

**Canadian Institute of Resources Law
Institut canadien du droit des ressources**

**Adopting a Single Provincial Regulator
for Electricity Generation Projects in Alberta**

Indra L. Maharaj

CIRL Occasional Paper #68

February 6, 2019

MFH 3353, Faculty of Law, University of Calgary, Calgary, Alberta, Canada T2N 1N4
Tel: (403) 220-3200 Fax: (403) 282-6182 E-mail: cirl@ucalgary.ca Web: www.cirl.ca

The Canadian Institute of Resources Law encourages the availability, dissemination and exchange of public information. You may copy, distribute, display, download and otherwise freely deal with this work on the following conditions:

- (1) You must acknowledge the source of this work,
- (2) You may not modify this work, and
- (3) You must not make commercial use of this work without the prior written permission of the Institute.

Copyright © 2019

Canadian Institute of Resources Law

The Canadian Institute of Resources Law was incorporated in 1979 as a registered charity with a mandate to examine the legal aspects of both renewable and non-renewable resources. Its work falls into three interrelated areas: research, education, and publication.

The Institute has engaged in a wide variety of research projects, including studies on oil and gas, mining, forestry, water, electricity, the environment, aboriginal rights, surface rights, and the trade of Canada's natural resources.

The education function of the Institute is pursued by sponsoring conferences and short courses on current issues in resources law, and through teaching in the Faculty of Law at the University of Calgary. The results of Institute research are published as discussion papers and in books.

The Institute is supported by the Alberta Law Foundation, the Government of Canada, and the private sector. The members of the Board of Directors are appointed by the Faculty of Law at the University of Calgary and the President of the University of Calgary.

All enquiries should be addressed to:

The Executive Director
Canadian Institute of Resources Law
Murray Fraser Hall, Room 3353 (MFH 3353)
Faculty of Law
University of Calgary
Calgary, Alberta, Canada T2N 1N4
Telephone: (403) 220-3200
Facsimile: (403) 282-6182
E-mail: cirl@ucalgary.ca
Website: www.cirl.ca

Institut canadien du droit des ressources

L'institut canadien du droit des ressources a été constitué en 1979 comme un organisme de bienfaisance enregistré et a reçu pour mission d'étudier les aspects juridiques des ressources renouvelables et non renouvelables. Son travail porte sur trois domaines étroitement reliés entre eux, soit la recherche, l'enseignement et les publications.

L'institut a entrepris une vaste gamme de projets de recherche, notamment des études portant sur le pétrole et le gaz, l'exploitation des mines, l'exploitation forestière, les eaux, l'électricité, l'environnement, les droits des autochtones, les droits de surface et le commerce des ressources naturelles du Canada.

L'institut remplit ses fonctions éducatives en commanditant des conférences et des cours de courte durée sur des sujets au courant en droit des ressources et par le truchement de l'enseignement à la Faculté de droit de l'Université de Calgary. Les résultats des recherches de l'Institut sont publiés sous forme de documents de discussion et de livres.

L'institut reçoit des subventions de Fondation du droit Alberta, du gouvernement du Canada et du secteur privé. Les membres du conseil d'administration sont nommés par la Faculté de droit de l'Université de Calgary et le recteur de l'Université de Calgary.

Toute demande de renseignement doit être adressée au:

Directeur exécutif
Institut canadien du droit des ressources
Murray Fraser Hall, pièce 3353
Faculté de droit
L'Université de Calgary
Calgary, Alberta, Canada T2N 1N4
Téléphone: (403) 220-3200
Télécopieur: (403) 282-6182
Courriel: cirl@ucalgary.ca
Site Web: www.cirl.ca

TABLE OF CONTENTS

<i>Acknowledgments</i>	<i>vii</i>
<i>Abstract</i>	<i>viii</i>
1.0 INTRODUCTION	1
1.1 Identification of the problem.....	1
1.2 Significance of the problem	2
1.3 Methodology	3
2.0 BASIC PRINCIPLES OF ADMINISTRATIVE LAW	5
2.1 Delegation of Authority to Make Quasi-Judicial Decisions	5
2.2 Principles of Natural Justice	6
2.2.1 The right to be heard (audi alteram partem).....	7
2.2.2 The rule against bias (nemo iudex in causa sua).....	8
2.3 Summary of Basic Principles of Administrative Law.....	9
3.0 EVOLUTION OF THE REGULATORY FRAMEWORK IN ALBERTA	10
3.1 A “Brief History of [Regulatory] Time”.....	10
3.1.1 1995 to 2008 – Unification of Fossil Fuel Resource Development and Gas and Power Utility Regulators.....	12
3.1.2 2008 to 2013 – Separation of Fossil Fuel Project and Utility Regulation.....	12
3.1.3 2013 to Present – A Single Regulator for Energy Developments but not for Power Generation	13
3.2 Impact of the Repeated Reorganization of the Regulatory Framework on Due Process	15
4.0 KEY REGULATORS WITH JURISDICTION OVER POWER GENERATION FACILITY APPROVALS	16
4.1 Alberta Utilities Commission - Public Interest Test	16
4.2 Energy Resources Conservation Board – Public Interest Test.....	16
4.3 Alberta Environment/Alberta Environment and Parks – no public interest test.....	17
4.4 Regulatory Purgatory – Where do power generation projects fit?.....	18
5.0 THE MULTI-BOARD REGULATORY FRAMEWORK AND ITS INTERFACE WITH THE PUBLIC INTEREST TEST	19
5.1 Treatment of the Existence of the Multi-Board Regulatory Framework 2001- 2019	21
5.1.1 Cases between 2001 and 2007 – Alberta Energy Utilities Board	21
5.1.1.1 EPCOR Power Development Corporation and EPCOR Generation Inc. – Rosedale Power Plant Unit 11 (Rd 11), Decision 2001-33, Application No. 990289 (EUB) (May 2001)...	21
5.1.1.2 AES Calgary ULC – 525-MW Natural Gas-Fired Power Plant, Decision 2001-101	23
5.1.1.3 EPCOR Generation Inc. and EPCOR Power Development Corporation – Expansion of Genesse Power Plant, Decision 2001-111	24

5.1.1.4	ECB Enviro North America Inc. – Construct and Operate the Lethbridge Biogas/Cogeneration Plant, Decision 2007-067, August 28, 2007	25
5.1.2	Cases between 2008 and 2017 – Alberta Utilities Commission	25
5.1.2.1	Mustus Energy Ltd. – Construct and Operate a 35-MW Biomass Power Plant, Decision 2009-101, August 5, 2009	26
5.1.2.2	TransCanada Energy Ltd. – Construct and Operate Saddlebrook Power Station, Decision 2010-059, February 3, 2010	26
5.1.2.3	ENMAX Shepard Inc. – Construct and Operate 800-MW Shepard Energy Centre, Decision 2010-493, October 21, 2010	27
5.1.2.4	Maxim Power Corp – H.R. Milner Power Plant Expansion, Decision 2011-337	28
6.1.2.5	ENMAX Bonnybrook Inc. – Construct and Operate 165-MW Bonnybrook Energy Centre, Decision 2011-353, August 26, 2011	30
5.1.2.6	Millar Western Forest Products Ltd. – Biogas Power Plant, Decision 2012-153	30
5.1.2.7	1646658 Alberta Ltd. – Bull Creek Wind Project, Decision 2014-040	31
5.1.2.8	Capital Power Generation Services Inc. – Genesee Generating Station Units 4 and 5, Decision 2014-226, August 12, 2014	31
5.1.2.9	2615991 Canada Ltd. (ATCO Power Canada Ltd.)- 400-MW Heartland Natural Gas Power Plant, Decision 2014-253, September 3, 2014	31
5.1.2.10	Suncor Energy Products Inc. – 80-MW Hand Hills Wind Power Project, Decision 2014-331, December 4, 2014	32
5.1.2.11	E.ON Climate & Renewables Canada Ltd. – Grizzly Bear Creek Wind Power Project, Decision 3329-D01-2016, May 19, 2016	32
5.1.2.12	Vulcan Solar Hybrid Energy Centre GP Inc., Decision 21897-D01-2016	32
5.1.2.13	C&B Alberta Solar Development ULC, Decision 22447-D01-2017, July 4, 2017	33
5.2	Brief Analysis	33
6.0	IMPACT OF ADDITION OF RENEWABLE GENERATION TO ELECTRICITY SUPPLY	34
7.0	SUMMARY	35
7.1	Restatement of the Problem	35
7.2	Solution 1 - Maintain the status quo	36
7.2	Solution 2 - Single window regulatory authority	36
7.4	Solution 3 - Single Regulatory Authority	37
8.0	CONCLUSION	42

Acknowledgements

We would like to thank the Alberta Law Foundation for its generous support in the development of this Occasional Paper. Any errors or omissions belong to the author alone.

ABSTRACT

Since 2013, oil and gas development projects in Alberta have been regulated primarily by the Alberta Energy Regulator (AER). For the most part, electricity transmission and gas distribution utilities are regulated by the Alberta Utilities Commission (AUC). However, power generation projects live in regulatory purgatory - simultaneously regulated by inter alia, the Alberta Utilities Commission, Alberta Environment and Parks, and the Alberta Electric System Operator. There are a multiplicity of regulatory authorities that must align their processes to ensure compliance with the principles of natural justice, apply a public interest test (or not), and conduct substantive factual reviews for the approval of power generation projects in Alberta. This approach is duplicative and challenges the tenets of due process. The CIRL working paper recommends that as in the case of the oil and gas industry, power generation facilities should be regulated by a single agency modeled after the AER that recognizes the unique aspects of the deregulated power generation market, a power generation facility's non-linear environmental footprint, and the power generation facility's interface with regulated electricity transmission assets in Alberta. A single regulator would clarify the project approval process and ensure compliance with the principles of natural justice in a fair and transparent process.

1.0 INTRODUCTION

1.1 Identification of the problem

The current regulatory framework for the approval of power (electricity) generation facilities in Alberta requires the synchronization of multiple regulatory authorities, resulting in the risk of a failure to respect a key principle of natural justice, due process. The Alberta Utilities Commission (“AUC”), and Alberta Environment and Parks (“AEP”), are the main regulators currently involved in the permitting of power generating facilities. The AUC is responsible for permitting the construction of power generation facilities and licencing their operation. The AEP is responsible for the assessment of the environmental impacts of the proposed power generation facility and the issuance of an Industrial Facility Approval. Additionally, Alberta Culture (“AC”) is responsible for providing clearance with respect to the potential impacts of the proposed power generation facility on any known or discovered historical or heritage resources and the Aboriginal Consultation Office (“ACO”) provides direction as to the level and breadth of consultation and accommodation of indigenous peoples that the project proponent must execute, typically on behalf of the Government of Canada. Finally, the Alberta Electric System Operator (“AESO”) is responsible for the connection of electricity generation to the Alberta Integrated Electric System (“AIES”) and the assurance of a reliable supply of electricity throughout the Province of Alberta.

Not only do power generation facilities suffer from a duplicative and complex regulatory framework, the principle regulatory authorities involved have overlapping areas of regulatory oversight. This is exemplified by the overlapping jurisdiction between the AUC and AEP, specifically with respect to the assessment of the environmental impacts from a power generation facility.

Power generation facilities have ended up in a state of regulatory complexity as a result of the constantly changing scope of regulatory jurisdiction, during the past 20 years in particular, and the added complication of the deregulation and implementation of the competitive electricity market in Alberta. This regulatory and market landscape has created a situation where the existing regulatory framework, founded in either regulated, rate-based methodology or market-based commodity methodology, is trying to address the approval of facilities that share the characteristics of both rate-regulated utilities and market-based commodity markets. Simply put, the sale of electricity has been deregulated and is typically sold at competitive rates to a captive audience, AIES connected customers, and distributed on the regulated transmission system.¹

The AUC and AEP now have key roles to play in the permitting and approval of power generation facilities. Prior to 2008, the unified regulator, operating as the Alberta Energy Utilities Board (“AEUB”) applied a public interest test to the assessment of an application for a power generation facility. In 2008, when the AEUB was split into the AUC and the ERCB, the government tried to retain continuity by requiring both regulatory authorities to apply the same test to their assessment of the power generation facility, that being whether the facility is in the “public interest”. Assessment of the public interest involves consideration of the social, economic,

¹ Power generation facilities that serve only an industrial customer, a.k.a., behind-the-fence generation, still require most of the same regulatory approvals, with the exception of an interconnection order as the generator is not connected to the Alberta Integrated Electric System.

and environmental impacts of the project. Furthermore, the mere fact that the project was assessed by two separate primary regulatory authorities, the AUC and ERCB from 2008 to 2013, or the AEP after 2013, gives rise to a clearly duplicative regulatory process. The result is that proponents must respond to different and overlapping regulatory requirements with respect to a single project, exacerbating confusion, adding unnecessary cost, and creating delay in the approval process for a facility. To add further to the confusion, among other secondary regulatory authorities, consideration of the assessments made by the ACO regarding the Government of Canada's constitutional obligation to consult and accommodate indigenous peoples in some cases must also be taken into account.

This paper will focus on the assessment of the impact of the multi-board model on the principles of natural justice by examining whether the multi-board regulatory process creates a lack of due process and, therefore, a failure of natural justice in the regulatory framework for power generation facilities. Further, this paper will recommend that a single regulator be created to review all aspects of power generation facility projects.

1.2 Significance of the problem

The current multi-board regulatory framework for power generation projects creates a framework wherein the principles of natural justice, including the principle of due process, are not easily attainable. The fact that there are multiple regulatory authorities simultaneously adjudicating an application for the same power generation project, in different forums and, depending on the date, applying different tests, creates a complex, duplicative, overlapping, and potentially conflicting, application of regulatory standards, particularly the public interest test. There is no stated primacy among the primary regulators and, thus, each regulator is free to adjudicate the application independently.² An example of how this regulatory multiplicity can create confusion is the assessment of whether the project is in the “public interest”. While this concept appears to be the threshold that was common among the key regulators AUC and ERCB, at least between 2008 and 2013, the way in which the components of the public interest test were weighted was not well-defined and hence, while seeming to create a commonality among regulatory authorities, the public interest test did not add clarity because each regulator had the opportunity to apply the test independently. To add to the complexity, the mandates of the AUC and ERCB were very different, as are the mandates of the AUC and AEP. The AUC's mandate is grounded in rate-based utility regulation.³ The ERCB's mandate was grounded in conservation and management of natural resources.⁴ The current treatment of the public interest test is for the regulatory authority to simply confirm that it is applying the public interest test and, without comment upon the way in which each of the components is to be weighted, make an assessment of the project specific elements of each component in order to reach its decision. After 2013, when the ERCB was disbanded, the waters became muddier because the jurisdiction to review power generation projects under the *Environmental Protection and Enhancement Act*⁵ (“EPEA”) was moved from the ERCB, a quasi-

² Primacy in this context simply refers to the stated hierarchy between various levels of legislation or decision-making.

³ “The Alberta Utilities Commission regulates the utilities sector, natural gas and electricity markets to protect social, economic and environmental interests of Alberta where competitive market forces do not” as stated at www.auc.ab.ca/about-the-auc/wha-we-are/Pages/default.aspx.

⁴ “The Alberta Energy Regulator is a regulatory body with a mandate to provide for the efficient, safe, orderly, and environmentally responsible development of Alberta's energy resources” as stated at www.aer.ca/about-aer.

⁵ *Environmental Protection and Enhancement Act*, RSA 2000, c E-12.

judicial regulatory authority that was required to make decisions in the public interest, to Alberta Environment and Parks, which is a government department exercising its administrative jurisdiction and one that is not bound by a public interest test when it considers the application for a power generation facility.

The core argument of this paper is that the multi-board model of the regulatory approval of power generation projects in Alberta fails to meet the principles of natural justice, particularly the right to due process. In this writer's view, power generation proponents, which are simultaneously regulated by multiple regulatory authorities, are placed in the untenable situation where the proponent cannot be certain of the case that it must meet because it is being judged by multiple decision-makers, which have different legislated mandates to fulfill, in different, uncoordinated, and overlapping regulatory processes. This results in an unduly complex procedure which runs the risk of being unfair and challenging the principles of natural justice.

1.3 Methodology

This paper is focused on addressing a practical problem that exists with the current provincial regulatory framework for regulating new power generation projects in Alberta. As such, it is fundamentally a doctrinal legal research project. However, I have reached an opinion as to regulatory reform to address the current problem that will take this research paper beyond a piece of purely doctrinal legal research and move towards being legal research with a view to law reform.⁶

This paper will address the research question from the perspective of a practising lawyer and a former regulator, expressing the internal perspective of the profession through the writer's experience, as well as adding the perspective of a proponent where relevant. This is a justified limitation on the perspective of this paper as the audience who will be most interested in the outcome of the research will include the parties who are directly and currently involved in the regulation of power generation projects in Alberta, these being the AUC, the AEP (currently), government policy experts, regulatory lawyers, environmental experts who support the regulatory process, regulatory analysts employed by large proponents to prepare power generation facility applications and, possibly, members of the judiciary engaged in the judicial review of administrative decisions. Essentially, this paper will be particularly important to parties who are involved in the industry and who have more than a passing familiarity with the regulatory hurdles that are part of the current approval process for power generation projects.

This paper will rely upon the key legal principles relevant to the research. As potential readers are expected to be legally educated or generally well-informed, this paper will assume that the reader is familiar with basic principles of administrative law. The two most pivotal concepts are the principles of delegated jurisdiction and the principles of natural justice. A brief discussion of delegated jurisdiction will precede a more detailed discussion of the principles of natural justice, with a view to understanding whether the current regulatory framework for permitting and

⁶ I bring a unique perspective to this area based on the three years I practised as senior counsel to the Alberta Utilities Commission and for many years acting on behalf of proponents who were required to contend with applications to multiple regulators to achieve the approvals and permits necessary to build and operate a power generation project in Alberta.

approving power generation facilities meets or fails to meet the due process principle of natural justice.

In order to have a fruitful conversation about this topic, one needs to appreciate the history of the regulatory authorities in question. As George Santayana famously said, “those who fail to learn from history are doomed to repeat it”.⁷ The importance of this brief provincial historical review is to highlight the chaos that the repeated reorganization of the regulatory authorities, and the consequent overlapping jurisdiction has caused over time, and to identify the risk that further reorganization may add to the accumulation of chaos rather than streamline and simplify the process. The writer believes that the fact that there has been such significant separation and re-unification in the Alberta regulatory authorities, particularly since 2008, is relevant to this argument. Earlier regulatory restructuring will only be addressed briefly.⁸

A good example of the confusion caused by the restructuring of the regulatory framework in Alberta is seen in the rather opaque application of the public interest test as a solution to the simultaneous and overlapping jurisdiction of the AUC and ERCB between 2008 and 2013. Leading out of that framework, the simultaneous and overlapping jurisdiction of the AUC and AEP after 2013 when the presumptive unifying thread of the public interest test vanished from the regulatory jurisdiction encompassed by the AEP. Therefore, this paper will review reported decisions of the AEUB and AUC with respect to the permitting of power generation facility projects released between January 1, 2001 and September 30, 2017 that address the public interest test and the basis upon which it is to be interpreted and applied in the context of power generation project approvals. This time frame represents nearly 16 years of tribunal decisions which the writer feels is a fair sample size to address the issues, particularly in light of the restructuring of the AEUB which occurred in 2007, effective 2008. Prior to January 1, 2008, the AEUB was a unified tribunal that adjudicated all aspects of both power generation facility and fossil fuel development projects. Accordingly, decisions issued prior to the emergence of the Alberta Utilities Commission and the coincident re-emergence of the ERCB in 2008, were issued by the single regulator for power generation facilities, electricity and gas utilities, and fossil fuel resource development projects. While some of the same issues may have arisen during the AEUB time frame (i.e. prior to 2008), a detailed analysis of the jurisdiction of the now-historical AEUB may not be particularly valuable.⁹

⁷ This turn of phrase has been attributed to George Santayana, whose comprehensive moral philosophy, *The Life of Reason*, was first published in 1905 and has been republished on July 1, 2006 by Echo Library.

⁸ I do not expect to rely exclusively upon purely legal research in this area but also on public policy documents. All of the policy documents that I will require are available publicly on the Department of Energy website or through simple electronic searches.

⁹ Since the preliminary research statement, this writer has considered the value of personal interviews with particular employees or leaders of the regulators in questions. While the potential interviewees hold positions of senior leadership at AUC, such as Bob Heggie, CEO, Willie Grieve, Chair, Doug Larder, General Counsel, as well as senior leadership at AER, such as Patricia Johnston, General Counsel, Cal Hill, EVP Strategy and Regulatory Division, and Gerry Protti, Chair of the AER Board. While these individuals would have little or no risk having their opinions identified in my paper and would have a big picture view of the regulatory process in Alberta, this writer feels that the legislation and commentary speaks for itself without the input from participants employed by any of the key regulators. For perspective, the writer relies on her personal experience having been involved in the practice of regulatory law for nearly 20 years, three of which were spent as senior counsel at the Alberta Utilities Commission.

Additionally, I have reviewed Canadian Institute of Resources Law (“CIRL”) Occasional Papers and several articles that are relevant to this discussion. These articles are a critical source of research material in this area and are well-written and, in this writer’s opinion, reliable.¹⁰

2.0 BASIC PRINCIPLES OF ADMINISTRATIVE LAW

The two key principles of administrative law that drive the integrity of all administrative processes are: adherence to the boundaries of the delegation of authority to administrative tribunals, and the consistent application of the principles of natural justice by the regulatory authority in the execution of its delegated authority. There are two foundational principles of natural justice that are important in understanding the basis for defensible administrative decision-making: the right to notice of and to understand the case to be met, and the right to an unbiased decision-maker. Together, these concepts are also known as procedural fairness or due process.

2.1 Delegation of Authority to Make Quasi-Judicial Decisions

Administrative tribunals created by statute, are delegated specific adjudicative power by the government through their empowering legislation, and are expected to make determinations at first instance, often within a specific area of technical expertise. The first principle of administrative law is that an administrative tribunal can only make decisions in accordance with its delegated authority or within the “four corners” of its statutory authority.¹¹ What this phrase means is that an administrative tribunal is restricted to adjudicating only those matters that it is authorized to adjudicate in the context of its empowering legislation.¹² If an administrative tribunal purports to issue a decision that exceeds its legislative authority or jurisdiction, it is subject to having that decision overturned by the court on an application for judicial review.

A clear delegation of authority, and a correspondingly clear test for decision-making by the administrative tribunal, is the check and balance that is required for there to be confidence and accountability in the overall process. If the scope of the authority, or the parameters by which the administrative tribunal is to apply that authority, are vague or unclear, then the requirements of predictability, fairness, and transparency, which are essential to procedural fairness, will be compromised. The result is a regulator that can go rogue and make unpredictable decisions about matters that are outside the scope of its authority. Should this occur, confidence in the

¹⁰ One of the advantages of using CIRL as a database of articles is that the quality is high, access is easy, and the people who wrote the articles are sometimes still available as faculty members or fellow students. In addition, CIRL has the focus on resources law that results in a serendipitous collection of highly relevant scholarship. I will also search ABLawg for interesting timely short pieces around the time of the launch of the Alberta Energy Regulator (summer 2013), particularly with respect to the absence of the standard public interest test. That situation has since been remedied by inclusion of the components of the public interest test in Section 3 of the *Responsible Energy Development General Regulation*, Alta Reg 90/2013 with amendments up to and including Alta Reg 195/2016. Interestingly, this section adds an additional component to the public interest test, being “consideration of the impact on the landowner of the location of an energy activity facility on his land”, that is not present in the scope of the public interest test in Section 17 of the *Alberta Utilities Commission Act*, SA 2007, c A-37.2.

¹¹ *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para 29 where the court states “[a] decision maker may not exercise authority that is not specifically assigned to him or her . . . conferred by statute”. This proposition is well-established law.

¹² *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170 at 1191 as cited in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 24.

administrative tribunal will be eroded. Judicial review of a decision can be triggered when a party believes that the administrative tribunal either acted outside the scope of its authority (made decisions that it was not permitted to make) or made a palpably incorrect decision. Under those circumstances, a party has the right to seek a review of the administrative tribunal's decision by the court. In order to ensure that the integrity of the process of delegation of authority is maintained, courts are disposed to be respectful and deferential to the factual decisions of an administrative tribunal based on the assumed technical expertise of the regulatory decision-makers but are careful to ensure that the administrative tribunal has acted within the scope and boundaries of its legal authority.

The leading case with respect to the basis for judicial review of the decisions of Canadian administrative tribunals is the *Dunsmuir* case.¹³ At a high level, the Court in *Dunsmuir* held that the standard of review for an error of law or jurisdiction is correctness, whereas the standard of review of determinations of fact should only be reviewed for reasonableness, in deference to the tribunal's opportunity to hear the evidence at first instance and apply its purported technical expertise. Therefore, the test that is set out as the basis for decision-making is critical for the administrative tribunal to know how to exercise its jurisdiction and upon what basis it may make decisions. Given that the legislation drives decision-making for administrative tribunals, and administrative tribunals are required for the orderly progress of electricity development, it is important to have clear guidance in the legislation as to relevant considerations for the decision-makers to apply when making decisions or the risk of unfairness and bias is significant.

2.2 Principles of Natural Justice

The rules of natural justice are of such critical importance to our social structure that they are ubiquitous and, specifically, form the foundation for determining whether we can be deprived of our fundamental rights. Section 7 of our Charter of Rights and Freedoms states that everyone has the right to life, liberty, and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental or natural justice (emphasis added).¹⁴

The rules of natural justice, including procedural fairness, create an expectation of inherent fairness. A significant amount of power to affect the rights of parties is delegated to administrative tribunals; in particular, the permitting and approving authorities for fossil fuel projects, power generation facilities, and utilities administration. To ensure that an administrative tribunal exercises its discretion and responsibilities appropriately, the administrative tribunal is required to

¹³ *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190. Briefly, in the *Dunsmuir* case, Dunsmuir was dismissed from his employment after the employer engaged in a series of processes to address Dunsmuir's performance. Dunsmuir grieved the result and the process. The issue that is relevant to this paper is the court's discussion about the standard of review that ought to be applied to the decision of the administrative tribunal that was tasked with the responsibility of reviewing the circumstances of Dunsmuir's termination. The debate centered on whether the standard of review of a tribunal's factual decision is correctness or reasonableness. If the test upon judicial review is correctness, the court has no obligation to defer to the tribunal's deliberations and is free to consider the case again and substitute its own determination of the facts for the tribunal's decision. On the other hand, if the standard of review is reasonableness (whether simpliciter or patent, which was held to be an "illusory" distinction at the end of the day), then the court is to give deference to the factual determinations of the administrative tribunal and only overturn that determination if it is unreasonable.

¹⁴ *Canadian Charter of Rights and Freedoms*, s 7, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c11.

ensure that the fundamentals of natural justice are respected and enforced in each of its processes and determinations. If a participant in the process feels that natural justice was not observed in an administrative tribunal's decision-making process, that person can have the decision of the tribunal reviewed by the courts.

The administrative tribunal is positioned to affect the rights of the parties, whether that party is the proponent who has expended a tremendous amount of money prior to arriving at the doorstep of the regulator, or the intervener whose personal rights may be directly and adversely affected by the development, or the rate payers who will be required to support the cost of a utility development from which they may or may not derive direct benefit.

The Supreme Court of Canada cases, *Nicholson v. Halimund Norfolk (Regional) Police Commissioners*¹⁵ and *Cardinal v. Kent Institution*¹⁶, set the stage for the unequivocal requirement that procedural fairness is owed to anyone whose "rights, privileges or interests"¹⁷ are affected by a statutory decision-maker.

Mr. Justice Binney states the criticality of procedural fairness in administrative decision-making in this oft-quoted passage from the *Dunsmuir* case:

...a fair procedure is said to be the handmaiden of justice. Accordingly, procedural limits are placed on administrative bodies by statute and the common law. These include the requirements of "procedural fairness", which will vary with the type of decision maker and the type of decision under review. On such matters, as well, the courts have the final say. The need for such procedural safeguards is obvious. *Nobody should have his or her rights, interests or privileges adversely dealt with by an unjust process.* Nor is such an unjust intent to be attributed easily to legislators... (emphasis added)¹⁸

It is this statement that demonstrates the fundamental role that procedural fairness plays in the administrative tribunal's exercise of its discretion and design of its processes.

2.2.1 The right to be heard (*audi alteram partem*)

Audi alteram partem literally means "it should be heard [*audiatur*] also the other party", "hear [*audi*] the other side too", or "hear the alternative party too", or "hear the other side; hear both

¹⁵ *Nicholson v. Halimund Norfolk (Regional) Police Commissioners*, [1979] 1 SCR 311 (Ont). Laskin, C.J., writing for the majority, says at page 324, "I accept, therefore, for the present purposes and as a common law principle what Megarry J. accepted in *Bates v. Lord Hailsham* [1972] 1 W.L.R. 1373, at p. 1378, "that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness" (emphasis added)."

¹⁶ *Cardinal v. Kent Institution* [1985] 2 SCR 643 (BC). LeDain, J., writing for the unanimous court, says, at para 14, "There can be no doubt, as was held by McEachern C.J.S.C. and the Court of Appeal, that the Director was under a duty of procedural fairness in exercising the authority conferred by s. 40 of the Regulations with respect to administrative dissociation or segregation. This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual."

¹⁷ *Ibid* at para 14.

¹⁸ *Supra*, note 13 at para 129.

sides”.¹⁹ Simply put, this means that all parties have a right to be heard meaningfully when a decision is made that could affect their rights. The right to be heard is generally interpreted as the right to a fair hearing, and to have the opportunity to make your case to the decision-maker, in the administrative law context. The concept of the right to be heard is settled law but the application of the concept is determined by context. As Justice L’Heureux-Dube stated in *Knight v. Indian Head School Division No. 19*, “[l]ike the principles of natural justice, the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case”.²⁰ In *Baker*, Justice L’Heureux-Dube further explained this idea of context by stating:

Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness required in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.²¹

For the right to be heard to be meaningful, in the context of power generation facility development permitting, a proponent or intervener must have a clear idea of the regulatory framework within which decisions will be made, so that it can formulate a clear position and respond effectively to the issues upon which it will be judged, as well as the standards by which a decision will be made. In the writer’s view, this is the heart of due process.

2.2.2 The rule against bias (*nemo iudex in causa sua*)

Nemo iudex in causa sua literally means "no-one should be a judge in their own cause."²² This means that all parties are entitled to be judged by an impartial and unbiased adjudicator. This principle is of such core importance to the administration of the law that it almost goes without saying. For any adjudicative process to have credibility and inherent value, it must be unbiased and consider fairly the positions of all affected parties. Beyond the obvious conclusion that adjudicators must not make decisions in the face of a personal conflict of interest, this concept also applies to the regulatory framework within which decisions are to be made. In the case of administrative decision-making, this aspect of procedural fairness is often characterised as

¹⁹ Gus Van Harten et al., *Administrative Law – Cases, Text, and Materials*, 7th ed (Toronto: Emond Montgomery Publications Limited, 2015) at 73-74.

²⁰ *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at p 682; also referred to in this decision is *Furnell v. Whangarei High Schools Board*, [1973] A.C. 660 (PC) where Lord Morris of Borth-y-Gest held (at p. 697), “Natural justice is but fairness writ large and juridically. It has been described as ‘fair play in action’. Nor is it a leaven to be associated only with judicial or quasi-judicial occasions. But as was pointed out by Tucker L.J. in *Russel v. Duke of Norfolk* [1949] 1 All E.R. 109, 118, the requirements of natural justice must depend on the circumstances of each particular case and the subject matter under consideration” and *syndicat des employees de production du Quebec et de l’Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 SCR 879 at pp. 895-96 therein per Sopinka, J. where he says “Both the rules of natural justice and the duty of fairness are variable standards. Their content will depend on the circumstances of the case, the statutory provision and the nature of the matter to be decided”.

²¹ *Baker v. Canada (Minster of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 22.

²² *Ibid* at 73-74.

ensuring that a regulatory authority is not fettered in its ability to make a decision by being unintentionally subordinated to another regulatory authority²³, by practice rather than statutory requirement, as well as ensuring that no regulatory authority suffers from being captured by another.²⁴

2.3 Summary of Basic Principles of Administrative Law

There is no dispute that regulatory authorities must exercise their delegated jurisdiction in accordance with the four corners of their empowering legislation and in compliance with the rules of natural justice or procedural fairness.

In this writer's opinion, the regulatory authorities involved in the permitting and approval of power generation facilities do exercise their authority in accordance with their empowering legislation. Acting within the four corners of the empowering legislation is not a framework issue with respect to which this writer is concerned.

However, as stated above, the writer believes that the multi-board model creates a significant risk of failure of the first principle of natural justice, being due process. How is a proponent to understand the case it must meet if it must satisfy multiple regulatory authorities simultaneously, particularly when those regulatory authorities have overlapping jurisdiction and an unclear hierarchy between them? Further, the attempt at synchronization of the two primary regulators through the application of the public interest test is flawed because both of the regulators in question have different legislated mandates that influence the way in which they interpret the public interest test. Herein lies the issue.

Finally, there are arguments to be made that the multi-board framework has the potential to result in the regulatory capture of one or more of the regulatory authorities involved as the regulatory authorities place one of them, unofficially, in a dominant position in order to facilitate a more orderly process overall. This would result in a heightened risk of failure of the principle of natural justice that requires an unbiased and independent decision-maker. However, this argument is beyond the current scope of this paper and is unnecessary to justify the writer's argument.

²³ When a regulatory framework is established, it is not unreasonable to establish a hierarchy or priority of regulatory authority with respect to the decisions to be made by various participating administrative boards. In the general case, the "big" decisions need to be made by a tribunal that will not be at risk of "small" decisions essentially upsetting the primary decision-makers result. An example of this structure is found in Section 619(1) of the *Municipal Government Act*, RSA 2000, c M-26) which states explicitly that "a licence, permit, approval or other authorization granted by the NRCB, ERCB, AER, AEUB or AUC prevails, in accordance with this Section, over any statutory plan, land use bylaw, subdivision decision or development decision by a subdivision authority, development authority, subdivision and development appeal board, or the Municipal Government Board or any other authorization under this part."

²⁴ Regulatory capture is the concept that the regulator is not able to make independent decisions because it has, in some way, become influenced or constrained in the exercise of its authority. A common manifestation of this concept is the idea that the regulator is "pro-industry" if it received financial benefits from industry participants. The implication is that the regulator loses its ability to be independent and becomes "captured" by the proponent, unable to make a decision that is not necessarily in favour of its captor. Similarly, if a regulator's seemingly equal jurisdiction is regularly subordinated to another regulatory authority's determinations, without there being a clear hierarchy of decision-making expressed in their respective empowering legislation, the subordinate regulator can be seen to be "captured" by the dominant regulator, i.e. unable to act independently of the will of the dominant regulator.

3.0 EVOLUTION OF THE REGULATORY FRAMEWORK IN ALBERTA

3.1 A “Brief History of [Regulatory] Time”²⁵

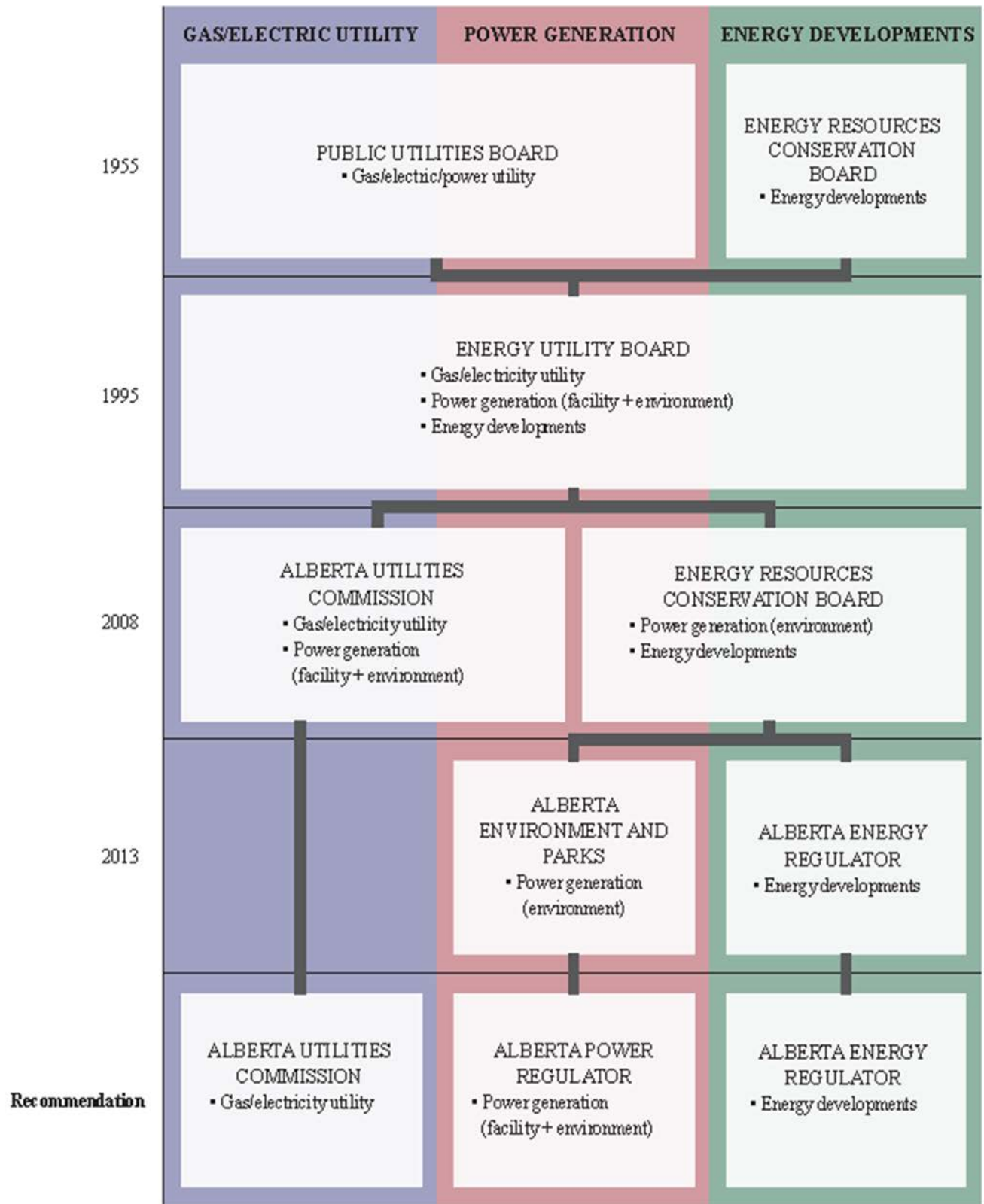
In Alberta, the history of regulation in fossil fuel resource development, power generation facility, and electricity and gas utility sectors bears a striking resemblance to a shell game. The history of public utility regulation in Alberta dates back a full century, starting in 1915 with the Alberta Board of Public Utilities Commissioners. Fossil fuel resource management regulation dates back to the establishment of the Turner Valley Gas Conservation Board in 1932, when the right to regulate natural resources was transferred to the provinces pursuant to the *Alberta Natural Resources Act*.²⁶ Over the subsequent 20 to 25 years, regulation increased significantly and finally, in 1955, regulation of fossil fuel resource development was delegated to the ERCB and the regulation of gas and electricity utilities, including the facilities that generated electricity, fell to the Public Utilities Commissioners.²⁷

The following figure shows the complexity of the evolution of the regulatory process over time and highlights the overlapping jurisdiction for the consideration of environmental impacts that occurred in 2008 and which remains unresolved today.

²⁵ Hawking, Stephen, *A Brief History of Time*, © 1998.

²⁶ In accordance with the transfer of jurisdiction over the natural resources located in Alberta through the enactment of the *Alberta Natural Resources Act*, SC 1930, c 3.

²⁷ Some of the key aspects of the history of the development of Alberta’s regulatory bodies up to 1995 are as follows: In 1915, the Alberta Board of Public Utilities Commissioners (“PUB”) was created. This was Alberta’s first regulatory agency and held the primary responsibility of regulating utility rates and service. In the 1930s, new regulatory boards were formed to administer some of the non-utility responsibilities of the PUB, pursuant to the newly created authority in the provinces to regulate provincially located natural resources in accordance with the *Alberta Natural Resources Act*, SC 1930, c 3. The increase in oil development in Turner Valley significantly increased the PUB’s role in regulating commodities. To assist the PUB in off-loading some of its responsibilities, the Petroleum and Natural Gas Conservation Board was created in 1938. This board was focused on conserving Alberta’s fossil fuel resources and ensuring their orderly development of these resources. This board was the precursor of the Energy Resources Conservation Board (1971-1995). In 1960, the *Gas Utilities Act* was introduced. Application of this statute remains a part of the legislative mandate of the Alberta Utilities Commission today. In 1974, the Natural Gas Prices Protection Plan was introduced. Under this plan, the PUB was required to issue certificates to qualifying utilities to receive provincial rebates designed to insulate the Alberta consumers from the increasing world market prices for natural gas. This jurisdiction was grounded in the *Natural Gas Rebate Act*. In 1982, the Alberta government created the Electric Energy Marketing Agency to equalize electricity rates by averaging the price of generation and transmission across the province. In this way, the influence of geographic proximity to a generation facility was eliminated and electricity was treated as a utility, the price of which was shared equally among the rate payers. In 1995, the Alberta Energy Utilities Board unified the fossil fuel resource development regulation, electricity utility regulation, and regulation of gas utilities.



3.1.1 1995 to 2008 – Unification of Fossil Fuel Resource Development and Gas and Power Utility Regulators

This was a period of relative stability in the regulatory history of Alberta. In 1995, the Alberta Energy and Utilities Board (“AEUB”) was created. This board was the result of the merger between the Public Utilities Board and the ERCB. The purpose of this merger was to provide a more streamlined and efficient regulatory process. The AEUB’s core function was described as “adjudication and regulation; applications; surveillance and enforcement; and, information and knowledge”.²⁸ Throughout the development of fossil fuel regulation over the last century, regulation in the public interest had been the unifying concept. The AEUB was directed to ensure that “the discovery, development, and delivery of Alberta’s resources takes place in a manner that is fair, responsible, and in the public interest”.²⁹

In 1996, the electric utility tariffs were restructured and the *Electric Utilities Act* was introduced.³⁰ Through this change, each major utility applied to separate its generation, transmission, and distribution assets. The framework for further restructuring of the electric utility industry was established through the *Electric Utilities Amendment Act* passed in 1997.

In 2005/2006, an Annual Report was issued by the Government of Alberta. However, it was curiously silent on the issue of the fate of the AEUB.³¹ It stated that “Alberta’s energy future will be based on an integrated approach to resource development ensuring that resource development in Alberta takes place in a coordinated, managed, and environmentally sustainable manner”.³² In 2006, the Premier’s office released the following directive: “improve the transparency and accountability of government agencies and boards”.³³ The government’s purpose at this point appeared to be focussed on fossil fuel resource development and ensure that the regulatory process was not impeding the economic viability of oil and gas project development in Alberta. At this time, there was no specific discussion about the separation of regulatory agencies to deal with power generation projects or electricity utilities.

3.1.2 2008 to 2013 – Separation of Fossil Fuel Project and Utility Regulation

The year 2007 was the *annus horribilis* for regulators in Alberta.³⁴ That was the year that the integrity of the regulatory structure, and its independence came under public scrutiny and derision.³⁵ The AEUB was found to have improperly authorized an undercover security guard to

²⁸ Cecilia A. Low, “Energy and Utility Regulation in Alberta: Like Oil and Water?” (2009) Canadian Institute of Resources Law Occasional Paper #25 at 28.

²⁹ AEUB, *Regulatory Highlights for 1998* (Calgary: 1999) at 1 as cited in Cecilia A. Low, “Energy and Utility Regulation in Alberta: Like Oil and Water?” (2009) Canadian Institute of Resources Law Occasional Paper #25 at note 104.

³⁰ *Electric Utilities Act*, SA 2003, c E-5.1.

³¹ Alberta Ministry of Energy, *2005/2006 Annual Report*, at 5 as cited in Cecilia A. Low, “Energy and Utility Regulation in Alberta: Like Oil and Water?” (2009) Canadian Institute of Resources Law Occasional Paper #25 at 31.

³² Alberta Ministry of Energy, *2005/2006 Annual Report*, at 5.

³³ *Supra*, note 28 at page 32.

³⁴ *Annus horribilis* means “horrible year” in Latin. The phrase was made prominent by Queen Elizabeth II in her 1992 Christmas speech wherein Her Majesty reflected upon a year of family divorces, scandal, and a fire at Windsor Castle.

³⁵ Legal commentator, Nigel Bankes, likened the relationship between the Public Utilities Board and the Energy Resources Conservation Board to an “unhappy marriage” in his blog titled “The ten biggest legal and regulatory

be present at landowner meetings during the hearing for the approval of the Western Alberta Transmission Line.³⁶ This incident resulted in an allegation of spying.³⁷ Subsequently, the AEUB was dissolved and its decisions regarding the Western Alberta Transmission Line were vacated. The AEUB was replaced with the newly created AUC with the mandate to regulate power generation facilities, gas distribution and electricity transmission utilities. The ERCB was re-created to take over the regulation of fossil fuel development from the now-dissolved AEUB.

The AUC commenced its operations on January 1, 2008. The ERCB continued the AEUB's operations with respect to the development and management of fossil fuel resources. However, the ERCB also retained jurisdiction over the *Environmental Protection and Enhancement Act* ("EPEA") requirement to issue an Industrial Facility Permit for power generation facilities and focused on the assessment of the environmental impacts of a power generation project.³⁸ In this writer's opinion, the government erred in re-creating a multi-board model of regulation at this critical juncture. This would have been the opportunity to consolidate all of the key regulatory authorities for power generation facilities, gas distribution utilities, and electricity transmission utilities under a single regulatory authority or, in the writer's opinion, split off utility model gas and electricity facilities from power generation facilities. However, what the government did instead was allow the multi-board model to return and create the lack of regulatory clarity that persists today.

3.1.3 2013 to Present – A Single Regulator for Energy Developments but not for Power Generation

On December 10, 2012, the Alberta Energy Regulator was created through the enactment of the *Responsible Energy Development Act* ("REDA").³⁹ REDA was proclaimed on June 17, 2013 and assumed all the regulatory permitting responsibilities with respect to fossil fuel resource developments in Alberta from the ERCB, leaving the ERCB with very little jurisdiction relevant to the energy industry.

The impetus behind the 2013 exercise was consideration of the need, again, to streamline the regulatory process in Alberta with respect to the permitting of fossil fuel resource development projects. The AER became known as the "super board" in the provincial regulatory world, combining under one regulator, all aspects of the regulation of fossil fuel resources projects. The jurisdiction that resided in the ERCB to regulate matters touching on public lands and the environmental impact of fossil fuel resource development was moved to the new AER and combined with fossil fuel resource development regulation. This created a single regulator with the authority to regulate all aspects of projects, from initiation of the project through operations

developments for the oil and gas sector from the first decade of the new millennium", posted January 22, 2010 on ABLawg.

³⁶ Alice Wooley, "Enemies of the State? The Alberta Energy and Utilities Board, Landowners, Spies, a 500kV Transmission Line and Why Procedure Matters" (2008), 26:2 *Journal of Energy and Natural Resources Law* 234 at 235 (<http://dx.doi.org/10.1080/02646811.2008.11435185>).

³⁷ Re: Application No. 1478550 – AltaLink Management Ltd., Application No. 1479163 EPCOR Transmission Inc., Decision 2005-031, Decision 2006-114 (AEUB) (September 30, 2007), Decision 2007-075

³⁸ *Environmental Protection and Enhancement Act*, RSA 2000, c E-12.
Responsible Energy Developments Act, SA 2012 c R-17.3.

and ultimately reclamation. Overall, the writer submits that this development has been a positive one for fossil fuel resource developers.

However, the impact of the reunification of the fossil fuel resources regulator left utility regulation and power generation developments behind and still responding to the demands and potentially differing standards of regulation of the remnants of the ERCB, from 2008 to 2013, and the newly minted AUC. Utilities and power generation projects were still required to obtain permits and approvals from both the ERCB and AUC. The regulatory framework did not give either regulatory authority priority in time or jurisdiction. Herein lies the issue with respect to the failure of due process. Both regulatory authorities were required to adjudicate the application simultaneously, without communication between them, and, at least between 2008 and 2013, based on a public interest test of sorts.

This writer sees a missed opportunity for the government to have brought the ERCB's jurisdiction with respect to EPEA, as it applied to power generation facilities, and gas distribution utilities, and electricity transmission utilities regulation over to the AUC at this point in time. A single regulator could oversee the environmental impact jurisdiction under EPEA as part of its overall consideration of the public interest and determine whether to issue the appropriate approvals in a transparent and clear fashion. Since the AUC was, and is, bound by a public interest test that includes the consideration of the impact of the project on the environment, the jurisdiction under EPEA to consider the environmental impacts of the project is fully duplicated.

The concept of a public interest test to align the efforts of the ERCB and the AUC was a good idea. Moreover, between 2008 and 2013, when Section 17 of the *Alberta Utilities Commission Act* ("AUCA") and Section 2.1 of the *Energy Resources Conservation Act* ("ERCA") were identical, there seemed to be a superficial consistency between the standards being applied by the two main regulators.⁴⁰⁴¹ However, after 2013, once REDA was enacted to establish the AER and the ERCB was disbanded, the permitting and approval jurisdiction of the former ERCB was not abandoned, rather it was moved to the AEP. Unfortunately, the ERCA was repealed and the adjudicators of the former ERCB's jurisdiction over the power generation facilities became an administrative act of the Department of Environment and Parks and, accordingly, the public interest test that was once applied by the ERCB, vanished.

In this writer's opinion, there is no logical reason that this jurisdiction was not consolidated under the newly constructed AUC in 2008. However, what the government did instead was to bind both regulators to apply a public interest test which, on its face, appeared to align the regulators but which, in fact, created the opportunity for lack of regulatory clarity because of the risk that the test would be applied differently by the different regulators based on their distinct mandates. A single regulator would have satisfied the role of an environmental impacts watchdog over the projects within the jurisdiction of the newly created AUC and, in fact, would be better positioned to respond to the present day drive from the government to add significant renewable electricity generation to our energy supply mix through the use of a variety of new technologies, each of which has novel and unique environmental impacts.

⁴⁰ *Alberta Utilities Commission Act*, SA 2007, c A-37.2.

⁴¹ *Energy Resources Conservation Act*, RSA 1989, c E-147.

3.2 Impact of the Repeated Reorganization of the Regulatory Framework on Due Process

The issue of complex and overlapping jurisdiction has been at its peak for power generation facilities since 2008. There are clear issues with the existence of different regulators with different mandates, different tests, and overlapping jurisdiction with respect to the approval of projects. In her article “The Provincial Energy Strategy – An Integrated Approach: The Challenges Raised by a Two-Board Model for Energy and Utility Regulation”, Ms. Low concisely identified four specific issues with the existence of different regulatory platforms with different mandates.⁴² Those four issues are:

1. Split jurisdiction over pipelines;
2. Lack of clarity for energy resources assessment, information gathering, and dissemination;
3. Lack of uniformity in specific public interest considerations guiding each regulator; and
4. Uncertainty arising from implementation of new provincial land use framework.

Of relevance to this discussion is Ms. Low’s commentary on the impact of the lack of uniformity in specific public interest considerations in the multi-board model and how that lack of clarity creates a general failure in the principles of natural justice, particularly in the concept of due process. In this case, power generation projects have suffered from multi-board regulation for two key periods – the period between 2008 and 2013, where the ERCB and AUC were both key regulatory authorities with overlapping jurisdiction over power generation facilities and the period between 2013 to the present, where AEP and AUC are both key regulatory authorities with overlapping jurisdiction over power generation facilities. The area of overlap that was governed by the ERCB between 2008 and 2013 is the same area that is regulated by the AEP from 2013 to the present. The concept that is highlighted by Ms. Low, and echoed by lawyers who practise in this area, is that the lack of uniformity of the standards by which a project will be assessed creates confusion, complexity, extra cost to the stakeholders in the process, and a failure of the regulatory framework to deliver due process.

Throughout the accordion-like history of the fossil fuel projects and utility sector regulatory authorities in Alberta, the primary driver has been the desire to “create a more streamlined regulatory process” and thereby ensure the efficient, fair, and transparent regulation of fossil fuel projects and power resources.⁴³ The secondary driver has been identified as the need to address the “gaps and overlaps in energy resource regulation”.⁴⁴ But what happens to power generation facility regulation? The policy directives are silent on this issue. The normative theory

⁴² Cecilia A. Low, “The Provincial Energy Strategy – An Integrated Approach: The Challenges Raised by a Two-Board Model for Energy and Utility Regulation” (2009), Canadian Institute of Resources Law Occasional Paper #26.

⁴³ Alberta Legislative Assembly, *Hansard* (28 February 1994) at 290-291 (The Hon. Patricia Black) as cited in Cecilia A. Low, “Energy and Utility Regulation in Alberta: Like Oil and Water?” (2009) Canadian Institute of Resources Law Occasional Paper #25 at 1.

⁴⁴ Alberta Legislative Assembly, *Government Bills and Orders Second Reading Bill 15 (Hansard)* (25 April 1994) at 1408 as cited in Cecilia A. Low, “Energy and Utility Regulation in Alberta: Like Oil and Water?” (2009) Canadian Institute of Resources Law Occasional Paper #25 at 1.

of regulation is that economic efficiency is best achieved through the independent, transparent, predictable, legitimate, and credible regulatory authority.⁴⁵ This theory of regulation leads to a framework that aligns with the principles of natural justice.

Through the decades of regulatory evolution in Alberta, the fact that the regulators of fossil fuel development have focused on the management and conservation of natural resources, whereas the regulators of the electricity and gas utilities have focused on the provision of utility service to ratepayers at a fair and equitable rate, has led to the particularly difficult situation for power generation facilities where they do not fit into either regulatory mandate.

4.0 KEY REGULATORS WITH JURISDICTION OVER POWER GENERATION FACILITY APPROVALS

4.1 Alberta Utilities Commission - Public Interest Test

The AUC is grounded in the rate-based utility model.⁴⁶ Utilities regulation in Alberta has followed the traditional public utilities model of regulation⁴⁷ – arm’s length adjudication, government control of pricing, protection of the public from unfair competition or monopoly while fulfilling the regulatory compact.⁴⁸

As of 2008, the AUC has had jurisdiction over the approval of power generation facilities through its administration of the *Hydro and Electric Energy Act* (“HEEA”). In implementing the permitting and approval sections of HEEA, beginning with sections 14 and 15, the AUC is required to make all of its decisions in the public interest. Section 17 of the AUCA states that the AUC must make its decisions in the public interest, giving consideration to the “social and economic impact of the project and its impact on the environment”. In applying this test, the AUC has referred back to decisions of its predecessor board, the AEUB, as well as its own decisions, for guidance. A review of the public interest test and its application by the AUC follows. In applying its public interest test, reference must be given to the AUC’s historical perspective and key area of regulation, being the regulation of utilities in accordance with the regulatory compact.

4.2 Energy Resources Conservation Board – Public Interest Test

The ERCB and then the AER have followed the fossil fuel resources management and conservation model of regulation. Fossil fuel resources regulation has followed a slightly different model with the board being a manager of development of the resource and gate-keeper of conservation efforts. Between 2008, when the Energy Resources and Conservation Board was reborn out of the ashes of the AEUB, and 2013, when it was disassembled again to create the

⁴⁵ *Supra* note 28 at 4.

⁴⁶ This focus is based on the regulatory compact which is the “deal” between the public and the utility service provider whereby the utility service provider obtains a monopolistic opportunity to provide the service in exchange for being regulated with respect to the price that it can charge for the service and the obligation to provide the service on a non-discriminatory basis.

⁴⁷ *Supra* note 26 at 12

⁴⁸ The AUC is expanding its utility model to include performance based regulation of certain utilities. However, this change does not impact the foundation concept of the cost-of-service method that supports utility regulation, it only affects the means by which the cost that is transferred to rate-payers is calculated.

Alberta Energy Regulator, the ERCB had jurisdiction over the environmental impact assessment of power generation facilities, other industrial facilities and fossil fuel developments pursuant to EPEA. During this time, the ERCB was responsible for considering the environmental impacts of power generation facilities.⁴⁹ The ERCB exercised its jurisdiction to assess power generation facilities through the authority of the ERCA. The ERCA required the ERCB to conduct its assessment by applying the public interest test set out in section 3 of the ERCA which utilized the same wording as the AUCA public interest test, being “social and economic impact and its impact on the environment”.

However, the historical perspective on regulation by the ERCB was based in its natural resources management and conservation background. The ERCB’s mandate was to support the development of resources in an environmentally responsible manner.

4.3 Alberta Environment/Alberta Environment and Parks – no public interest test

REDA purports to streamline the regulatory process for fossil fuel project approvals by combining the jurisdictions of the ERCB (at that time) and to create a single regulator, known as the Alberta Energy Regulator (“AER”) for fossil fuel development (coal, oil, and gas resources) in Alberta. From a high level, this should create a simpler, faster, more efficient pathway for fossil fuel development in Alberta. The fact that power generation facilities are left behind in the ERCB’s jurisdiction over EPEA, and not carried into the AER or the AUC, creates the second leg of the multi-board regulatory framework and adds to the complexity of the regulatory process that burdens power generation facilities.

The AEUB addressed the public interest test, as it then existed, in section 3 of the ERCA extensively, in a decision issued in 2002, where the criticality of a public interest consideration in board decision-making was acknowledged, as was the subjectivity of the public interest test.⁵⁰ Although evidence must be the foundation of any determination of an administrative tribunal, there can be no specific objective test that can be applied to all cases, as the evidence will differ in each case. Consistency in decision-making is a valuable result when considering how various projects may affect the public and which parts of the public need to be considered in that impact analysis.⁵¹

However, in 2013, when the ERCB’s jurisdiction over power generation facilities was taken up by Alberta Environment and Parks, the public interest test set out in the ERCA was not moved. With the AEP adjudicating the environmental impacts of power generation facilities as an administrative function, the lack of a public interest test further exacerbates the confusion created by the multi-board system and the challenges faced by participants in knowing the case they must meet.

⁴⁹ *Activities Designation Regulation*, Alta Reg 276/2003, s 2(vv), identifies a “power plant” as being an activity that falls within Schedule 1 Division 2 and which, pursuant to section 5(1) thereof, requires an approval under the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12.

⁵⁰ Memorandum of Decision, Prehearing Meeting, Manhattan Resources Ltd. Applications for Wells, Pipelines, and Facilities Licences and an Amendment to a Facility, Fort Saskatchewan Field. AEUB Decision 2002-107.

⁵¹ Shell Canada Limited, Application for the Quest Carbon Capture and Storage Project, Radway Field. Decision AERCN 008, 10 July 2012, at para. 391.

4.4 Regulatory Purgatory – Where do power generation projects fit?

In the writer’s mind, this phrase regulatory purgatory aptly describes the circumstance where a project, in this case a power generation project, does not fit within a single regulatory structure but rather fits between various regulatory structures, sitting metaphorically, between heaven and hell.

A typical fossil fuel development is a resource extraction project that is developed because the proponent speculates that it will be able to market the resource for profit. The determination of whether the project is a “valuable and worthwhile investment” is not left up to the regulator, it is a fully market-based assessment conducted by the proponent that will pay for the total cost of the facility build. Similarly, a power generation project is a market-based project because the need for the project is based upon the proponent’s assessment of the economic viability of building the project to generate electricity. Power generation as a market was deregulated in 1996 and, therefore, there is no real requirement to demonstrate the need for the project to a regulator nor is there the opportunity for the developer of a power generation project to connect it to the AEIS and to participate in a utility or cost of service based regulatory model. Specifically, section 3 of HEEA states that the AUC has no need to consider the economic impact with respect to a generating unit or a renewable electricity production facility.⁵² The fact that section 3 of HEEA specifically diminishes the public interest test set out in section 17 of the AUCA by removing the assessment of the economic impact of a project underscores the fact that the AUC’s perspective on the assessment of the public interest does not fit the power generation facility context. In the case of section 17 of the AUCA, economic impact is clearly intended to reflect the impact of building a new facility on the rate payers; hence, in the case of power generation facilities, economic impact on rate payers is irrelevant because rate payers do not contribute economically to the cost of construction and operation of the facility.

In contrast, the proponent of a regulated utility project is required to prove the need for the project to the regulator prior to obtaining permission to build the project because the capital cost of building the project and the cost of ongoing operations will be shared among the rate payers. The regulator is the gate-keeper for the rate payers and ought only to approve utility projects that are needed to provide service to the rate payers because once a utility project is built, the ratepayers do not have an opportunity to refuse selectively to pay for a particular asset if they wish to receive utility service generally. That being said, where does a power generation project fit?

Since the deregulation of the market, a power generation project is not required to meet the utility test of necessity with respect to the provision of a service. There is no requirement to assess the need for a generation project in the same way that a regulator would assess the need for a transmission or utility project. In this regard, perhaps it is more like a natural resource project than a utility project. However, the commodity produced by an electricity generation project, electricity, is sold to the regulated market and transmitted on regulated transmission lines. The power generated by a project must be able to fit on the existing power transmission lines or additional capacity would need to be built, resulting in additional cost to the regulated utility rate payer. In that regard, it is quite different from a natural resources project where the commodity is sold in an unrelated market that is not regulated by the same regulator that controls the construction and operation of the facility. Perhaps in this regard, a power generation project is more like a utility

⁵² *Hydro and Electric Energy Act*, RSA 2000, c H-16, s 3.

project than a natural resources project. Therefore, power generation projects are in regulatory purgatory, stranded between their deregulated production roots and their regulated utility interface, for the sale of their unregulated commodity to the regulated transmission system, which regulated transmission system is supported by rate payers operating under the protection of the regulatory compact.⁵³ It's complicated!

5.0 THE MULTI-BOARD REGULATORY FRAMEWORK AND ITS INTERFACE WITH THE PUBLIC INTEREST TEST

The concept of the public interest test was, at first blush, the unifying thread that bound the AUC and ERCB together with respect to their complementary, but overlapping roles in the regulation of power generation facilities in Alberta, between 2008 and 2013. Theoretically, if each regulator was applying the same test, and regulating distinct parts of the power generation project, there should be sensible and non-duplicative regulation of power generation projects. However, this does not appear to be the case in practice, particularly after 2013 when the ERCB was disbanded and the AEP took over administration of EPEA.

If there are two regulatory authorities that can impact the same development, there is a potential for differing opinions and approaches as to whether the development is in the public interest.⁵⁴ It is instructive to consider this dilemma in two distinct time bands – 2008 to 2013 and 2013 to the present. Most power generation facilities, except very small power plants, required approvals from the AUC and, between 2008 and 2013, from the ERCB and from 2013 to present, from the AEP. The AUC is required to assess whether the project is in the best interests of the public, giving consideration to the social, economic and environmental impacts of the project.⁵⁵ The ERCB was required to make its assessment of the project on the same basis; however, the scope of the ERCB's jurisdiction was focused on the environmental impacts of the project because it was required to issue an Industrial Approval pursuant to EPEA. After 2013, the AEP is still required to issue the Industrial Approval pursuant to EPEA but it does not have the consistency of the public interest test because it is not an administrative tribunal acting in accordance with its delegated authority. It is a government agent acting in an administrative capacity.

Let us consider this example of a situation that was common during the 2008 to 2013 time period: Suppose that a proponent files its application with the AUC and the ERCB at the same time. The AUC application does not receive any objections. The AUC does not hold a hearing and issues a permit to construct and a licence to operate the facility. The ERCB is still required to apply a public interest test. In the proceeding before the ERCB, statements of concern are filed, the proponent responds to the statements of concern and provides additional information to the ERCB which does not form part of the AUC's record. The ERCB imposes conditions on the approval. Now, there are two different regulators who have reviewed the same development, been provided with different information, engaged in different regulatory assessment processes, and which have potentially issued approvals with different impacts. This is the essence of the confusion created by

⁵³ *Supra*, note 24.

⁵⁴ *Supra*, note 42 at page 22.

⁵⁵ When considering the economic impacts of a power generation facility, the AUC is required to “not have regard to whether the generating unit is an economic source of electric energy in Alberta or to whether there is a need for the electric energy to be produced by such a facility ...”, *Hydro and Electric Energy Act*, RSA 2000, c H-16, s 3(c).

a development stuck in regulatory purgatory. Both the proponent and potentially adversely affected stakeholders are placed in an awkward position. The applications for a development are being adjudicated in two different places, either at the same time or sequentially, upon different grounds. Further, none of the information filed in either proceeding is confidential so it could be used across proceedings. This situation is made worse by the removal of the public interest test in the current regulatory structure (post-2013) where the former jurisdiction of the ERCB over power generation facilities has been taken over by the AEP. This process is not streamlined or efficient or responsive to the public's right to be involved in the regulatory process. The writer questions how this situation is consistent with the concept of due process and, accordingly, whether it satisfies the requirement for natural justice.

Low confirms that the idea of decision-making with the public interest as a key concept is regularly validated as a means of establishing a check and balance on regulatory discretion to protect against regulatory capture.⁵⁶ Interestingly, there is no judicial wisdom from the Supreme Court of Canada on the interpretation of the phrase “in the public interest”, other than a basic generalization that the public interest is to be interpreted in the context of the legislative scheme as a whole.⁵⁷ In the *Solex* case, the Alberta Court of Appeal says that the scope of the public interest test is “meant to be broad and should not be interpreted restrictively”.⁵⁸ Further jurisprudence on this point is found in the *Sincennes v. Alberta (Energy and Utilities Board)*⁵⁹ case where the issue was the application of the public interest test under HEEA. In that case, the Alberta Court of Appeal cited, with approval, the reasoning of the National Energy Board in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy and Utilities Board)*⁶⁰ case as follows:

...there are no firm criteria for determining public interest that will be appropriate to every situation. Like ‘just and reasonable’ and ‘public convenience and necessity’, the criteria of public interest in any given situation are understood rather than defined and it may well not serve any purpose to attempt to define those terms too precisely.⁶¹

This concept leads directly to the point of concern, being that the multi-board model creates the opportunity for divergent interpretations of the critical threshold for adjudicating the rights of the parties, being the public interest test. This risk is heightened by the fact that a regulatory authority can only make decisions within the scope of its delegated authority and that authority is constrained by its legislative mandate. In the case of the AUC and the ERCB, those mandates were very distinct and had different objectives. In this example, the multi-board framework can easily lead to a failure of due process. In the post-2013 case where the AEP has the jurisdiction formerly exercised by the ERCB with respect to power generation projects and where the AEP does not have the statutory

⁵⁶ Cecilia A. Low, “The “Public Interest” in Section 3 of Alberta’s *Energy Resources Conservation Act*: Where Do We Stand and Where Do We Go From Here?” Canadian Institute of Resources Law Occasional Paper #36 at page 6.

⁵⁷ *Ibid*, at page 8.

⁵⁸ *Solex Gas Processing Corp. v. Alberta (Energy and Utilities Board)*, 2004 ABCA 388 (CanLII), para 33-43.

⁵⁹ *Sincennes v. Alberta (Energy and Utilities Board)*, 2009 ABCA 167.

⁶⁰ *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 SCR 140, 2006 SCC 4.

⁶¹ *Sincennes v. Alberta (Energy and Utilities Board)*, 2009 ABCA 167 at para 67. See note *infra* for the NEB’s definition of public interest as cited in Cecilia A. Low, “The “Public Interest” in section 3 of Alberta’s *Energy Resources Conservation Act*: Where Do We Stand and Where Do We Go From Here?” Canadian Institute of Resources Law Occasional Paper #36 at page 17.

requirement to make decisions in the public interest, the risk of a failure of due process due to regulatory complexity, over-lapping jurisdiction, and lack of transparency is exacerbated.

Generally speaking, consideration of the social, economic, and environmental impacts of a development must each be specifically and individually considered,⁶² but the Court of Appeal has stated that a rigid test should not be prescribed.⁶³ However, the result of the operation of the multi-board model is that the public interest test creates a significant risk that it will not be applied consistently by both of the current key regulators of power generation facilities. That being the case, this writer believes that the solution is to eliminate the multi-board model and establish a single board that will adjudicate all aspects of a power generation project through the consistent and singular application of the public interest test, a model that is proving to be successful for the AER with respect to the regulation of fossil fuel project development.

5.1 Treatment of the Existence of the Multi-Board Regulatory Framework Between 2001 – 2019

5.1.1 Cases between 2001 and 2007 – Alberta Energy Utilities Board

5.1.1.1 EPCOR Power Development Corporation and EPCOR Generation Inc. – Rosedale Power Plant Unit 11 (Rd 11), Decision 2001-33, Application No. 990289 (EUB) (May 2001)

In this case, the application was heard by the AEUB. It was an application for a 170 MW natural gas-fired turbine. The Rosedale power plant had a total capacity of 221 MW, some of which was operating on standby only. However, the proponent proposed to expand the plant to add a 170 MW generating unit to take advantage of the opportunity presented by the competitive marketplace.

The Board clearly specifies that the project must satisfactorily address the purpose of the legislative provisions regarding “the establishment of a competitive electrical generation market in Alberta” and meet the “public interest in relation to social, economic, and environmental impacts on society as a whole and the communities in close proximity to the plant in particular”.⁶⁴ In its decision, the Board acknowledged the influence of the multi-board model when it said that:

Alberta Environment (AENV) and the EUB administer environmental standards and measures. Social impacts, such as the project’s effect on archaeological and historical resources, in the Board’s view, will be properly supervised by Alberta Community Development (ACD) pursuant to the *Historic Resources Act* (“HRA”).⁶⁵

⁶² *Taylor Processing Inc Applications for Three Pipeline Licences and a Facility Licence Amendment Harmattan-Elkton Field*, ERCB Decision 2010-36 (7 December 2010) at 5 [*Taylor Processing*], online: ERCB <http://www.Ercb.ca/portal/server.pt?>.

⁶³ *Supra*, note 56 at page 23.

⁶⁴ Re: EPCOR Power Development Corporation and EPCOR Generation Inc. - Rosedale Power Plant Unit 11 (RD11) (May 2001), Decision 2001-33, page 1.

⁶⁵ *Ibid*, at page 1.

It is important to note that, even at the initial stages of developing a competitive electrical generation market in Alberta, the multiplicity of boards required to approve a facility was acknowledged and addressed by the Board.

The discussion of the determination of the public interest was brief, comprised of seven lines in the decision, which focused on the fact that consideration of the “need for and the economics of generating units are no longer relevant factors in assessing whether an application under section 9 of HEEA is in the public interest.”⁶⁶ EPCOR submitted that the assessment of the public interest ought to consider “whether the full cost of meeting appropriate environmental, social, and economic requirements or standards, described as externalities, have been properly assigned to and borne by the project. EPCOR argued that if a project has demonstrated that such costs have been internalized, the final decision on whether to proceed with the project must be the responsibility of the applicant. EPCOR submitted that the mandate of the AEUB in these applications is to determine whether an applicant has in fact satisfactorily addressed all of the important externalities. It concluded that when the AEUB has made such a finding, and the applicant has proceeded with the project, the public interest has been met.”⁶⁷ Intervenors argued that the public interest is, “good, beneficial and in the best interests of the society for which the particular legislation was designed”.⁶⁸

The Board held that:

[t]he determination of the public interest is ultimately a subjective determination bounded only by the general and specific objects of the legislation in question and the power of the EUB to carry out those purposes. Such a determination must arise from the evidence presented and the careful, fair, and objective discernment of that evidence by the Board. The facts, circumstances, and issues of each individual application necessarily mean that no objective test of what constitutes “in the public interest” can be formulated.”⁶⁹

The AEUB also describes the components of the public interest test as “broad and elastic”.⁷⁰ As freeing as that concept may be for the regulatory authority, it is not of assistance to the proponent that is trying to ensure that its application for a power generation project is accepted.

Intervenors in this case made a compelling argument that the consideration of the public interest included whether there were any impacts on historical resources and archaeological resources. However, the AEUB acknowledges that that ACD was the regulator responsible for this assessment. The AEUB acknowledged its responsibility to account for the social impact of a project but then stated, “the Board may look to ACD and its mandate under the HRA to ensure that the public interest in this regard is met”.⁷¹ The Board acknowledged that the HRA is the “dominant legislation governing the supervision of historical resources in the province ... Board is satisfied that ACD’s regulatory process will ensure that the resources identified at the Rosedale

⁶⁶ *Ibid*, at page 2.

⁶⁷ *Ibid*, at page 4.

⁶⁸ *Ibid*, at page 5.

⁶⁹ *Ibid*, at page 6.

⁷⁰ *Ibid*, at page 6.

⁷¹ *Ibid*, at page 8.

site will be appropriately dealt with in the public interest”.⁷² More importantly, the Board states that its decision to approve or reject EPCOR’s application “would neither fetter the Minister’s discretion to designate any part of the site as a Provincial Historic Resource nor remove EPCOR’s obligation to seek ministerial approval to alter a building designated as a Provincial Historic Resource”.⁷³

In the writer’s opinion, the Board specifically addressed its mind to the complexity of the multi-board model, and even specifically turned its mind to the duplicative process that results from the ACD having jurisdiction over the social impact of the project insofar as it applies to the determination of impacts on historical resources, but then must simply soldier on in the face of a regulatory model that does not create clarity of process but, in fact, evidences a duplicative process and the potential for conflicting decision-making and the fettering of one regulatory authority by another.

5.1.1.2 AES Calgary ULC – 525-MW Natural Gas-Fired Power Plant, Decision 2001-101 (December 2001)

In this case, the proponent applied for a permit to construct and a licence to operate a 525 MW natural gas-fired power plant approximately two kilometers east of Calgary. The Board confirmed that it was specifically empowered by HEEA, section 9, to determine whether projects for electricity generation plants were in the public interest. In addition, the Board acknowledged its responsibility under section 2.1 of HEEA that it is to have regard to the deregulation of the electric generation sector. Prior to finding that a project is in the public interest, the Board “must assess whether a particular application will further the purposes of the HEEA as well as meet the public interest test in terms of acceptable social, economic, and environmental impacts as mandated in section 2.1 of the *Energy Resources Conservation Act*”.⁷⁴

In its decision, the Board referred to its earlier decision in the EPCOR case, Decision 2001-33, where it confirmed that the need for and cost of a proposed project were not relevant in its consideration. However, the Board also affirmed that, even though it does not need to consider need and cost, projects still require Board approval and that the Board is required to examine, among other things, “the environmental, social, and economic impacts resulting from an approval. The public interest must still be met in these areas.”⁷⁵

The Board also clearly identifies the fact that other regulatory agencies will be involved in the permitting of an electricity generation plant. It states “[t]he Board notes it is not alone in deciding whether a proposed generating plant can be operated in a safe and efficient manner without compromising the environment or the health and safety of the citizens of Alberta. The Board is fully aware that other agencies must also endorse the project and/or issue approvals for a proposed generating plant to be built.”⁷⁶ However, with that pronouncement, the Board does not go on to address the fairness of this multiplicity of regulatory agency players, the effect that the

⁷² *Ibid*, at page 8.

⁷³ *Ibid*, at page 8.

⁷⁴ Re: AES Calgary ULC (December 2001), Decision 2001-101, page 2.

⁷⁵ *Ibid*, at page 4.

⁷⁶ *Ibid*, at page 5.

multi-board model has on the process of regulatory approval, or the potential for duplicative regulatory process. It simply addresses the situation as a status quo and moves on, presumably with the assumption that all will be well.

In the writer's opinion, the Board has no option but to concede to the existence of the duplicative process and do its best with the status quo. While this response may be the only practical solution at the time, it does not lead to the conclusion that the process is fair or just.

5.1.1.3 EPCOR Generation Inc. and EPCOR Power Development Corporation – Expansion of Genesee Power Plant, Decision 2001-111, December 21, 2001

In this case, the AEUB addressed its mind to the role and authority of the Board in the regulatory permitting process. The proponent in this case sought approval for a 490 MW expansion to the existing coal-fired Genesee Power Plant, located west of Edmonton. The expansion generation facility would use supercritical pulverized coal combustion technology, which would make it 10% more efficient than other units at Genesee or in the province generally.

In considering this case, the Board had the opportunity to address the intention of the legislature, as expressed in the *Electric Utilities Act*, with respect to the creation and support of a deregulated and competitive electricity generation market.⁷⁷ The Board reflected on sections 9 and 2.1 of HEEA and section 2.1 of the ERCA⁷⁸ as directing it to consider “whether the construction and operation of a proposed power plant is in the public interest, taking into account a number of factors including the social, environmental and economic impacts of the project, the economic, orderly, and efficient development of electric generation, and the creation of an electric generation sector guided by market forces”⁷⁹.

This decision gave rise to the summary of the public interest consideration to which nearly every subsequent AEUB and AUC decision refers:

The determination of whether a project is in the public interest requires the Board to assess and balance the negative and beneficial impacts of the specific project before it. Benefits to the public as well as negative impacts on the public must be acknowledged in this analysis. The existence of regulatory standards and guidelines and a proponent's adherence to these standards are important elements in deciding whether potential adverse impacts are acceptable. Where such thresholds do not exist, the Board must be satisfied that reasonable mitigative measures are in place to address the impacts. In many cases, the Board may also approve an application subject to specific conditions that are designed to enhance the effectiveness of mitigative plans. The conditions become an essential part of the approval and breach of them may result in suspension or rescission of the approval.⁸⁰

⁷⁷ *Electric Utility Act*, SA 1995, c E.-5.5.

⁷⁸ *Energy Resources Conservation Act*, RSA 1980, c E-11, with amendments thereto (as it was at the time).

⁷⁹ Re: EPCOR Generation Inc. & EPCOR Power Development Corporation (December 21, 2001), Decision 2001-111, page 4.

⁸⁰ *Ibid*, at page 4.

Interestingly, while this provision has become oft-quoted, it is less than explicit about the methodology behind the establishment of a strong public interest argument, nor does it provide much guidance to the proponent or the intervener about the basis upon which the public interest will be assessed. The decision goes on, as most of them do, to address the specific impacts of the proposed project and whether the mitigation measures proposed by the proponent are likely to provide sufficient mitigation of any negative impacts caused by the project.

5.1.1.4 ECB Enviro North America Inc. – Construct and Operate the Lethbridge Biogas/Cogeneration Plant, Decision 2007-067, August 28, 2007

This is a decision by the AEUB with respect to the application for the Lethbridge biogas/cogeneration power plant, one of the first biomass to power plants in Alberta. The concept of anaerobically digesting organic waste, such as manure and food and agricultural waste, to generate methane and carbon dioxide was new and of predictable concern to the local stakeholders. This decision is not remarkable with respect to its approach to the public interest test but rather because it specifically addresses the duplicative regulatory processes that were required at the time and which, in the writer's view, regrettably persist today.

In section 4.3 of the Decision, the Board addresses the multiplicity of regulatory authorities that were involved in the permitting of the applied-for biogas/cogeneration plant.⁸¹ It states:

The EUB and AENV are the regulators primarily responsible for establishing and enforcing the requirements that ECBENA [the proponent] must meet in order to construct and then operate the proposed facility. AENV did not participate in the hearing but it was engaged in the ADR process. In addition, AENV has its own approval process through which to measure the project proposal and the concerns expressed with the project, and to make an appropriate and informed decision on project applications that are before it.

The Board notes that the interveners expressed a lack of faith in the regulators' ability or resolve to enforce the requirements that would apply to the plant and its operations. The EUB has extensive experience sharing regulatory oversight with AENV, and the Board wishes to assure the interveners that both it and AENV fully intend to ensure that all the conditions and other requirements applicable to the project are met by the operator.⁸²

It is interesting that, even though there were concerns expressed by the interveners about the ability of the regulatory authorities to enforce their conditions, there is a tacit acceptance that the multiplicity of processes and regulatory authorities is the status quo, even to the extent that the AEUB states that it has "extensive experience sharing regulatory oversight with AENV".⁸³

5.1.2 Cases between 2008 and 2017 – Alberta Utilities Commission

⁸¹ Re: ECB Enviro North America Inc. (August 28, 2007), Decision 2007-067, page 10.

⁸² *Ibid*, at page 10.

⁸³ *Ibid*, at page 10.

5.1.2.1 Mustus Energy Ltd. – Construct and Operate a 35 MW Biomass Power Plant, Decision 2009-101, August 5, 2009

This is one of the earlier decisions of the AUC. In this case, the applicant applied for a permit to construct and licence to operate a biomass power plant. The discussion of the public interest test was brief. There is no reference to the empowering section of the AUCA, which sets out the test, nor is there reference to the requirements for Alberta Environment for a facility approval for facilities greater than one MW. The discussion of the public interest is limited to a simple reference as follows:

In determining whether the proposed Power Plant is in the public interest, the Commission considered the environmental, social, and economic impacts of the facility and whether adverse impacts can be mitigated to acceptable levels.⁸⁴

There is a brief reference to the project complying with air quality objectives as set out by Alberta Environment, as well as zoning requirements and water usage as set out by the County, but that is the extent of the discussion of the basis for assessment of the project.

5.1.2.2 TransCanada Energy Ltd. – Construct and Operate Saddlebrook Power Station, Decision 2010-059, February 3, 2010

This application was for a 338-MW gas and steam fired power generation station. In this decision, the AUC does refer to Section 17(1) of the AUCA. In the decision, the Commission refers to the “other approvals” required to complete the permitting of the power plant, but does not provide any discussion of how to reconcile the assessment of the project by the other regulatory authorities. At page 3 of the decision, the Commission identifies the following other approvals that are required by TransCanada:

22. TransCanada submitted a concurrent application to AENV pursuant to the Alberta Environmental Protection and Enhancement Act for an industrial approval for the Power Plant, which application is under consideration.

23. Project approval from Transport Canada and a letter of non-objection from NAV CANADA were received on September 9, 2008 and January 21, 2009 respectively.

24. TransCanada consulted with the Municipal District of Foothills regarding the Power Plant, and received a letter of support on September 23, 2008 for the project.⁸⁵

Again, a very brief and summary statement of compliance with section 17(1) of the AUCA public interest test ends the discussion of how the Commission applied the test to find that the project was in the public interest. Further, there is no discussion at all about the overlapping jurisdiction with AENV, NAV Canada, and the Municipal District of Foothills.

⁸⁴ Re: Mustus Energy Ltd. (August 5, 2009), Decision 2009-101, page 12, para 77.

⁸⁵ Re: TransCanada Energy Ltd. (February 3, 2010), Decision 2010-059, page 3, para 22-24.

5.1.2.3 ENMAX Shepard Inc. – Construct and Operate 800 MW Shepard Energy Centre, Decision 2010-493, October 21, 2010

This application was for one of the large power generation facilities in the Province of Alberta. Despite the significant amount of procedures associated with a facility application of for a project of this size, the decision itself makes only very brief mention of the implementation of the public interest test. The Commission predictably cites sections 2 and 3 of the HEEA and section 17 of the AUCA as guiding legislation with respect to the determination of the proceeding before it. Sections 2 and 3 of HEEA give guidance to the Commission to make its decisions “in the public interest”. The following excerpt from section 17 of the AUCA is also cited:

...in addition to any other matters it may or must consider in conducting the hearing or other proceeding, give consideration to whether construction or operation of the proposed... power plant..., is in the public interest, having regard to the social and economic effects of the ...plant... and the effects of the ...plant... on the environment.⁸⁶

In this decision, the Commission begins to provide more structure for its consideration of the components of the public interest test. Whereas in previous decisions, the Commission simply engaged in a discussion of the specific environmental impacts and social impacts of the project, without relating that discussion to the public interest test and the weighing of the factors contained in the public interest test, in the Shepard decision, the Commission begins to draw the connection between the public interest test and the discussion of each of the potential impacts of the project.

The Commission refers back to the decision of the AEUB in the EPCOR Genesee case and sets out clearly the public interest test and the way that the Commission is to apply that test. At page 4, paragraphs 25-26 of its decision, the Commission states:

25. In Decision 2001-111⁸⁷, the Commission’s predecessor, the Alberta Energy and Utilities Board (EUB or Board), explained its approach to assessing whether the approval of a power plant is in the public interest as follows:

The determination of whether a project is in the public interest requires the Board to assess and balance the negative and beneficial impacts of the specific project before it. Benefits to the public as well as negative impacts on the public must be acknowledged in this analysis. The existence of regulatory standards and guidelines and a proponent’s adherence to these standards are important elements in deciding whether potential adverse impacts are acceptable. Where such thresholds do not exist, the Board must be satisfied that reasonable mitigative measures are in place to address the impacts. In many cases, the Board may also approve an application subject to specific conditions that are designed to enhance the effectiveness of mitigative plans. The conditions become an essential part of the approval, and breach of them may result in suspension or rescission of the approval.⁸⁸

⁸⁶ Re: ENMAX Shepard Inc. (October 21, 2010), Decision 2010-493, page 4, para 22.

⁸⁷ Re: AEUB Decision 2001-11, as cited in ENMAX Shepard Inc. (October 21, 2010), Decision 2010-493, page 4, para 22.

⁸⁸ *Ibid*, at page 4, para 22.

In the Board's view, the public interest will be largely met if applications are shown to comply with existing provincial health, environmental, and other regulatory standards in addition to the public benefits outweighing negative impacts.

26. The Commission is of the view that this approach to assessing whether a proposed project is in the public interest is consistent with the purpose and intent of the statutory scheme. Further, the Commission considers that this approach provides an effective framework for the assessment of large projects that are the subject of multiple jurisdictions and require multiple approvals or authorizations.

Subsequent to the above statement, the Commission proceeds, as it is wont to do, to conduct a very site-specific analysis of the specific impacts and the applicant's efforts to mitigate the impacts of those specific items concluding that the project is in the public interest, with certain conditions.⁸⁹

5.1.2.4 Maxim Power Corp – H.R. Milner Power Plant Expansion, Decision 2011-337, August 10, 2011

In this case, the Commission was asked to issue a permit and licence for the 500 MW expansion of the existing 150 MW H.R. Milner Power Plant.

Again, the existence of multiple regulatory authorities is simply accepted as the status quo and not addressed in the context of potential regulatory conflicts or confusion. At page 2, paragraphs 7 to 8 of the decision, the Commission states:

7. To operate the power plant, Maxim requires, in addition to the Commission's approval, approvals and clearances from a number of other government departments or agencies, including Alberta Environment, Alberta Sustainable Resources Development (ASRD), Transport Canada, NAV Canada and Alberta Culture and Community Spirit (ACCS).

8. As part of its internal review of the application, the Commission took note of the fact that Maxim had already engaged several other government departments and agencies prior to submitting the application to the Commission.⁹⁰

There was no further discussion of the impact of multiple regulatory authorities on the regulatory efficiency of the process or the risk of confusion other than to reach the following conclusion at page 11, paragraph 67:

The Commission has reviewed the entire record, including the application, the EIA, the information responses from Maxim to Alberta Environment and to the Commission, and the letters or approvals from Alberta Environment, the Department of Fisheries and Oceans Canada, Alberta Culture and Community Spirit and Alberta Sustainable Resources Development. The Commission evaluated the evidence submitted by Maxim and relies upon its own evaluation as well as the existing and anticipated involvement of other

⁸⁹ *Supra*, note 86 at page 30, para 192.

⁹⁰ Re: Maxim Power Corp – H.R. Milner Power Plant Expansion (August 10, 2011), Decision 2011-337, page 2, para 7-8.

government regulatory agencies with respect to the specific authorizations that are within their scope of authority to issue.⁹¹ (emphasis added)

With respect to the application of the public interest test, the Commission defaulted to the standard recitation of sections 2 and 3 of HEEA, section 17(1) of the AUCA, and reference back to the AEUB Decision 2001-111: EPCOR Generation Inc. and EPCOR Power Development Corporation 490 MW Coal-Fired Power Plant, December 21, 2001, which states:

The determination of whether a project is in the public interest requires the Board to assess and balance the negative and beneficial impacts of the specific project before it. Benefits to the public as well as negative impacts on the public must be acknowledged in this analysis. The existence of regulatory standards and guidelines and a proponent's adherence to these standards are important elements in deciding whether potential adverse impacts are acceptable. Where such thresholds do not exist, the Board must be satisfied that reasonable mitigative measures are in place to address the impacts. In many cases, the Board may also approve an application subject to specific conditions that are designed to enhance the effectiveness of mitigative plans. The conditions become an essential part of the approval, and breach of them may result in suspension or rescission of the approval.

In the Board's view, the public interest will be largely met if applications are shown to be in compliance with existing provincial health, environmental, and other regulatory standards in addition to the public benefits outweighing negative impacts.⁹²

In this decision, the Commission goes further to explain how it has applied the public interest test and considered the impacts of the project on the public as set out below:

Based on the record of this proceeding, the Commission has given consideration to whether the construction and operation of the power plant is in the public interest pursuant to section 17 of the Alberta Utilities Commission Act. The Commission has assessed and balanced the negative and beneficial impacts of the power plant, as stated in this section 6. The Commission is satisfied that the power plant will provide economic benefits to the Grande Cache region and to the province. The Commission concluded that minimal negative social impacts would materialize. With respect to environmental impacts, the Commission has considered that these will be adequately addressed given the design of the power plant, the various mitigative measures committed to by Maxim, and Maxim's obligations to comply with existing regulations and standards and the regulatory requirements of Alberta Environment and all other responsible government departments and agencies. The Commission has also determined that conditions will be imposed on Maxim in this decision and in the power plant approval relating to ash capture and disposal, and fogging and icing impact monitoring and mitigation. As a result, the Commission concludes that the construction and operation of the power plant is in the public interest and approves the power plant.⁹³

⁹¹ *Ibid*, at page 11, para 67.

⁹² Re: EPCOR Generation Inc. and EPCOR Power Development Corporation 490-MW Coal-Fired Power Plant (December 21, 2001), Decision 2001-111, page 4.

⁹³ *Supra*, note 90 at pages 13-14, para 80.

The Commission, in this case, has provided a bit more insight into the application of the public interest test to the specific facts of the case.

6.1.2.5 ENMAX Bonnybrook Inc. – Construct and Operate 165 MW Bonnybrook Energy Centre, Decision 2011-353, August 26, 2011

In this case, the applicant sought a permit to construct and licence to operate a 165 MW power plant at Bonnybrook. The facts of this case and the predicted impacts of the facility are not exceptional. In its decision, the Commission relied upon sections 2 and 3 of the HEEA and section 17(1) of the AUCA to set up its jurisdiction to consider the application by weighing the three, now very familiar, components that make up the public interest test. Again, as usual, the Commission cited the Section from the EPCOR case that has become as familiar as the sections of HEEA and AUCA that are cited with regularity.

Interestingly, in this case, the AUC declined to issue approvals until the Ministerial approval pursuant to section 95 of the *Electric Utilities Act* was provided to the Commission.⁹⁴ This is a good example of how the overlapping jurisdiction of different regulatory schemes can result in a process that is stopped in place when those jurisdictions do not operate in full synchronization.⁹⁵

As stated in section 6, the Commission is not prepared to issue an approval for the BEC until such time as EBI demonstrates compliance with section 95 of the *Electric Utilities Act* by filing with the Commission the Minister's authorization pursuant to section 95. Should the Commission receive that authorization, it is prepared to issue an approval to EBI to construct and operate the BEC, subject to the above noted condition, pursuant to sections 11 and 19 of the *Hydro and Electric Energy Act*.⁹⁶

5.1.2.6 Millar Western Forest Products Ltd. – Biogas Power Plant, Decision 2012-153, June 5, 2012

This particular application is a little different from the preceding power plant applications. In this case, the applicant is proposing to build a power plant that will not be connected to the AIES but will simply provide power to its own industrial facilities. However, even in the face of the behind-the-fence power plant application, the Commission clearly refers to section 17(1) of the AUCA as the definition of the public interest test and the frequently cited excerpt from the EPCOR - Expansion of Genesee Power Plant Decision for the concept of balancing the factors that affect the

⁹⁴ Re: ENMAX Bonnybrook Inc. – Construct and Operate 165-MW Bonnybrook Energy Centre (August 26, 2011), Decision 2011-353, page 20, para 132.

⁹⁵ A similar situation exists with respect to many aspects of different regulatory processes. For example, in the case of a wind generation project, approvals from Navigation Canada must be obtained and submitted prior to the AUC issuing the permit to construct and licence to operate the wind generation facility. In many cases, there are secondary level permits that must be obtained both before and after the primary regulator issues its approval for the project to be fully operational. As long as the hierarchy of processes is clearly defined, there is no issue of due process, other than the time and effort required to implement a project. However, if the hierarchy of processes is unclear, as was the case between the ERCB and the AUC, from 2008 to 2013, and is now the case between AEP and the AUC after 2013, then the risk of a failure of due process exists.

⁹⁶ *Supra*, note 94 at page 20, para 132.

public interest.⁹⁷ Furthermore, the Commission does refer to the fact that other regulatory authorities must be satisfied as part of the overall approval scheme for this power plant. However, beyond citing the common passages from prior decisions, the Commission does not add any additional depth to understanding how to apply the public interest test or what to do about the multiplicity of regulatory proceedings that will affect even a small private power plant like the Millar Western biogas plant.

5.1.2.7 1646658 Alberta Ltd. – Bull Creek Wind Project, Decision 2014-040, February 20, 2014

In this application, the applicant was seeking approval for a large wind farm in the Bull Creek area of Alberta. For the purposes of this paper, the actual objections and wind power specific impacts are not relevant. The Commission set up its jurisdiction in the exact same way as it has done so for years of power plant approvals, by citing sections 2 and 3 of HEEA and section 17(1) of the AUCA. Interestingly, this Commission did conduct a more detailed explanation of how it applied the public interest assessment in this case and balanced the positive and negative impacts of the project in each of the categories of the public interest test – social, economic, and environmental impacts.⁹⁸

5.1.2.8 Capital Power Generation Services Inc. – Genesee Generating Station Units 4 and 5, Decision 2014-226, August 12, 2014

In this application, Capital Power Generation Services Inc. applied for a very large (1050 MW) expansion to the existing Genesee generating station. For the purposes of this discussion, there is nothing new added to the understanding of how to apply the public interest test what the scope of the public interest test should be. There is a bit more acknowledgement of the multiplicity of regulatory authorities and the impact of same in this decision. At paragraph 61, the Commission states:

Compliance with existing regulatory requirements administered by other public or government departments or agencies are important elements in deciding if potential adverse impacts are acceptable and approval of a project is in the public interest. In this respect, the Commission has also taken into account the fact that both the ERCB and the CEA Agency determined that it was unnecessary for Capital Power to undertake a formal environmental assessment for the project. The Commission considers this to be generally supportive of the Commission’s determination that the potential environmental effects of the project are well understood and can be mitigated to an acceptable degree.⁹⁹

5.1.2.9 2615991 Canada Ltd. (ATCO Power Canada Ltd.) 400 MW Heartland Natural Gas Power Plant, Decision 2014-253, September 3, 2014

⁹⁷ Re: EPCOR Generation Inc. and EPCOR Power Development Corporation – Expansion of Genesee Power Plant (December 21, 2001), Decision 2001-111 at page 4.

⁹⁸ Re: 1646658 Alberta Ltd. – Bull Creek Wind Project (February 20, 2014), Decision 2014-040, pages 123-124, para 661-672.

⁹⁹ Re: Capital Power Generation Services Inc. – Genesee Generating Station Units 4 and 5 (August 12, 2014), Decision 2014-226, page 12, para 61.

This is a significant power plant but it is intimately entwined with the Heartland transmission line facility. Intervention on the power plant application was minimal and, aside from setting out jurisdiction through sections 2 and 3 of the HEEA and section 17(1) of the AUCA, the Commission did not add any further jurisprudence on either the implementation of the public interest test or the complexity of dealing with multiple regulatory authorities.

5.1.2.10 Suncor Energy Products Inc. 80 MW Hand Hills Wind Power Project, Decision 2014-331, December 4, 2014

In this case, there is a more significant reference to the fact that multiple regulatory authorities still affect these facilities and the balance between those processes needs to be maintained. The Commission states:

With respect to the environment, the Commission observes that Suncor has received ERCB sign-off. As indicated in past decisions¹⁰⁰, the Commission regards compliance with the existing regulatory requirements administered by other public or government departments or agencies to be important elements when deciding if potential adverse impacts are acceptable and approval of a project is in the public interest. The Commission considers that the sign-off is strong evidence that the project's environmental effects would be acceptable. The Commission accepts Suncor's representations that it will implement those mitigation measures required by ERCB and considers that any approval from the Commission would be conditional on Suncor's compliance with all ERCB directions.¹⁰¹

The Commission acknowledges the multiple regulatory authorities but must accept that there is nothing to be done other than hope that the proponent can balance all of the different regulatory demands in order to achieve a fully permitted facility. That being said, there is no suggestion of change reflected in the decision of the Commission.

5.1.2.11 E.ON Climate & Renewables Canada Ltd. – Grizzly Bear Creek Wind Power Project, Decision 3329-D01-2016, May 19, 2016

In this decision, again, the same sections are cited to establish the jurisdiction of the Commission and the requirement to make decisions in the public interest. However, in this case, rather than referring back to the EPCOR - Expansion of Genesee Power Plant Decision, the Commission decided to make reading a little more interesting and referred back to the Bull Creek Wind Power Plant, which quoted the EPCOR case. Again, little or no development in this area of the law has occurred since 2001.

5.1.2.12 Vulcan Solar Hybrid Energy Centre GP Inc., Decision 21897-D01-2016, October 25, 2016

¹⁰⁰ Re: EPCOR Generation Inc. and EPCOR Power Development Corporation - 490-MW Coal-Fired Power Plant (December 21, 2001), Decision 2001-111 and: 1646658 Alberta Ltd. - Bull Creek Wind Project (February 20, 2014) (Errata issued March 10, 2014), Decision 2014-40, as cited in Suncor Energy Products Inc. – 80-MW Hand Hills Wind Power Project (December 4, 2014), Decision 2014-331, at page 11, para 77.

¹⁰¹ Re: Suncor Energy Products Inc. – 80-MW Hand Hills Wind Power Project (December 4, 2014), Decision 2014-331, at page 11, para 77.

In this case, the proponent proposed to construct and operate a 77.5 MW solar voltaic power project, in two phases, near Vulcan, Alberta. In the decision, the AUC referenced the communications with and commitments that the proponent, Vulcan Solar LP, made to AEP with respect to the potential environmental impacts of the project. In addition, the AUC referred to the fact that approval for the project had been granted by Alberta Culture and Tourism pursuant to the *Historical Resources Act*, prior to the determination being made by the AUC. Other than confirming that each of the aspects of the AUC Rules and the public interest test have been acceptably addressed by the proponent and the public interest test has been met, the Commission did not add any further comment about either the multi-board model or the fact that its determination of the public interest test relied upon the involvement of other regulatory agencies, such as AEP and Alberta Culture and Tourism.

5.1.2.13 C&B Alberta Solar Development ULC, Decision 22447-D01-2017, July 4, 2017

In this case, the proponent applied for a permit and licence to construct and operate a 17.6 MW solar photovoltaic facility near Vauxhall, Alberta. Again, in this decision, the existence of the multi-board framework is accepted as status quo and there is no specific comment made. There is a reference to the fact that AEP has “concluded the project posed a low risk to wildlife and wildlife habitat, and found that the proposed mitigation measure were acceptable”.¹⁰²

There is a more detailed explanation of the involvement of other regulatory and permitting agencies in this decision. However, there is no discussion as to how the multi-board framework affects the decision-making of the Commission or the ability of the proponent to present its case. The one clear curiosity is that the three-pronged public interest test is clearly referenced, considered, and applied. However, as we have seen with respect to power generation facilities, the economic considerations are deemed to be subsumed by the fact that the proponent is self-financing the construction and operation of the plant pursuant to section 3 of HEEA, and the environmental aspects of the public interest test appear to be addressed by AEP. What remains is a gutted public interest consideration of the social impacts of the project and the project’s compliance with the technical and siting aspects of Rule 007. In this writer’s opinion, this situation is clear evidence that there is a risk that the process is becoming so complex and unclear, particularly as to the overlapping jurisdiction with respect to the environmental impacts of the project, that there is a definable risk that the process is unfair and that there could be a failure of due process.

5.2 Brief Analysis

The cases decided between 2001 and 2017 by the AEUB and then the AUC clearly acknowledge the multi-board regulatory framework was the model within which they must operate. The AEUB cases take particular note of the fact that there are other regulatory agencies that have roles to play in the permitting of power generation facilities and, while they appear to be content to work within the existing framework, do not acknowledge that the complexity and overlapping jurisdiction, particularly as evidenced by the fact that both the ERCB (2008-2013) or the AEP (2013 to present) have the jurisdiction to assess the environmental impacts of a project, stands the risk of creating sufficient lack of clarity and complexity to create a real risk of an unfair process that fails to meet

¹⁰² Re: C&B Alberta Solar Development ULC (July 4, 2017), Decision 22447-D01-2017, page 2, para 8.

the due diligence aspect of natural justice. This theme is evident in the ECB Enviro North America Inc. Lethbridge Biogas/Cogeneration Plant decision in 2007 where the AEUB acknowledges the multiplicity of regulatory authorities and specifically states that it has “extensive experience sharing regulatory oversight with AENV”.¹⁰³ Further, in the TransCanada Energy Ltd. Saddlebrook Power Station case, the AUC identifies the fact that there is a concurrent application to AENV that is under consideration. The AUC does not proceed to address how that concurrent application will affect its consideration of the matters under its consideration. In the Maxim Power Corp. – H. R. Milner Power Plant Expansion case application, the AUC simply states that it is relying upon “its own evaluation as well as the existing and anticipated involvement of other government regulatory agencies” in reaching its decision.¹⁰⁴

The first time that the AUC puts this issue into clear focus is in 2011 in the ENMAX Bonnybrook Inc – ENMAX Energy Centre decision where it declined to issue approvals until Ministerial approval pursuant to section 95 of the EUA was provided to the Commission.¹⁰⁵ Interestingly, this approval is not about the environmental impact of the project, which is the obvious overlap, but about whether a municipality can hold an interest in a power generating unit, which is a rare and very specific occurrence. And then again in 2014, in the Suncor Energy Products Inc. – Hand Hills Wind Power Project decision, the AUC recognizes the influence of the ERCB’s involvement (the application was commenced prior to the transfer of jurisdiction to Alberta Environment/AEP in 2013) and states that the fact Suncor represented that it would comply with the conditions placed upon it by the ERCB was relevant. Further, that fact that ERCB had provided a sign-off was “strong evidence” that the impacts of the project on the environment would be acceptable. What is unclear is whether the AUC is relying solely upon its own assessment of the impacts of the project on the environment, which would create a clear overlap in jurisdiction, or whether it is relying upon the assessment by the ERCB, which could create the perception of a captured regulatory authority, or something in between. Again, this is indicative of the complexity that leads to unfairness and a lack of clarity in the process, which in turn, creates the risk of a failure of due process. While it is no surprise that the regulators profess comfort and competence at working within the complex process, the point is that a fair process is the right of the participants, not the adjudicator!

6.0 IMPACT OF ADDITION OF RENEWABLE GENERATION TO ELECTRICITY SUPPLY

An additional consideration for the need to address the permitting and approval structure for power generation projects in Alberta is the clear message that has been sent by the provincial government to retire coal-fired power generation plants and shift the electricity supply balance strongly towards renewable sources.¹⁰⁶ The *Renewable Electricity Act* was proclaimed on March 31, 2017 and can be seen as a strong indication that increasing the supply of renewable electricity is a reality, not just a concept.

¹⁰³ *Supra*, note 77.

¹⁰⁴ *Supra*, note 86.

¹⁰⁵ *Supra*, note 89.

¹⁰⁶ *Renewable Electricity Act*, SA 2016, c R-16.5.

What this means for regulation of power generation in Alberta is that there will be an increase in the number of power generation projects relying on a variety of renewable energy sources that will be put in front of the various regulatory authorities. Most of the renewable power generation projects that have been applied-for to date have been quite small, with the exception of a couple of large solar photovoltaic generation projects. In addition, these projects span a number of renewable power source fuels, such as solar photovoltaic, wind, biomass, and waste heat. Given the diversity of these green power generation sources, a regulator that is focused solely on power generation projects, large and small, conventional and renewable, makes sense. Furthermore, ensuring that smaller renewable power generation project proponents are able to work with a regulatory framework that is clear and simple, not complex, cumbersome, and lacking relevance makes economic sense for those proponents. If the project does not make economic sense for the proponent, in part because of an unreasonably large regulatory financial burden and risk, then the projects simply will not be built and the goal of a more diverse energy supply mix in Alberta will not be realized.

The Government of Alberta's direction for a high level of renewable power generation on the grid necessitates the consideration of the creation of a regulator that is familiar with the issues faced by generation proponents as well as the specific and intricate balance between the generation market and the regulated transmission assets onto which the power must be transported if it is to reach the competitive market, and should focus specifically on those projects.

7.0 SUMMARY

7.1 Restatement of the Problem

The key problem facing power generation facility development in the coming 15 to 20 years will be the unfortunate confluence of the following factors:

1. A complex multi-board regulatory model;
2. A regulatory authority whose mandate and experience is grounded in a rate-based utility model that does not align with the deregulated competitive electricity market;
3. The pending addition of a variety of new and innovative generation technologies which have their own unique technical requirements and generation profiles;
4. A regulatory authority that is required to apply a public interest test whose components are:
 - a. Statutorily irrelevant – economic impact or need
 - b. Simultaneously regulated by two regulators – environmental impact
 - c. Dissimilar to the original concept of linear transmission – social impact.

The end result is a level of regulatory complexity that results in an insufficient level of clarity to qualify as a process that meets the fundamental requirement of due process.

7.2 Solution 1 - Maintain the status quo

The first potential solution is, of course, to do nothing. Accepting the status quo is the easiest option. In this case, the key advantage of maintaining the status quo is that there is some comprehension of the convoluted, but existing, process. While the process is neither efficient nor without regulatory challenges, it is at least known and manageable by experts in the field.

The key disadvantages, as discussed above, are the lack of clarity and potential unfairness in the existing process. The matters of overlapping jurisdiction, a marginally relevant public interest test, multiple regulators without a clear indication of primacy, and the need to engage experts to understand the process results in the preservation of a process that runs a risk of failing to meet the first requirement of natural justice – due process. The unfairness to proponents and stakeholders is clear.

Therefore, the writer believes that the current regulatory framework is severely challenged to meet the requirement of due process and therefore could fail to align with the principles of natural justice. Maintaining the status quo is not an option.

7.2 Solution 2 - Single window regulatory authority

Another solution is to allow one regulator to be the single window for the receipt and coordination of all regulatory processes affecting a power generation project combining all of the required regulatory assessments related to power facility development under the auspices of either the AUC or the AER. There are two key aspects of the regulation of power facilities that make it impractical to assign power generation facilities to the AUC or the AER. The first of these two aspects is the fact that power generation is deregulated, making it more like resource development than a rate-regulated utility asset. In this case, the power generation facilities could fold into the AER more easily than the AUC. The second of these two aspects is that the commodity produced by the power generation facility is sold into the regulated electricity grid and the nature of electricity is that it cannot be stored in large quantities in an economic fashion at this time. Thus, the interface with the rate-regulated transmission system suggests that the regulation of power generation would fit better within the scope of the AUC's jurisdiction. However, both of these regulatory "homes" are inadequate for power generation facilities in the long term because a power generation facility is a unique asset. It is not required to meet the economic need component of the public interest test. The decision to construct and operate the facility is a commercial decision, not a utility based decision, as the owner will pay for the cost of construction and operation, not the rate payers. Further, the interface with the AESO for the sale and delivery of electricity into the rate-regulated AIES creates a unique consideration with respect to which the AER is not familiar. Finally, the drive towards adding significantly more renewable power generation to the energy supply mix in Alberta, currently stated to be 5,000 MW by 2030¹⁰⁷, will require a regulator with a deep understanding of a wide variety of technologies for the production of power, such as hydro generation, solar generation, wind generation, biomass generation, and waste heat capture, to name a few of the existing technologies.

¹⁰⁷ Alberta Ministry of Energy, *Climate Leadership Plan*, <https://www.alberta.ca/renewable-electricity-program.aspx>.

The writer believes that the AUC is best positioned to be the single window coordinating authority in this scenario. It has the infrastructure and the expertise to manage all of the regulatory requirements with respect to a power generation project. In addition, the AUC is the authority that presently has the largest scope of influence with respect to power generation facilities. This solution would reduce the administrative inefficiency of multiple regulatory processes and would simplify the application process for the proponent but would not necessarily eliminate the risk of a failure of due process created by the separate consideration of aspects of the application by separate regulators executing the duties within the framework of overlapping jurisdiction.

Therefore, the writer believes that the single window solution is not a complete answer to the problem of a potentially unfair process with respect to the consideration of power plant generation applications, but it is a better solution than the status quo.

7.4 Solution 3 - Single Regulatory Authority

In the case of the AER, the regulatory duplication and inefficiency has been resolved by having a single regulator address all aspects of the regulatory process for fossil fuel projects. The writer believes that this model is worth consideration as a template for a single regulator structure for power generation facilities.

In December 2010, the Regulatory Enhancement Project Technical Report (“REP”) was issued by the Government of Alberta Task Force. The REP was a cross-ministry initiative of the Departments of Energy, Environment, Sustainable Resource Development, Justice, and the ERCB. The objective of the REP is stated to be “ensur[ing] Alberta’s regulatory system for upstream oil and gas is modern, efficient, performance-based and competitive, while maintaining Alberta’s strong commitment to environmental management, public safety, and responsible resource development in the public interest”.¹⁰⁸ The regulatory framework for regulating fossil fuel resources, prior to the creation of the AER, was “complex, lacking integrated policy or policy development, and involving multiple regulators with largely uncoordinated delivery”.¹⁰⁹ This is the situation that faced the industry with respect to the regulation of resources and that the creation of the AER solved.

The regulation of power generation facilities is in an arguably similar state. It is “complex, lacking integrated policy or policy development, and involving multiple regulators with largely uncoordinated delivery”.¹¹⁰ The regulatory functions of the AUC were not included in the review conducted by the task force. However, all of the principles of fair regulation are as relevant for power generation facilities as they are for fossil fuel projects. It is equally relevant for Alberta to have regulation of power generation facilities that are “modern, efficient, performance-based and competitive, while maintaining Alberta’s strong commitment to the environmental management, public safety, and responsible ... development in the public interest”.¹¹¹ The administrative values that are important for fossil fuel development regulation are equally important to power generation facility development. Implementing a similar solution for power generation facilities makes sense.

¹⁰⁸ Alberta Ministry of Energy, *Regulatory Enhancement Project - Technical Report December 2010*, at page 2.

¹⁰⁹ *Ibid*, at page 2.

¹¹⁰ *Ibid*, at page 2.

¹¹¹ *Ibid*, at page 2.

To draw a parallel between the state of the fossil fuel resource regulatory framework and the power generation facilities regulatory framework is quite simple. Both were in a similar state of complexity and confusion prior to the single regulator solution. The regulatory process was complex, uncoordinated, and duplicative. And, the primary purpose of the process in both instances, was to exercise the delegated jurisdiction of the government with respect to ensuring that the public interest is protected by providing assurance with respect to environmental impacts, public safety, and resource coordination, in the case of fossil fuel resource management, and fair access to utilities, in the case of gas and electricity utilities. The objectives to be addressed by the REP were stated to be the following:

1. Enhance integration in policy development and provide clear policy guidance to regulators;
2. Clarify responsibility for regulatory functions and simplify the structure to reduce overlap and complexity;
3. Provide for enhanced engagement of public interests to inform policy development and focused consideration of interests in policy assurance (i.e. regulatory delivery);
4. Examine the selection process for tools and increase consideration for a broader set of tools; and
5. Develop and use a systematic risk management approach to inform the development of policy and the operation of the assurance system.¹¹²

Interestingly, the REP only deals with finding a solution for the fossil fuel resources side of regulation and not the utilities or power generation facilities side of regulation. In the writer's view, it would be an advisable strategy for harmonizing power generation facilities regulation. Policy development and policy assurance are both required to provide a complete regulatory framework. The REP looked closely at these issues with respect to fossil fuel resource development.¹¹³ The preliminary finding of the REP that set the stage for the rest of the report was that the informal interactions among the various regulators "results in a lack of overall policy coherence, potential competition among policy, and implementation challenges. There is a need for more fully integrated policies to enable Alberta to be competitive and achieve desired social, economic and environmental outcomes".¹¹⁴

A series of potential system enhancements were identified:

1. Policy development interaction;
2. Authority for integration functions (formalizing integration function within existing authorities or establish integration authority separate from existing authorities);
3. Supporting enhancement;
4. Creating assessment structure.¹¹⁵

¹¹² *Ibid*, at page 12.

¹¹³ *Ibid*, at page 19.

¹¹⁴ *Ibid*, at page 19.

¹¹⁵ *Ibid*, at page 20.

What the REP identified was that there are a series of regulators whose involvement is required in the approval of a fossil fuel resource applications but those functions, although related, are not coordinated in any way. The relevant regulators were the AEP, Environment and Sustainable Resource Development, and the ERCB, all operating independently and with limited coordination. The issues created by this situation were apparent to the REP.¹¹⁶ Multiple agencies and processes that operated independently and in an uncoordinated fashion resulted in a duplication of effort and the need for the proponent to seek multiple authorizations or permits through multiple applications for the same project. There was a lack of consistency and alignment between the regulators. This lack of alignment in the scope of delivery brought competing interests and added complexity.

Of the three solutions that were considered – a single submission framework, a one window framework, and a single regulatory authority framework, the result was to choose the single regulatory authority solution. The following figure clearly demonstrates the logic behind the single regulator solution, for fossil fuel development projects.¹¹⁷ This logic is applicable, in the writer's opinion, to the discussion of the best solution for power generation facilities as well.

¹¹⁶ *Ibid*, at page 26.

¹¹⁷ *Ibid*, at page 29, Figure 5.6.

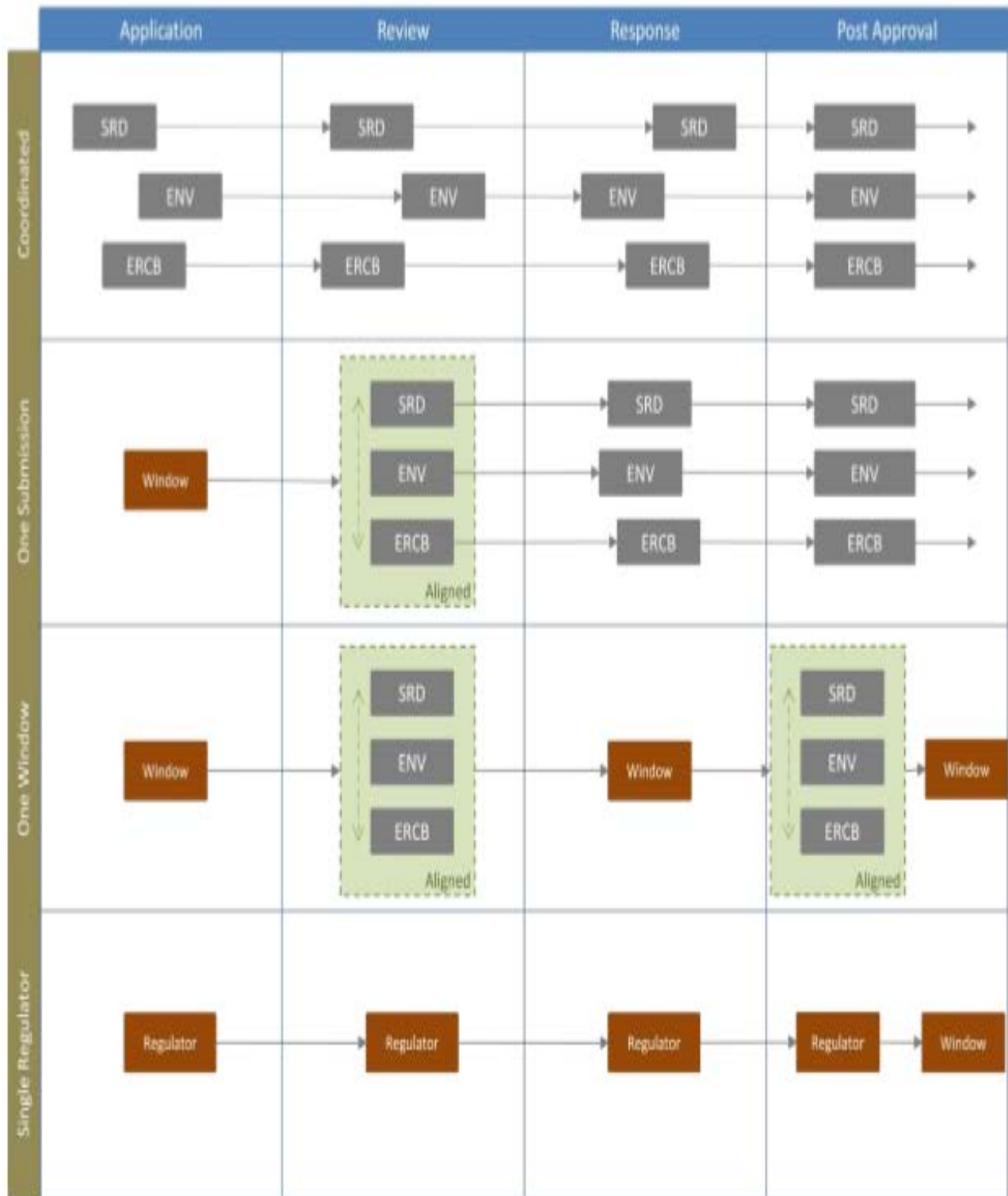


Figure 5.6 – Simplified representations of structural enhancement options.

The formation of the single regulator was determined to be the best solution and as a result the AER was created. The system attributes that are optimized by the single regulator solution are effectiveness, efficiency, adaptability, predictability, fairness, and transparency. The REP found that the single regulator solution is “the simplest and clearest structure for decision making”.¹¹⁸

In this writer’s opinion, the regulation of power generation facilities approval should follow a similar pathway to resolve the remarkably similar issues that are present with respect to uncoordinated and multiple agencies that are engaged in the approval of a power generation facility. In the words of the REP, the “creation of single regulator approach of upstream oil and gas industry poses significant issues for the regulatory processes that remain in place for other industries. How is the integrity/consistency of those systems maintained if administered by multiple agencies”?¹¹⁹

The theme persists throughout the REP that the “lack of consistency and alignment amongst existing decision review processes contributes to complexity, ambiguity and confusion for project proponents, stakeholders, and the public”.¹²⁰

The REP provides a detailed look at the composition of enhanced policy development and policy assurance system and implementation framework.¹²¹ The solution is sound and in the writer’s opinion, if implemented with respect to power generation facilities, would result in an improved regulatory framework. The lion’s share of the thinking and work has been done by the REP to create the AER, a solution that makes sense and streamlines the review of fossil fuel development projects in the public interest. There is no good reason why this analysis cannot be leveraged to create a single regulator for power generation facilities based on the same principles and considerations.

The advantages of this solution are being tested, in real time, by the AER. A single regulator provides a single forum where all of the processes that affect a project reside so that the opportunity to be heard is clear, not onerous for either the proponent or the intervener, and the consideration of the impact of the social, economic, and environmental impacts of the project are all collected under a single umbrella. The issues are heard once in the same proceeding, and then determined using a known test, applied once a single regulator allows the proponent to know the case that it needs to meet, and to meet it without suffering from any risk of conflict between regulators. Additionally, the administration is cost effective and, likely, more time efficient. In the end, a single regulator would solve the complex regulatory structure that currently is the status for power generation projects in Alberta. The disadvantage to this solution is that it would create yet another disruption in the overall provincial regulatory regime in Alberta. There would be some additional cost and confusion associated with the reorganization of the regulatory framework as it relates to power generation facilities.

¹¹⁸ *Ibid*, at page 32.

¹¹⁹ *Ibid*, at page 32.

¹²⁰ *Ibid*, at page 40.

¹²¹ *Ibid*, at page 52.

8.0 CONCLUSION

It is this writer's conclusion that the current regulatory structure for assessing power generation facilities is duplicative and creates a risk of a sufficiently unfair process that challenges the concept of due process and risk alignment with the principles of natural justice. Evidence of this disconnect is found in the multiplicity of regulatory authorities that are engaged in the approval of a facility, the lack of primacy among them, and the overlapping jurisdiction, particularly with respect to the impact of the project on the environment.

Currently, there are two prevailing models of regulation: the resource conservation and commodity based model applied by the AER to fossil fuel development projects and the rate-based model applied to public utility regulation by the AUC. Power generation facilities do not fall neatly within either of these mandates and reside in the writer's phraseology, in regulatory purgatory. Power generation facilities are not built to exploit a Crown-owned natural resource and sell it into a merchant market nor are they built to ensure that a utility service is provided to all rate payers at a regulated rate in accordance with the regulatory compact. Power generation facilities have characteristics that overlap both of these regulatory mandates. Alberta deregulated the power generation market in 1996, so power generation facilities are not utility facilities. Accordingly, a power generation facility developer is not restricted from building a facility based on a system wide determination of whether it is needed. The economics of the electricity project will drive the developer's decision as to whether the project ought to be built. In this way, power generation facilities are more like fossil fuel resource facilities in that the proponent is building the facility at its own financial risk. In the case of power generation facilities, although the rate that the generator receives is not regulated by the AUC, the Commission is responsible for ensuring that there are sufficient utility transmission facilities to provide fair and demanded electricity service to load customers or rate payers. This is where the similarity with the AUC's regulatory mandate occurs as it relates to power generation facilities. Electricity transmission facilities and gas utility transmission facilities, and the economic regulation of these facilities, should remain regulated as utilities by the AUC in accordance with the provisions of the regulatory compact.

Creating a new regulator for power generation projects would allow for the regulator to create a single comprehensive process that clearly addresses the unique characteristics of these facilities. Additionally, a single regulator focused solely on power generation facilities can be better positioned to understand the technical aspects of upcoming renewable electricity generation technology and the impacts of these very diverse facilities on the power market and the environment. A single regulator for power generation facilities could create the interface between itself and the AIES, which would address the impacts on the electricity utility system in Alberta.

Power generation facilities are unique and require their own regulator to ensure that the assessment of whether and how a power generation facility is built and connected to the AIES is focused on the specific characteristics of these facilities and not lumped in with either natural resource exploitation projects or public utilities. A single regulator for power generation facilities will overcome the risk of failure of natural justice created by the multi-board regulatory framework within which these applications are currently assessed. This regulatory purgatory is created by the fact that both the AUC and the ERCB (2008-2013) or AEP (2013 to present) have overlapping jurisdiction to regulate a power generation project and neither regulator has primacy over the other. Multi-board regulation has been recognized as being sub-optimal and results in a challenge to the

first tenet of natural justice, due process. It is difficult to know the case you need to meet when a proponent is subject to multiple regulators and to achieve fair, open, and transparent regulation in a format that has two regulators tripping over each other's jurisdiction.

The AUC would be in a position to apply the values of its predecessor regulators to the projects that fall within its purview, being those projects where the regulatory compact is a valid foundation upon which to make decisions and the economic regulation of a utility project is properly partnered with the environmental impact assessment of the facility. The AUC would continue to be the regulatory authority responsible for the regulation of gas and electricity utility facilities and tolls and tariffs. This streamlining would allow the AUC to retain its current area of expertise, being rate-based utility regulation, without the distraction of power generation facility regulation, a class of developments that is changing rapidly in its technology and its impacts as well as its importance to the energy supply in Alberta.

In order to ensure that Alberta's power generation facilities developers, stakeholders, market participants, and interveners have a platform that honours the principles of natural justice, a fair procedure is necessary. While creating a new power generation regulator similar to the AER may face practical challenges, I submit that this evolution of regulatory structure is the handmaiden to justice that is required.