel Board were to help develop the provincial natural gas industry and ensure public safety in regards to its distribution, production, and consumption.

In 1959, the administration of the Fuel Board was placed under the Ontario Department of Energy Resources, signalling the beginning of the end to the short-lived agency. In 1960, the Fuel Board was replaced by the Ontario Energy Board with the enforcement of the *Energy Act* and *Ontario Energy Board Act*.

In introducing the two Acts, the then-Minister of Energy Resources Robert Macaulay stated the rationale of the new legislation:

“... the basic purpose of the two Acts is to separate the quasi-judicial functions of the fuel board from the purely administrative functions, so that the fuel board will retain control over matters dealing with quasi- or semi-judicial functions, and the Department of Energy Resources will assume the responsibilities dealing with purely administrative functions.”⁴

As the OEB’s first annual report notes, the Board “took over the judicial part of the work” with administrative work transferred to the Department of Energy Resources.⁵ The responsibilities and remit of the OEB reflected this desire to have the new Board focus exclusively on adjudicative, tribunal-like functions such as hearing applications and granting licences. These initial responsibilities also resemble aspects of its current remit in regard to fuel regulation and the setting of “just and reasonable” rates and charges for the production, distribution, transmission and storage of gas.⁶

2. The Board’s first Chair was A.R. Crozier; its first major rate hearing was for the Consumers’ Gas Company, which was then the largest gas utility in the country. Source: Ontario Energy Board. (1960). *Annual Report*. Ontario Energy Board, at 5 and 7. Retrieved from <https://archive.org/details/annualreport-onta1960onta/>

3. Royal Commission Inquiry into Civil Rights. (1971). *Royal Commission Inquiry Into Civil Right Part V: Report Number Three*. The Queen’s Printer and Publisher, at 1914. Retrieved from <https://archive.org/details/royalcommissioni05onta/page/n5/mode/2up>

4. Royal Commission Inquiry into Civil Rights, *ibid* at 1914.

5. Ontario Energy Board. *supra* note 2 at 1.

6. Ontario Energy Board, *ibid* at 3-4.



Given the Board's focused mandate on natural gas and oil at the time and adjudicative functions, the OEB was seen as the provincial counterpart regulator to the then recently created and independent tribunal the National Energy Board (NEB).⁷

However, despite the quasi-judicial focus of the new Board and comparison to the NEB, the 1968 Royal Commission Inquiry into Civil Rights noted several issues with respect to its independence and effectiveness including inconsistent procedures and confusion over final decision-making authority. The Commission noted that while the OEB has "some characteristics of an independent board" and exercises both administrative and judicial powers, "it lacks many of the characteristics of an independent tribunal."⁸

One issue raised by the Commission was that members of the Board lacked security of tenure. Security of tenure is a core feature of "judicial independence", the independence prescribed to those in Canada's judicial branch by the Canadian Constitution.⁹ At inception, members appointed to the OEB were not granted what NEB Members had in terms of tenure for their position. For instance, NEB Members held office during good behaviour for a seven-year term with a fixed minimum salary.¹⁰

Additionally, the OEB did not have any restrictions on who might be appointed to be a board member.¹¹ This concerned the Commission who recommended that appointed board members possess pre-requisite legal experience and expertise to ensure proper rules of procedure and evidence during hearings were applied by those presiding. Given the lack of any restrictions for OEB member appointments by the Lieutenant Governor in Council, it was possible for individuals without the necessary expertise ("legal qualifications"), or individuals with real/perceived bias to be appointed to the quasi-judicial tribunal.¹² The Commission later noted that non-lawyer members could exercise power regarding questions of law.¹³

Additionally, the Commission observed that many of the Board's powers and decision-making procedures outlined in its legislation were confusing, arbitrary, undetailed or lacked clarity.¹⁴ For instance, there were few factors that needed to be considered to "temper the wide powers of the Board."¹⁵

7. Royal Commission Inquiry into Civil Rights, *supra* note 3 at 1915.

8. Royal Commission Inquiry into Civil Rights, *ibid* at 1916.

9. The Advocates' Society. (2020). *Judicial Independence: Defending an Honoured Principle in a New Age*, at 7. Retrieved from [https://www.advocates.ca/Upload/Files/PDF/Advocacy/Judicial Independence/Judicial Independence Defending an Honoured Principle in a New Age Final Design Draft Approved by Board of Directors 7-Apr-2020.pdf](https://www.advocates.ca/Upload/Files/PDF/Advocacy/Judicial%20Independence/Judicial%20Independence%20Defending%20an%20Honoured%20Principle%20in%20a%20New%20Age%20Final%20Design%20Draft%20Approved%20by%20Board%20of%20Directors%207-Apr-2020.pdf)

10. See case study one, the Canada Energy Regulator, footnote 10.

11. Membership of the NEB was restricted such that it was not open "to anyone who is not a Canadian citizen or who is an owner, shareholder, director, officer, partner or is engaged in the business of producing or dealing in hydrocarbons or power or who holds any bond, debenture or other security of a company as defined in the Act." Source: Royal Commission Inquiry into Civil Rights, *supra* note 3 at 1918.

12. Royal Commission Inquiry into Civil Rights, *ibid* at 1916.

13. Royal Commission Inquiry into Civil Rights, *ibid* at 1923.

14. Royal Commission Inquiry into Civil Rights, *ibid* at 1918-1920, 1922 and 1933.

15. Royal Commission Inquiry into Civil Rights, *ibid* at 1918.



There was no initial clarifying policy set out “in exercising its powers to decide whether to fix or not to fix rates” with “social or economic policy for rate-making [...] not expressed in the Act or the regulations.”¹⁶ Furthermore, there were no conditions laid out for the Board’s “arbitrary” power of investigation.¹⁷ The Commission notes that it is not clear what specific matters of energy policy “come within the investigatory powers that may be exercised by the Board at the direction of the Lieutenant Governor in Council.”¹⁸ Again, the Commission compares this with the procedures of the NEB, where there is clarity over what energy matters the Minister can ask the Board to investigate.

Finally, confusion existed around the Lieutenant Governor in Council’s rights to appeal authority. The Commission described the ability to appeal a Board’s decision as “both too broad in one sense and may be too narrow in another.”¹⁹ Confusion arose between the role of the courts to hear decisions on any questions of law and jurisdiction and Section 45 of the Board’s legislation which stated Board decisions as “final and conclusive.”^{20,21}

The analysis by the Commission provides evidence that the OEB’s initial legislation did have deficiencies that affected the Board’s structural independence and ability to regulate in a clear and effective manner. In outlining 35 recommendations, the Commission called for a “complete revision of the Board’s powers and procedures.”²²

Over the years, the OEB and respective governments would try to resolve some of these matters in providing greater policy clarity and guidelines. In 1969, the *Ontario Energy Board Amendment Act* made important fixes to the Board, addressing some of the issues raised by the Commission.

Despite these issues with the Board’s structural independence, the provincial government did not tend to interfere with the OEB and its decision-making. One interview participant noted that fuel regulation and the price setting of natural gas were not of importance to government given the low political stakes. At the time, natural gas was considered “a rich man’s fuel.” Natural gas was a new industry, an expensive resource, and often inaccessible to the general population. Additionally, the provincial government had no ownership in the gas companies that the OEB regulated.

16. Royal Commission Inquiry into Civil Rights, *ibid* at 1919-1920.

17. Royal Commission Inquiry into Civil Rights, *ibid* at 1933.

18. Royal Commission Inquiry into Civil Rights, *ibid* at 1922.

19. Royal Commission Inquiry into Civil Rights, *ibid* at 1933.

20. Royal Commission Inquiry into Civil Rights, *ibid* at 1935.

21. It is observed that the Lieutenant Governor in Council, in hearing petitions of appeal would not interpret the legislation’s finality clause as negating their right to appeal. Royal Commission Inquiry into Civil Rights, *ibid* at 1935.

22. Royal Commission Inquiry into Civil Rights, *ibid* at 1945.



In thinking back to this period in history, interview participants only recalled one case where the government intervened in gas decisions. This was the takeover attempt of Union Gas Ltd by the Consumers Gas Company in 1969. In this instance, the government passed legislation requiring cabinet approval whenever a private company wanted to purchase over 20 percent of a utility.²³ Under the new rule, the government rejected the Consumer Gas Company's bid.²⁴ Notably this was not the last time there was a takeover attempt of Union Gas Ltd which created political controversy and involved the OEB's investigative powers.²⁵ However, for the reasons aforementioned, the government saw little reason to regularly intervene in the Board's decision-making in the gas sector. This meant the Board could focus on hearings and applications and carry forth its remit in a relatively independent manner.

The OEB's narrow mandate on natural gas remit created a relatively simple regulatory environment. As stated by Doern and Gattinger, "the old OEB was essentially a gas regulator dealing with three (now two) gas utility companies. There was therefore a fairly simple, even cozy, regulatory interest group realm."²⁶

In contrast, Ontario's electricity sector at the time was exponentially growing and politically dramatic, dominated by the vertically integrated government monopoly, the Hydro-Electric Power Commission of Ontario (a.k.a. Ontario Hydro). While it is outside the purview of this study to give an in-depth history of Ontario Hydro, a brief overview is necessary to exemplify the political nature of electricity in the province, the corporation's influence on energy policy for most of the 20th century, and the way electricity was regulated in the province during this time.²⁷

Ontario Hydro was created in 1906 to own and operate a transmission grid to bring privately-owned hydroelectric generation through to municipally-owned distribution systems. However, over the 20th century and under the "dominating leadership" of Sir Adam Beck, the Crown corporation expanded its vision and procured privately held hydro generation across the province to create an expansive, province-wide transmission and generation monopoly.²⁸ With the mantra of "power-at-cost", Ontario Hydro became one of the largest electricity utilities in North America.

23. Powis, T. and Clark, M. (1985, Feb. 25). Fending off a takeover. *Maclean's*. Retrieved from <https://archive.macleans.ca/article/1985/2/25/fending-off-a-takeover>

24. Ontario Energy Board. (1971). *Eleventh Annual Report of the Ontario Energy Board*. Ontario Energy Board, at 9. Retrieved from <https://archive.org/details/annualreportonta1970onta/>

25. In 1985, Union Gas was fending off a takeover attempt by Unicorp Canada Corp. Source: Power and Clark, *supra* note 23.

26. Doern G. B., and Gattinger, M. (2003). *Power Switch: Energy Regulatory Governance in the Twenty-First Century*. University of Toronto Press, at 121-124.

27. To learn more about the history of Ontario Hydro and the provincial electricity sector in the 20th century, see: Daniels, R. J., and Trebilcock, M. J. (1996). *The Future of Ontario Hydro: A Review of Structural and Regulatory Options*, in R. Daniels, ed., *Ontario Hydro at the Millennium: Has Monopoly's Moment Passed*. McGill-Queen's University Press.

28. Daniels and Trebilcock, *ibid* at 1.



It was also a controversial utility, with issues including substantial generation project cost overruns and significant debt accumulations leading to some of the largest cost write-downs in Canadian corporate history. The corporation never veered far from the political spotlight: from 1960-1990, there were 16 major special inquiries or legislative committee reports related to Ontario Hydro (or roughly one major inquiry every two years.)²⁹

The electricity sector in Ontario was not conventionally regulated during the 20th century with Ontario Hydro. In other jurisdictions in Canada, independent quasi-judicial tribunals, such as the NEB or Nova Scotia Utilities and Review Board, traditionally regulated and approved electricity rates and energy projects for private and public corporations. While the OEB fell into the camp of a quasi-judicial tribunal in the 20th century, it didn't regulate the electricity sector during this time. Rather, as a vertical monopoly, Ontario Hydro acted as the regulatory tribunal and as a self-regulating body: it set wholesale rates for the electricity supply for over 300 Municipal Electric Utilities (MEU's), the retail rates that the MEUs could charge themselves, as well as its own rates for its own customers. Experts were aware of the "high degree of autonomy" granted to the Crown corporation in deciding hydro rates, as well as its close collaboration with government on policy; government viewed the monopoly as "a Delivery Agency of Government."³⁰ Thus, during this period, Ontario Hydro was a fairly political entity and effectively acted as the electricity regulator.

However, despite concerns about public accountability and conflict of interest, there was no real push from government to adopt the independent regulator model. In fact, the 1972 Task Force Hydro Report, produced by a government-appointed committee with the remit to review the function and structure of Ontario Hydro, dismissed the idea of moving to an independent regulator for the electricity sector and specified concerns about independent regulation. The Task Force noted concerns about dealing with policy in isolation ("..a[n] [independent] board that was interested in some of the policy issues and not in others could not, by itself, provide effective regulation"³¹); timeliness of hearings and decisions by such bodies; and concerns about regulatory capture ("Boards tend, with the passage of time, to come to identify with the bodies they are established to regulate. They are influenced by their own past decisions and, as a consequence and again with the passage of time, they may lose objectivity."³²). The Task Force concluded:

"For these reasons Task Force Hydro feels that an independent board is not the most appropriate mechanism for regulating the Hydro Corporation. We feel that the degree of external regulation that is needed can be provided through policy direction given to the Hydro Corporation through the Provincial Secretary for Resources Development."³³

29. Daniels and Trebilcock, *ibid* at 4.

30. Task Force Hydro. (1972). *Hydro in Ontario: A Future Role and Place, Report Number One*. Committee on Government Productivity of Ontario, at 64 and 25. Retrieved from <https://archive.org/details/hydroinontariofu00munc/>

31. Task Force Hydro, *ibid* at 65.

32. Task Force Hydro, *ibid* at 65.

33. Task Force Hydro, *ibid* at 65.



In 1973, in light of issues facing Ontario's energy sector, the government made a compromise to address concerns over accountable rate regulation. In addition to establishing the new Ministry of Energy, the government tasked the OEB with reviewing rates and "rate-related" matters for Ontario Hydro. Specifically, the Board now was responsible for reviewing and reporting on Ontario Hydro's annual rate changes. Moreover, the Minister of Energy was now able to request the Board to hold a hearing, investigate, and report back to the Minister on rates or rate-related matters. The latter option was used almost immediately by the Minister of Energy, directing the Board to examine "Ontario Hydro's power system expansion program and its financial policies and objectives."³⁴

While these new responsibilities increased the Board's workload,³⁵ they did not give the Board real authority in the electricity sector. While Ontario Hydro's rates were now subject to review by the OEB, the Board could only make recommendations to the Ministry and the corporation and they were not in any way binding. Ontario Hydro could and did disregard the Board when there were disagreements over rates.³⁶

A 1984 Task Force on Hydro report called the OEB's relationship with Ontario Hydro "anomalous" and the advisory nature of recommendations to Ontario Hydro a "strange exception" compared to the mandatory recommendations the Board provided during its other rate hearings.³⁷ One participant, in speaking to the Legislative Committee on Resource Development in 1992, described the annual Ontario Hydro rate review process as a "patently... useless, time-consuming and costly exercise serving no practical purpose."³⁸

Electricity regulation in Ontario lacked proper oversight and transparency throughout the 20th century with short-term political goals prominent in decision-making.³⁹ In 1992, amendments to the *Power Corporation Act* enabled the Minister of Energy to issue binding policy directives to Ontario Hydro (following consultation with the corporation).⁴⁰ Nevertheless, Trebilcock and Daniels (1996) characterized Ontario Hydro's system during this period as "an anachronistic regulatory structure characterized by dispersed and fragmented authority that has at times subverted public transparency and fostered government micromanagement."⁴¹

34. Ontario Energy Board. (1974). *Annual Report: Year ending December 31, 1973*. Ontario Energy Board, at 19. Retrieved from <https://archive.org/details/annualreportonta1973onta/>

35. Ontario Energy Board. (1975). *Annual Report: Year ending December 31, 1974*. Ontario Energy Board, at 1. Retrieved from <https://archive.org/details/annualreportonta1974onta/>

36. Public Interest Advocacy Centre. (n.d.). *Ontario Electricity Restructuring*. Retrieved from <https://www.piac.ca/our-specialities/ontario-electricity-restructuring/>

37. MacDonald, D. (1984). *Harnessing Hydro: Report of the Ontario New Democratic Party Caucus Task Force on Hydro*. The Ontario New Democratic Party Caucus, at 11. Retrieved from <https://archive.org/details/harnessinghydror00macd/>

38. Legislative Assembly of Ontario, Standing Committee on Resources Development. (1992, Jan. 20). *Bill 118: Power Corporation Amendment Act, 1991*. 35th legislature, 2nd session. Retrieved from <https://www.ola.org/en/legislative-business/committees/resources-development/parliament-35/transcript/committee-transcript-1992-jan-20>

39. Vegh, G. (2017). *Report on Energy Governance in Ontario: To the Ontario Energy Association and the Association of Power Producers of Ontario*. Ontario Energy Association. Retrieved from https://energy-ontario.com/wp-content/uploads/2018/04/Governance_Report_to_OEA_and_APPrO.pdf

40. Daniels and Trebilcock, *supra* note 27 at 3.; Wickens, B. (1992, Sep. 21). The costs of power. *Macleans*. Retrieved from <https://archive.macleans.ca/article/1992/9/21/the-costs-of-power>

41. Daniels and Trebilcock, *supra* note 27 at 6.



In summary, the OEB as a natural gas regulator had a flawed, confusing inception; the Board did not possess the structural independence of its comparator, the NEB. But in practice, the Ontario government did not often interfere with its quasi-judicial responsibilities and decision-making, and the OEB stayed more or less above the political fray. In 1973, the OEB dipped its toe into electricity, providing non-binding advice to the new Ministry of Energy and Ontario Hydro. However, the Board had no real authority and was not (nor perceived to be) the provincial electricity regulator. This would change only in the final years of the millennium and with the election of Mike Harris as Ontario's Premier in 1995.



THE OEB'S NEW ROLE IN THE ELECTRICITY SECTOR (1995 - 2003)

In the late 1990s, electricity restructuring led by the Harris Government changed the mandate of the OEB to become the electricity regulator. Many interview participants noted the importance of the electricity restructuring that took place at this time and its impact on the OEB's history and evolution.

There were several reasons why the sector was restructured. Like many governments in the 1990s, the newly elected Conservative government under Premier Mike Harris wished to explore deregulation in the energy sector. This meant moving away from the government monopoly model and instead opening up its electricity grid to market competition. The government's 1997 report, "Direction for Change: Charting a Course for Competitive Electricity and Jobs in Ontario" (a.k.a. the White Paper)⁴² notes that "other jurisdictions are restructuring rapidly, setting examples, and positioning themselves to compete more effectively for investment and jobs. Ontario risks falling behind."⁴³ Ideologically, Harris' Common Sense Revolution was consistent with the restructuring, based on the belief that private sector efficiency and moving to a competitive structure could lead to lower electricity prices.⁴⁴

The government's White Paper also noted Ontario Hydro's poor performance in the 1990s as a leading reason for the province's electricity issues and the need to introduce competition and market-driven forces into the sector. Ontario Hydro was performing poorly in the 1990s and was faced with significant debt accumulation and project cost overruns; a changing provincial "industrial structure"; and a recession in the 1990s reducing electricity demand and Hydro's revenues.⁴⁵ The monopoly had also over-estimated projected electricity demand. The end result was that the corporation was plagued with financial issues and was requesting significant rate increases at a time when the province was undergoing a recession. This led to public outcries and subsequent political reactions. This is evidenced in a 1992 press released by the acting Minister of Energy Brian Charlton, commenting on a recent Hydro announcement concerning a 7.9 per cent rate increase:

"Much more must be done in the area of cost control," Mr. Charlton said. 'The People of this province and our industrial sector simply can't tolerate any more increase of the magnitude announced today.'"⁴⁶

42. Ministry of Energy, Science and Technology. (1997). *Direction for Change: Charting a Course for Competitive Electricity and Jobs in Ontario*. Ministry of Energy, Science and Technology. Retrieved from <https://collections.ola.org/mon/2000/10270087.pdf>

43. Ministry of Energy, Science and Technology, *ibid* at 1.

44. Gluck, L. (2015). *Ontario's Electricity Supply Industry after the Restructuring: An Economic and Environmental Impact Analysis* [Master's thesis, York University]. York University. Retrieved from https://yorkspace.library.yorku.ca/xmlui/bitstream/handle/10315/30042/Gluck_Lawrence_2015_Masters.pdf?sequence=2&isAllowed=y

45. Daniels and Trebilcock, *supra* note 27 at 6.

46. Ontario Ministry of Energy. (1992, Sep. 15). *Energy Minister Responds to Hydro Rate Announcement* [News release]. Retrieved from <https://collections.ola.org/newsrel/ont/1992/09/352611.pdf>



By the time that the Conservatives came to power in 1995, there was considerable pressure to address the unpopular monopoly Ontario Hydro and how it was regulated. The government sought guidance and direction from an appointed committee, known as the Advisory Committee on Competition in Ontario's Electricity System, chaired by Donald S. Macdonald. The Macdonald Report would guide the government's White Paper⁴⁷ which provided the blueprint for what was to be Bill 35, the *Energy Competition Act* announced on June 9, 1998. The *Energy Competition Act*, which replaced the *Power Corporation Act*, included the *Electricity Act, 1998* and the *Ontario Energy Board Act, 1998*. This new legislation was sweeping and some of the major changes included creating a competitive market for wholesale and retail customers, establishing the Independent Market Operator (IMO)⁴⁸ to oversee and manage the wholesale market and its reliable operation, and unbundling the Ontario Hydro monopoly into five successor companies, including Ontario Power Generation (OPG; to operate Ontario Hydro's generation assets) and Ontario Hydro Services Corporation (to own and operate Ontario Hydro's transmission and distribution assets).⁴⁹

In addition to these structural changes, was the enhanced mandate and powers bestowed upon the OEB. The OEB now had the mandate to regulate the monopoly functions of the sector and the necessary regulatory tools to set rates and license the companies in the space.

In addition to its mandate in the natural gas sector, the OEB's role now included:

- Licensing and establishing codes for "distributors, transmitters, wholesalers, generators, [and] retailers"⁵⁰;
- regulating the IMO, licensing and approving its budget and fees;
- setting transmission and distribution rates and the rate for consumers who do not choose competitive retailers;
- approving specific construction projects of transmission facilities and interconnections; and,
- approving certain business arrangements in the electricity sector including amalgamations and acquisitions.

47. Ministry of Energy, Science and Technology, *supra* note 42.

48. The IMO became the Independent Electricity System Operator (IESO) in 2004.

49. Doern and Gattinger, *supra* note 26 at 115-117.; Gluck, *supra* note 44 at 33.

50. Government of Ontario. (2002). *Review of the Ontario Energy Board's Mandate: A Consultation Paper*, at 3. Retrieved from <https://collections.ola.org/mon/4000/10307061.pdf>



In short, the OEB regulated all market participants of both the natural gas and electricity sectors in Ontario, bolding a “strengthened” role in the restructured sector.⁵¹ As described in the White Paper, the Board along with the IMO were to be “the most important defences against potential conflicts of interest” in electricity’s natural monopoly.⁵² This reference to impartial regulatory decision-makers protecting the sector, along with a nod to a greater balance between the government’s role and regulator’s role stated in the MacDonald Report,⁵³ suggests that there was a desire to have greater “adjudicative” or “institutional” independence with the OEB under the restructuring.⁵⁴

In analyzing the legislative changes, Doern and Gattinger (2003) note how the then-new mandate was not only broader and more multi-purpose but also more “explicit”⁵⁵; the new legislation now clearly outlined the Board’s consumer protection role. Additionally, the changes to the OEB gave the Board a larger regulatory tool kit and a more multi-functional role and thus more procedural discretion in its decision-making and carrying out its remit. This included a move away from traditional prescriptive regulation to incentive- or performance-based regulation.

Most importantly, the expansion of *de facto* policymaking and policy advising roles meant that the OEB had much greater discretionary power in provincial energy and was now more engaged in “small-*p* politics.”⁵⁶ The Board could no longer be a passive adjudicator but would have to take a more active role in policymaking with its enhanced power, all while trying to be an independent regulator.

This move into a more political space can be exemplified by the appointment of Floyd Laughren as Chair of the Board. Laughren was a former Finance Minister and Deputy Premier under the previous NDP government. As a politician for 27 years, he stood in contrast to former OEB Chairs and members. Past governments had made a concerted effort to ensure that the OEB Chair and its members were politically independent; past OEB leadership came from the civil service or legal/financial profession and were thus not well known to the general public.⁵⁷ Laughren’s appointment as Chair “signaled that a heavier weight of political leadership is inherent and needed in the new OEB.”⁵⁸

51. Ministry of Energy, Science and Technology, *supra* note 42 at 31.

52. Ministry of Energy, Science and Technology, *ibid* at 18.

53. As stated in the Macdonald Report: “. . . the Legislature should state the goals of regulation and leave the selection of techniques to the regulator.”, Source: Advisory Committee on Competition in Ontario’s Electricity System [Macdonald Report]. (1996). *A Framework for Competition: The report of the Advisory Committee on Competition in Ontario’s Electricity System to the Ontario Minister of Environment and Energy*, at 99. Retrieved from <https://archive.org/details/frameworkforcomp00advioft/page/n7/mode/2up?ref=ol&view=theater>

54. Thomson, I. T. D. (2020). A Literature Review on Regulatory Independence in Canada’s Energy Systems: Origins, Rationale and Key Features. *University of Ottawa Positive Energy*. Retrieved from https://www.uottawa.ca/positive-energy/sites/www.uottawa.ca.positive-energy/files/a_literature_review_on_regulatory_independence_in_canadas_energy_systems_final.pdf

55. Doern and Gattinger, *supra* note 26 at 118.

56. Doern and Gattinger, *ibid* at 122.

57. Doern and Gattinger, *ibid* at 120.

58. Doern and Gattinger, *ibid* at 124.



Such political appointments usually spark outrage, as the appointee may have greater sensitivity and empathy to the short-term political goals of the government-of-the-day, potentially at the expense of a more long-term outlook and the regulator's expertise. Possessing a long-term perspective over short-term electoral considerations is a key rationale for having regulatory independence.⁵⁹

The OEB was also now exposed to Ontario's complex and politically charged electricity sector. Prior to 1998, the OEB dealt with a small group of gas utility companies. Now, the Board was regulating a sector that included over 250 Local Distribution Companies (LDCs) that were intrinsically tied to their local governments, the new successor companies to Ontario Hydro, the new market participants, and the new IMO. Additionally, many of these stakeholders were new to the concept of regulation by an independent, quasi-judicial regulator. For several previous decades, they had their rates regulated by the late Ontario Hydro and its more opaque regulatory decision-making. LDCs and their associated municipalities felt some ownership over the Ontario Hydro model because they had played a role in its "public power" history.⁶⁰ Thus, to these actors, electricity rate regulation was and remained political. The OEB's new mandate meant that these stakeholders and governments now had a reason to intervene with the rate-setting process of the OEB.

This was noted by one interview participant:

"Electricity utilities were either owned by the provincial government or they were owned by municipal governments, and as far as they were concerned, the regulator was Queen's Park, and they knew Queen's Park well."

Thus, the OEB's expansion into electricity meant that the Board had new policymaking authority and had to consider a greater, more political and more complex context where governments were more incentivized to intervene.

Lastly, the new legislation enabled the Minister of Energy to issue directives to the Board (upon approval by cabinet) regarding general policy and the Board's objectives.⁶¹ While the use of directives is discussed later in this report, it is important to note that its modern inception was in 1998 with the *Electricity Competition Act*.

In May 2002, the electricity market was opened. However only a few months later, Ontarians were presented with significantly higher electricity bills⁶² and the province passed legislation freezing retail prices retroactively and for the next four years.

59. OECD. (2016). *Being an Independent Regulator*. OECD Publishing, at 21-22. Retrieved from https://read.oecd-ilibrary.org/governance/being-an-independent-regulator_9789264255401-en#page23

60. Doern and Gattinger, *supra* note 26 at 123.

61. Region of Ottawa-Carleton. (1999). *Energy Competition Act, 1998 – Potential Impacts of Hydro-electricity Restructuring*. Retrieved from https://app06.ottawa.ca/calendar/ottawa/archives/rmoc/Regional_Council/10Mar99/33-1.pdf; Wilson, J. (1998). *Bill 35, Energy Competition Act, 1998*. (1998). Legislative Assembly of Ontario. 36th Parliament, 2nd session. Retrieved from <https://www.ola.org/en/legislative-business/bills/parliament-36/session-2/bill-35>

62. In July 2002, the peak price was 4.71/kWh which was more than 100 times the normal monthly average price. Source: Dewees, D. N. (2005). *Electricity Restructuring and Regulation in the Provinces: Ontario and Beyond* [Draft conference presentation]. CCGES Transatlantic Energy Conference, Toronto, ON, Canada, at 5. Retrieved from <https://www.economics.utoronto.ca/workingPapers/tecipa-205-1.pdf>



While wholesale prices continued to operate under the market structure, the retroactive freeze on retail electricity prices undermined the signal sent from the deregulated market to consumers. Several factors contributed to the high prices following the market opening, including high consumer demand (the province was faced with heat waves over the summer) and low electricity supply (refurbished nuclear units failed to come on line in time for the market opening). Given that energy prices had previously been frozen in 1990,⁶³ the 2002 freeze was effectively a continuation of the policy. Both the initial 1990 freeze and the 2002 freeze resulted in similar public backlash from high electricity bills with politicians under pressure to alleviate the outrage. However, the 2002 freeze was unique in that the OEB was now a proper energy regulator and a major player in the province's electricity sector. One interviewee considered the government's decision to legislate a price freeze on retail prices in 2002 as setting a precedent that opened doors for future government interventions in electricity rates. The interventions also reduced confidence in the new market, making investors less likely to invest in new generation or lease the government's generation assets.⁶⁴

Interviewees highlighted one incident that revealed the new dynamics between the government and the newly independent OEB after the restructuring. In leading up to the market opening in 2002, the OEB made a decision with respect to the market and LDC's, whereby customers who were not part of a fixed energy contract with a retailer would be moved to the prices associated with the spot market, where the price of electricity would fluctuate widely with the supply and demand. Utilities, through the "Standard Supply Service" policy designed by the OEB in December 1999,⁶⁵ would apply to the Board⁶⁶ to pass on the spot price volatility directly to their customers.⁶⁷ The government recognized the political risks related to this move and privately requested the OEB to reconsider its decision. However, according to one interviewee, those who made the decision told the government, "we're an independent agency so just take a hike" and that the OEB felt that they "should be independent of... any political judgements." The Ministry was reluctant to overturn the policy at cabinet and instead crossed their fingers that the market would succeed and there would not be issues. However, such a decision facilitated the failure of the market opening and put the government at risk. While the OEB exercised independence with the decision, the Board's judgement, according to one interviewee "was absolutely atrocious with respect to the public's acceptance of the entire electricity restructuring initiative."

63. Fremeth, A. (2018). A Historical and Comparative Perspective on Ontario's Electricity Rates. *Energy Regulation Quarterly*, (6)4. Retrieved from <https://www.energyregulationquarterly.ca/articles/a-historical-and-comparative-perspective-on-ontarios-electricity-rates#sthash.6l6kl0zi.dpbs>

64. Dewees, *supra* note 62 at 5.

65. Ontario Energy Board. (1999). *Standard Supply Service Code for Electricity Distributors*. Retrieved from <https://www.oeb.ca/documents/cases/RP-1999-0040/code.pdf>

66. Ontario Energy Board, *ibid* at 7.

67. The Distributors' Electricity Efficiency Policy Group. (2003). *Delivering Value: The Next Evolution of Electricity Distribution in Ontario*. Ontario Energy Board, at 4. Retrieved from <https://www.oeb.ca/documents/cases/RP-2003-0144/veridianDEEP%20Paper.pdf>; Market Surveillance Panel. (2002). *Market Surveillance Panel Monitoring Report on the IMO-Administered Electricity Markets*. Ontario Energy Board, at 17 footnote 23. Retrieved from https://www.oeb.ca/documents/msp/panel_mspreport_imoadministered_071002.pdf



One could argue that such a risk was worth overturning at cabinet. However, these events exemplify the balance between providing regulators sufficient independence in their decisions and the need for regulators to take into account the context in which they make such decisions, in this case, this meant taking into account the government's policy initiatives and their objectives for reasonable electricity prices. This was not the only time interviewees described events where a regulator was "regulating without context." Many interviewees emphasized the notion that regulators cannot, nor should, operate within a vacuum.

Following the market freeze in 2002, the government continued to review the electricity system and the role of its regulator within it, launching a review of the OEB's mandate, governance, structure, and legislative framework in late 2002.⁶⁸ The review's focus was driven by the desire to protect energy consumers and make the Board more efficient and accountable. One specific goal was to improve the timeliness of the Board's decisions and its hearings; Minister of Energy John Baird noted the "unacceptable lag times in getting good decisions out" and the impact they had on consumer and investor confidence.⁶⁹

The 2003 legislation based on the review (*The Ontario Energy Board Consumer Protection and Governance Act*) made subtle but ultimately substantive changes to the OEB's governance and structure. These included measures to streamline the timeliness of hearings with a regulatory calendar, to eliminate duplication between natural gas and electricity regulation, enhance communication for consumer protection, redefine the length of appointments for members, and require the Board to prepare new accountability reports.⁷⁰ Three changes introduced in 2003 are discussed in greater depth below:

Firstly, the Board became a "self-financing" Crown agency. This meant that the regulated participants and their fees now directly funded the OEB, rather than such fees going to the Government and Treasury Board where the Board would then still have to justify its budget.⁷¹ The OEB's 2003 Annual Report notes that the then-new change would be "enhancing the independence of the Board."⁷² Setting a budget and having funding that is not interfered with by government was described in our interviews as key to a Board's independence and producing effective decision-making. Additionally, the Organization for Economic Co-operation and Development (OECD) describes "financial independence" as a key condition for a Board's de facto independence.⁷³

68. Ontario Energy Board. (2003). *2002-03 Annual Report*. Ontario Energy Board.; Ontario Ministry of Energy. (2002, Oct. 7). *Premier Eves Orders Review of Ontario Energy Board* [News release]. Retrieved from <https://collections.ola.org/newsrel/ont/2002/10/229175.pdf>

69. Ontario Ministry of Energy. (2003, May 6). *Eves Government Introduces Legislation to Strengthen the Ontario Energy Board and Enhance Consumer Protection* [News release]. Retrieved from <https://collections.ola.org/newsrel/ont/2003/05/233579.pdf>

70. Ontario Ministry of Energy, *ibid*.

71. Doern and Gattinger, *supra* note 26 at 123.

72. Ontario Energy Board. (2004). *2003-04 Annual Report*, at 11. Retrieved from <https://collections.ola.org/ser/5175/2003-2004.pdf>

73. OECD. (2017). *Creating a Culture of Independence: Practice Guidance Against Undue Influence*. OECD Publishing, at 2. Retrieved from <https://www.oecd.org/gov/regulatory-policy/Culture-of-Independence-Eng-web.pdf>



Furthermore, by moving to a “self-sufficient regulatory organization”, it had to develop its own business infrastructure separate from the Ministry, including corporate and HR services.⁷⁴ Such separation could potentially set the stage for developing a greater “culture of independence.”⁷⁵

Secondly, the Board adopted a new corporate governance structure. A Chair/CEO and a new Management Committee assumed oversight of the fee structuring, the Board’s resource needs and performance.⁷⁶ The intent of the Committee was to deal with administrative duties, while the board members could then focus fully on adjudicative hearings. This parsing of responsibilities is particularly interesting given that such an administrative/ adjudicative split led to the creation of the OEB in the first place. (This rationale was also behind the Board’s adoption of a tripartite governance structure in 2021.)

Thirdly, the changes enhanced the responsibility of the OEB staff. Board members and the Management Committee could now delegate decision-making authority to OEB staff. This was in an attempt to further distribute administrative tasks so board members could focus on adjudicative tasks.⁷⁷

One interview participant argued that such delegation diminished the role of board members and expertise of the organization (see next section).

The 2003 changes were varied and substantive to the OEB’s structure. In some instances, the changes granted the OEB more flexibility in its decision-making and in developing a culture of independence. Other changes arguably diminished the independence of its members; board member terms were to be set for an initial two-year period with renewal terms up to five years. This would make a member more sensitive to political short-termism if their appointment renewal was coming up.⁷⁸ Additionally, these changes reflected an intention to push the OEB into its new small-p political role in Ontario’s energy sector where it had to engage in greater “forward-looking initiatives” (compared to its previous role as being a passive adjudicator).⁷⁹ As Doern and Gattinger (2003) note, the 1998 changes meant that there was more space for “an activist role” by an OEB Chair, whereby they can engage in greater policy-regulatory initiatives.⁸⁰

74. Ontario Energy Board, *supra* note 72 at 12.

75. OECD, *supra* note 73.

76. Ontario Ministry of Energy, *supra* note 69.

77. Baird, J. (2003). *Notes For a Statement to the Legislature By the Honourable John Baird Minister of Energy On the Introduction of the Ontario Energy Board Consumer Protection and Governance Act, 2003*. Queen’s Park. Retrieved from <https://collections.ola.org/newsrel/ont/2003/05/353787.pdf>

78. As Holburn (2012) observes with the OPA’s board of directors (which had the same appointment term lengths as the OEB), “Since the first term is limited to only two years and reappointments are the prerogative of the Minister, the Minister can replace dissenting Board members within a relatively short time horizon – creating a strong incentive for OPA board members to account for the preferences of the Minister in their decisions.” Source: Holburn, G. L. F. (2012). Assessing and managing regulatory risk in renewable energy: Contrasts between Canada and the United States. *Energy Policy*, 45, at 659.

79. Ontario Energy Board, *supra* note 72 at 12.

80. Doern and Gattinger, *supra* note 26 at 125.



In 2003, Howard Wetston was appointed to OEB Chair. Wetston was brought up frequently by interviewees as a key character in the OEB's evolution as the Chair of the OEB from 2003 to 2010. Some considered his influence as strengthening the independence of the Board (given his previous experience as a judge of the Federal Court of Canada⁸¹); others characterized Wetston as a "policy wonk" and as someone who wanted the OEB to become more of a proactive policy-regulation maker in the provincial energy system. Under Doern and Gattinger's definition, Wetston can arguably be called the first "activist" OEB Chair:

Wetston's desire to grow the OEB as a proactive policy creator aligned with the August 2003 blackout, which saw much of the province (and several Midwestern U.S states) lose electricity for an extended period of time. This led to a push by regulators to develop conservation policy initiatives in alignment with the government's plan to develop a "conservation culture."⁸² One interviewee saw this push into conservation policy at the OEB under Wetston's leadership as opening the door for the "daily government intervention" into Board operations that would occur under the incoming provincial Liberal government.

This short but important period from 1995 to 2003 saw the restructuring of Ontario's electricity structure, moving away from its near century old monopoly model to a deregulated, competitive oriented system. This included an expansion of the OEB's role giving the Board more policymaking instruments, more procedural discretion, more stakeholders to regulate and ultimately, more responsibility as a regulator in a politically charged sector. While the market-oriented model would be short-lived, the OEB's electricity remit continues to live on and shaped what we know now as the modern OEB. It was no longer the passive natural gas regulator conceived in 1960. 2003 and the August blackout saw the Board move into government-aligned conservation initiatives; this direction into conservation policy has been seen as a first step into the extensive government intervention seen in the next period.

81. Government of Ontario Newsroom. (2010, Oct. 13). *Howard Wetston, Q.C.* Retrieved from <https://news.ontario.ca/en/backgrounder/14662/howard-wetston-qc>

82. Ontario Energy Board, *supra* note 72 at 14 and 25.



RENEWABLES AND MODERN DIRECTIVES (2003 - 2018)

The next period in the history of the OEB and its independence is marked by the Liberal government and its efforts to develop a green economy in the province. It is observed that 2002 onwards was marked by several major changes to the provincial energy sector; a time where conservation initiatives, demand management and renewable energy integration were paramount and where electricity rates were frozen, unfrozen and subsidized.⁸³ In reviewing the OEB, Warren (2017) further noted the extent of the changes from 2002 onward:

“The frequency of changes in the government’s policies towards the sector has required the OEB to, in turn, adapt to the changes. The clearest example of this need to adapt is the response to the province’s green energy legislation. The OEB had to adapt to a material shift in the focus of regulation towards conservation, demand management, and the incorporation of renewable energy sources.”⁸⁴

Interviewees noted that the OEB was now (and continues to be) “in the middle of some pretty important policy issues.” While government interference had been present throughout the previous decades at Ontario Hydro, the changes that occurred throughout the 21st century were unique in that they were significant in scope and explicit in their nature on the sector’s independent agencies. The consequence was that the OEB would be viewed “less as an independent regulator than as an instrument of government policy.”⁸⁵

In October 2003, Dalton McGuinty was elected the 24th Premier of Ontario. Interviewees all noted the influence that his leadership had on the evolution of the OEB, specifically on government’s emphasis on environmental initiatives and climate policy, and the closing of the province’s coal plants. This period is marked by greater government intervention; a focus on transitioning its energy generation away from fossil fuels to renewables; demand management and conservation policy through use of prescriptive directives; and Ministerial-centred, non-regulated long-term electricity planning. These large-scale initiatives came at the expense of having an independent expert regulator in the OEB, which essentially became a government department - an operational appendage of the government’s direction.

Some participants had quite strong words on the effects that Liberal leadership had on Ontario’s energy sector and the independence of the OEB:

“The [Liberal] Government was in [power]. . . for a long time. And it drove everything, as far as the electricity sector in Ontario is concerned. There was no such thing as independence [. . .] People may have gone around and called themselves independent regulators [. . .] but that was phoney. There was no independence. Everybody just marched to the orders of the government. And the government simply wanted to do two things: get rid of coal and [. . .] introduce a whole bunch of renewable energy.”

83. For a timeline on the legislation/policy changes that took place from 1998 to 2011, see: Office of the Auditor General of Ontario. (2011). *Electricity Sector – Regulatory Oversight*, at 71, figure 2. Retrieved from <https://www.auditor.on.ca/en/content/annualreports/arreports/en11/302en11.pdf>; For an overview of the key events related to power system planning from 2004-2015, see: Office of the Auditor General of Ontario. (2015). *Electricity Power System Planning*, at 237, Appendix 1. Retrieved from <https://www.auditor.on.ca/en/content/annualreports/arreports/en15/3.05en15.pdf>

84. Warren, R. B. (2015). *Governance of Regulatory Agencies: Case Study of the Ontario Energy Board*. Council for Clean & Reliable Electricity, at 11. Retrieved from https://www.weirfoulds.com/assets/uploads/15118_CCRE-The-Governance-of-Regulatory-Agencies.pdf

85. Warren, *ibid* at 11.



In 2004, the Liberal government introduced the *Electricity Restructuring Act*. The objective of the Act was to move away from some of the competitive aspects of the Harris' 1998-2002 restructuring, introducing a hybrid model whereby there were both competitive and regulated qualities in the electricity sector.⁸⁶ The OEB was empowered to set annual retail rates for customers. The Act also established the Ontario Power Authority (OPA), an independent agency whose main objectives were in electricity planning, conservation program oversight and procuring new generation capacity for the province.⁸⁷ The OPA submits its plan and procurement to be reviewed by the OEB, including its long-term supply and demand forecast plan: the Integrated Power System Plan (IPSP). This was to be a transparent process, utilizing the OEB's regulatory expertise and quasi-judicial process to ensure cost-effectiveness.⁸⁸ On planning, the Act appeared to continue on the trajectory of empowering the OEB and utilizing its expertise in providing a transparent procurement plan. However, conversely, the 2004 Act continued to expand the government's directive powers including towards the new OPA.⁸⁹

During this time, stakeholders saw the OEB's role becoming more important with changes in the province's energy environment.⁹⁰ However, confidence in the Board's performance was "mid-range", with stakeholders taking a wait-and-see approach to how the Board would handle its new responsibilities. It is interesting to observe the stakeholders' view of the OEB's independence: over 80 percent of stakeholders agreed that independence of the OEB (defined as "autonomy – freedom from political influence or interference") was very important.⁹¹ While they saw the OEB as having a high degree of independence with its regulatory decision-making, they also perceived it to have little independence with respect to setting energy policy. This is because stakeholders viewed energy policy in the domain of the government.

While the 2004 legislation appeared to further legitimize the OEB and its role as Ontario's energy regulator, the quasi-judicial process outlined in the legislation was never followed. In what is now a well-known affair in the Ontario energy community, the first IPSP that the OPA brought to the OEB was scrapped two weeks into the Board's review process by a Ministerial directive.

86. Yauch, B. (2020). Ontario's Electricity Market Woes: How Did We Get Here and Where Are We Going. *Energy Regulation Quarterly*, 8(2), at Part IV. Retrieved from <https://energyregulationquarterly.ca/articles/ontarios-electricity-market-woes-how-did-we-get-here-and-where-are-we-going#sthash.yj6zDfrj.dpbs>

87. Warren, R. B. (2013). The Role of Government – Background Paper. *Council for Clean & Reliable Energy*, at 3. Retrieved from <https://thinkingenergy.ca/wp-content/uploads/2021/03/R-Warren-THE-ROLE-OF-GOVERNMENT-IN-THE-ENERGY-SECTOR-APRIL-2013.pdf>; Yauch, *ibid* at Part IV.

88. Yauch, *ibid* at Part IV; Office of the Auditor General of Ontario. (2015). *Annual Report 2015*, at 213. Retrieved from https://www.auditor.on.ca/en/content/annualreports/arreports/en15/2015AR_en_final.pdf

89. Warren, R. B., *supra* note 87 at 5.

90. NATIONAL Public Relations. (2004). *Ontario Energy Board: Stakeholder Perception Survey Report*, at 2. Retrieved from <https://collections.ola.org/ser/249546/2004.pdf>

91. NATIONAL Public Relations, *ibid* at 6 and 14.



The OPA withdrew its proposal temporarily and then permanently, despite its legislated obligations to submit a plan to the OEB.⁹² The IPSP was ultimately replaced by the Long-Term Energy Plan (LTEP), a plan overseen and published by the Ministry of Energy. This LTEP (which is still in operation), guides procurement in the province without regulatory review by the OEB.⁹³ In light of these events, Vegh (2017) came to the following conclusion:

“The lesson to be drawn from this is that establishing independent responsibilities in agencies is not sufficient to ensure that these powers will, in fact, be exercised independently and in accordance with statutory purposes. In fact, agency policy instruments (rules, codes, guidelines, etc.) may eventually be exercised directly or indirectly by the government.”⁹⁴

Despite the quasi-judicial planning process and powers outlined in the *Electricity Restructuring Act* to the OEB and OPA, the government wanted (and exhibited) greater control over the direction and decision-making of procurement. As noted by our participants, the Liberals were fervently driven by environmental initiatives and the closing of the coal plants; one participant said closing the coal plants “was a matter of religious conviction.” The creation of the OPA, the determination to close the plants and the projected energy demand meant that there was an urgency to purchase generation capacity.⁹⁵

The drive for rapid procurement of generation (more specifically clean, renewable generation) led to the ambitious *Green Energy and Economy Act* (a.k.a. *the Green Energy Act*; the *GEA*), legislated in 2009.

Much like the 1998 legislation, the *GEA* was seen by interview participants as a key piece of legislation in the evolution of the OEB’s independence. The *GEA* has been described as a bold industry policy with the intent of establishing Ontario as a leader in North America for renewable generation.⁹⁶ One of the key levers was the Feed-in-Tariff (FIT) program, which would provide renewable generators with long-term, above-market contracts to procure and dispatch renewable generation to Ontario’s grid. The *GEA* also brought forth several changes to the governance and regulatory structure of the energy system, giving more authority to the Ministry of Energy in final decision-making and pushing certain objectives in the OEB’s mandate. Under the *GEA*, the OEB had “responsibility to promote electricity conservation and demand management, facilitate the implementation of a Smart Grid, and promote the use and generation of electricity from renewable sources.”⁹⁷

However, the most infamous feature of the *GEA* was the even-greater enhancement of government-issued directives to independent agencies.

92. Vegh, *supra* note 39 at 22.

93. Yauch, *supra* note 86 at Part IV.

94. Vegh, *supra* note 39 at 22.

95. Yauch *supra* note 86 at Part IV.

96. Rodger, J. M. (2014) Looking Back: 5 Years under Ontario’s Green Energy Act. *Energy Regulation Quarterly*, 2. Retrieved from <https://energyregulation-quarterly.ca/articles/looking-back-5-years-under-ontarios-green-energy-act#sthash.7GXnCLWo.dpbs>

97. Ontario Energy Board. (2010). Annual Report 2009-10, at 13. Retrieved from <https://collections.ola.org/ser/5175/2009-2010.pdf>



As noted, while a provision allowing for directive from government to the OEB had been in place prior to 2009, the *GEA* increased the specificity, detail, and binding guidance to which the Board must adhere.⁹⁸ The scope for directives expanded in the ensuing years, providing the government with greater ability and specificity for which it could issue directives.⁹⁹ For instance, legislative amendments in 2010 gave the Minister the ability to issue directives outlining conditions for licences already issued by the Board and to “amend specific licences of specified licensees.”¹⁰⁰

Interviewees noted that the new legislation and significant use of directives¹⁰¹ were “problematic.” One interviewee noted that with the government setting energy policy in increasing detail to the regulatory agencies, the agencies’ ability to formulate strategic direction based on their own expertise diminished. Many experts have identified the problems that the directives created for the OEB’s independence and effectiveness. Robert Warren noted that the directives limited the OEB’s independence by both requiring the OEB to do certain actions, as well as “deprive the OEB of the ability to assess whether what they have been directed to do is in the public interest. . . . The OEB is precluded by the terms of the directive from undertaking any such [impact] analysis.”¹⁰²

The Ontario Auditor General also noted issues with transparency stating there was “no evidence that ministerial directives and directions were supported by public consultations or economic analyses disclosed to the public.”¹⁰³ Holburn concluded that the *GEA* made renewable energy pricing “subject to political control” and significantly prevented the OEB from making independent decisions.¹⁰⁴

Lastly, Harrison argued that, while a board could still be independent even with such directives, the question is raised about the value of the tribunal’s role. The result is that the government does not have faith in the independence of the regulator:

“At a minimum, in the case of the OEB, the inclusion of such provisions indicates an unwillingness on the part of government to leave the Board to determine independently the means by which the stated policy objectives are to be pursued by the Board. Overall, the scheme reflects a nod by government to independence as a principle, but not where independence might lead to results it does not like.”¹⁰⁵

98. Holburn, *supra* note 78 at 660 and 663.; Warren, *supra* note 87 at 5.; Bruno, G. (2015). Section 67 of the Responsible Energy Development Act: Seeking a Balance between Independence and Accountability. *Alberta Law Review*, 52(4), at 862.

99. In comparison, the 1998 version of the *Ontario Energy Board Act* had only two provisions for which the executive could provide directives. Source: Bruno, *ibid* at 862.

100. Bruno, *ibid* at 862.

101. The government issued 114 directives to the OPA, IESO and OEB from 2005 to 2015. Source: Yauch, *supra* note 86 at Part VI.

102. Warren, *supra* note 84 at 15.

103. Office of the Auditor General of Ontario. (2017). *Electricity Power System Planning: Follow-Up on VFM Section 3.05*, 2015 Annual Report, at 65. Retrieved from https://www.auditor.on.ca/en/content/annualreports/arreports/en17/v2_105en17.pdf

104. Holburn, *supra* note 78 at 660.

105. Harrison, R. J. (2014). Tribunal Independence: In Quest of a New Model. *Energy Regulation Quarterly*, 2. Retrieved from <https://energyregulationquarterly.ca/articles/tribunal-independence-in-quest-of-a-new-model#sthash.5QywdBXR.dpbs>



In terms of long-term energy planning, in 2016, the IPSP and its legislated process were nixed and replaced with the Ministry's LTEP as mentioned above. The direction of the LTEP and the procurement of large renewable energy projects by the OPA was now legislated to be outside the purview of the OEB. The Auditor General who brought to light several structural issues of the sector, criticized this regulatory gap. Her 2015 follow-up report on electricity system planning stated that the OEB, in not being given the opportunity to review the long-term policy as an independent regulator, "was not able to ensure that Ontario's technical energy planning had been carried out in a prudent and cost-effective manner to protect the interests of electricity consumers."¹⁰⁶ The Ministry also gained authority over deciding which large transmission projects would get approved; powers that previously resided with the OEB.¹⁰⁷

In summary, the OEB was not given the independence and authority to fulfill its mandate as the province's energy regulator, acting more in a technical implementation capacity to government direction much like a department. This lack of regulatory authority was also reflected in electricity bills: in 2011, the OEB only had jurisdiction over roughly half of the total charges on the average bill.

The other half was "based on government policy over which the Board has no say", including long-term energy contracts with the government/OPA as part of its push towards renewable generation.¹⁰⁸ While the OEB received enhancements in 2016 to its consumer protection mandate via amendments, including authority to determine how a retailer/gas marketer determines prices they charge and stronger enforcement powers,¹⁰⁹ this period was more defined by the government interfering with the OEB's operations.

The *GEA* and its legacy is complicated. As a policy, the *GEA* and government achieved what it had desired: a rapid transition to renewable energy and a closing of the province's coal plants. In 2003, coal made up 25 percent of total generation; by 2014 it made up zero percent.¹¹⁰

However, this transformation came at both a financial and political cost. The initiatives led to a significant surplus in energy in the province.¹¹¹ Differences between the high price guaranteed to the generators in contracts and the low Hourly Ontario Energy Price (the market price) led to large difference that needed to be made up by the Global Adjustment costs in electricity bills.

106. Office of the Auditor General of Ontario, *supra* note 103 at 63.

107. Yauch, *supra* note 86 at Part VI; *Bill 112: An Act to Amend the Energy Consumer Protection Act, 2010 and the Ontario Energy Board Act*, (2015). 41st Legislature, 1st Session. Retrieved from <https://www.ola.org/en/legislative-business/bills/parliament-41/session-1/bill-112>

108. Office of the Auditor General of Ontario. (2011). *Electricity Sector – Regulatory Oversight*, at 69. Retrieved from <https://www.auditor.on.ca/en/content/annualreports/arreports/en11/302en11.pdf>

109. Office of the Auditor General of Ontario, *supra* note 103 at 64-65.

110. Government of Ontario. (2021). *The End of Coal*. Retrieved from <https://www.ontario.ca/page/end-coal>

111. In 2014, the Auditor General observed that the province could produce 30,203 MW, yet only needed 15,959 on an average day. Source: Morrow, A., and Cardoso, T. (2017, Jan. 8). Why does Ontario's electricity cost so much? A reality check. *The Globe and Mail*. Retrieved from <https://www.theglobeandmail.com/news/national/why-does-electricity-cost-so-much-in-ontario/article33453270/>



Thus, there were high costs that Ontarians were paying to subsidize these long-term renewable energy contracts: from 2006 to 2016, average home electricity bills increased by 19 percent.¹¹² This rate increase was much faster than in the rest of Canada.¹¹³ Faced with high electricity bills, the public became more concerned about affordability and the government responded with a series of policies that shifted the cost burden to different groups including “the tax base, future rate-payers or between small and large volume customers.”¹¹⁴ The 2017 Fair Hydro Plan, a policy that reduced electricity bills by 25 percent for small customers through long-term debt, was cited by interview participants as an outcome of the politicization of electricity in the province. Like the price freezes from past decades, the Fair Hydro Plan was a further denial that the events were a “complete disaster.” Stated by one participant, “we destroyed the electricity sector and the main function of electricity pricing in Ontario because everything was decided politically.”

Holburn, in his 2011 article, made several observations regarding Ontario’s energy regulatory framework during this period.

He examined the extensive use of directives in shaping policy, the “concentrated political control over sector agencies in a single ministry,” and the lack of policy stability and long-term commitments for energy goals, as evidenced by the province’s FIT programs and shifting renewable energy capacity targets during this period.¹¹⁵ He observed that this “continual policy churn” can be explained partially by the succession of different Ministers of Energy over the years. Despite the Liberals continually being in power throughout this period, there was a different Minister appointed roughly every 12 months.¹¹⁶ The result of different Ministers each with differing policy priorities meant that, from 2003 to 2010, successive Ministers “either introduced a major new policy initiative or else abandoned a predecessor’s policy.”¹¹⁷ This policy instability had a negative effect on industry investment; in 2011, Samsung compared the political uncertainties in Ontario to those of volatile regimes in developing countries.¹¹⁸

In addition to the political interference and policy instability, the OEB also faced important internal challenges related to its structure and management during this period.

112. Environmental Commissioner of Ontario. (2018). *Making Connections: Straight Talk about Electricity in Ontario*, at 113. Retrieved from <https://irp.cdn-website.com/26237149/files/uploaded/Making-Connections.pdf>

113. Environmental Commissioner of Ontario, *ibid* at 113.

114. Yauch, *supra* note 86 at Part VI.

115. Holburn also analyzed why the Canada’s regulatory governance structure “creates a tight coupling between agencies and political institutions which inhibits agencies from establishing policy in an independent manner” compared to the United States. Source: Holburn, *supra* note 78 at 660.

116. Holburn, *ibid* at 661.

117. Holburn, *ibid* at 661.

118. Hamilton, T. (2011, Jun. 17). Samsung hasn’t received ‘one cent from Ontario.’ *The Toronto Star*. Retrieved from https://www.thestar.com/business/tech_news/2011/06/17/samsung_hasnt_received_one_cent_from_ontario.html



From 2002 to 2014, the Board reduced the number of full-time board members from eight in 2002 to four in 2014 with greater emphasis placed on appointing part-time members and delegating decision-making authority to staff.¹¹⁹ One of our interviewees saw this as problematic to the Board's effectiveness, leading to a diminishment into the role of individual board members, a loss of expertise that they could offer, and a centralization of the role of the OEB Chair. In Warren's 2017 OEB case study, he noted that a move to part-time members "may undermine the perception that the members have the necessary expertise."¹²⁰ He further raised concern about the challenges of part-time members developing overall expertise and a robust institutional memory as decision-makers compared to full-time members.

As noted in the previous section, legislation allowed for the board members to delegate tasks to allow them to focus more on hearings and adjudicative roles. Over time, the Board delegated more of its decision-making to staff, including decisions related to adjudicative functions: In 2008-09, 63 percent of the 315 decisions were made by staff; in 2017-18, 81 percent of the 323 decision were made by staff and only 19 percent by board members.¹²¹

Warren noted concerns of effectiveness if OEB staff were not adequately independent in providing advice without fear of reprisal, or if they did not possess sufficient expertise:

"Any indication of a lack of expertise or the absence of independence would be matters of concern because it would erode trust in the Board's processes and in the overall effectiveness of regulation. Effective governance would, I suggest, require assessments of the expertise and independence of OEB staff."¹²²

Warren also noted that significant operational changes, such as the reduction of full-time members and change to distribution rate applications, occurred during a time when the OEB's management structure requirements were not being followed. The Board had not appointed a second Vice-Chair and had also eliminated its Chief Operating Officer (COO) position which meant that all positions reported directly to the Chair. These actions went against the Ontario Energy Board Act, its Memorandum of Understanding with the Ministry, and the OEB's own bylaws. Warren concluded that these practices meant that "the culture of independence recommended by the OECD may be absent."¹²³

119. Warren, *supra* note 84 at 17.

120. Warren, *ibid* at 17.

121. Ontario Energy Board Modernization Review Panel. (2018). *Final Report*, at 5, footnote 1. Retrieved from <https://files.ontario.ca/endm-oeb-report-en-2018-10-31.pdf>

122. Warren, *supra* note 84 at 18

123. Warren, *supra* note 84 at 18



In summary, the period from the early 2000s to late 2010s was marked by significant environmental initiatives led by the Liberal government. Over this period, the government made fundamental structural changes to the energy sector and the functioning of agencies like the OEB. This was evidenced most prominently by 2009's *GEA*, which saw the government increase the frequency, detail and binding guidance of ministerial directives to which the OEB was to adhere. The extensive use of directives and a revolving door of energy ministers during this period led to policy instability, declining investor confidence, and the OEB acting more as a government department than independent quasi-judicial regulator. Internal changes at the OEB led to further concerns over the Board's legitimacy, expertise and independence. While the government was successful in transitioning away from coal to renewable generation, this result came with both a financial cost (seen through higher electricity bills) as well as a political cost, with the Liberals' defeat to Doug Ford and the Progressive Conservatives in the 2018 provincial election.



A MODERN GOVERNANCE APPROACH AND MORE OF THE SAME (2018 - FUTURE)

The issue of high electricity bills has been seen as one of the reasons for Liberals' 2018 election loss and the election of a Progressive Conservative majority led by Doug Ford.¹²⁴ While the newly elected government had a different political ideology than its predecessor, it has continued its tradition of political interference in the electricity sector. This has included the abrupt cancellation of 758 renewable energy contracts, the use of directives to shape energy procurement, and the abolition of the Liberal's FIT program.¹²⁵ While the government repealed the *GEA* in late 2018,¹²⁶ it has continued to utilize ministerial directives to direct the OEB and IESO and its decisions; a recent directive to the OEB required the regulator to amend its transmission license with Hydro One to include development of a new transmission line.¹²⁷ Although the government is no longer pursuing renewable electricity policy, it has identified new reasons for interference in energy regulatory decision-making, including economic growth and low electricity prices.¹²⁸

The result of years of explicit political interference into energy decision-making has continued had adverse effects on investor confidence in the province. Interviewees cited the flip-flopping nature of polar opposite provincial governments as negatively impacting investor confidence. One interviewee noted that Ontario's declining energy investor reputation can be exemplified with the recent rejection by U.S. regulators of the Avista (a U.S.-based utility) acquisition by Hydro One (the transmission and distribution utility of the late Ontario Hydro). The interviewee noted that rejections by public utilities' commissions in the states of Washington and Idaho painted Ontario's regulatory context as "a bit of a banana republic."

124. Rodriguez, J. (2018, Jun. 7). Doug Ford's PC Party wins majority in 2018 Ontario election. *Maclean's*. Retrieved from <https://www.macleans.ca/politics/doug-ford-wins-the-2018-ontario-election/>

125. Ministry of Energy, Northern Development and Mines. (2018, Jul. 13). *Ontario to Cancel Energy Contracts to Bring Hydro Bills Down* [News release]. Retrieved from <https://news.ontario.ca/en/release/49720/ontario-to-cancel-energy-contracts-to-bring-hydro-bills-down>

126. Yantzi, J. (2018, Oct. 12). Ontario Repeals Green Energy Act, 2009 [Blog post]. *Aird & Berlis Energy Insider*. Retrieved from <https://www.airdberlis.com/insights/blogs/energyinsider/post/ei-item/ontario-repeals-green-energy-act-2009>

127. Minister of Energy, Northern Development and Mines. (2020). *MC-994-2020-1148* [Minister's directive]. Retrieved from <https://www.oeb.ca/sites/default/files/Letter-from-the-Minister-ENDM-Chatham-Lakeshore-OIC-and-Directive-20201217.pdf>

128. Minister of Energy, Northern Development and Mines, *ibid* at 1; Stevens, D. (2019, May 13). Ontario Passes Legislation to "Reform" the OEB and Repeats Promise to Reduce Electricity Costs [Blog post]. *Aird & Berlis Energy Insider*. Retrieved from <https://www.airdberlis.com/insights/blogs/energyinsider/post/ei-item/ontario-passes-legislation-to-reform-the-oeb-and-repeats-promise-to-reduce-electricity-costs>



Washington state's regulator identified the sudden resignation/retirement of Hydro One's Board and CEO upon election of a new government¹²⁹ and the rapidly introduced new legislation following the election as evidence why Ontario's political interventionism is a deterrent to investors, shareholders and customers of Avista:

"This sudden and complete change in Hydro One's leadership at the instance of its former owner and largest shareholder, the Province of Ontario, along with certain legislation passed quickly into law following the change in government leadership, demonstrates that Hydro One remains subject to management control by the province and that the province may not limit itself, or allow itself to be limited, to the role of "shareholder" as had been represented to the Commission. It became clear on and after July 11, 2018, that Hydro One's directors cannot be considered independent and the province's role is not limited to that of a minority shareholder in a publicly traded corporation."¹³⁰

Regardless of one's opinion on the merger, this example shows how Ontario's political climate and reputation for regularly interfering with ostensibly independent actors have harmed investor confidence in the province.

In December 2017, the Ontario Government appointed long-time Canadian public servant Richard Dicerri, to head an expert panel to review the OEB.¹³¹ The panel was given a broad mandate into the affairs of the OEB "including reviewing how the OEB can continue to protect consumers amidst a rapidly changing sector, support innovation and new technologies, and how the OEB should be structured and resourced to deliver on its changing role."¹³² The announcement, which noted the then-ongoing modernization of the NEB and Alberta Utilities Commission, was observed to take into account the changing complexity of electricity and need to modernize to manage these rapid changes.¹³³

129. Ford had campaigned on the promise of removing the CEO and Board of Hydro One. Source: Ferguson, R. (2018, Apr. 12). Doug Ford says he'll fire Hydro One's CEO if he wins election. *The Toronto Star*. Retrieved from <https://www.thestar.com/news/queenspark/2018/04/12/doug-ford-says-hell-fire-hydro-ones-ceo-if-he-wins-election.html>

130. Washington Utilities and Transportation Commission. (2018, Dec. 5). *Docket U-170970: Order 07, Final Order Denying Joint Application For Transfer of Property*, at 2-3.

131. Richard Dicerri is now the Chair of the OEB Board of Directors. Source: Ontario Energy Board. (n.d.). *Richard Dicerri: Chair of the OEB Board of Directors*. Retrieved from <https://www.oeb.ca/about-us/who-we-are/board-directors/richard-dicerri>

132. Ministry of Energy, Northern Development and Mines. (2017, Dec. 14). *Ontario Establishing Panel to Modernize the Ontario Energy Board* [News release]. Retrieved from <https://news.ontario.ca/en/bulletin/47529/ontario-establishing-panel-to-modernize-the-ontario-energy-board>

133. Stevens, D. (2018). What's Next for the Ontario Energy Board. *Energy Regulation Quarterly*, 6(1). Retrieved from <https://energyregulationquarterly.ca/case-comments/whats-next-for-the-ontario-energy-board#sthash.FcZjv4Ni.dpbs>



The final report was released in 2018. The report noted the challenges the Board had faced with the rapidity of changes to its mandate and operations since beginning to regulate electricity in 1998. This included the challenges of “balancing regulatory independence with responding to an increasing number of government directives.”¹³⁴

The report’s main recommendation regarding changes to the OEB’s corporate governance informed the government’s new legislation, the *Fix the Hydro Mess Act*. The governance changes included establishing a Board of Directors responsible for oversight and “interfacing” with the government and Minister of Energy; a CEO (separate from the Chair) providing executive leadership on the Board’s policy and operational matters; and Commissioners who take on the adjudicative responsibilities for hearings. This includes a Chief Commissioner who assigns the cases and ensures “the timeliness and dependability of the regulatory process.”¹³⁵ In recommending the model, the report noted that the previous governance structure was an “impediment to independent decision-making and accountability.”¹³⁶ This new model would clarify lines of accountability and strengthening the regulator’s independence.¹³⁷

In presenting the legislative amendments to the *Ontario Energy Board Act, 1998*, the government noted the reforms were brought forward to ensure a “greater separation of its administrative and adjudicative functions.”¹³⁸ This is of note, given the original rationale for creating the OEB back in 1960.

This new corporate governance structure came in effect in early 2021. Also known as the tripartite model, other energy regulators across the country have in recent years adopted this structure including the Alberta Energy Regulator, and the new Canada Energy Regulator. Interviewees and experts have noticed this trend in energy regulatory governance; there is debate currently over whether such a model improves the effectiveness of a regulator (see more in the NEB Case Study).

One interviewee brought up the recent appointment of the new OEB CEO under this new governance modernization, saying that Susanna Zagar’s appointment to CEO provided a “sense of relief” for the independence of the role, given Zagar’s well-respected public service record. They noted that she will have a steep learning curve for energy policy and may be challenged by stakeholders who want to maintain “non-independence” of the Board.

134. Ontario Energy Board Modernization Review Panel, *supra* note 121 at 4.

135. Stevens, *supra* note 130.; Ministry of Energy Northern Development and Mines. (2019, Mar. 21). *Building a Modern, Efficient, and Effective Energy Regulator for Ontarians* [News release]. Retrieved from <https://news.ontario.ca/en/backgrounder/51628/building-a-modern-efficient-and-effective-energy-regulator-for-ontarians>

136. Ontario Energy Board Modernization Review Panel, *supra* note 121 at 14.

137. Ontario Energy Board Modernization Review Panel, *ibid* at 14.

138. Ministry of Energy Northern Development and Mines, *supra* note 135.



However, the fact that she did not come from the energy sector,¹³⁹ nor is mired with a political history or a sector history or bias bodes well for the perception of independence of the Board and adds confidence in the future of the agency.

In addition to these governance changes to the OEB, the Ford Government recently decided to review the long-term electricity planning framework and the role of the government and expert agencies within it. Earlier in 2021, the government solicited input on the long-term energy process in a desire “to increase the effectiveness, transparency, and accountability of energy decision-making in Ontario.”¹⁴⁰ As discussed earlier, the current LTEP is written and approved by the Ministry of Energy setting the planning framework with the OEB and IESO as technical implementers for the Plan. This review signals that the government’s goal may be to empower “independent, agency-led planning” and have the Ministry “rely more directly on Ontario’s technical agencies and economic regulators.”¹⁴¹ Additionally, the government is considering revoking legislation related to the current long-term energy plan, the government’s implementation directives, and the agencies’ implementation plans.¹⁴²

Indeed, energy experts in providing input for the review have signalled support for giving the OEB greater authority in pressure testing components of the planning process.¹⁴³ It will be interesting to see how these changes could affect regulatory independence and the OEB’s decision-making authority with respect to Ontario’s long-term energy planning.

Ultimately, interviewees for this project were pessimistic about the future of the OEB and its independence. There is a lack of confidence that government will not cease political micromanagement into the affairs of the regulator. Additionally, with the pronouncement of new policy imperatives, including climate change and environmental aspects of energy development in the province, there is a belief that every decision affecting an entity in the market will attract political attention. And when the process becomes politicized, the role of the regulator in its traditional independent economic regulator paradigm becomes more difficult.

139. Zagar was previously the Chief Strategy, Analytics & People Officer at the Workplace Safety and Insurance Board. Source: Association of Power Producers of Ontario. (2020). *New appointments to OEB*. Retrieved from <https://magazine.appro.org/news/ontario-news/6346-1597711523-new-appointments-to-oeb.html>

140. Environmental Registry of Ontario. (2021). *The Ministry of Energy, Northern Development and Mines is reviewing Ontario’s long-term energy planning framework with a view to implementing a new, more transparent, predictable, and reliable planning process*. Retrieved from <https://ero.ontario.ca/notice/019-3007>

141. Environmental Registry of Ontario, *ibid*.

142. Environmental Registry of Ontario, *ibid*.

143. Thomson, I. T. D., Fagan, D., and Speer, S. (2021). *Reforming Provincial Energy Planning: Summary and Analysis from Ontario 360’s Expert Roundtable*. Ontario 360 Project, at 14 and 19. Retrieved from https://on360.ca/wp-content/uploads/2021/05/ON360_EnergyPlanningReport_v5.pdf



One interviewee further observed that there really is no desire for regulatory independence in Ontario, noting Ontario's long political roots with electricity in the province:

"I don't think it will change. I think we've crossed that bridge. I don't think there's any appetite for that construct [regulatory independence] that existed for so many years [...] I tell people what you need to do is go to University Avenue in Toronto. And there's a statue there: and the guy is Adam Beck. And if you read that statue, you will find all of the municipal installations that were installed when they brought hydro power to Ontario and how much involved politics was both at the Queen's Park and in the municipalities [...] and that was driven, of course, by the nature of electricity. It was the technology that developed the province."

In summary, despite a differing political ideology, the current Progressive Conservative majority has in recent years continued the tradition of political interference in the province's energy sector. While repealing several of the Liberal's environmental initiatives, investor confidence in the sector remains low, as evidenced by U.S. state regulators rejection of Hydro One's acquisition of Avista. The latest modernization report highlighted concerns over the OEB's regulatory independence and recommended a new tripartite governance model for the organization which came into effect in 2021. Additionally, a recent government review of the long-term electricity planning process may lead to greater empowerment of the OEB and the IESO to engage in "independent, agency-led planning." However, interviewees were generally pessimistic about the OEB's independence in the future and expressed little confidence that governments will cease political intervention into the affairs of the OEB.



CONCLUSION AND KEY TAKEAWAYS

This case study examined the evolution of the OEB from 1960 to present day. In the early days, the OEB possessed structural deficiencies with regards to independence but was essentially left to its own devices by the government as it worried about electricity policy and the vertically-integrated monopoly, Ontario Hydro. In the late 1990s, the OEB's mandate and authority expanded to include electricity regulation which introduced the OEB to a more political environment. The OEB was no longer a passive adjudicative tribunal. While the OEB received enhancements to its authority over the early 21st century (including becoming a self-financing agency) the green energy movement, and the Liberal's expedient push to close coal plants and transform the provincial electricity grid moved the OEB into the role of a technical implementor to the government, through the extensive and explicit use of directives. While moving away from an emphasis on conservation and renewable generation, recent years have still been characterized by political intervention and have left experts pessimistic that the system will run effectively despite significant challenges in energy.

The OEB recently adopted a new tripartite governance structure in an attempt to separate adjudicative and administrative functions; the very reason it was formed back in 1960.

The following are key takeaways from this analysis of the evolution of the OEB:

1. *The OEB has never been a fully "independent" tribunal:* The OEB's origins show that the Board lacked "structural independence" upon inception. While it had limited government interference during this time, it was not designed like the then-independent NEB. Over the years, it has been given new mandates, however, the OEB has not always been given the tools to exercise its mandate in an independent manner. The OEB has frequently been underutilized in regulating the energy sector, despite being Ontario's energy regulator. Ontario desires regulatory independence as a principle, but not in actuality.

2. *The electricity sector in Ontario has always been (and most likely always will be) political:* To those engaged in the sector, this may come as an obvious point. With Ontario Hydro's populist roots in rural electrification and non-conventional electricity regulation, political intervention into energy regulatory decisions has been common since inception and has occurred for more than a century. Any action taken by decision-makers to give more authority to independent regulators/tribunals is actually contrary to the province's long-established culture and conventions with the electricity sector. As all Canadian energy decision-making systems become more complex and intertwined with more distributive policy judgements, including environmental and social decisions, it is unlikely the OEB will ever be independent and outside of undue political influence.
3. *It is difficult to square adjudicative and administrative functions in relation to independence:* The OEB was developed in 1960 to split up quasi-judicial functions and administrative functions between itself and the Ministry. Yet decades later, the new tripartite structure has been designed to parse these functions out again. Even in our interviews, participants defined regulatory independence as different between adjudicative functions and administrative functions: the former more judicial, and the latter more involved in policy-making and distributive decision-making. Decision-makers must be cognizant of the difference between these two functions within the OEB, their apparent inseparability in a single regulator and the different degrees of independence to which such functions benefit. As Janisch argued, while adjudicative processes benefit from political insulation, regulation "as an agent of change" actually requires integration into the political process.¹⁴⁴ The OEB, like other regulators, possesses both functions and each may be over- or under-emphasized to fit the changing context of the day; there is no "one-size-fits-all" for independence, even within a regulator.

144. Janisch, H. N. (1996) *In Search of the Cat's Pyjamas: Regulatory Institutions and the Restructured Industry*, in R. Daniels, ed., *Ontario Hydro at the Millennium: Has Monopoly's Moment Passed*. McGill-Queen's University Press, at 370.





CASE STUDY FOUR: THE NOVA SCOTIA UTILITY AND REVIEW BOARD

INTRODUCTION

The Nova Scotia Utility and Review Board (NSURB) is Nova Scotia's quasi-judicial, arm's length utility regulator. NSURB came into existence in 1992, combining the roles and responsibilities of four provincial tribunals: the Board of Commissioners of Public Utilities (PUB); the Nova Scotia Municipal Board; the Expropriations Compensation Board; and the Nova Scotia Tax Review Board. The NSURB has an expansive mandate in both regulation and adjudication for wide-ranging services in Nova Scotia. The Board administers nearly 40 statutes. This includes (but is not limited to): utilities, gas and diesel prices, auto insurance rates, payday loans, tolls, appeals for municipal land use planning and fire safety.¹ However, the most central governing statutes are the *Utility and Review Board Act, (1992)* and the *Public Utilities Act (1989)*.

1. Nova Scotia Utility and Review Board. (n.d.). *About*. Retrieved from <https://nsuarb.novascotia.ca/about/about>



THE PUB AND JUDICIALIZATION (1909 - 1992)

The NSURB's predecessor was the province's Board of Commissioners of Public Utilities (PUB). The PUB was formed in 1909 with the remit to regulate gas, water, electricity, and telecommunications. Interestingly, rate regulation of such utilities was initially a responsibility of the provincial cabinet, as such "elaborate machinery for regulation" was not considered necessary.² The executive regulated the railway industry, telephone services, and electricity services starting in 1898, 1903 and 1907 respectively.³ However, cabinet's role as the sole regulator was short-lived. Following its "immediate failure" in regulating electricity in the province, there was a desire to depoliticize the regulatory process while also maintaining state authority.⁴ The result was the *Public Utilities Act*, establishing the PUB and suspending cabinet's involvement with utilities.⁵

Notably, the PUB possessed a great deal of independence to fulfill this mandate. As noted, the intent in providing the PUB with this independence appears to have been that government did not want to be overburdened with the complex and detailed regulation of the province's operating utilities, tramways, and gas operations; and to remove "political interference with the Board's operations."⁶

It is observed that the PUB, like other early 20th century boards in Canada, was influenced by the American "independent commission" model. Kline (1965) notes that the PUB's 1913 legislation and many of its sections were patterned after the Wisconsin's Board of Railway Commissioners.⁷ Furthermore, during the first decade of its establishment, the PUB underwent a "judicialization" of its regulatory process.⁸ Aucoin (1977) observes that, in 1912, one of its Commissioners, R. T. McIlreith, before accepting the position, "imposed certain conditions on the government calculated to raise the dignity of the Board almost to the judicial level and to guarantee immunity from political pressure."⁹ The outcome was a "quasi-judicial perception" along with the legal framework to back up that claim.¹⁰

Features of its independence included the Board being granted "powers of taxation" and "financial autonomy" such that the PUB's operating costs could be covered directly from the regulated utilities.¹¹ Additionally, the Board gave its members individual independence with guaranteed tenure "during good behaviour or until the age of 70 years of age."¹² The Board was also granted the ability to hire staff to enhance its expertise as needed.

2. Windsor, H., and Aucoin, P. (1978). *The Regulation of Telephone Service in Nova Scotia*. In G. B. Doern (Ed.) *The Regulatory Process in Canada*. Macmillan of Canada, at 239.

3. Windsor and Aucoin, *ibid* at 239.

4. Windsor and Aucoin, *ibid* at 239.

5. Windsor and Aucoin, *ibid* at 239.

6. Gillis, R. A. (1992). *Scheduled Motorcoach Service in Nova Scotia 1922-1990: A Study on the Effects of Government Regulation on the Industry* [Master's Thesis, Saint Mary's University]. National Library of Canada, at 113.

7. Kline, J. D. (1966). Aspects of Water Utility Operations in the Atlantic Provinces of Canada. *American Water Works Associations*, 58(4), at 413-414.

8. Windsor and Aucoin, *supra* note 2 at 247.

9. Windsor and Aucoin, *ibid* at 240, footnote 13.

10. Windsor and Aucoin, *ibid* at 240.

11. Windsor and Aucoin, *ibid* at 241.

12. Windsor and Aucoin, *ibid* at 240. Aucoin observes how this has had the effect of members serving over more than one administration. For instance, W.D. Outhit was appointed in 1950 and at the time of publication in 1978, had served through six government of varying political ideologies.



Lastly, another feature was the narrow appeal of Board decisions. The Board's decisions were final and could "not be subject to any political appeal."¹³ Additionally, court appeals were also "extremely limited", and on questions of fact, Board decisions could not be appealed.¹⁴ These features of independence continued with the NSURB into the 1990s.

Scholars and legal experts often highlighted the "far-reaching" authority and powers of the Board.¹⁵ For instance, a 1976 study on telecommunication regulation and the PUB's legislation stated that "the legislature appears to have created a board capable of very wide-ranging activities and actions..."¹⁶

Over the years, the PUB grew its remit because the Board was at an arm's length from government and was able to operate and regulate industries without interference.¹⁷ In 1923, it assumed authority over the regulation of public transport and motor carriers under the *Motor Carrier Act*,¹⁸ in 1934, it assumed the administration of the *Gasoline Licensing Act*; and in 1964, the *Salvage Yards Licensing Act*.¹⁹

The PUB only took action once it received a request for a rate revision, service change or occasional service complaint. As such the Board took a "reactive" approach to regulation.²⁰ In analyzing the Board's telephone service regulation and select cases, Aucoin observed a few challenges with the Board's processes related to its approach. While benefits of this quasi-judicial model included minimal costs and the ability to regulate excessive abuses to the public interest, there were also disadvantages. These included limited opportunities for consumers to provide input in the process and "less than thorough scrutiny of the utility's policies and practices."²¹ These two weaknesses were intrinsically connected. Because of limited consumer representation and regulators' limited ability to conduct detailed analysis and evaluate programs, the regulator had to make decisions based predominately on information provided by the regulated utility.²²

13. Janisch, H. N. (1979). Policy Making in Regulation: Towards a New Definition of the Status of Independent Regulatory Agencies in Canada. *Osgoode Hall Law Journal*, 17(1) at 73.; it is observed that the right to appeal a Board decision to cabinet was withdrawn in 1913, following the PUB's "judicialization." Source: Windsor and Aucoin, *ibid* at 247.

14. Windsor and Aucoin, *ibid* at 247.

15. Kline, *supra* note 7 at 413.

16. Lesser, B. and Chamard, J. (1976). *Telecommunications Regulation in Nova Scotia: A Study on the Tariff Objectives and Tariff Determination of Maritime Telegraph and Telephone Company Limited*. Dalhousie University, Government Studies Programme, at 105. Retrieved from http://publications.gc.ca/collections/collection_2020/isde-ised/Co24/Co24-491-1976-eng.pdf

17. Gillis, *supra* note 6 at 9.

18. Gillis, *ibid* at 9.

19. MemoryNS. (n.d.). *Nova Scotia Public Utilities Board*. Retrieved from <https://memoryns.ca/nova-scotia-public-utilities-board>

20. Windsor and Aucoin, *supra* note 2 at 249.

21. Windsor and Aucoin, *ibid* at 255.

22. Windsor and Aucoin, *ibid* at 250.



In addition to the difficulties that arise when the regulator orders the reversal of a utility's plan once it has commenced, the situation leads to questions over the PUB's interpretation of the public interest:

"While it is not the intention of regulation to supplant managerial by government authority, a reactive rather than an initiating regulator runs the risk of interpreting the public interest solely on the basis of the industry's perception of the public good."²³

In 1973, changes were made to Nova Scotia's electricity generation and how electricity was regulated by the PUB. Prior to 1973, there were two major actors in the province's electricity generation: the government-owned Nova Scotia Power Commission and Nova Scotia Light and Power. The Commission was established in 1919 to build hydro projects and transmission projects and distribute electricity across the province (similar to Ontario Hydro). Like Ontario Hydro, the Commission dealt predominately with electrification of rural areas, and, more importantly, its prices were not regulated by the PUB. Nova Scotia Light and Power was an investor-owned power company that provided electricity mostly to cities, and was subject to the PUB. In 1973, these two entities consolidated to establish the government-owned monopoly: Nova Scotia Power Corporation (NSP).

Initially, the PUB did not regulate this monopoly, presumably because it was government-owned.²⁴ As one interviewee noted, the PUB worried less about the crown corporation because of the accountability held between the government monopoly and democratically elected officials:

"The Public Utilities Board back in the day didn't have quite as much to worry about with a Crown corporation, because anytime somebody didn't like what the local line crew was doing or had a beef about their bill, they would phone their local MLA and the local MLA would phone the power company and they would have a chat."

Put simply, the PUB worried less about the NSP because regulation and accountability of this monopoly was through the politicians directly.

However, in 1976, this changed with the PUB gaining regulatory oversight over the Crown corporation's rates. Participants highlighted some of the challenges of regulating a Crown corporation, as it is ultimately subject to direction by the governments through executive direction from the Premier's office, or through appointments to its Board of Directors. They noted that it was hard for the NSURB to regulate a Crown corporation, given its accountability to political decision-makers. Indeed, Gosselin identified some of the challenges in regulating Crown-owned utilities, including the rate-payer sense of ownership which influences the corporation's decision-making and limitations to regulatory authority over the corporation.²⁵

23. Windsor and Aucoin, *ibid* at 249.

24. Janisch, *supra* note 13 at 72.

25. Gosselin, R. (2015). *Regulating Government Owned Utilities* [Conference presentation]. CAMPUT. Retrieved from <http://www.camput.org/wp-content/uploads/2015/05/8a-Gosselin.pdf>



This latter point is observed with the OEB and Ontario Hydro in the 1970s. Further, Lucas observed the difficulty in applying the regulatory model to commercial Crown corporations, which in some cases, may “even be likened to ordinary government departments.”²⁶

“On the face of their operations, these Crown corporations may be indistinguishable from similar private sector corporations. They may even be established as ordinary joint stock companies. However, their ‘share-holder’ is the government, and they are either, explicitly in their statutes, or at least implicitly, through government control of the general meeting, instruments in some sense of government policy.”²⁷

Despite the PUB’s considerable authority, there were times when the government and the PUB’s regulatory authority came into conflict, typically over the extent of the Board’s independence. As one participant pointed out, electricity rates are often some of the more controversial proceedings. Janisch (1979) noted that the year after receiving authority over NSP’s rates, the Board approved substantive rate increases (due to the rapid rise in oil prices at the time). Faced with an impending election, the Premier was prepared to revise the PUB’s decision on high electricity costs for community hockey rinks and clubs, deeming these facilities to be politically sensitive.

The Board was unmoved by this potential interference, announcing another rate increase in 1978. At this point, the Premier announced that “the two most important issues of the election were unemployment and the electricity rates. . .”²⁸ The government ultimately chose to subsidize power rates from 1978 to 1986.²⁹ As Janisch noted, rate intervention in the early 20th century in Nova Scotia led to “politically disastrous consequences” when the government couldn’t satisfy either consumers or industry regarding rates.³⁰ As Windsor and Aucoin noted:

“It was its failures in this field of regulation that led the government to search for a method that would ‘depoliticize’ the regulatory process while, at the same time, maintaining the authority of the state to regulate.”³¹

However, despite these events, the PUB maintained a healthy relationship with government. Bill Outhit, former chairman and member of the PUB, stated in an interview that, “the government did not tell the Board what to do. The Board operated within the Act and regulations. If there was something which the government wanted changed, the Board’s reply was that the Act should be changed.”³² Some interviewees also highlighted this constructive relation between the Board and policymakers.

26. Lucas, A. R. (1987). Judicial Review of Crown Corporations. *Alberta Law Review*, 25(3), at 364.

27. Lucas, *ibid* at 364.

28. Janisch, *supra* note 13 at 73.

29. Krowina, J. O. (1992). American and Canadian Responses to the Challenge of Small Power Production. *Dalhousie Law Journal*, 15(2), at 556 at footnote 161. Retrieved from <https://digitalcommons.schulichlaw.dal.ca/cgi/viewcontent.cgi?article=1662&context=dlj>

30. Windsor and Aucoin, *supra* note 2 at 239.

31. Windsor and Aucoin, *ibid* at 239

32. Gillis, *supra* note 6 at 10.



In 1990, the courts changed the jurisdiction of telecommunications regulation in Canada. In *Alberta Government Telephones v. CRTC*, the Supreme Court of Canada determined that telecommunications and its regulation were a federal, not provincial concern. At the time of the case, there were several public and privately owned telephone companies that were provincially regulated, including in the Atlantic provinces. However, as Hogg noted, “the reasoning in the *AGT* case left no doubt that the four Atlantic telephone companies . . . were within exclusive federal jurisdiction.”³³ Thus, the PUB, which had regulated telecommunications since its inception, ceased regulating telephone companies in Nova Scotia which moved under the authority of the Canadian radio-television and Telecommunications Commission.

The regulation of telecommunications had consumed a significant amount of bandwidth at the PUB (one interviewee said roughly 30 percent of its work related to its telecommunications mandate). Following the Supreme court decision, the PUB’s leadership began discussions with government over how to more effectively utilize Board resources. given the removal of this remit and the subsequent decline in workload.

In doing so, Government brought up concerns over the adequate resourcing of other, smaller boards with part-time Board members. One interviewee also implied mismanagement at one of these Boards. These discussions led to the PUB’s amalgamation with the NSURB.

From the 1970s to the early 1990s, the province was led by the Progressive Conservatives. Much like other jurisdictions in the late 1980s/early 1990s, government prioritized economic efficiency and deregulation of the gas market, privatization of the NSP (discussed below) and other government-held assets, as well as the restructuring and consolidation of governmental departments.³⁴

By combining the works of smaller, less efficient boards (with part-time members) with a larger board such as the PUB (with full time members), mandates of the smaller Boards could be dealt with by full-time members. Additionally, interviewees further noted that, as a smaller province, it made sense to combine many mandates into a single adjudicative and regulatory Board. Large single regulatory boards are also seen in other provinces with smaller populations including Manitoba and Prince Edward Island.³⁵

33. Hogg, P.W. (1990). Jurisdiction Over Telecommunications: *Alberta Government Telephones v. CRTC*. *McGill Law Journal*, 35(2), at 489. Retrieved from https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=2112&context=scholarly_works

34. MacNeil, C. (1992, Apr. 24). “Res. 2187, Estimates (1992-1993).” Nova Scotia House of Assembly. *Nova Scotia Hansard*. 55th legislature, 2nd session, at 8406-8407. Retrieved from <https://0-nsleg--edeposit-gov-ns-ca.legcat.gov.ns.ca/deposit/HansardDeposit/55-02/19920424.pdf>

35. Manitoba Public Utilities Board. (n.d.). *About the PUB*. Retrieved from <http://www.pubmanitoba.ca/v1/about-pub/index.html>; Prince Edward Island. (2021). *Island Regulatory and Appeals Commission*. Retrieved from <https://www.princeedwardisland.ca/en/information/executive-council-office/island-regulatory-and-appeals-commission>



This drive towards economic efficiency by board consolidation was emphasized by Minister of Finance Charles MacNeil in his budget speech in April 1992:

“While the major reduction and restructuring within government are complete, we will continue our streamlining process in 1992-93 with the consolidation of a number of provincial boards. We will establish a new Provincial Administrative Review Board, which will perform the duties previously assigned to the Expropriation Compensation Board, the Municipal Board, the Tax Review Board and the Public Utilities Board. The consolidation of these boards will result in cost efficiencies and improved service to the public.”³⁶

Put simply, as one interviewee put it, “there was a desire to clean it all up and make it work better and save some money.” In the early 1990s, a government committee examined the amalgamation and functionality of this new Board. Featuring deputy ministers and a few departmental bureaucrats, the committee was to consider the logistics and legislative framework of this new “Provincial Administrative Review Board,” including consideration of different models. Additionally, the Attorney General invited the Nova Scotia Law Reform Commission to provide suggestions for administrative procedures and practices in the consolidation of the tribunals.³⁷ The work would lead to the Bill 231 and ultimately the consolidation of the four Boards (the Expropriation Compensation Board, the Municipal Board, the Tax Review Board, and the Public Utilities Board) under NSURB.

In summary, the NSURB’s inception begins with the PUB in 1909. The PUB was granted an expansive remit and authority to regulate several utilities in the province. Further, the PUB possessed a great deal of independence to fulfill its mandate, undergoing a “judicialization” in its early years of operation. This included elements of judicial and financial independence, and individual independence for the Commissioners. Challenges for the PUB at this time included consequences related its “reactive” and court-like regulatory approach, difficulties in regulating a Crown-owned monopoly, and occasional politicization of electricity rate setting. However, despite this, the PUB maintained its strong court-like independence and a constructive relationship with government. In the 1990s, the courts changed the jurisdictions of telecommunications regulation which began the discussion to consolidate the province’s smaller Boards with the PUB. To achieve greater economic efficiency, deliberations began to establish a new “Provincial Administrative Review Board”, which became the NSURB.

36. MacNeil, *supra* note 34 at 8406.

37. Law Reform Commission of Nova Scotia. (1992). *First Annual Report of the Law Reform Commission of Nova Scotia 1991-1992*, at 9. Retrieved from https://lawreform.ns.ca/wp-content/uploads/2020/04/annrpt_91.pdf



INCEPTION, PRIVATIZATION AND CONSOLIDATION (1992 - 2007)

In 1992, the NSURB was established, merging the responsibilities of the four Boards. Interviewees noted that the new consolidated Board maintained many of the same critical characteristics that gave the PUB's greater independence and decision-making authority. This included the PUB's financial independence, such that Board's expenses continued to be drawn from the public utilities (i.e. powers of taxation), and finality of its decisions with findings within its jurisdiction being "binding and conclusive."³⁸ Other elements of independence included the limited appeal to the Appeal Division of the Supreme Court on questions of law or jurisdiction; the ability to independently procure technical resources and expertise "as the Board deems fit;" and security of tenure for board members who were appointed "at good behaviour" rather than "at pleasure."³⁹ Further, there is no directive authority or equivalent for government, through either the Governor in Council or the minister, to issue prescriptive directives to the Board as seen in other jurisdictions like Ontario or Alberta. As Taylor noted in her jurisdictional review, the policy of government "is contained in legislation and regulations issued pursuant to legislation."⁴⁰ As one interviewee put it, if government disagrees with the Board's actions, it can tell the Board what to do so long as it is in the form of legislation or regulation.

It is a much higher bar to establish policy through legislation or regulation and requires more political capital by government, compared to prescriptive directives issued by a minister and/or cabinet.

Lastly, given Canada's Westminster government system, a minister has to hold agencies, boards, and commissions accountable to the legislature. In the case of NSURB, it is the minister of finance to whom the Board technically reports. This is notable for a few reasons. First, the minister does not have any mandates through the Board. Second, other provincial and federal electricity and energy resource boards are often held accountable through energy or environment ministers, who may have a more active interest in the operations of the board. In contrast, NSURB only meets with the minister regarding administrative matters.

These factors and the Board's legislation, left relatively unaltered since 1992, have made the NSURB one of the more court-like and independent energy and utility boards in Canada. Indeed, as observed in a regulator jurisdictional scan by KPMG, a consultancy, the NSURB "operates with a high level of independence from government. . ."⁴¹ Additionally some characteristics of its independence, such as appointments and board capacity, have even been enhanced over the years (see below).

38. Utility and Review Board Act, SNS 1992, c. 11, s.26. Retrieved from <https://nslegislature.ca/sites/default/files/legc/statutes/utility%20and%20review%20board.pdf>

39. Taylor, K. (2019). *Jurisdiction Review of Energy Regulation by Province and Territory*. Council for Clean & Reliable Energy, at 30. Retrieved from <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>

40. Taylor, *ibid* at 30.

41. KPMG. (2014). *Performance and Operational Review of British Columbia Utilities Commission*, at 28. Retrieved from https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/electricity-alternative-energy/electricity/bcuc_kpmg_operational_review.pdf



In addition to the NSURB being formed, 1992 was also the year that NSP changed from being a government-owned monopoly to a private corporation, under the Nova Scotia Power Privatization Act. Due in part to the corporation's high level of debt,⁴² it is also worth noting that the move to privatize stemmed from the same rationales as the Board consolidation, including greater efficiency and better cost control.

"In a January, 1992 news release issued by Nova Scotia Power Corporation announcing its privatization, Mr. Comeau is stated to have said that 'He believes privatization will encourage the company to achieve further efficiencies and better cost control, ultimately leading to lower rates than otherwise would have been the case.'"⁴³

While some observers saw the move to privatize the monopoly as controversial and sudden,⁴⁴ interviewees described it as a critical point in the history of the Board's independence. The regulation of Crown corporations was described as "tricky" given that they are ultimately subject to direction and are accountable to the government and minister. If a decision made by a regulator is unpopular, the crown corporation could conceivably go to the minister in hopes of intervening to some degree.

Whereas a shareholder-based company is not accountable to the minister, the nature of NSURB's regulation of the NSP changed. As one interviewee put it, "...with the privatization...the board's independence was strengthened as a result of regulating that private company."

Notably, a few years following consolidation and privatization, there was a push to expand the power of the NSURB to ensure that the new private NSP would act more "in the public interest."⁴⁵ The government appointed a three-member Electricity Regulation Review Panel in 1995 to examine whether the NSURB should have an expanded "socio-economic or environmental mandate."⁴⁶ As observed by Starr in his book "Power Failure?" the panel's report cited comments by one citizen activist who stated that, by expanding the mandate and pushing these considerations onto the Board, the legislature was "abrogating their responsibility for some of these issues."⁴⁷ The majority on the panel ultimately opposed expanding the Board's mandate, and the NSURB remained a predominately economic regulator.

NSP remains the largest electric utility in the province, serving 95 percent of the province's 500K customers.⁴⁸ Investor-owned, it is vertically integrated, owning essentially all transmission as well as a significant majority of distribution assets and generation in the province.

42. Power Advisory LLC. (2015). *Review of the Newfoundland and Labrador Electricity System*, at 141. Retrieved from <https://www.muskatfallsinquiry.ca/files/P-00110.pdf>

43. Nova Scotia Power. (2012). *2013 General Rate Application*, at Attachment 2, 5. Retrieved from [https://www.nspower.ca/docs/default-source/pdf-to-upload/2012-06-25-nspi-\(nsuarb\)-irs-1-32-redacted.pdf?sfvrsn=1bfa5d2f_0](https://www.nspower.ca/docs/default-source/pdf-to-upload/2012-06-25-nspi-(nsuarb)-irs-1-32-redacted.pdf?sfvrsn=1bfa5d2f_0)

44. Majka, C. G. (2012). *Fast Facts: Power to the People*. *Canadian Centre for Policy Alternatives*. Retrieved from <https://www.policyalternatives.ca/publications/commentary/fast-facts-power-people>

45. Starr, R. (2011). *Power Failure*. Formac Publishing Company Limited, at 169.

46. Starr, *ibid* at 169.

47. Starr, *ibid* at 169.

48. Power Advisory LLC, *supra* note 42 at 130.



In the 1990s and into the 2000s, cabinet frequently used a clause in the *Utility and Review Board Act* that allowed the transfer of responsibilities of unsuccessful agencies to the NSURB, a well-resourced, expert tribunal. Cabinet considered the NSURB a competent board that was stable, predictable, and efficient. Despite changing political leadership, Nova Scotia's government continued to embrace the goals of economic efficiency, small government, and streamlining of services by merging provincial agencies, boards, and commissions. These developments turned the NSURB into an "omnibus provincial super-regulator."⁴⁹ NSURB is the largest tribunal in the province and has been described as both "powerful"⁵⁰ and "the most important of the province's regulatory-adjudicated agencies."⁵¹ There are currently 40 statutes containing an NSURB mandate.⁵²

The mandates/additional powers given to the NSURB over the years include the following:⁵³

- the regulation of natural gas distribution (1997);⁵⁴
- the regulation of intra-provincial oil and gas pipelines, including operation and construction (1999);⁵⁵
- the determination and approval of the number/ boundaries of electoral districts in school districts/ regions (1999);⁵⁶
- the adjudicative functions of the Board of the Alcohol and Gaming Authority (2000);⁵⁷
- the regulation of railways under the Railways Act (2001);⁵⁸
- the adjudicative functions to hear appeals from decisions of the Fire Marshall's Office under the Fire Safety Act (2004);⁵⁹

49. Clancy, P. (2012). *Offshore Petroleum Politics: Regulation and Risk in the Scotian Basin*. UBC Press, at 267.

50. Manitoba Law Reform Commission. (2009). *Improving Administrative Justice in Manitoba: Starting with the Appointments Process*. Manitoba Law Reform Commission, at 23.

51. Aucoin, P., and Goodyear-Grant, E. (2002). Designing a merit-based process for appoint boards of abcs: Lessons from the Nova Scotia reform experience. *Canadian Public Administration*, 45(3), at 309.

52. Nova Scotia Utility and Review Board. (2021). *Business Plan 2021-2022*, at 10. Retrieved from <https://nsuarb.novascotia.ca/sites/default/files/UARB%20Business%20Plan%20FY2022.pdf>

53. This is not exhaustive. For a more comprehensive rundown of the Board's regulatory and adjudicative duties and respective statutes, see: Nova Scotia Utility and Review Board, *ibid* at 3 and 10.

54. Clancy, *supra* note 49.

55. Nova Scotia Utility and Review Board. (n.d.). *Natural Gas*. Retrieved from <https://nsuarb.novascotia.ca/mandates/natural-gas>

56. *Education Act*, SNS 1995-96, c 1, s.43. Retrieved from <https://people.stfx.ca/aforan/Education%20Act.htm>

57. Nova Scotia Utility and Review Board. (n.d.). *Gaming*. Retrieved from <https://nsuarb.novascotia.ca/mandates/gaming>

58. Clancy, *supra* note 49.

59. Nova Scotia Utility and Review Board. (n.d.). *Fire Safety*. Retrieved from <https://nsuarb.novascotia.ca/mandates/fire-safety>



- the authority to set rates/charges paid to use two bridges operating under the Halifax-Dartmouth Bridge Commission (2005);⁶⁰
- powers to address public safety issues related liquified natural gas in the province (2005);⁶¹
- the authority to regulate payday loans (2006);⁶²
- the duties/functions held by the Nova Scotia Insurance Review Board (NSIRB) with NSURB reassuming responsibilities over automobile insurance rates and premiums (2008);⁶³
- the regulatory functions of petroleum products sold in Nova Scotia, as outlined in the Petroleum Products Pricing Act and Regulations, taking authority back from the Minister of Service Nova Scotia and Municipal Relations (2009);⁶⁴
- the authority to carry out adjudicative functions under the Liquor Control Act and the Liquor Licensing Regulations, including consideration of liquor license applications, and complaints (2012);⁶⁵ and
- the adjudicative functions to hear appeals related compliance orders and penalties imposed by the Nova Scotia Apprenticeship Agency (2018).⁶⁶

In addition to its expansion of responsibilities, over the years, the Board also expanded the number of panel members to nine and added more clerical staff. Furthermore, continued privatization and liberalization of industry meant that the Board would “experience significant changes to its operational context in the closing decades of the twentieth century.”⁶⁷

Transition to new roles and responsibilities for the Board has not always been smooth. For instance, Clancy (2011) noted challenges the Board had in transferring its skills to the regulation of natural gas in the late 1990s. The NSURB had to bring in consultants to train staff and board members to help increase the Board’s technical competence in the gas sector. The Board’s use of consultants with specialized knowledge has continued to present day.

In the 1990s, the provincial government aimed to improve the appointment process for its Boards and agencies. The province, like other jurisdictions, was said to have a past “tradition of partisan patronage in several aspects of government.”⁶⁸

60. *Halifax-Dartmouth Bridge Commission Act Bill no. 198*. Retrieved from https://nslegislature.ca/legc/bills/59th_1st/3rd_read/b198.htm

61. Nova Scotia Utility and Review Board, *supra* note 54.

62. *NSUARB-PD-07-001*, [2008] NSUARB 87, at para. 1. Retrieved from <https://nsuarb.novascotia.ca/sites/default/files/139632.pdf>

63. Nova Scotia Utility and Review Board. (n.d.). *Auto Insurance*. Retrieved from <https://nsuarb.novascotia.ca/mandates/auto-insurance>

64. Nova Scotia Utility and Review Board. (n.d.). *Gasoline & Diesel Pricing*. Retrieved from <https://nsuarb.novascotia.ca/mandates/gasoline-diesel-pricing>

65. Nova Scotia Utility and Review Board. (n.d.). *Liquor Licensing*. Retrieved from <https://nsuarb.novascotia.ca/mandates/liquor-licensing>

66. Nova Scotia Ministry of Labour and Advanced Education. (2018, Oct. 19). *Changes to Legislation Strengthen Apprenticeship System, Make Workplaces Safer* [News release]. Retrieved from <https://novascotia.ca/news/release/?id=20181019001>

67. Clancy, *supra* note 49 at 267.

68. Aucoin and Goodyear-Grant, *supra* note 51 at 302.



However, by the mid-1990s, several contextual factors set the stage for reform. First was the election of a new Liberal government in 1993 with John Savage as the Premier of the province. Savage personally campaigned to eliminate patronage appointments opposing “individual merit” (where the appointment has to be qualified) and advocating for “relative merit” (where the most qualified/best candidate is appointed).⁶⁹ While the rest of the Liberal party seemed ambivalent, Savage wanted to ensure that appointments were based on competence alone. Nonetheless, partisan appointments continued under his leadership.⁷⁰

Savage was justified in his hardline stance towards eliminating patronage appointments. The general public had “little tolerance for a perpetuation of the partisan-patronage that has been such a prominent feature of the province’s political culture and practice.”⁷¹ The bar was also much higher for merit-based reform in the Atlantic provinces compared to other jurisdictions like Alberta or Britain. Additionally, in 1995, Dalhousie law professor Archibald Kaiser raised a human rights complaint alleging that his applications to two Boards were rejected because he was not a partisan Liberal. Kaiser took the issue to the courts in 2002. A human rights staff report for the case noted that, “the evidence does support that there was a context of systematic political patronage in ABC [agencies, boards and commissions] appointments.”⁷² The government, Kaiser and the Human Rights Commission reached a settlement prior to public hearings.

69. Aucoin and Goodyear-Grant, *ibid* at 303.

70. Clancy, *supra* note 49 at 262.

71. Aucoin and Goodyear-Grant, *supra* note 51 at 303.

72. Manitoba Law Reform Commission, *supra* note 50 at 23.

73. Clancy, *supra* note 49 at 262.

Indeed, the new NSURB was not immune to partisan appointments during this period. In 1997, two of the three Members of the Board had Liberal party affiliations. This included the Chair of the Board, who was previously Premier Savage’s Chief of Staff.⁷³

While initial attempts for merit-based appointments via standing committee resulted in deadlock, by the late 1990s, some progress had been made. In June 2000, the government issued the “Guidelines to Ensure Appointments Based on Merit,” new guidelines for appointments to the NSURB. Interviewees noted that these guidelines strengthened the Board and its independence; one interviewee stated that the 2000 guidelines issued are “probably the most important change related to independence [of the regulator.]”

The 2000 guidelines established a rigorous process that remains in place to this day. The guidelines are modelled after the appointment process for provincial court judges adopted by the government in 1995. The guidelines for NSURB members require that vacancies are advertised and include an advisory committee with the power to interview applicants and prepare a “best-qualified” short-list of candidates to the government.



Aucoin and Goodyear-Grant, in analyzing the guidelines, noted two important factors of the NSURB model for appointments. Firstly, the advisory committee is not at the discretion of the minister; the minister only has authority to appoint two of the committee's members.⁷⁴ Other members with equal input/authority include the Chair of the NSURB, a public servant from the Public Service Commission and (in the case of full-time appointment) a member from another tribunal from another province.⁷⁵ Secondly, while the appointments are ultimately selected by the responsible minister, constraint is exercised because they choose from a shortlist prepared by the advisory committee.

The NSURB model was seen as an advancement in the appointments process for agencies in the province "reducing the patronage powers of ministers."⁷⁶ Other provincial agencies adopted this model for other important agencies in the province, making Nova Scotia one of the first provinces in Canada to "attempt significant changes to some board appointments process."⁷⁷

Government continued to strengthen the NSURB's appointment process and expert capacity in the 2000s. For instance, in 2007, the Utility and Review Board Act was amended, increasing the retirement age for NSURB Members from 65 to 70.⁷⁸ Further, the number of board members increased again from eight to a maximum of ten in 2008.⁷⁹

Through this new, rigorous and merit-based appointments process, in 2003 the government appointed Peter Gurnham as Member of the NSURB,⁸⁰ and in 2004 he became Chair of the Board. Some interviewees noted how the leadership of the Chairperson and how they react (or not react) to government actors and policy influences the independence of a regulator over time. Specifically, interviewees spoke positively about Gurnham and his leadership at the NSURB. They noted that Gurnham, as Chair of the Board, has provided strong institutional knowledge and expertise over his tenure.

74. They are selected from among the four members that serve on the Advisory Committee on Provincial Judicial Appointments. Source: Nova Scotia Utility and Review Board. (2017). *Appendix 1: Utility and Review Board Appointments: Guidelines to Ensure Appointments Based on Merit*. Retrieved from [https://nsuarb.novascotia.ca/sites/default/files/NSUARB-%23259231-v1-Guidelines %28Revised by Finance August 2017%29 to Ensure Appointments Based on Merit.pdf](https://nsuarb.novascotia.ca/sites/default/files/NSUARB-%23259231-v1-Guidelines%28Revised%20by%20Finance%20August%202017%29%20to%20Ensure%20Appointments%20Based%20on%20Merit.pdf)

75. Additionally, in the case of full-time appointment and if there is a need for the appointment to hold a professional designation, a representation from that professional association is also on the committee. Source: Nova Scotia Utility and Review Board, *ibid*.

76. Aucoin and Goodyear-Grant, *supra* note 51 at 310.

77. Manitoba Law Reform Commission, *supra* note 50 at 23.

78. *Bill No. 189, Utility and Review Board Act (amended)*. (2008). General Assembly of Nova Scotia. 60th General Assembly, 1st Session. Retrieved from https://nslegislature.ca/legc/bills/60th_1st/3rd_read/b189.htm

79. *Bill No. 217, An Act to Amend Chapter 11 of the Acts of 1998, the Utility and Review Board Act*. (2008). General Assembly of Nova Scotia. 60th General Assembly, 2nd Session. Retrieved from <https://nslegislature.ca/sites/default/files/legc/PDFs/annual%20statutes/2008%20Fall/c068.pdf>

80. Notably, Gurnham's appointment was the first appointment where the process of an independent review panel was applied to selection of a board member. Source: Nova Scotia Environment and Labour. (2003, Jul. 6). *Appointment to Utility and Review Board* [News release]. Retrieved from <https://novascotia.ca/news/release/?id=20030606010>



Indeed, Gurnham has been in this role for over 15 years, interacting with governments from three different political parties. Interviewees noted Gurnham's focused view of the NSURB's role in relation to government. That is, "if government wishes [the NSURB] to do something. . . they must instruct [the NSURB] by law and/or regulation." This view on regulator-government relations, along with his regulatory law background and leadership have meant that the independence of the Board is well-respected within the confines of its legislation. Additionally, during his time as Chair, the Board, its expertise, and decisions across varying sectors have been well-respected even as it tackles sensitive matters like town dissolution.⁸¹

In the early 2000s, the province (like other jurisdictions) explored opportunities to increase competition within its electricity sector. However, the province wished to incorporate competition "gradually and carefully."⁸² In its "precautionary"⁸³ approach, the province released its Energy Strategy in 2001.

Under this strategy, the province committed to implementing a series of actions to introduce electricity competition, incorporate renewable generation, and enhance its energy security.

In addition to establishing an electricity marketplace governance committee, the government would "provide policy direction to the UARB⁸⁴ to authorize open access transmission. . . to implement market access for wholesale customers, retail customers of renewable generators, and export markets."⁸⁵

The beginnings of this transition, following the release of the governance committee's report, was the *Electricity (2004) Act*.⁸⁶ While the news release did discuss having a minimum portion of supply from renewable generation, the Act only implemented four of the governance committee's 89 recommendations and these were mostly related to market access and competitive power procurement.⁸⁷

81. CBC News. (2014, Jun. 16). Springhill dissolution mired in controversy. *CBC News*. Retrieved from <https://www.cbc.ca/news/canada/nova-scotia/springhill-dissolution-mired-in-controversy-1.2676700>

82. Electricity Marketplace Governance Committee. (2003) *Final Report*, at 17. Retrieved from <http://www.scotianwindfields.ca/sites/default/files/publications/emgcfinalreport.pdf>

83. Doern G. B., and Gattinger, M. (2003). *Power Switch: Energy Regulatory Governance in the Twenty-First Century*. University of Toronto Press, at 165-166.

84. The NSURB is also abbreviated as the UARB.

85. Province of Nova Scotia. (2001). *Seizing the Opportunity: Nova Scotia's Energy Strategy*, at 26. Retrieved from <https://energy.novascotia.ca/sites/default/files/Seizing%20the%20Opportunity.pdf>

86. Nova Scotia Department of Energy. (2004, Oct. 21). *New Electricity Act Means Cleaner Environment, More Choice* [News release]. Retrieved from <https://novascotia.ca/news/release/?id=20041021005>

87. Nova Scotia Department of Energy, *ibid.*; Hughes, L. (2005). Securing our energy future? A review of Nova Scotia's energy sector in 2004. *Canadian Centre for Policy Alternatives Nova Scotia*. Retrieved from https://www.policyalternatives.ca/sites/default/files/uploads/publications/Nova_Scotia_Pubs/2005/NS_Energy_Jul05.pdf



However, the government's pursuit of greater renewable electricity generation and addressing growing challenges like climate change, gained greater importance for NSURB in the following years.⁸⁸

In summary, in 1992, the NSURB was established, inheriting some long-held elements of independence from the PUB. The NSURB's independence was said to be further strengthened by the privatization of the NSP in the same year. In the following years, cabinet transferred responsibilities of smaller provincial Boards to the NSURB, given its reputation as a competent, stable, and efficient regulator and adjudicator. Further, the Board's appointment processes were strengthened, evidenced by guidelines established in 2000. These guidelines were used to appoint Peter Gurnham to the Board in 2003.

Interviewees noted Gurnham's strong leadership as Chair from 2004 to present as providing the Board with strong institutional knowledge and expertise, as well as high levels of independence in relation to the government. Throughout the 2000s, the government began pursuing expansion of competition within its electricity sector, with amendments to the *Electricity Act* to open the market. Also, in the following years, the government began pursuing greater green energy policies and consequently, test the province's stable regulator.

88. Hamilton, T. (2010, Aug. 23). Hamilton: Nova Scotia joins Canada's green energy club. *The Toronto Star*. Retrieved from https://www.thestar.com/business/tech_news/2010/08/23/hamilton_nova_scotia_joins_canadas_green_energy_club.html; Mordant, N. (2011). Analysis: Small Canadian province flexes green energy muscle. *Reuters*. Retrieved from <https://www.reuters.com/article/us-energy-novascotia/analysis-small-canadian-province-flexes-green-energy-muscle-idINTRE79359820111004>



RENEWABLES, COMPLEXITY AND CONCERN OVER INSTITUTIONAL LOSS (2007 - FUTURE)

In recent years, Nova Scotia has become more engaged in pursuing low-emissions energy sources to address climate change. Most interviewees cited the province's transition to renewable energy and how the transition has influenced the evolution of NSURB with respect to regulatory independence. One interviewee noted that, prior to the legislative changes between the mid-2000s and the mid-2010s, the NSURB had been "largely unfettered in its pursuit of the lowest cost electricity."

In January 2007, the Progressive Conservative government imposed mandatory renewable energy targets into law to address the province's use of coal for electricity generation. At the time, coal-fired power plants produced 80 percent of Nova Scotia's electricity.⁸⁹ Through regulation under the Electricity Act, the government set the target to increase its use of electricity from renewable sources to 20 percent by 2013.⁹⁰ In 2009, amendments to the *Environment Act*, imposed greenhouse gas emission caps on NSP. In 2010, the regulation was updated again to have renewables make up 25 percent of provincial generation by 2015 and 40 percent by 2020.⁹¹

Under this legal framework, standards set by government were imposed on electricity utilities, most importantly, the private monopoly NSP. That is, NSP had to procure renewable generation and/or develop renewable electricity projects to meet standards.

NSURB gained new responsibilities to set and review the province's new Feed-in-Tariff program but also continued its role as the electricity regulator approving and reviewing electricity rates, most notably for NSP. This latter responsibility, whereby the NSURB also continued to review and approve electricity rates and project proposals was confirmed in the province's 2010 Renewable Electricity Plan which stated that "the UARB will evaluate, approve, and regulate projects proposed by NSPI in the *traditional manner* [emphasis added]."⁹² In other words, while the government set new renewable electricity targets, it explicitly refrained from interfering with the NSURB's role in implementation of these targets. The Board's institutional independence remained intact.

Interviewees commented on the new initiatives and the fairly non-prescriptive legislative framework taken by the province to achieve its renewable goals and targets. These standards provided guidance for the direction of the various actors in the electricity system. At its core, the government sets the policy into regulation; producers (mostly NSP) purchase electricity or build projects to meet the standards, and the NSURB reviews and approves these rates and projects and their cost-recovery from rate-payers.

89. Gunn, A. (2019, Apr. 30). Coal fires most of Nova Scotia's energy; will we still be burning it in 20 years. *The Chronicle Herald*. Retrieved from <https://www.saltwire.com/nova-scotia/news/local/coal-fires-most-of-nova-scotias-energy-will-we-still-be-burning-it-in-20-years-307232/>

90. Nova Scotia Department of Energy. (2007, Jan. 25). *Province Commits to Green Energy Market Reform* [News release]. Retrieved from <https://novascotia.ca/news/release/?id=20070125002>

91. Nova Scotia Department of Energy. (2010). *Renewable Electricity Plan: A Path to Good Jobs, Stable Prices, and a Cleaner Environment*, at 2. Retrieved from <https://energy.novascotia.ca/sites/default/files/renewable-electricity-plan.pdf>; *Renewable Electricity Regulations*, OIC 2010-281, N.S. Reg. 155/2010. Retrieved from <https://www.novascotia.ca/just/regulations/regs/elecnew.htm>

92. Nova Scotia Department of Energy, *ibid* at 9.



As one interviewee put it, the targets were managed “quite maturely” by government in setting them out explicitly in regulation; once the regulation was set, government essentially stepped aside and, as one interviewee said, “let the system find the most economic way to do it. [...] I really think that’s the way policymakers and regulators should interact.”

Lahey, in analyzing the NSURB’s role in the province’s energy transition, noted that much of the success of the Board in this realm is related to the government respecting its “institutional independence” and exhibiting restraint in not altering the Board’s mandate to fit government favoured goals. Successive governments have not taken a prescriptive approach to achieve legislated outcomes through the Board. Further, the Board has shown dependability in its decisions.

As such, through this legislative framework, the Board has meaningful “operational independence” to achieve the government’s renewable objectives; and can hold actors like NSP to greater account with their renewable energy plans:

“...[P]lans and measures have been vetted and tested in a process that has been rigorous, open, transparent and accountable. In addition, a non-prescriptive legislative framework has also left the UARB with flexibility to keep the regulatory system responsive to changing conditions and evolving stakeholder expectations, as well as to the particular accommodations ‘traditional ratemaking’ has had to make with Nova Scotia realities.”⁹³

The province, through its regulations, has attempted to move away from coal-generated electricity and incorporate more renewable electricity into its grid. While the province extended its goal of 40 per cent renewable electricity to 2022⁹⁴ and still uses coal for more than half of its generation, progress has been made: from 2010 to 2017, the province added 527 MW of renewable capacity to its grid⁹⁵ and renewables now make up more than 30 percent of the energy generation in Nova Scotia.⁹⁶

93. Lahey, W. (2014). The Contributions of Utilities Regulation to Electricity Systems Transformation: the Case of Nova Scotia. *Energy Regulation Quarterly*, 2. Retrieved from <https://energyregulationquarterly.ca/articles/the-contributions-of-utilities-regulation-to-electricity-system-transformation-the-case-of-nova-scotia#sthash.HD7RMn00.KYnnKxJ2.dpbs>

94. Grant, T. (2020, May 12). Nova Scotia will not meet its 2020 renewable energy target. *CBC News*. Retrieved from <https://www.cbc.ca/news/canada/nova-scotia/nova-scotia-renewable-energy-delay-1.5566438>

95. Canada Energy Regulator. (2021). *Canada’s Renewable Power – Nova Scotia*. Retrieved from <https://www.cer-rec.gc.ca/en/data-analysis/energy-commodities/electricity/report/canadas-renewable-power/canadas-renewable-power/provinces/renewable-power-canada-nova-scotia.html>

96. Simms, M. (2021). The N. S. Shared Solar Energy Program: 3 Key Facts. *McInnes Cooper*. Retrieved from <https://www.mcinniscooper.com/publications/the-n-s-shared-solar-energy-program-3-key-facts/>



The province's approach has also been well-regarded by environmental advocates; the province received an award from environmental groups at the 2009 Copenhagen climate summit for its absolute electricity sector emissions cap;⁹⁷ and has received progressively better rankings on its climate action from the David Suzuki Foundation.⁹⁸ Further, its moderation and long-term approach has arguably not faced the same controversy or the political micromanagement as seen with the renewable initiatives in other jurisdictions like Ontario.

A part of the province's transition away from coal generation has also meant greater electricity system transformation and transmission of renewable electricity across provincial borders, for instance, the Maritime Link project (ML Project) which is a transmission infrastructure project extending 360 kilometres from Newfoundland to Nova Scotia. The goal is to connect the Muskrat Falls Hydro Electric Project in Labrador to Nova Scotia and ultimately through to New Brunswick and northeastern U.S. markets.⁹⁹ The ML Project, built by a subsidiary of Emera (NSP is also a subsidiary of Emera), would both provide NSP customers with clean hydroelectric energy, as well as connect the province more fully to the North American grid.

In early 2013, the ML Project was put forward to the NSURB for approval.¹⁰⁰ The Board was required to approve the project if it provided the lowest-cost alternative for electricity ratepayers and was consistent with obligations under the *Electricity Act*, the *Environmental Act*, and the *Canadian Environmental Protection Act* and any associated agreements.¹⁰¹ But the ML Project hearing and approval process presented the NSURB with "difficult and challenging issues at the intersection of regulation, policy and politics" and has been described as "the Board's most significant renewable energy decision."¹⁰²

The ML Project was important for a few reasons. The first reason was its political nature. As a mega-project, its prominence in the public eye and media has been similar to federally regulated pipelines like Trans Mountain or Energy East. Its substantial budget, its effects on larger international electricity grids, and its relation to provincial electricity/environmental initiatives meant that the Nova Scotia government has played more of a role in the project.

97. Environmental Defence. (2009, Dec. 16). Acts of Climate Leadership in Canada Praised in Copenhagen. *NewsWire*. Retrieved from <https://www.news-wire.ca/fr/news-releases/acts-of-climate-leadership-in-canada-praised-in-copenhagen-539085921.html>

98. Holmes, M. (2012). *All Over the Map: A Comparison of Provincial Climate Change Plans*. David Suzuki Foundation, at 13 and 81. Retrieved from <https://david Suzuki.org/wp-content/uploads/2012/04/all-over-map-2012-comparison-provincial-climate-change-plans.pdf>

99. Harrison, R. J. (2013). Nova Scotia Maritime Link Decision. *Energy Regulation Quarterly*, 1. Retrieved from <https://energyregulationquarterly.ca/case-comments/nova-scotia-maritime-link-decision#sthash.Zsyhsd3b.dpbs>

100. This included the project's design, construction, operation, maintenance and its related commercial transactions.

101. *Maritime Link Cost Recovery Process Regulations*, OIC 2012-326, N. S. Reg. 189/2012. Retrieved from <https://novascotia.ca/just/regulations/regs/mlcostrecovery.htm>

102. Lahey, *supra* note 93.



The second reason (related to the first) was the specific legislation for the project created by government. Unlike other utility projects which adhere to the legislation and regulations previously set out, the ML Project had its own additional legislation and regulations, under the *Maritime Link Act* and the *Maritime Link Cost Recovery Process Regulations (ML Regulations)* passed in the Fall of 2012.¹⁰³ This specific legislation set out the conditions for the NSURB's regulatory review of the project. Through the legislation, the Governor in Council (after consultation with the NSURB Chair) set out the regulations for the regulatory approval process, including the subject matter to be considered at the hearing for the project; criteria and conditions for its approval; and the timing for the hearing and approval process.

The ML Project is seen as an outlier to the government's more typical "hands-off approach" with the NSURB and its regulatory process.¹⁰⁴ This is most evidenced by the ML Regulations which included a mandatory timeline of 180 days for the Board to consider the project application from the date of its submission. While the imposed timeline was met by the Board, it did prevent the Board (and the consultancy it hired) from fully considering an alternative to the Maritime Link. Concerns have been raised over the imposition of such timelines and its "unfairness," as the Board was given "insufficient time for the compilation of a complete record."¹⁰⁵ This raises questions around "procedural independence", as NSURB's experts did not have adequate time to reach a fair and evidence-based decision.

That said, despite the ML project's magnitude, importance and more political nature, the Board's well-established independence and expertise were still trusted to carry out a comprehensive evaluation of the critical project proposal. The NSURB still had "wide-ranging powers to review the proponent's application, to obtain information, to conduct examinations, to order any terms and conditions it considered necessary, and to approve the cost."¹⁰⁶ Further, the NSURB still maintained its final approval decision-making authority over the project, even with the inclusion of the legislated criteria.

The NSURB approved the ML Project in 2013, but imposed a condition related to right-to-access market-priced energy for the project.¹⁰⁷ The NSURB's regulatory process was viewed as rather effective. In comparing the NSURB's process for the ML Project versus Newfoundland's Public Utilities Board's regulatory process for the Muskrat Falls Project, Holburn (2018) stated the following on the NSURB's process:

"The regulatory review process – focused around open, transparent, evidence-based hearings – thus proved effective in evaluating the merits and risks of the proponent's application and in identifying a regulatory solution that would protect rate-payer interests."¹⁰⁸

103. Government of Nova Scotia. (2013). *Key Dates*. Retrieved from <https://novascotia.ca/maritimelink/key-dates.asp>

104. Lahey, *supra* note 93.

105. Harrison, *supra* note 99.

106. Holburn, G. (2018). *Regulating Mega-projects: The Case of Muskrat Falls*. *Ivey Business School, University of Western Ontario*, at 16. Retrieved from <https://www.ivey.uwo.ca/cmsmedia/3783943/regulating-mega-projects-november-2018.pdf>

107. *Re NSP Maritime Link Incorporated*, [2013] NSUARB 154, at paras. 226-30.; Lahey, *supra* note 93.

108. Holburn, *supra* note 106 at 17.



In December 2013, amendments made to the *Maritime Link Act* confirmed the Board's jurisdiction to regulate the ML Project.¹⁰⁹ The Board made a number of decisions involving this complex mega-project; some of these were due in part to the cost overruns and delays of the Muskrat Falls project in Newfoundland, having a downstream effect of delaying the operations of the ML Project.¹¹⁰ In Fall 2017, the Board issued a further decision related to the Project's interim cost assessment starting in 2018. While this report does not delve into details of the decision itself, it is worth noting that regulatory expert Gordon Kaiser observed that this was a challenging case for the Board "requiring a balancing of the interest between all parties."¹¹¹ He further observed that the Board implemented "an interesting and novel approach that successfully addressed the concerns going forward without prejudging the result."¹¹²

While the ML Project showed a government taking a more hands-on approach to the regulatory process, the NSURB was still granted its operational independence and wielded its expertise as to come to competent, timely and respected decisions.

Throughout the 2000s and into the 2010s, stable and affordable energy prices have been a salient issue for Nova Scotians. Due in large measure to the rise in price of fossil fuels, electricity rates increased by roughly 58 percent from 2001 to 2012 with fuel oil prices up by 90 percent during the same period.¹¹³ Government was aware of the challenges associated with electricity affordability¹¹⁴ and in 2013, launched a comprehensive review of the province's electricity system which included public consultation.¹¹⁵ Interestingly, public polling highlighted a desire for increased transparency and accountability to rate-payers. The average participant slightly disagreed that rate regulation by the NSURB has led to a balanced price for electricity.¹¹⁶

The outcome of the government's review was a long-term electricity plan and subsequent legislation to implement the plan under the *Electricity Plan Implementation (2015) Act*.

109. Government of Nova Scotia, *supra* note 103.

110. Kaiser, G. E. (2017). Energy Regulators and Cost Overruns: The Nova Scotia Maritime Link Decision. *Energy Regulation Quarterly*, 5(4). Retrieved from <https://energyregulationquarterly.ca/case-comments/energy-regulators-and-cost-overruns-the-nova-scotia-maritime-link-decision#sthash.pbfcfn8sb.li40Xt4Q.dpbs>

111. Kaiser, *ibid*.

112. Kaiser, *ibid*.

113. Gifford, B. (2013). Solving Nova Scotia's Electricity Pricing Problem: Energy Affordability Vs Rising Electricity Prices. *Ecology Action Centre* at 2. Retrieved from <https://www.ecologyaction.ca/files/images-documents/file/Energy/AffordabilityRep%20RevFeb14%20LoRes.pdf>

114. Nova Scotia Department of Energy. (2015). *Our Electricity Future: Nova Scotia's Electricity Plan 2015-2040*, at 25. Retrieved from <https://energy.novascotia.ca/sites/default/files/Our-Electricity-Future.pdf>; Nova Scotia Department of Energy, *supra* note 91.

115. Nova Scotia Department of Energy. (n.d.). *Electricity System Review*. Retrieved from <https://energy.novascotia.ca/electricity/electricity-system-review>

116. Nova Scotia Department of Energy. (2015). *Electricity System Review Survey*, at 10. Retrieved from <https://energy.novascotia.ca/sites/default/files/Electricity%20System%20Review%20Survey.pdf>



Addressing some of the themes heard in the review, such as the need for greater accountability, predictable and stable rates, innovation and competition, the legislation granted the NSURB greater authority to hold NSP to task by setting performance and reliability standards through enforcement penalties to the monopoly (up to \$1M each year if NSP fails to meet the standards).¹¹⁷ Thus issues of accountability over rates were resolved by holding NSP to greater account, with the tribunal granted more authority to oversee this politically wrought issue. This can be contrasted with other jurisdictions where politically sensitive issues have led to greater intervention by the executive. Energy Minister Michel Samson, in the second reading of the Bill emphasized both the expertise of the Board to develop the standards; and the substantive administrative penalty the Board could impose (“Mr. Speaker, \$1 million is a meaningful amount of money. . .”).¹¹⁸ As a result, since the mid-2010s rates have been more stable and/or under the rate of inflation with only marginal rate increases.¹¹⁹

Over the years, interviewees indicated that the Board has maintained its effectiveness as a “super-regulator”¹²⁰ according to multiple criteria:

Transparency. Interviewees noted the Board is now more transparent or “an open book” with evidence, hearings and other case information (*i.e.*, transcripts, videos, audio files) available online for the general public. This move began in 2008. FAQ pages and videos are available to help people learn how they can participate in a hearing.

Timeliness. Some interviewees noted that the Board has maintained timeliness of decisions. The Board’s 2020 Accountability report was cited, noting that 99.3 percent of all cases are decided within the target number of writings days (which varies from 10-day matters up to 90-day matters).¹²¹ Such decision timeliness seems to be fairly consistent over time with similar success rates observed from 2006 to present.¹²² As one interviewee put it, “stakeholders know they’re going to get a decision from [the Board] within 90 days.”

117. Nova Scotia Department of Energy. (2015, Dec. 15). *Legislation Advances New Electricity Plan* [News release]. Retrieved from <https://novascotia.ca/news/release/?id=20151201005>

118. Samson, M. (2015, Dec. 3). “*Electricity Plan Implementation (2015) Act*”. Nova Scotia House of Assembly. Nova Scotia Hansard. 62nd Assembly, 2nd Session, at 6607. Retrieved from https://nslegislature.ca/legislative-business/hansard-debates/62e-assembly-2re-session/house_15dec03#HPage6605

119. Nova Scotia Department of Energy (2016, Nov. 16). *Electricity System More Accountable to Nova Scotians* [News release]. Retrieved from <https://novascotia.ca/news/release/?id=20161116002>; Nova Scotia Power (2021). Rate Stability. Retrieved from <https://www.nspower.ca/about-us/who-we-are/how-we-operate/regulations/rate-stability-plan>

120. Clancy, *supra* note 49 at 267.

121. Nova Scotia Utility and Review Board. (2020). *Annual Accountability Report For the Fiscal Year Ended March 31, 2020*, at 7. Retrieved from <https://nsuarb.novascotia.ca/sites/default/files/Accountability%20Report%20FY2019-2020%20FINAL.pdf>

122. Nova Scotia Utility and Review Board. (2006). *Annual Accountability Report For the Fiscal Year Ended March 31, 2006*, at 11. Retrieved from https://nsuarb.novascotia.ca/sites/default/files/account_rpt_06.pdf



Indigenous consultation. One interviewee also highlighted the growing importance of Indigenous consultation and the Board's work in that area. Indeed, Board reports highlight recent court decisions at the Supreme Court of Canada and the Nova Scotia Court of Appeal in clarifying the Board's role in determining whether "sufficient Crown consultation has occurred" in decisions that may impact Indigenous rights.¹²³ The Board has adopted specific protocols addressing consultation and notification of Indigenous communities about upcoming hearings.

The Board's first case concerning duty to consult in 2018 involved the province's Mi'kmaq First Nations and an \$18M dam refurbishment.¹²⁴ Citing the recent Supreme Court cases, the Board concluded that the Crown had not met its duty to consult and halted the proceedings until after satisfactory consultation was completed.¹²⁵

The province appealed the NSURB's decision to the Court of Appeals on the grounds of its jurisdiction. The Court dismissed the appeal, concluding that the Board correctly applied the Supreme Court's rulings and had "jurisdiction to consider the adequacy of prior Crown Consultation with the Mi'kmaq representatives."¹²⁶ In 2019, the Board, following "sufficient" fulfillment of the Crown's duty to consult,¹²⁷ approved the application for the refurbishment.¹²⁸

Decision quality. One interviewee stated that the quality of the decisions was also improving. They cited the Board's growing expert capacity, both in the years of veteran Board members and executive leadership, but also through an expanding advisory staff with external consultants, new consumer advocate and small business advocate positions.¹²⁹ Staff and Board Counsel have made an effort to bring all pertinent information in front of the Board, "not just what the parties would like to have in front of the regulator."

123. Nova Scotia Utility and Review Board. (2021). *Business Plan 2020-2021*, at 4. Retrieved from https://nsuarb.novascotia.ca/sites/default/files/NSU-ARB%20Business_Plan_2020-2021.pdf

124. Laroche, J. (2018, Aug. 7). Regulator halts Tusket dam review until utility consults Mi'kmaq. *CBC News*. Retrieved from <https://www.cbc.ca/news/canada/nova-scotia/mi-kmaq-consultation-uarb-utility-and-review-board-ns-government-native-1.4776295>

125. *Nova Scotia Power Incorporated (Re)*, [2019] NSUARB 11 at para. 19. Retrieved from <https://canlii.ca/t/hxc73>

126. *Nova Scotia (Attorney General) v. Nova Scotia (Utility and Review Board)*, 2019 NSCA 66, at Result. Retrieved from <https://www.canlii.org/en/ns/nsca/doc/2019/2019nsca66/2019nsca66.html>

127. The Board acknowledged that while outstanding issues remain relating to the overall consultation framework. Source: *Nova Scotia Power Incorporated (Re)*, *supra* note 125 at para. 21

128. *Nova Scotia Power Incorporated (Re)*, *supra* note 125 at paras. 143 and 147.

129. Nova Scotia Utility and Review Board. (n.d.). *Electricity Mandate – Consumer Advocate*. Retrieved from <https://nsuarb.novascotia.ca/sites/default/files/ca.pdf>; Nova Scotia Utility and Review Board. (n.d.). *Electricity Mandate – Small Business Advocate*. Retrieved from <https://nsuarb.novascotia.ca/sites/default/files/sba.pdf>



Investor confidence. Lastly, interviewees overall suggested that investor confidence in the Board and its regulatory and adjudicative processes “remains high.” Interviewees cited the Board’s stability, consistency, and predictability with its decisions in contributing to investors’ confidence and satisfaction. “[On] the investors side of things, I think they’re relatively happy with [NSURB] at the moment because they can predict what the outcomes are [...] I don’t have a sense that the investors are upset with the Board at all.”

However, despite the Board’s effectiveness, interviewees expressed concern over the increasing complexity in which regulatory decisions are made. Much of this is outside of the Board’s control as a quasi-judicial utility tribunal and is related to the intricacies of its electricity system and transition from fossil fuel generation to renewable clean energy generation. This includes the unique financial structures of actors like NSP with their monopoly power; related technical problems requiring complex engineering solutions; and the quantity of information that goes into the regulatory system. As one interviewee said:

“I think the electricity world has gotten very complex. Not that it wasn’t complex before, but the complexities are growing faster and both the utility [NSP], the regulator, and the stakeholders I think are all challenged to [...] adequately explain all the moving parts in this transition that we are going through [...] moving from a heavily fossil fuel intensive system and aiming for obviously a highly renewable system and all the various points of competition that are growing in those spaces and in that transition and all those components.”

This effects how transparent the Board can actually be. Some interviewees noted that, even if decisions and evidence are available, it is not really transparent when it comes to the public’s understanding, given the complexity of these matters. One interviewee noted that a recent general electricity rate application was thousands of pages long and is “an impenetrable mess even to someone who is an expert in this field.”

Furthermore, some stakeholders have noted that the NSURB’s legislation has remained largely unchanged and does not reflect the changing contextual circumstances. Unlike other Canadian energy regulators and tribunals in recent years, the NSURB has not undergone significant reform; Abreu notes the antiquated nature of singular “economic”-based regulation:

“The UARB is guided by principles that date from 1909 to 1913, depending on which version of the Public Utilities Act is considered. These principles fail to reflect modern social and environmental values. While economic considerations are crucial, the attempt to limit decision criteria to minimizing cost to the ratepayer ignores other factors necessary to properly evaluate complex energy decisions.”¹³⁰

130. Abreu, C. (2013). *Electricity and Nova Scotia’s Future: Hurdles and Opportunities*. Ecology Action Centre, at 30. Retrieved from https://www.ecologyaction.ca/files/images-documents/file/Energy/ElectricityAndNSFuture_LoRes.pdf



One interviewee noted that the NSURB's legislation should be modernized to incorporate broader dialogue. Some stakeholders have called for a review of the NSURB's mandate to incorporate greater environmental variables in its decision-making criteria.¹³¹ Lahey notes that the NSURB may not have always benefitted from the "hands-off approach" taken by government. That said, it is a core reason why the Board is still perceived as an independent, expert and stable regulator:

"Reading the decisions of the Board, one can easily suspect that on a range of matters, the Board may have wished for clearer legislative direction of the kind that is enjoyed by counterparts in other jurisdictions. At the same time, it is possible that the perceived independence, objectivity and fairness of the UARB process -and thus of its decisions – have benefited from the fact the Board works largely within an economic regulator mandate."¹³²

Interviewees raised concerns over the loss of key members of the Board retiring in the next few years, including long-time Board Chair Peter Gurnham (whose retirement was announced in June 2021),¹³³ Board members, as well as long-time advisory and expert staff, who have been with the Board for decades (in some cases before the NSURB was created).

With their exit, the Board faces a potential loss of institutional memory and expertise that has developed through years of regulatory and adjudicative decisions made, and institutional conventions established at the Board. Interviewees noted that the success and effectiveness of the Board's decision-making comes from the strength of these dedicated and well-resourced experts; it may be a challenge for the Board to maintain its effectiveness after these individuals leave and during the time of transition and turnover. One interviewee addressed one staff member in particular who had been providing regulatory law expertise for the Board since the 1970s; this interviewee asked, "how do you replace 40 plus years of regulatory experience?" Thus, finding qualified, experienced people in niche regulatory areas, as well as training people to replace the turnover at the Board will be a challenge. These challenges come at a time of increasing decision complexity, where a stable, predictable regulator is needed for the province's energy transition to succeed.

131. Abreu, *ibid* at 32.

132. Lahey, *supra* note at 93.

133. Nova Scotia Utility and Review Board. (2021, Jun. 2). *Press Release – Retirement – Peter W. Gurnham, Q.C. – Chair – Nova Scotia Utility and Review Board* [News release]. Retrieved from <https://nsuarb.novascotia.ca/sites/default/files/Press%20Release%20-%20Retirement.pdf>



As one interviewee said:

"I am always impressed at the quality of the questions that the Board asks and the insights that they bring in their decisions, but I know it is not without substantial work and substantial engagement of consultants. And the amount of resources that have to be dedicated to this are quite substantial. And what concerns me is knowing that Mr. Gurnham is headed toward retirement in the not-too-distant future as are other Board members. [...] I worry that the loss of that long history of how decisions got made [...] I do think that it could be a very challenging time in Nova Scotia for the regulator to get back to the full bench strength that it has today once [...] [these] members are leaving in the near future. I think that's a really significant challenge."

In summary, decisions in the late 2000s to address the province's electricity grid through the implementation of Nova Scotia's renewable energy targets involved the NSURB as a key actor, yet respected the Board's "institutional independence," allowing the Board to regulate "in the traditional manner."¹³⁴

Part of the province's electricity system transformation has involved the ML Project, which was reviewed by the Board in 2013. The ML Project was/is a prominent political mega-project and had legislation established specifically for its regulatory approval process by the NSURB. This project represents an outlier to the government's more typical hands-off approach to the NSURB's regulatory process, most evidenced by the imposed timeline for process. However, as the years progressed (and with the ML Project approved), the Board still maintained its established independence and expertise, even when addressing pressing and political issues related to affordable electricity and the Crown's duty to consult with Indigenous peoples. Interviewees noted that the Board's efforts to increase transparency and maintain timeliness of decisions have led to high levels of investor confidence. In recent years, there has been concerns over the growing complexity of regulatory decision-making, the potential need for the Board to adapt to these complexities, and the loss of key Board members and staff in the next few years.

134. Nova Scotia Department of Energy, *supra* note 91 at 2.



CONCLUSION AND KEY TAKEAWAYS

This case study has explored the evolution of the NSURB from its 20th century predecessor, the PUB, to present day. The PUB was borne out of a desire to depoliticize the regulatory process following a failure of cabinet-regulation in the early 1900s. Over the years, the PUB both expanded its remit and became “judicialized”, receiving critical features of independence seen in U.S. jurisdictions and with the courts, such as security of tenure. In the 1970s, challenges arose regarding electricity rate regulation of the NSP, then a government-owned corporation. Despite these challenges, the PUB maintained a healthy relationship with government. In the 1990s, jurisdiction changes and a desire to achieve greater economic efficiency led to the consolidation of the PUB and three smaller provincial boards. This created the multi-purpose NSURB in 1992. NSURB both maintained many of the critical features of independence from the PUB and had its independence enhanced over the years through the privatization of NSP and strengthened appointment guidelines. Since the NSURB was seen as a reliable, competent, and efficient regulator and adjudicator, cabinet transferred several far-ranging responsibilities and remits to the NSURB from other boards and agencies. To this day, the Board has authority over everything from electricity rates to payday loans and liquor licenses appeals.

Into the 2000s, greater emphasis on renewable energy standards involved the NSURB as a key actor, but it continued to maintain its independence. The ML Project tested the operational independence of the Board through imposed procedures by government through legislation. This represented an outlier to the hands-off approach taken by government in the early-to-mid-2010s.

However, the Board has maintained its authority and independence. Even when addressing politically sensitive issues related to affordable electricity rates and the Crown’s duty to consult with Indigenous peoples, the Board remained an independent and trusted source of evidence-based decision-making. Current concerns relate to the loss of key members and staff at the Board in the next few years and thus a loss of critical institutional memory, as well as the growing complexity of regulatory decisions in the energy sector.

The following are key takeaways from an analysis of the evolution of the NSURB:

1. *NSURB and its predecessor have been largely independent throughout the years:* There is a long history in the province of competent, arm’s length regulators dating back to the early 20th century. Boards have been given attributes consistent with “judicial independence” and the protections granted to court judges but have also possessed traits of perceived, operational, individual, political, and structural independence. This is in contrast to our other case studies of jurisdictions which have lost some important elements of their independence over the years. This isn’t to say the Board hasn’t had its procedural independence tested with the ML Project. However, the NSURB’s authority and independence has remained intact even as the province faces the same challenges as seen in other jurisdictions such as addressing climate change.

2. *When all else fails, give it to NSURB: Politicians have played “political hot potato” with the Board by transferring the remits from other agencies/ boards or regulatory/adjudicative functions of the executive.* This has been done in an attempt to remove decisions “out of politics,” when smaller regulators are not adequately performing, or when seeking to achieve economic efficiency. Provincial regulation and expert capacity have subsequently centralized around the NSURB, turning it into a “super-regulator.”
3. *A stable, economic regulator can exist in the 21st Century:* The NSURB stands in contrast to the other energy boards in Canada in several ways. This includes recent “modernization” taken by many of the energy boards with their mandates adjusted to reflect new considerations, including greater weight to environmental or socio-economic considerations, or a new corporate “tripartite” governance. The NSURB’s mandate has not been modernized; its guiding legislation remains in large measure the century-old Public Utilities Act. This is both a blessing and a curse: it gives the Board greater flexibility in tackling complex decisions but not necessarily the required policy guidance to address new complex decisions. Other measures have been taken to address such challenges, as seen with the province’s renewable standards and separate legislation for the ML Project. Additionally, unlike in the other jurisdictions, investor confidence is higher in Nova Scotia and the NSURB is seen as more stable and independent in comparison. An ‘economic’ regulator can still function in the 21st century.
4. *A concerning future:* Despite decades of stability, there is concern over NSURB’s future, with the regulatory environment becoming more complex and the Board set to lose key executives in the next few years, including current Chair Peter Gurnham. Members and executive staff possess strong institutional memory and expertise. The effectiveness of the Board may be hindered if these concerns are not adequately addressed by decision-makers.





CASE STUDY FIVE: BC OIL AND GAS COMMISSION

INTRODUCTION

The British Columbia Oil and Gas Commission (BCOGC) is the provincial resource regulator. The Commission, a “single-window regulatory agency” has authority over the oil and gas activities in B.C. through the *Oil and Gas Activities Act*. The Commission has also specified responsibilities under the *Forest Act*, *Heritage Conservation Act*, *Land Act*, *Environmental Management Act*, and *Water Sustainability Act*.¹ Among the five case studies, the BCOGC is unique for two reasons: First, it is the youngest regulatory agency among the five, established only in October 1998.² Second, it is not a tribunal but instead its governance structure resembles more that of a corporate agency.

1. BC Oil & Gas Commission. (2021). *About*. Retrieved from <https://www.bcocg.ca/about/>

2. BC Oil & Gas Commission, *ibid*.



THE PRE-OGC ERA AND ITS INEFFICIENCY (EARLY 1990s - 1998)

Oil and gas resource development in B.C. dates back 125 years. However, the BCOGC was only formed in 1998. In the mid-20th century, administration of oil and gas development was mainly under the jurisdiction of the Department of Lands Forests. It was later transferred to the Department of Mines.³

However, immediately prior to the establishment of the BCOGC in the 90s, oil and gas regulation in B.C. was dispersed amongst various provincial departments and agencies. These included the Ministry of Lands, the Ministry of Environment, the Ministry of Agriculture, the Ministry of Energy and Mines. Agencies like the Agricultural Land Commission (ALC) also had some responsibilities over resource regulation. Additionally, oil and gas companies that required cutting and road use permits would have to work with the Ministry of Forests.⁴ One interviewee noted that, while the ministries possessed expertise, they never worked together to streamline regulation of resource projects. They noted that a project, in obtaining regulatory approval, bounced around the ministries “like [...] a ping pong ball.”

Indeed, the regulation of B.C.’s oil and gas sector prior to the BCOGC has been consistently described as inefficient. Agencies like the ALC (which had some jurisdiction over certain aspects of oil and gas lands), were seen as under-resourced and administratively slow, lacking an understanding as to how oil and gas worked. This ineffective process was described colourfully by Jaremko:

“B.C. leaders knew their province was notorious for making industry jump through numerous and often frustrating political, administrative, and economic hoops. Obtaining project approvals was a long, uncertain, and expensive exercise that involved winning the consent of four Victoria-based agencies, all of which viewed northern development through a different policy lens. It was a standing joke among Alberta energy business executives that ‘B.C.’ stood for ‘bring cash.’”⁵

A 1998 report commissioned by the Canadian Association of Petroleum Producers (CAPP) to review the regulatory regime for oil and gas in the province also identified major weaknesses. The report discussed issues related to “overlapping legislation, inconsistent legislative application, an overly complex approval process, lack of departmental cooperation, and a shortage of human resources particularly at peak times.”⁶ Furthermore, the report noted that, if the government failed to implement regulatory reform, companies in the Peace River region would withdraw their investments in the province.

3. Government of British Columbia. (n.d.). *A Brief History of Oil and Gas Exploration in British Columbia*. Retrieved from https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-gas-oil/petroleum-geoscience/brief_history_of_oil_and_gas_exploration_in_bc.pdf

4. Rankin, M., Carpenter, S., Burchmore, P., and Jones, C. (2000). Regulatory Reform in the British Columbia Petroleum Industry: The Oil and Gas Commission. *Alberta Law Review* 38(1), at 165.

5. Jaremko, G. (2013). *Steward: 75 Years of Alberta Energy Regulation*. Energy Resources Conservation Board. Retrieved from https://static.aer.ca/prd/documents/about-us/Steward_Ebook.pdf at 142-143.

6. Rankin et al., *supra* note 4 at 145.



The provincial resource sector in the late 1990s provided fairly sizable revenues to the B.C. government. Still, the government knew that, compared to other western jurisdictions like Saskatchewan and Alberta, it was missing out on opportunities in exploration, particularly in the Western Canadian Sedimentary Basin located in the northeast of the province.⁷ New extraction technologies developed in the 1990s and 2000s provided further incentives to explore unconventional gas reserves. Further, as Rankin *et al.* noted, reports in the late 1990s showed that demand for natural gas was going to remain robust over the next decade.

The desire for greater industry exploration and resource production in the province (and subsequent increase in government revenues) as well as concerns over efficient resource regulation, led to a Memorandum of Understanding (MOU) between the province and the oil and gas industry (represented by CAPP) in February 1998.⁸ At its core, the government wanted to build an additional resource industry, and oil and gas companies wanted a more efficient process.

The MOU provided for an “Oil and Gas Initiative”, with a goal of “making British Columbia one of the most attractive places in North America for oil and gas investment.”⁹ Seen as a joint industry-government initiative, the MOU promised support to the resource industry through a series of investments, and regulatory and tax changes. In exchange for these changes, the industry would commit to invest \$25B in the province over the following ten years, increasing resource production.¹⁰ Such changes included infrastructure investments in roads in northeastern B.C. for greater access;¹¹ a reduction in royalty rates of up to 40 percent;¹² and (most important for this study) streamlining the regulatory approval process through a ‘single window.’¹³

Following the MOU, early discussions in the drafting of legislation to establish a ‘single window’ regulatory process and the parameters of authority introduced several options.

7. Government of British Columbia. (n.d.). Northeastern B.C. Basin. Retrieved from <https://www2.gov.bc.ca/gov/content/industry/natural-gas-oil/petroleum-geoscience/sedimentary-basins-of-bc/northeastern-bc-basin>

8. MacPhail, J. (1998, Mar. 30). “Budget Address.” Legislative Assembly of British Columbia. *British Columbia Hansard*. 36th Parliament, 3rd session, at 6615. Retrieved from <https://www.leg.bc.ca/documents-data/debate-transcripts/36th-parliament/3rd-session/19980330pm-Hansard-v8n3>

9. Rankin *et al.*, *supra* note 4 at 146.

10. British Columbia Ministry of Energy and Mines. (1998, May 26). *May sale of oil and gas rights brings \$7.77 million* [News release]. Retrieved from <https://archive.news.gov.bc.ca/releases/archive/pre2001/1998/0967.asp>; British Columbia Ministry of Finance and Corporate Relations. (1999). *British Columbia Financial and Economic Review*, at 106. Retrieved from <https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/government-finances/financial-economic-review/financial-economic-review-1999.pdf>

11. British Columbia Ministry of Energy and Mines. (2003). *Sierra Yoyo Desan Road Registration of Interest*. Retrieved from https://www.infrastructurebc.com/pdf/SYD_ROI-June_27.pdf

12. British Columbia Ministry of Finance and Corporate Relations, *supra* note 10 at 106.

13. Taylor, M., and Hunter, T. (2019). *Agricultural Land Use and Natural Gas Extraction Conflicts: A Global Socio-legal Perspective*. Routledge, at 104.



This included having a ‘single window’ within the Ministry of Energy and Mines, establishing a “truly independent agency” separate from government with the ability to issue a “super-permit” (i.e., an amalgamation of existing separate permits), and/or creating a government agency by taking staff from other ministries with authority to issue the same permits as before but under a “single wicket.”¹⁴

The creation of a government agency to issue the same permits as before was selected as the preferred option for the ‘single window’ regulatory process for a number of reasons. First, the model was the least disruptive to the established expertise with other ministries, and it was relatively quick to implement. Second, the government agency would be able to carry out the government’s consultative obligations to Indigenous Peoples. Lastly, the government wanted to maintain greater control over elements of the resource industry, given its importance in the province. In addition, given the short time frame for establishing the single window process, it was viewed as not practical to amend all the legislation to establish a single “super-permit”, and this was rejected in the short-term.

In addition to establishing the Commission as a government agency, the government rejected the tribunal model (as seen with the National Energy Board and the province’s Utilities Commission), opting for a corporate model.

This was done to give the Commission greater “financial and administrative flexibility as well as a considerable degree of independence from ministerial control.”¹⁵ Unlike other energy regulators, the BCOGC does not have a true adjudicative function.

Lastly, the province was inspired by Alberta’s approach to regulating the oil and gas industry, while also working collaboratively with it. In the 1990s, Alberta’s resource industry was performing well, and its regulatory entity was well-respected. In establishing the BCOGC, B.C. Premier Glenn Clark travelled to Calgary to learn about conducting resource industry business. Further, Rob McManus, the first BCOGC Commissioner, stated that, in creating the Commission “we basically took the ERCB [Energy Resources Conservation Board] model” and “took everything we thought was the best from the Alberta model.”¹⁶

A notable element of the initial discussions surrounding the OGC’s legislation was the desire for cooperation and support amongst other stakeholders. Following the MOU and organization of the initial form of the agency, consultation took place with industry, environmental groups, government ministries, and First Nations communities.

Of note was the participation of environmental groups and First Nations communities. Despite a desire to expand the oil and gas industry, the government did not wish to do so at the expense of environmental standards or its obligations to First Nations.

14. Rankin et al, *supra* note 4 at 146-147.

15. Rankin et al., *ibid* at 147-148.

16. Jaremko, *supra* note 5 at 143.



Environmental groups seemed supportive of the establishment of a Commission given their desire to integrate oil and gas development decision-making with greater economic and environmental considerations.¹⁷ Conversely, there was initial push back from the Treaty 8 Tribal Association. This group cited conflict between the Commission's formation and ongoing negotiations on an MOU between the Treaty 8 First Nations and the province at the time.¹⁸

Consulting and collaborating with stakeholders continued in the early years of the BCOGC. This is evidenced with 'the Reference Group', a group of stakeholders that provided advice and guidance on the implementation of the Oil and Gas Commission Act (OGC Act), the Operations Sub-Committee which helped make the Commission operational, and later the legislated Advisory Committee (described below).¹⁹ Thus, consensus and consultation with the stakeholders has been a critical element in the establishment of the BCOGC.

In summary, this section provides the context of oil and gas regulation prior to the Commission as well as some of the motivations and initial discussion behind the creation of the BCOGC. Prior to the Commission, oil and gas regulation in the province was managed by various ministries and agencies, widely characterized as inefficient.

A 1998 report by CAPP illustrated the problem and emphasized the potential loss of investment should it not be addressed. Aware of this issue, as well as a desire to expand resource development and government revenues, the province signed an MOU with industry to provide for an "Oil and Gas Initiative." Early discussions on the initiative's design involved the desire for a 'single window' regulatory process, a rejection of the tribunal model, strong partnership and consultation with industry, environmental groups, and First Nations communities. Only a few months after these discussions, the BCOGC was established.

17. Rankin et al., *supra* note 4 at 149.

18. Rankin et al., *ibid* at 149.

19. Rankin et al., *ibid* at 149.



BUILDING BC'S RESOURCE CAPACITY AND THE INITIAL YEARS OF THE BCOGC (1998 - 2008)

As Rankin et al. (2000) observed, the timeframe between the initial idea of the BCOGC and its creation in legislation was “extraordinarily brief”, from February 1998 with the industry-government MOU to the passage of the *Oil and Gas Commission Act* in July 1998.²⁰ In the second reading of the Bill, Minister of Energy and Mines Dan Miller highlighted many of the goals of the BCOGC as a single window agency. These included “improving the efficiency and effectiveness of the province’s regulation of the industry.”²¹

The *Oil and Gas Commission Act* transferred authority over oil and gas regulation and project approval to the BCOGC from the various ministries, including the Ministry of Energy and Mines, Ministry of Environment, Lands and Park, and the Ministry of Forests. The Commission was given specific powers to exercise under several pieces of legislation, including the *Forest Act*, *Forest Practices Code of British Columbia Act*, the *Heritage Conservation Act*, the *Land Act*, the *Waste Management Act*, the *Water Act* and (most critically) under the *Petroleum and Natural Gas Act* and the *Pipeline Act*.²²

On October 23rd, 1998, the operations of the BCOGC commenced. Staff and management came from the ministries who had previously been involved in oil and gas industry regulation were drawn together to form the Commission.²³

In the initial years, the Commission led initiatives consistent with the rationale for its establishment. These included initiatives to streamline the regulatory process for applications and to conduct consultations on behalf of government with the Treaty 8 First Nations. From 1999 to 2000, the Commission conducted roughly 2,500 consultations with First Nation communities on oil and gas applications.²⁴

The BCOGC’s level of independence at the time of its establishment was ambiguous. On the one hand, the BCOGC was granted a “considerable degree of independence” through its legislation.²⁵ Most notably was the Board’s financial independence, a characteristic emphasized by the interviewees. The BCOGC’s funding comes from production levies, annual fees prescribed to industry, and application/issuance fees for approvals issued under the *Petroleum and Natural Gas Act* and the *Pipeline Act*.²⁶ Because of this funding model, the Commission does not rely on government funding. Further, the BCOGC was granted other elements of administrative and financial flexibility and independence in its legislation. The Commission was granted powers to hold and dispose of property, borrow and invest money and enter into agreements (all subject to prior approval by cabinet). The Commissioner is able to hire expertise and staff to carry out the agency’s activities.

20. Rankin et al., *ibid* at 144 and 149.

21. Miller, D. (1998, Jun. 25). “Oil and Gas Commission Act.” Legislative Assembly of British Columbia. *British Columbia Hansard*. 36th Parliament, 3rd session, at 9234. Retrieved from <https://www.leg.bc.ca/content/Hansard/36th3rd/19980625pm-Hansard-v11n7.HTM>

22. Rankin et al., *supra* note 4 at 152.

23. Auditor General of British Columbia. (2000). *Report of the Auditor General of British Columbia to the Commissioner of the Oil and Gas Commission, and to the Minister of Energy and Mines and the Minister Responsible for Northern Development, Province of British Columbia*. Retrieved from <https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/government-finances/public-accounts/1999-00/sup-e/oil-and-gas-commission-fs-1999-00.pdf>

24. Oil and Gas Commission. (2000). *1999 / 2000 Annual Report*, at 5. Retrieved from https://www.bco.gc.ca/files/reports/Annual-Reports/9900annualreport_1.pdf

25. Rankin et al., *supra* note 4 at 148.

26. Auditor General of British Columbia, *supra* note 23.



However, the government still retained necessary controls over the resource regulator. As noted above, its model as a government agency was designed to ensure that the government maintained some control over the oil and gas industry, given how critical it was considered to be for the province's economy. While the Commission has been viewed in the literature as an "arms-length organization" its lacks adjudicative functions.²⁷ As such, its decisions are not subject to certain legal standards that have given other regulators in Canada (which are tribunals) "quasi-judicial" characteristics.²⁸ Thus, comparisons with the courts system and their judicial independence are less applicable to the BCOGC than other energy regulators in Canada.

Furthermore, the BCOGC is a policy-taker with government retaining a policy-setting role.²⁹ While the Commission set technical regulations under the *Petroleum and Natural Gas Act*, the government retained control over the passing of all general regulations. In some cases, regulatory authority by cabinet appeared quite prescriptive. The government has authority to make regulations with respect to policies and procedures to be followed by the BCOGC in conducting its affairs and discharging its duties and applications to the commission, and it prescribed time limits in the processing of applications.³⁰

Furthermore, the Commissioner and Deputy Commissioner are/were appointed by cabinet and thus subject to concerns over partisan patronage and/or bias.³¹

However, despite government control through cabinet regulation, the BCOGC was the primary regulator of its oil patch with the decision-making authority to issue permits and licenses, and to assess and determine if applications were "in the public interest having regard to environmental, economic and social effects."³² Additionally, the influence from Alberta's independent regulator meant that the Commission was still fairly at arm's length. One interviewee stated that independence has been inherent with the Commission since its inception.

In these initial years, despite having authority over several pieces of legislation, the Commission was still dependent on the expertise of many of the government ministries/agencies. Additionally, the complexities of some of the legislation necessitated that the Commission consult with the ministries. For instance, one interviewee noted how, in the first few years at the agency, the Commission was consulting the Ministry of Environment, asking for impact analyses on the province's caribou population. Similarly, under legislation, the Commission was still required to consult the Ministry of Forests before issuing road use permits.³³

27. Stratos Inc. (2017). *Cross-Jurisdictional Review of Energy Regulators*. NEB Modernization Panel, at 25-26. Retrieved from https://www.neb-modernization.ca/system/documents/attachments/7a2231b8ba4c5ba7430dc12ac856316f50edf1f5/000/005/913/original/Cross-Jurisdictional_Review_of_Energy_Regulators_Report_English-15.pdf?1490643374

28. Stratos Inc., *ibid* at 21.

29. Rankin et al., *supra* note 4 at 148.

30. *Oil and Gas Commission Act*, SBC 1998, c. 39, s.22(3). Retrieved from https://www.bclaws.gov.bc.ca/civix/document/id/consol6/consol6/98039_01

31. While the previous legislation specified that cabinet appointed the Commissioner and Deputy Commissioner, the current legislation under the *Oil and Gas Activities Act* only specifies that cabinet appoints two directors to the board, "one of whom is both the commissioner and vice chair of the Board." Source: *Oil and Gas Activities Act*, SBC 2008, c. 36, s.2(3). Retrieved from https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/08036_01

32. *Oil and Gas Commission Act*, *supra* note 30, at s.3(b).

33. *Oil and Gas Commission Act*, *ibid*, at s.17(3); Rankin et al., *supra* note 4 at 153.



By around 2004–2006, the Commission was relying less on the ministries and other agencies as it built up holistic expertise for the province’s resource regulation, including specific experts such as geologists and hydrologists. The Commission grew from 83 staff in 2000/01 to 154 staff in 2006/07.³⁴ Since the Commission competes with the private sector for hiring and recruitment, the BCOGC has been exempted from the Public Service Act since 2006/07, providing it greater flexibility in recruiting and retaining technical expertise.³⁵

In addition to the Commission developing its expert capacity, there was a continued push to speed up its decision-making processes and the issuance of permits.³⁶ Some interviewees indicated that there was tension with other agencies and ministries at the beginning, as the Commission streamlined the process and developed independent expertise. One interviewee noted that the Commission’s ability to move quicker with single-window decisions and with their own expertise made other agencies uncomfortable, as they were used to slow-moving bureaucracy.

Other agencies, the interviewee said, have come to respect the Commission’s ‘less-bureaucratic’ approach, but disagreements have arisen over the extent of the BCOGC’s decision-making authority. One interviewee noted disagreements with the ministry over the BCOGC’s authority under the *Land Use Act*.

Interviewees noted one area in particular where tension has arisen between the Commission and another arm’s length agency, namely the conflict over authority with the Agriculture Land Commission (ALC). The ALC is an independent administrative authority formed in the 1970s and “dedicated to preserving agricultural land and encouraging farming in British Columbia.”³⁷ The Agriculture Land Reserve (ALR) is roughly 5 percent of the land in the province zoned for agricultural purposes and was established in 1973. Additions and removals to the zone are decided on by the ALR. Most importantly for this discussion, non-farm use and subdividing of the ALR land cannot occur without the approval of the ALC.³⁸

34. Oil and Gas Commission. (2001). *2000 / 2001 Annual Report*, at 9. Retrieved from https://www.bcogc.ca/files/reports/Annual-Reports/0001annualreport_1.pdf; Oil and Gas Commission. (2007). *Annual Service Plan Report 2006/2007*, at 2. Retrieved from https://www.bcogc.ca/files/reports/Annual-Reports/ogc200607annualreport_1.pdf

35. Oil and Gas Commission (2007), *ibid* at iii and 16.

36. It is observed that during this time, the Commission’s “average working days to complete an application” went from roughly 24 days in 2001/02, to 15 in 2003/04. Source: Oil and Gas Commission. (2004). *Annual Service Plan Report 2003/2004*, at 20. Retrieved from https://www.bcogc.ca/files/reports/Annual-Reports/0304annualreport_1.pdf

37. Government of British Columbia. (n.d.) *Agricultural Land Reserve*. Retrieved from <https://www2.gov.bc.ca/gov/content/industry/agriculture-seafood/agricultural-land-and-environment/agricultural-land-reserve/the-agricultural-land-reserve>

38. Taylor and Hunter, *supra* note 13 at 100.



Notably, over a quarter of the ALR is located in the Peace River Regional District, where significant areas of the province's shale gas development are located.³⁹ Oil and gas development has been the largest non-farm use activity in the ALR. Taylor and Hunger (2018) observed that, in the early years of the ALC, it took a more precautionary approach to granting non-farm use activities in the ALR.⁴⁰ Thus, it was rare that it granted permission for other activities. Conversely, since 1976, the ALC has largely facilitated and accommodated oil and gas activities on ALR lands.⁴¹

Taylor and Hunter (2018) observed that as unconventional gas became more commercially viable in the years following the establishment of the BCOGC, the ALC's decision-making authority (and how it regulated non-farm use activities on ALR protect land) was challenged. In 2002, the amendments to the *Agricultural Land Commission Act* allowed the ALC to delegate decision-making to an "authority."⁴² This meant that the ALC could adjust its powers and work with another administrative authority and "implement decisions more adaptive over specified non-farm uses on ALR lands."⁴³

One interviewee noted that there is "lots of history about whether that was something the ALC really wanted to do or not," noting there had been tension in previous years over the development and approval of non-farm use oil and gas development in the ALR.

In 2004, the ALC entered into a delegation agreement with the BCOGC (as the "authority" in question).⁴⁴ The 2004 agreement delegated specific authority to the BCOGC over decisions on oil and gas, non-farm development in the ALR that were previously held by the ALC.⁴⁵ The agreement also exempted certain oil and gas non-farm use activities from requiring BCOGC approval.⁴⁶ The Delegation Agreement (updated in 2013), has been described as "innovative", with the goal of creating "a regulatory framework which facilitates the adaption of ALR lands to permit unconventional gas development in order to 'streamline and improve the review and approval processes for oil and gas activities and ancillary activities on agricultural reserve lands while preserving agricultural lands and encouraging the farming of agricultural lands.'"⁴⁷

39. Taylor and Hunter, *ibid* at 100.

40. Taylor and Hunter, *ibid* at 100.

41. Evidenced by General Order #4473/76, which facilitated accommodation of oil and gas activities on ALR lands less than 2 ac's. Source: Taylor and Hunter, *ibid* at 102-103.

42. Provincial Agricultural Land Commission. (2013). *Oil and Gas Development in the Agricultural Land Reserve: The Non-Farm Use of Agricultural Land: An Historical Overview of the Agricultural Land Commission's Position Regarding Oil and Gas Activities in the ALR*, at 3. Retrieved from https://www.alc.gov.bc.ca/assets/alc/assets/about-the-alc/working-with-other-ministries-and-agencies/history_of_oil_and_gas_activities_in_the_alr_november_2013.pdf

43. Taylor and Hunter, *supra* note 13 at 107.

44. Provincial Agricultural Land Commission, *supra* note 42 at 3.

45. Provincial Agricultural Land Commission, *ibid* at 3.

46. Provincial Agricultural Land Commission, *ibid* at 4.

47. Taylor and Hunter, *supra* note 13 at 109.



However, some interviewees observed that the delegation was beneficial and better, with the BCOGC offering a more holistic examination of land-use in certain areas of the ALR for oil and gas activities. Conversely, others did not speak as positively about the move, noting that the agreement, over time, led to more and more exemptions for oil and gas activities. One interviewee stated that, in delegating decision-making to the BCOGC, the ALC “gave up its independence.”

In addition to being delegated authority previously held by the ALC, legislative amendments made in 2002 further enhanced authority of the Commission to continue to regulate the industry, to streamline resource regulatory processes, to clarify rules and processes, and to reduce the “regulatory burden on industry.”⁴⁸ These amendments came as the government announced its desire to double oil and gas investment in the province together with the number of wells in production.⁴⁹

Under the *Energy and Mines Statutes Amendment Act*, the government and the BCOGC were now allowed to grant exemptions to certain regulations for oil and gas activities.⁵⁰

Additionally, the Commission assumed greater regulatory authority from line ministries to enhance streamlining processes and “improve efficiencies.” This included authority in regulation under the *Waste Management Act*, the *Water Act*, and the *Forest Practices Code of BC Act* (transferring enforcement from the Ministry of Forest to the BCOGC). Further, the BCOGC now had authority to grant a general development permit.⁵¹

However, despite these enhanced powers to regulate oil and gas, the government intended to ensure that the way the Commission regulated reflected government’s “interests and priorities.”⁵² This was best exemplified with the move to have the Deputy Minister of Energy and Mines become the third Director and Chair of the BCOGC. Previously, the Board only had two members, the Commissioner and Deputy Commissioner. Additionally, as Chair, the Deputy Minister would now hold the deciding vote in the event of a tie.⁵³

The move re-emphasized government’s desire to ensure its control over the critical development of the resource industry.

48. Neufeld, R. (2002, May 2). “Energy and Mines Statutes Amendment Act, 2002.” Legislative Assembly of British Columbia. *British Columbia Hansard*. 37th Parliament, 3rd session, at 3135. Retrieved from <https://www.leg.bc.ca/documents-data/debate-transcripts/37th-parliament/3rd-session/20020502am-Hansard-v7n2>

49. West Coast Environmental Law. (2002). *Bill 36: The Energy and Mines Statutes Amendment Act*, at 2. Retrieved from <https://wcel.org/sites/default/files/publications/Deregulation%20Backgrounder%20-%20Bill%2036.pdf>

50. West Coast Environmental Law, *ibid* at 2.; Bill 36, *Energy and Mines Statutes Amendment Act*, 2002, 3rd Session, 37th Parliament at s.28 and s.37 [amending s.36 and s.133 of the Petroleum and Natural Gas Act respectively]. Retrieved from <https://www.bclaws.gov.bc.ca/civix/document/id/lc/bill-sprevious/3rd37th:gov36-1>

51. Bill 36, *ibid* at s.23.

52. Neufeld, *supra* note 48 at 3135.

53. Bill 36, *supra* note 50 at s.16 [amending s.2 of the *Oil and Gas Commission Act*].



In the second reading of the Bill, then Minister of Energy and Mines Richard Neufeld highlighted the move:

“Changing the structure will strengthen the authority of the commission. Having the deputy minister serve as chair acknowledges the close relationship that must exist between the commission and the ministry.”⁵⁴

The original commission model was designed such that the agency was operated at arm’s length, yet government still retained important tools related to its appointments, general regulation of the Commission’s processes and policy setting.

While these 2002 amendments were surprisingly not highlighted by interviewees as key events in the history of BCOGC’s independence, some environmental advocates emphasized their changes and the effects on the independence of the Commission. For instance, West Coast Environmental Law, an environmental non-profit, highlighted how the original commission model, the administrative and financial flexibility, as well as its two-person independent Board initially gave stakeholders comfort when environmental approvals were transferred to it. BCOGC was “perceived as neutral – at least relative to the Ministry of Energy and Mines.”⁵⁵

With the Deputy Ministry of Energy and Mines now as the Chair of the Commission’s Board (and with the tie-breaking vote), they noted the conflict in adequately regulating environmental and agricultural decisions:

“Environmental approvals previously issued by the environmental ministry and then by a ‘neutral’ Commission, could now be decided by the Deputy of Energy and Mines whose Ministry’s first objective is to ‘increase investment in energy and mineral resource development in B.C.’”⁵⁶

As discussed above, part of the rationale for the commission model was for the agency to engage more with the province’s First Nations communities. In 1998, the government took steps to ensure that First Nations communities were involved in establishing the Commission with the communities represented in the Commission’s initial planning and implementation groups.⁵⁷ The government’s desire for the BCOGC to take on consultation with First Nations communities for resource projects is also reflected in its initial legislation. For instance, section 4 of the BCOGC’s initial legislation references the intent “to respect aboriginal and treaty rights in a manner consistent with section 35 of the Constitution Act, 1982;” while a further provision outlines that one of the Commission’s purposes is to “encourage the participation of First Nations and aboriginal persons in processes affecting them.”⁵⁸

54. Neufeld, *supra* note 48 at 3135.

55. West Coast Environmental Law, *supra* note 49 at 4.; The Pembina Institute also highlighted the 2002 change and how it “minimized” the Commission’s previously granted independence. Source: Dagg, J., Campbell, K., and Simieritsch, T. (2011). Tenable Tenure: The need for oil and gas tenure reform in British Columbia. *Pembina Institute* at 4. Retrieved from <https://www.pembina.org/reports/tenable-tenure.pdf>

56. West Coast Environmental Law, *ibid* at 4.

57. Rankin et al., *supra* note 4 at 149.

58. Rankin et al., *ibid* at 158.



Moreover, the BCOGC, as an agency of the Crown, was bound to existing MOUs between the government, the BCOGC, and Treaty 8 First Nations. These MOUs outlined details of the consultation process for oil and gas activities, as well as the financial contributions to these First Nations communities. In analyzing the agreements, Rankin et al noted that, while there was a good deal of overlap between the MOUs' provisions and section 35 of the Constitution, the MOUs went beyond their duty to consult established in the Constitution. The authors note that the MOUs "may have the effect of expanding the Commission's obligations in terms of the process to be followed."⁵⁹

Over the years, new agreements and consultative processes have been put in place between the BCOGC and First Nations in the province. Further the BCOGC appears to have extensively consulted with First Nations; in its first annual report for 2000/01, the Commission documented 4,278 consultations.⁶⁰ While a deeper analysis is beyond the scope of this case study, it is worth noting that compared to other energy regulators in Canada, the BCOGC has been particularly strong in establishing specific policies concerning Indigenous reconciliation, participation, and consultation.

In a jurisdictional review, Stratos Inc. noted that the BCOGC is one of a only handful of energy regulators (and the only Canadian regulator) that "stand out for their legal requirements, policies, procedures and/or practices for proactive consultation and provisions for substantive participation of Indigenous peoples in regulatory decision making."⁶¹ As Bennett Jones noted in 2010, the OGC encourages industry to engage with communities before submitting their applications, inviting them to participate in discussion and resolution. However ultimately "the OGC undertakes the consultation with First Nations, is responsible for its adequacy, and reflects any accommodation of aboriginal concern in conditions to project approvals."⁶² Through the lens of First Nations consultation and engagement and its responsibilities, the BCOGC is distinguished as an energy regulator, particularly compared to that of the National Energy Board.

Additionally, in 2004, the B.C. Supreme Court reaffirmed in *Saulteau First Nations v. British Columbia (Oil & Gas Commission)* that the BCOGC is part of the Crown and has a fiduciary duty and duty to consult Indigenous parties affected by energy developments. The court noted the difference between the NEB and the BCOGC, where the former does not have a fiduciary duty with Indigenous Peoples.

59. Rankin et al., *ibid* at 162.

60. Oil and Gas Commission (2001), *supra* note 34 at 5.

61. Stratos Inc., *supra* note 27 at 50.

62. McPherson, D. M., Sheehan, D., and Buchinski, M. (2010). Energy Development in British Columbia versus Alberta: Comparing Aboriginal Consultation Processes. *Bennet Jones LLP*. Retrieved from <https://www.bennettjones.com/Publications-Section/Updates/Energy-Development-in-British-Columbia-versus-Alberta-Comparing-Aboriginal-Consultation-Processes>



As noted in the NEB case study, the NEB's quasi-judicial, independent arm's length body was determined to be inconsistent with the imposition of a fiduciary duty. In contrast, "the Commission does not perform a quasi-judicial role" and their process "does not involve formal hearings or a formal record"⁶³ which means that the BCOGC is "not a quasi-judicial decision maker but is, instead an administrative decision maker."⁶⁴ Conversely, the NEB "has the power of a superior court of record in relation to procedural matters" with a "process that differs little from the courts."⁶⁵ Additionally NEB members have security of tenure, while the BCOGC Commissioners do not. These differences, among others outlined in the case, led to the Court to state:

"... I find that the statutory framework of the Commission is significantly different from that of the National Energy Board. The Commission has none of the independence of the National Energy Board, since it is a Crown agent exercising ministerial or executive statutory policies."⁶⁶

Thus, the Commission exhibits less traits of "judicial independence" and its obligations to consult with First Nations on behalf of the Crown were established much earlier in the early 2000s than other quasi-judicial regulators like the NEB. The outcome has been a more "proactive" role in engaging with First Nations communities, establishing consultation processes, and maintaining frequent contact with communities.

In the mid-2000s, B.C.'s resource industry was growing and expected to grow exponentially. In 2002, 643 wells were drilled and forecasts saw this number rise well into the mid-1000s in the upcoming years.⁶⁷ By 2005/2006, the Commission noted that the number of well applications exceeded what they had budgeted for (1,935 applications versus 1,750 budgeted).⁶⁸ This growth occurred at a time when the Commission was still in the process of building its own expertise. However, with a growing industry there was mounting pressure to ensure timeliness of decisions and regulatory processes.

In 2004, the government launched the Oil and Gas Regulatory Improvement Initiative (OGRII), a collaborative effort between the Ministry of Energy and Mines and the BCOGC.

63. *Saulteau First Nations v. British Columbia (Oil and Gas Commission)*, [2004] 4 C.N.L.R. 284, at paras. 130 and 131

64. *Saulteau First Nations v. British Columbia (Oil and Gas Commission)*, *ibid* at para. 138.

65. *Saulteau First Nations v. British Columbia (Oil and Gas Commission)*, *ibid* at paras. 132 and 133.

66. *Saulteau First Nations v. British Columbia (Oil and Gas Commission)*, *ibid* at para. 137.

67. Campbell, K., and Howard, T. (2004). When the Landman Comes Knocking: A Toolkit for BC Landowners Living with Oil and Gas. *West Coast Environmental Law and Sierra Legal Defence Fund*, at 1. Retrieved from <https://www.wcel.org/sites/default/files/publications/When%20the%20Landman%20Comes%20Knocking%20-%20A%20Toolkit%20for%20BC%20Landowners%20Living%20with%20oil%20and%20Gas.pdf>

68. Oil and Gas Commission. (2006). *Annual Service Plan Report*, at 13. Retrieved from https://www.bco.gc.ca/files/reports/Annual-Reports/annual20report202005-06_1.pdf



Aware of the growing pressure on the Commission and staff, OGRIL's objectives included consolidating statutory provisions that governed the BCOGC and the regulation of oil and gas; harmonizing the commission's regulatory framework with other provincial legislative initiatives; and enhancing the commission's operations as a single-window regulator.⁶⁹ More generally, the goal of OGRIL was to:

*"Recommend legislation that will position British Columbia as a world class regulatory environment that supports greater industry activity levels while meeting provincial health, safety and environmental objectives."*⁷⁰

In summary, 1998 saw the establishment of the BCOGC, which assumed authority over oil and gas regulation and project approval from government ministries and agencies. The BCOGC's independence at the time can be characterized as ambiguous. While possessing financial independence and administrative flexibility, the government still retained control over the resource regulator through general regulations and appointments. Despite authority over several pieces of legislation, in its initial years, the BCOGC was interdependent on the government ministries and agencies to regulate the sector. However, the Commission soon developed its own expertise and received further authority from line ministries to streamline processes.

Tension arose between the Commission and the ALC over the delegation of non-farm use decisions from the ALC to the BCOGC. Interviewees had mixed views on whether the delegation agreement was a success for regulatory independence. Further, concern arose over the independence of the Commission with the Energy and Mines Statutes Amendment Act instating the Deputy Minister of Energy and Mines as the Chair of the Commission's Board of Directors. During this time, the Commission engaged extensively with First Nations groups and the Crown's duty to consult. In 2004, the B.C. Supreme Court emphasized the BCOGC's lack of judicial independence in reaffirming its fiduciary duty toward Indigenous Peoples and its duty to consult. Through the mid-2000s, the province's resource industry continued to grow, and in 2004, the OGRIL was launched to improve the BCOGC and the regulatory framework to keep up with the sector's growth. This initiative set the stage for further legislative reform and enhancement of the BCOGC in 2008.

69. Ministry of Energy, Mines and Petroleum Resources, Oil and Gas Policy Branch. (2005). *Oil and Regulatory Improvement Initiative: Discussion Paper*, at 1. Retrieved from <https://www.deslibris.ca/ID/204112>

70. Ministry of Energy, Mines and Petroleum Resources, Oil and Gas Policy Branch, *ibid* at 1.



BALANCING RELATIONSHIPS (2008 - PRESENT/FUTURE)

Interviewees highlighted the late 2000s and the continuing growth of the resource industry and extraction technologies (the “shale boom”) as critical context in the evolution of the BCOGC. In 2008, the government highlighted how natural gas production in the province had increased by 40 percent in the previous ten years, the significant resource reserves and the growing industry innovation and investment.⁷¹ Further, Braul (2011) noted that, from 2006 to 2008, Crown rights purchased in the Horn River Basin in the province’s northeast grew from \$126M to \$1.1B.⁷² Lastly, Graham highlights the growth in total land and petroleum and natural gas rights sales in northeast B.C. from 2005 to 2008 and the steady increase of shale gas production from the late 2000s onwards.⁷³

To keep up with the growth of the industry and changing technological and resource context, the government introduced the *Oil and Gas Activities Act (OGAA)* in 2008. The legislation was a product of the previous OGRII earlier in the 2000s, involving extensive consultation with stakeholders.⁷⁴

In a press release announcing the legislation, Minister of Energy, Mines and Petroleum Resources Richard Neufeld highlighted the changes for industry:

“With record-setting land rights sales and strong interest in developing the province’s emerging gas plays, this statute sets the structure for success. This new innovation-ready legislation will support growth in a way that safeguards the environment and demonstrates the Province’s stewardship of our energy resources.”⁷⁵

OGAA attempted to simplify, consolidate, and modernize the oil and gas regulatory framework that existed under many acts and regulations. OGAA repealed the *Oil and Gas Commission Act*, the *Pipeline Act*, and the regulatory provisions of *Petroleum and Natural Gas Act*, replicating their key organization and regulatory provisions within the new legislation.

71. Ministry of Energy, Mines and Petroleum Resources. (2008, Oct. 8). *Oil and gas week highlights industry successes* [News release]. Retrieved from https://archive.news.gov.bc.ca/releases/news_releases_2005-2009/2008EMPR0058-001523-Attachment1.htm

72. Braul, W. (2011). The Changing Regulatory Scheme in Northeast British Columbia. *Alberta Law Review*, 49(2), at 370.

73. Graham, N. (2017). State-Capital Nexus and the Making of BC Shale and Liquefied Natural Gas. *BC Studies*, 194, at 19.

74. Energy and Mines Ministers’ Conference. (2013). *Responsible Shale Development: Enhancing the Knowledge Base on Shale Oil and Gas in Canada*, at 26. Retrieved from https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/www/pdf/publications/emmc/Shale_Resources_e.pdf

75. Ministry of Energy, Mines and Petroleum Resources. (2008, Apr. 8). *New oil and gas legislation enhances stewardship* [News release]. Retrieved from https://archive.news.gov.bc.ca/releases/news_releases_2005-2009/2008EMPR0026-000496.htm



Despite the BCOGC originating only a decade earlier, the province's regulatory framework for oil and gas activities was actually much older and did not reflect recent changes to industry. As Stikeman Elliott noted:

"Before the implementation of the OGAA, the regulatory framework governing oil and gas activities was over 40 years old. Since then, oil and gas activities have expanded, new technologies have developed and expectations relating to stakeholder input and environmental responsibility have evolved. As a result, the OGAA attempts to address these changes by balancing economic goals with environmental and socially responsible development."⁷⁶

It is worth emphasizing a few of the changes made by the Act related to the BCOGC and environmental regulation. Firstly, the Act enhanced the Commission's regulatory powers. The Act supplemented the Commission's previous "general authority" to pass regulations by adding more powers on specific matters. The BCOGC now had regulation-making powers related to notification and consultation, operator information and record, security, levies and penalty charges, and technical aspects of exploration and production.⁷⁷

Braul observed that the ability of the regulator to enact regulations was consistent with other energy regulators in Canada, including the ERCB, and like the ERCB, the BCOGC did not require cabinet approval to enact these regulations. The Commission was given enhanced enforcement and compliance powers, including the authority to determine when contravention of its legislation or regulations has occurred. The BCOGC was now able to conduct inspections, to audit, and to impose monetary penalties. The OGAA also established expanded consultation and notification requirements.⁷⁸

While cabinet still retained significant powers to enact regulations, the OGAA turned the BCOGC from being a policy-taker into more of a policy-maker. As Braul noted, "the OGAA affirms the government's intention to position the OGC as a super agency, especially given the host of new regulation-making and enforcement powers."⁷⁹

Additionally, OGAA established a new appeal and review process. "Eligible persons" may request review of a decision, which is brought to a "review official" (a senior BCOGC official). The official can then "confirm, vary or rescind the determination." Further, decisions can also be appealed to the then-newly established Oil and Gas Appeal Tribunal.

76. Stikeman Elliott. (2010). British Columbia's oil and gas activities act. *Stikeman Elliott*. Retrieved from <https://www.stikeman.com/en-ca/kh/canadian-energy-law/british-columbia-oil-and-gas-activities-act>

77. Braul, *supra* note 72 at 373.

78. Stikeman Elliott, *supra* note 76.

79. Braul, *supra* note 72 at 395.



The Tribunal, established under section 19 of OGAA, is a quasi-judicial tribunal established to hear appeals on BCOGC decisions. The Tribunal is independent in a few senses: “it is not part of the Ministry that oversees oil and gas approvals or that regulates that industry, nor is it a part of the Oil and Gas Commission.”⁸⁰ Further, the Tribunal is “committed to providing a fair, impartial and independent appeal process.”⁸¹ Interviewees confirmed the independence of the Tribunal, describing the relationship between the Tribunal and the Commission as “very formal” and interactions as “structured.”

Lastly, the OGAA and the new *Environmental Protection and Management Regulation (EPMR)*; a subsequent regulation under the legislation adopted by cabinet in 2010) introduced new environmental standards for oil and gas activities. In the late 2000s, there remained significant public concern and criticism over fracking of shale formations⁸² and the harm it posed to the environment through the use of ground and surface water, wastewater treatment and uncontrolled contamination.⁸³

Braul noted that fracking had been addressed under previous legislation and was compiled in regulations under OGAA. However, further fracking rules were put in place to address environmental concerns. In particular, the Commission now had to consider impacts on water, wildlife and wildlife habitat, and cultural heritage resources when making determinations on permit applications and formulating conditions for oil and gas activities.⁸⁴ It regulated the actions of “persons carrying out an oil and gas activity” and the steps they must undertake (or not undertake) to engage in environmental protection and management.⁸⁵ Under the EPMR, the BCOGC has statutory authority “for the management and protection of environmental values.”⁸⁶

In 2010, many of OGAA’s provisions were enacted, including the Oil and Gas Appeal Tribunal. This new legislation has shaped the modern perception that the BCOGC is “considered to have a sufficient measure of decision-making authority to warrant being called arm’s length or ‘independent.’”⁸⁷ The BCOGC is said to be the model on which the AER’s 2012 legislation REDA was based.⁸⁸

80. Oil and Gas Appeal Tribunal. (n.d.). *About the Tribunal and the Appeal Process*, at 1. Retrieved from <http://www.ogat.gov.bc.ca/about/about.pdf>

81. Oil and Gas Appeal Tribunal, *ibid*, at 1.

82. Put simply, fracking is a technique to recover oil and gas from shale rock. It is “the process of drilling down into the earth before a high-pressure water mixture is directed at the rock to release the gas inside.” Source: BBC News. (2018, Oct. 15). What is fracking and why is it controversial. *BBC News*. Retrieved from <https://www.bbc.com/news/uk-14432401>

83. Braul, *supra* note 72 at 374.

84. Stikeman Elliott, *supra* note 76.

85. *Environmental Protection and Management Regulation*, B.C. Reg 200/2010, O.C. 435/2010. Retrieved from https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/200_2010

86. BC Oil and Gas Commission. (2018). *Environmental Protection and Management Guideline*, at 10. Retrieved from <https://www.bcogc.ca/files/operations-documentation/Environmental-Management/epmg-december-21-release-v27-2018.pdf>

87. Bruno, G. (2015). Section 67 of the Responsible Energy Development Act: Seeking a Balance Between Independence and Accountability. *Alberta Law Review*, 52(4), at 857.

88. Bruno, *ibid* at 857.



From 2003 to 2013, more than 10,000 oil and gas wells were drilled in northeastern B.C.⁸⁹ However, this came with concerns. Despite the modern legislation there remained apprehension over fracking in the province, and into the 2010s, concerns over the adequacy of the province's (and BCOGC's) environmental regulation of this technology remained.⁹⁰ In particular, OGAA did not address issues related to the handling of fracking fluids, access to information policies, and the environmental impacts of coalbed methane development.^{91,92} Additionally, concern was raised over the ability for operators to receive exemptions from standards if there was no "material adverse effect."⁹³

In 2011, the government and BCOGC committed to enhancing fracking regulation, as well as studying the health effects of fracking, with further iterative changes to regulations to be made throughout the 2010s.⁹⁴

However, environmental advocates have continued to express concern over the Commission's environmental enforcement and regulations through the 2010s.⁹⁵

In examining the regulatory development for fracking in British Columbia and comparing it with other jurisdictions, Millar (2018) noted that the province has a limited regulatory framework for hydraulic fracking despite "a long history of environmental mobilization . . . strong public support for environmental regulation . . . and the provincial government's ongoing commitment to climate policy . . ."⁹⁶ Notably, she commented that the Commission's regulators "were insulated from environmental advocates and electoral politics."⁹⁷ Thus, salient narratives around scientific uncertainty and public opposition to fracking were lacking and the regulator engaged in more "technical learning."⁹⁸ This came at a time when the BCOGC was gaining more flexibility through the *OGAA* to regulate independently without cabinet or legislation.

89. BC Oil and Gas Commission. (2013). Number of wells drilled in NEBC from 2002 to 2013 (Report No. OGCR9960A_9); Yetskalo, V. (2014). *British Columbia's Approach to Drill Cuttings Disposal: Is Legislation Fit for the Purpose* [Master's Thesis: Royal Roads University]. ProQuest LLC.

90. Parfitt, B. (2011). *Fracking Up Our Water, Hydro Power and Climate: BC's Reckless Pursuit of Shale Gas*. Canadian Centre for Policy Alternatives. Retrieved from https://www.policyalternatives.ca/sites/default/files/uploads/publications/BC%20Office/2011/11/CCPA-BC_Fracking_Up_SUMMARY.pdf

91. Brault, *supra* note 72 at 376.

92. Bender, Q. (2008, Apr. 30). Pembina Institute pans Shell's plans. *CNW Group Ltd.*

93. Brault, *supra* note 72 at 376.

94. Brault, *supra* note 72 at 377.

95. Werring J. (2015, Nov. 25). Investigation by the David Suzuki Foundation into issues of potential environmental concern related to oil and gas development in the Montney Shale Play in Northeastern British Columbia, August 14–28, 2015. *David Suzuki Foundation*. Retrieved from <https://david-suzuki.org/wp-content/uploads/2016/02/investigation-david-suzuki-foundation-issues-potential-environmental-concern-oil-gas-development-montney-shale-play-northeastern-bc.pdf>; *David Suzuki Foundation*. (2018). Submission to the British Columbia Oil and Gas Commission on their Proposed Approach to Regulating Methane Emissions from B.C.'s Oil and Gas Sector. *David Suzuki Foundation*. Retrieved from <https://david-suzuki.org/science-learning-centre-article/submission-to-the-british-columbia-oil-and-gas-commission-on-their-proposed-approach-to-regulating-methane-emissions-from-b-c-s-oil-and-gas-sector/>; Dagg, Campbell and Simieritsch, *supra* note 55; Pembina Institute. (2018, Dec. 19). *Photos from B.C.'s leaking methane gas wells confirm need for stronger regulations* [News release]. Retrieved from <https://www.pembina.org/media-release/methane-leaks-images>

96. Millar, H. (2020). Problem Uncertainty, Institutional Insularity, and Modes of Learning in Canadian Provincial Hydraulic Fracturing Regulation. *Review of Policy Research*, 37(6) at 766.

97. Millar, *ibid* at 787.

98. Millar, *ibid* at 767.



Additionally, as the BCOGC has become a more established regulator in a growing resource industry, more concern was raised over the extent of “regulatory capture” of the Commission by industry. These concerns have been cited primarily by environmental advocates.⁹⁹ Critics have raised issues regarding the Commission’s financial independence¹⁰⁰ and its close relationships with both the government and CAPP that had existed right from the Commission’s inception, including with its initial appointments.¹⁰¹ Into the 2010s, reports further expressed concern over the Commission and its dismissal of its environmental mandate to continue to use provincial land for resource development. This has included concerns over the Commission’s lack of enforcement over dam construction which violated water and environmental laws and regulations; access to information over well leaks; and safeguarding the boreal caribou population in the province.

Researchers have also examined how the Commission had become a target of fossil fuel industry lobbying, including lobbying by a former Commissioner on behalf of CAPP.¹⁰² Parfitt, an environmental policy analyst and prominent critic of the Commission, concluded in his 2019 report that “the OGC acts as an industry promoter more often than as a regulator or as a protector of the public interest.”¹⁰³

In the late 2000s to 2010s, tension continued over oil and gas development on agricultural land. Changes made in the early 2000s, including the delegation of the ALC’s powers to the BCOGC and creating greater regional representation at the ALC, created concern over the adequacy of agricultural lands protection.¹⁰⁴ For instance, a 2010 Auditor General Report concluded that the ALC did not adequately protect agricultural lands but also noted that the ALC was troubled “about the long-term cumulative impacts of oil and gas development on the ALR.”¹⁰⁵ Despite these concerns, the ALC has continued to sign delegation agreements with the BCOGC, reaffirming the Commission’s role in granting approval over non-farm use activities. The most recent delegation agreement was made in December 2017.¹⁰⁶

99. Parfitt, B. (2019). Captured: British Columbia’s Oil and Gas Commission and the Case for Reform. *Canadian Centre for Policy Alternatives*. Retrieved from https://www.policyalternatives.ca/sites/default/files/uploads/publications/BC%200ffice/2019/08/ccpa-bc_cmp_Captured_final.pdf

100. Rees, S. (2010). *Regulatory Capture* [Blog post]. Retrieved from <https://stephenrees.blog/2010/09/13/regulatory-capture/>

101. Parfitt, *supra* note 99 at 12.

102. Graham, N., Daub, S., and Carroll, B. (2017). Mapping Political Influence: Political donations and lobbying by the fossil fuel industry in BC. *Canadian Centre for Policy Alternatives*, at 6. Retrieved from https://www.policyalternatives.ca/sites/default/files/uploads/publications/BC%200ffice/2017/03/ccpa-bc_mapping_influence_final.pdf; <https://read.aupress.ca/read/regime-of-obstruction/section/c358f3b2-6caa-4f21-a893-3826e6ed9923>

103. Parfitt, *supra* note 99 at 25.

104. West Coast Environmental Law. (2019). *Bill 15 – Important protection for agricultural land or an assault on farmers*. Retrieved from <https://www.wcel.org/blog/bill-15-important-protection-agricultural-land-or-assault-farmers>

105. Office of the Auditor General of British Columbia. (2010). *Audit of the Agricultural Land Commission*, at 13. Retrieved from https://www.bcauditor.com/sites/default/files/publications/2010/report_5/report/OAGBC_AgriculturalLandCommission_Final.pdf

106. ALC and BC Oil and Gas Commission. (2017). *The OGC ALC Delegation Agreement*. Retrieved from <https://www.bco.gc.ca/files/application-manuals/Oil-and-Gas-Activity-Application-Manual/Supporting-Documents/alcogcdelegationagreement2017update.pdf>



In 2018, the Minister of Agriculture's "Advisory Committee for Revitalizing the ALR and the ALC" released its final report.¹⁰⁷ The report highlighted the impacts of oil and gas activities on the ALR noting that "the development of the energy sector has exceeded the capacity of the current regulatory environment to protect farmland."¹⁰⁸ The Committee recommended establishing a task force to develop a strategy to address the imbalance between resource development and agriculture in the province's northeast region.¹⁰⁹ Further to this, the report also questioned "whether the delegation agreement between the ALC and the BC Oil and Gas Commission is the correct approach or if there is an alternative approach that would better protect agricultural interests and restore confidence in the regulator system over the long term."¹¹⁰

To address the persistent tension and following the Committee's recommendation, the Deputy Minister Oil and Gas Task Force was created, comprised of deputy ministers from the Ministries of Agriculture and Energy, Mines and Petroleum Resources, the CEO of the ALC, and the Commissioner and CEO of the BCOGC.¹¹¹

At the time of writing this case study, the Task Force has not published its report(s). Further, in March 2019, the government passed the Agriculture Land Commission Amendment Act 2019 to "strengthen the independence" of the ALC and better serve its mandate of protecting the ALR.¹¹² This has included changes to its governance model, giving more compliance and environment capacity and tools to the ALR and giving the ALC Chair more flexibility to organize decision-making panels.¹¹³

However, until the release of the Task Force report, its strategy and/or any conclusions on the ALC-BCOGC Delegation Agreement model, our interviewees concluded that tension will likely remain between the two independent agencies and the trade-offs between agricultural land protection and resource development.

Throughout the period from the early 2010s to present, issues relating to the adequacy of BCOGC's consultations and agreements with First Nations have surfaced. In the early 2010s, several Consultation Process Agreements (CPAs) with First Nations expired.

107. BC Minister of Agriculture's Advisory Committee for Revitalizing the Agricultural Land Reserve and the Agricultural Land Commission. (2018). *Final Committee Report to the Minister of Agriculture: Recommendations for Revitalization*, at 2-3. Retrieved from https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/agriculture-and-seafood/agricultural-land-and-environment/agriculture-land-reserve/final-committee-report-to-the-minister-of-agriculture-recommendations-for-revitalization-december-4-2018_optimized.pdf

108. BC Minister of Agriculture's Advisory Committee for Revitalizing the Agricultural Land Reserve and the Agricultural Land Commission, *ibid* at 2-3.

109. Government of British Columbia. (n.d.). *Deputy Minister Oil and Gas Task Force – BC's Northeast ALR*. Retrieved from <https://www2.gov.bc.ca/gov/content/industry/agriculture-seafood/agricultural-land-and-environment/agricultural-land-reserve/deputy-minister-oil-and-gas-task-force>

110. BC Minister of Agriculture's Advisory Committee for Revitalizing the Agricultural Land Reserve and the Agricultural Land Commission, *supra* note 107 at 98.

111. Government of British Columbia, *supra* note 109.

112. BC Ministry of Agriculture, Food and Fisheries. (2019, Mar. 7). *New legislation will strengthen independence of Agricultural Land Commission* [News release]. Retrieved from <https://news.gov.bc.ca/releases/2019AGRI0020-000336>

113. BC Ministry of Agriculture, Food and Fisheries, *ibid*.



These had been part of a response to new case law in 2005/06 concerning the Crown's duty to consult. Upon their expiration, First Nations communities expressed concerns over the CPAs. These included the time provided for communities to assess development proposals and to determine their impact and the Commission's "lack of responsiveness to consultations" given the high application approval rate.¹¹⁴

Issues surrounding the effectiveness of resource accommodation and consultation with First Nations are observed in Garvie and Shaw's¹¹⁵ 2014 article. Some of the challenges they outlined included the following:

- The permit-by-permit consultation process and the fact that submission of a permit application is often the first time that the BCOGC learns about a proponent's plans. By this point, the industry proponent had already invested large sums of money, which may increase pressure on the Commission to issue the permit.
- The short timelines for First Nations to respond to permit applications and the inflexibility of government to address these "restrictive time frames."¹¹⁶
- The lack of information, lack of data, and capacity within First Nations to adequately

assess applications. Coupled with overlapping ministries reaching out to a community over the same project, these factors limit a First Nations community's ability to identify impacts to their rights and make an informed decision.¹¹⁷

- The narrow focus of government decision-makers on the legality of consultation and the lack of transparency during the decision-making process. This means that First Nations land managers do not know whether their concerns have actually been considered.¹¹⁸

As a result, Garvie and Shaw concluded:

"The lack of transparency during the decision-making process, in combination with First Nations lack of success influencing permit outcomes, has left all interviewed lands managers questioning the legitimacy of the consultation process. One lands manager voiced this frustration: 'Our decisions weren't being figured into any of the development decisions. I know that. We would say something and they would just come back with an excuse why we're wrong, or why they went ahead with the permit anyways. So a lot of their work has been justifying decisions that they made regarding our rights that we disagreed with.'"¹¹⁹

114. Braul, *supra* note 72 at 388.

115. Garvie, K. H., and Shaw, K. (2014). Oil and Gas Consultation and Shale Gas Development in British Columbia. BC Studies, 184, at 79. Retrieved from <https://ojs.library.ubc.ca/index.php/bcstudies/article/view/184888/185330>

116. Garvie and Shaw, *ibid* at 85.

117. The authors observed that "several other Treaty 8 First Nations have a single staff person who handles all oil and gas applications." Source: Garvie and Shaw, *ibid* at 86 and 89.

118. Garvie and Shaw, *ibid* at 88-89.

119. Garvie and Shaw, *ibid* at 89.



Frustration over adequate consultation is further demonstrated in 2014 when the provincial government announced the fast-tracking of sweet gas processing plants, exempting these applications from environmental assessment and First Nations consultations. First Nations communities, led by Chief Sharleen Gale of the Fort Nelson First Nation (FNFN), signed a declaration opposing the decision. Further, FNFN announced a ban on shale gas development in their territory.¹²⁰ The government offered a swift apology and revoked the decision.¹²¹

By the early 2010s, First Nations increasingly considered litigation as a strategic option to achieve enhanced consultation and accommodation. This was exemplified in 2017 with the case *The Fort Nelson First Nation v. B.C. Oil and Gas Commission*.¹²² The case highlighted concerns over the BCOGC's consultation with FNFN over a pipeline and storage facility. FNFN brought many objections to the projects, including the adverse effect the activities would have on the territory's caribou population. However, because the Commission believed that the activities would not have a material impact on caribou, it refused to discuss the issue further.¹²³

The Supreme Court of British Columbia ruled against the Commission, quashing the previously approved project. The Court ruled that the BCOGC "acted unreasonably in attempting to limit the consultation in the manner it did" and "failed to meet its duty to engage in a meaningful consultation . . ."¹²⁴

With increasing controversy around environmental and Indigenous issues, concerns were expressed over eroding public confidence in the Commission.¹²⁵ In 2018, Commissioner Paul Jeakins addressed these concerns, noting that going forward, the Commission "is going to be a lot more transparent."¹²⁶ Further, Jeakins stated that the Commission took the 2017 Supreme Court decision "very seriously" and had hired an independent consultant to review the Commission's consultation process and identify opportunities for improvements.

Interestingly, despite public and stakeholder perception issues, some of our interviewees spoke highly of the BCOGC.

120. Murray, M. (2009). *Re-scaling Governance: First Nations and the Challenge of Shale Gas Development in British Columbia* [Master's Thesis, University of Victoria]. University of Victoria. Retrieved from https://dspace.library.uvic.ca/bitstream/handle/1828/6664/Murray_Mathew_MA_2015.pdf?sequence=1&isAllowed=y

121. Garvie and Shaw, *supra* note 115 at 73.

122. *The Fort Nelson First Nation v. BC Oil and Gas Commission*, 2017 BCSC 2500. Retrieved from <https://www.canlii.org/en/bc/bcsc/doc/2017/2017bcsc2500/2017bcsc2500.html>

123. Blake, Cassels & Graydon LLP. (2018). B.C. Court Decision Provides Example of the State of Indigenous Law in Canada. Blake, Cassels & Graydon LLP. Retrieved from <https://www.blakes.com/insights/bulletins/2018/bc-court-decision-provides-example-of-the-state-of>

124. *The Fort Nelson First Nation v. BC Oil and Gas Commission*, *supra* note 115 at paras. 76 and 79.

125. Bennett, N. (2018, Jan. 24). Critics blast BC Oil and Gas Commission performance. *JuneWarren-Nickle's Energy Group*. Retrieved from <https://www.jwnenergy.com/article/2018/1/24/critics-blast-bc-oil-and-gas-commission-performanc/>

126. Bennett, *ibid*.



They were positive regarding the arm's length nature of the Commission and how it has been "significant" for public confidence in regulation of the province's resources:

"The beauty of having a regulator in British Columbia that is not being seen as having undue political influence on it [. . .]. It provides the general public with a go-to regulator that makes decisions based on good science [. . .] The proponents know what the end game is. It [the Commission] provides certainty."

Some interviewees were also particularly assured or hopeful over the Commission's performance on Indigenous consultation compared to energy regulators in other jurisdictions, including at the federal level and other agencies in B.C. Interviewees highlighted some recent actions taken by the Commission, including expansion of programs to promote Indigenous cultural awareness amongst its staff and the establishment of a strategic relations group which focuses on "enhancing relationships and partnerships with [First] Nations".¹²⁷ This is further exemplified in research¹²⁸ and with Stratos' jurisdiction scan, which notes the extent of Indigenous policies at the Commission, particularly compared to other energy regulators.¹²⁹

Moving forward, interviewees emphasized the importance of the relationship between the BCOGC and First Nations. Particularly, interviewees emphasized the Commission's role in the provincial government's commitments "to implementing principled, pragmatic, and organized approaches informed by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the Truth and Reconciliation Commission's (TRC) Calls to Action, and the Supreme Court of Canada Tsilhqot'in decision and other established law."¹³⁰ In November 2019, the provincial government passed the *Declaration on the Rights of Indigenous Peoples Act*, which recognizes the UN declaration as the framework for reconciliation.¹³¹

127. BC Oil and Gas Commission. (n.d.). *Commission-Indigenous Relations*. Retrieved from <https://www.bcogc.ca/how-we-regulate/engage-with-indigenous-communities/commission-indigenous-relations/>

128. Anderson, A. (2015). *Western Canadian Approaches to Aboriginal Consultation: A Comparative Analysis* [Master's Thesis, University of Calgary]. University of Calgary. Retrieved from https://prism.ucalgary.ca/bitstream/handle/1880/51655/Anderson,%20Adam_Redacted.pdf;jsessionid=5553B6E-AE6C62C839B4AA6E6A7AC461D?sequence=1

129. Stratos Inc., *supra* note 27.

130. BC Oil and Gas Commission, *supra* note 127.

131. BC Oil and Gas Commission, *ibid.*



In summary, the late 2000s were marked by a continued growth of the B.C. oil and gas industry (specifically from unconventional sources) and subsequent enhancement of the BCOGC's remit and authority. *OGAA* consolidated and modernized the oil and gas regulatory framework, made the Commission more of a policymaker (rather than only a policy-taker), established a new tribunal and appeals process, and introduced new environmental regulations. This legislation enhanced the independence of the Commission but did not resolve familiar areas of tension. These included public concerns over fracking and adequate environmental regulation of the technology despite *OGAA*, and industry regulatory capture at the Commission, as evidenced through a series of reports in the 2010s. The Commission's role in regulating non-farm use activities on the province's ALR put the regulator at the centre of debates about the trade-offs between resource development and farmland protections.

Tension may remain until the release of the Deputy Minister Oil and Gas Task Force report(s) in the near future. Additionally, frustrations have grown over the government's and the Commission's duty to consult First Nations, evidenced by dramatic events in 2014 and litigation in 2017. These continued tensions have led to concerns over the BCOGC's decision-making effectiveness and perceived declining public confidence in the regulator. However, some interviewees did not share this perspective, indicating that the BCOGC's independence and performance are generally strong.



CONCLUSION AND KEY TAKEAWAYS

This case study has examined the short, but eventful history of the BCOGC. Established in 1998, the BCOGC grew out of a desire by both government and industry to cultivate the province's oil and gas sector and to address its inefficient regulatory framework previously handled by various governmental ministries. Having been transferred authority to regulate oil and gas and given specific powers under several pieces of legislation, the BCOGC's record on independence was mixed: while it had financial independence, the government retained control over the passing of all general regulation. Additionally, the Commission was not a quasi-judicial tribunal, lacking traits of judicial independence. Legislative amendments in 2002, while enhancing powers of the Commission to regulate, placed the BCOGC in closer proximity to government by instating the Deputy Minister of Energy and Mines as the BCOGC's Board Chair. In the early 2000s, the Commission extensively engaged in First Nations consultation and assumed responsibility from the ALC for regulating oil and gas development on agricultural land. Tensions in both these areas are on-going challenges for the BCOGC.

In the mid-2000s, the resource industry continued to grow. The government, in pursuing greater efficiency, wished to further enhance the resource regulatory framework. This led to OGR11 which led to the OGAA. This legislation modernized the regulatory framework, established a new appeals process, introduced new environmental regulation, and moved the BCOGC closer to being more of a policymaker rather than simply a policy-taker. But multiple tensions persisted during this time. These included concerns over perceptions of regulatory capture; insufficient environmental protection; the delegation agreement with the ALC over the ALR and the adequacy of farmland protection at the expense of resource development; its duty to consult with First Nations; and the effectiveness of resource decision-making. There are concerns over declining public confidence in the Commission and its decision-making. However, despite these events, some of our interviewees were generally optimistic regarding the BCOGC's performance and the stability and certainty it provided to communities and industry.



The following are key takeaways:

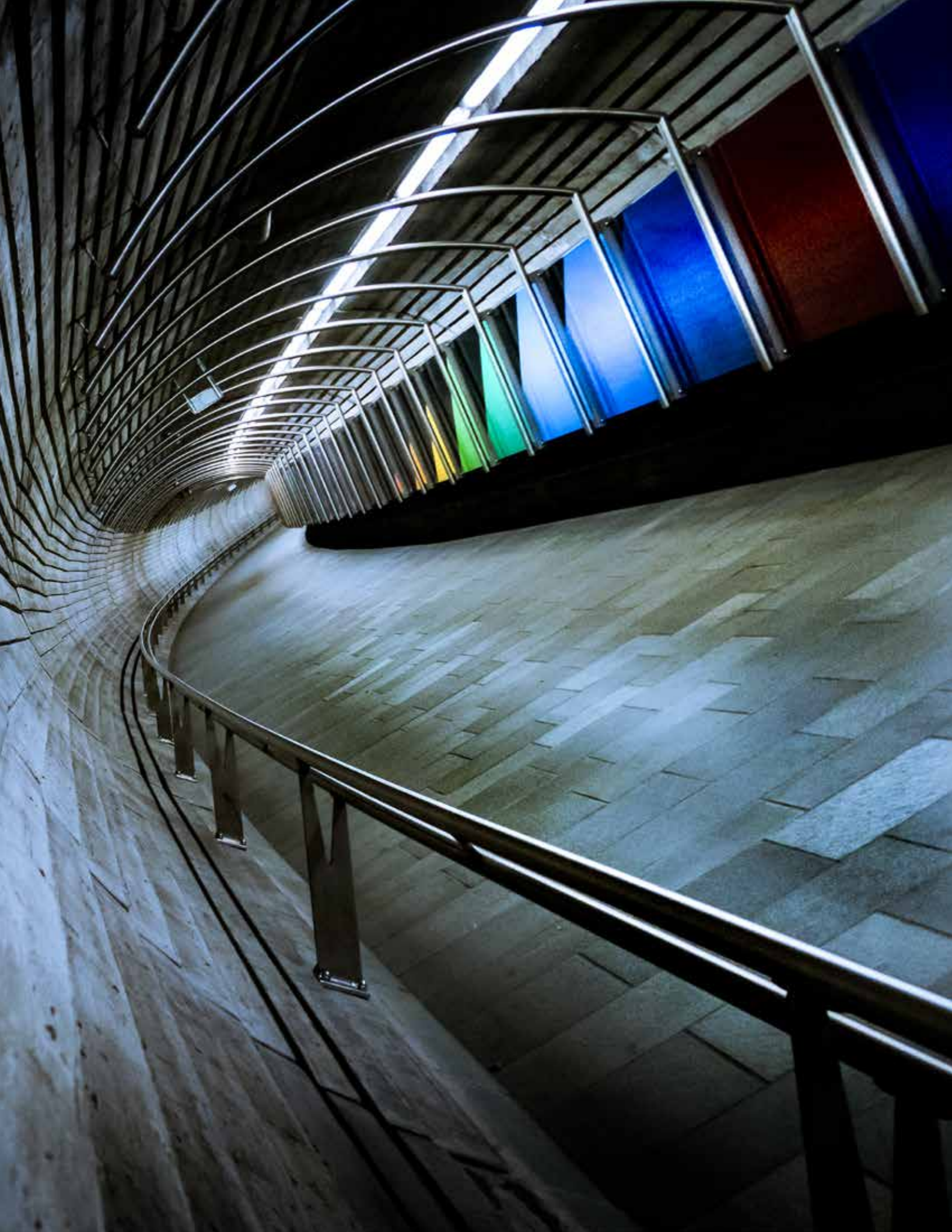
1) *The BCOGC is structurally and culturally distinct from other Canadian energy regulators yet contextually, faces similar issues:* While the other regulators may have different trajectories, the BCOGC is unique, given its much later inception (1998), its rejection of the tribunal model for resource regulation, and the emphasis on Indigenous consultation as rationale for its establishment. Yet, like other energy regulators, the Commission has had to deal with similar issues of growing complexities around Indigenous consultation, environmental protection, and the political character of decisions around resource development. Like other regulators, the BCOGC also faces some concerns over a loss of public confidence in the Commission.

2) *The BCOGC exemplifies distinctions between different definitions of regulatory independence:* The BCOGC has financial independence, yet its Board lacks “security of tenure.” Legislation has given the BCOGC greater operational independence to pursue its mandate, but its Chair is the Deputy Minister of Energy and Mines. Thus, questions arise over how independent it is in reality. The BCOGC illustrates that regulatory independence is not binary. Rather, there are many metrics by which to evaluate and perceive a regulator’s independence, and regulators may have a mixed record across these metrics.

3) *There are theoretical/perceived “regulatory capture” concerns:* The initial intention behind the inception of a single-window regulator was to facilitate consensus with the various stakeholders, including environmental groups and Indigenous communities. Despite this (see takeaway one), several traits of the BCOGC now point to potential “regulatory capture” by industry whereby industry players are given a more sympathetic ear over other stakeholders. These include the BCOGC’s expert capacity, executive leadership, financial independence, initial mandate, conflicting remits, and the resource development push by the provincial Liberal government during their tenure from 2001 to 2017. Consensus and collaboration were priorities in the Commission’s inception as a new single-window regulator.

4) *The success of the BCOGC depends on the success of its various relationships:* There are several complex and rapidly evolving relationships between the Commission and those involved in provincial resource development. These include First Nations, government ministries, industry actors, municipalities, and environmental advocates. Research seems to suggest a disproportionate emphasis on some stakeholders, sometimes at the expense of other stakeholders. There is an argument to be made for a more nuanced balance. The BCOGC’s ability to maintain, navigate, and balance these relationships will likely be crucial to its future perception as a non-biased, independent, and effective regulator.







APPENDIX 1: LIST OF PROJECT INTERVIEWEES

First Name	Last Name	Present/Past Affiliation(s)
Lori	Ackerman	City of Fort St. John
Paul	Allen	Nova Scotia Utility and Review Board
Kerrie	Blaise	Canadian Environmental Law Association
Justice David	Brown	Court of Appeal for Ontario; and former Stikeman Elliott LLP
Bruce	Cameron	Envigour Policy Consulting Inc.; and former Nova Scotia Department of Energy
Jason	Cameron	Canadian Nuclear Safety Commission
Dave	Collyer	Former Canadian Association of Petroleum Producers
Lisa	DeMarco	DeMarco Allan LLP
Richard	Dunn	Capilano Policy Group; and former Encana Corporation.
Judith	Ferguson	Nova Scotia Power
Ginny	Flood	Clean Resource Innovation Network; former Suncor Energy Inc.; and former Natural Resources Canada
Kim	Grout	Provincial Agricultural Land Commission
Peter	Gurnham	Nova Scotia Utility and Review Board
Chris	Henderson	Lumos Clean Energy Advisors
Paul	Jeakins	BC Oil and Gas Commission
Gordon	Kaiser	Energy Arbitration LLP; and former Ontario Energy Board
Brenda	Kenny	Alberta Innovates; former National Energy Board Modernization Panel; former Canadian Energy Pipeline Association; and former National Energy Board
Gordon	Lambert	GRL Collaboration for Sustainability Inc.; former Alberta Energy Regulator; and former Suncor Energy Inc.
Dan	McFadyen	University of Calgary School of Public Policy; former Alberta Energy Resources Conservation Board; and former Alberta Energy
Claire	McKinnon	Alberta Energy Regulator; and former National Energy Board
David	Miller	Nova Scotia Department of Energy
Ken	Paulson	BC Oil and Gas Commission
Bryne	Purchase	Queen's University School of Policy Studies; and former Ontario Ministry of Energy, Science and Technology.
Alan	Reid	Cenovus Energy Inc.
Judith	Snider	Former Federal Court of Canada; and former National Energy Board
George	Vegh	McCarthy Tétrault; Canada Energy Regulator; and former Ontario Energy Board
Ed	Whittingham	Former Pembina Institute



APPENDIX 2: INTERVIEW GUIDE

The interviews conducted for this study were semi-structured, which means that the interview guide provided a general structure for each conversation, but there was opportunity to expand beyond the guide in light of interviewee responses.

1. Please briefly describe your current and/or past relationship with [Insert name of Regulator]?
2. How would you characterize or define regulatory “independence” as a general concept?
3. How, in your view, has the [insert name of Regulator] and its surrounding decision-making systems (from policy makers to courts) evolved with respect to independence since the mid-20st century or over the period that you have observed?
4. With respect to independence, in your view, what were the contextual conditions that shaped the evolution of the [insert name of Regulator] and its associated decision-making systems (i.e., economic, social, political, environmental, etc)?
5. As [insert name of Regulator] has evolved, what can you say about the implications for decision outcomes – e.g., effectiveness, fairness, openness and transparency, certainty, timeliness?
6. What can you say about how this evolution may have influenced both public and investor confidence in the process?
7. Do you have any observations about how you see independence evolving in the coming decade and how those processes may affect both public and investor confidence?



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