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Building a Reclamation Security Regime for Electricity Generation: Transparent, Constrained, Fair, and Credible

By: Martin Olszynski

Matter commented on: [Proceeding: 28501 – Inquiry into the ongoing economic, orderly, and efficient development of electricity generation in Alberta - Module A](#)

On August 3, 2023, the Alberta Utilities Commission (AUC) initiated an inquiry into the ongoing economic, orderly, and efficient development of electricity generation. As has been my practice in such matters (see e.g. [here](#)), what follows is my own submission to the AUC, dated December November 20, 2023, modified only for formatting purposes.

I. INTRODUCTION

I am pleased to submit this brief to the Alberta Utilities Commission (AUC) as it enquires into the economic, orderly, and efficient development of electricity generation in Alberta. My submission focuses on the issue of reclamation liabilities.

Briefly by way of background, I am an associate professor at the University of Calgary Faculty of Law where my research interests include environmental, energy, and natural resources law and policy. Of particular relevance to this inquiry, recent publications include an examination and critical assessment of Alberta’s liability management regime for conventional oil and gas assets (further discussed below), and a forthcoming paper that similarly examines and assesses the liability regime for oil sands mines, known as the Mine Financial Security Program (MFSP). My full Faculty Profile is available [here](#).

Accompanying this brief is the above-noted, peer-reviewed paper on Alberta’s failed approach to conventional oil and gas liabilities:

- Drew Yewchuk, Shaun Fluker and Martin Olszynski, “A Made-in-Alberta Failure: Unfunded Oil and Gas Closure Liability” (October 2023) University of Calgary School of Public Policy Paper Series, Vol. 16:31 (available [online](#)).

The information and analysis contained in that paper both complements and supplements two of the expert reports commissioned by the AUC, namely:

- Ecoventure, “Consideration of Implementing Mandatory Reclamation Security Requirements for Power Plants” ([November 8, 2023](#)) (which discusses and critiques Alberta’s liability regimes for conventional and non-conventional oil and gas assets as relevant precedents, at pages 37 – 45)

- Dr. Colin Mackie, “Reclamation Security Requirements for Power Plants in Alberta: A Report for The Alberta Utilities Commission (AUC)” ([November 2023](#)) (which discusses the importance of appropriate legislative authorities and constraints and the impact of reclamation security requirements as potentially hindering (too onerous) or subsidizing (too lax) a given sector).

My basic submission is that the AUC should recommend a reclamation security regime that is transparent, sufficiently constrained by legislation, fair to the renewable energy sector, and which will maintain the AUC’s independence, credibility, and trust. Each of these elements is further discussed below.

II. BUILDING A RECLAMATION SECURITY REGIME FOR ELECTRICITY GENERATION

The most prominent features of Alberta’s failed regime for conventional oil and gas liabilities are its ‘asset-to-liability’ approach for determining security requirements (which operates to require no security in the vast majority of circumstances, in part by grossly underestimating liabilities), coupled with the absence of any timelines for closure activity (i.e., abandonment, remediation, and reclamation). The predictable result of such an approach is the accumulation of approximately \$60 billion in closure liabilities for which the Alberta Energy Regulator (AER) holds less than \$300 million in security ([Auditor General of Alberta, 2023](#)). The Ecoventure report highlights other problems with the AER’s approach, including timing issues (e.g., at 37: “A main issue with [Liability Management Rating] is that when companies have a rating below 1.0, there is potential the company is already in financial distress and security cannot be posted”; see also the discussion at 81).

As a starting point, then, it is clear that the AUC should reject the specific ‘Liability Management Framework’ adopted by the AER. This is not to suggest, however, that all of the elements found therein, or variations of them, need to be rejected. The question is one of thoughtful design, calibration, and effective implementation. As recently noted by the Ecofiscal Commission, in its comparative analysis of mining liability regimes in Canada:

... policy-makers face multiple, competing goals. First, good policy should create incentives for the businesses involved to reduce the risk of environmental harm. Second, it should reduce the extent to which society bears the costs of any environmental damage that does occur. Third, good policy should consider the economic costs of achieving the first two goals.

(Canada’s Ecofiscal Commission, “[Responsible Risk: How Putting a Price on Environmental Risk Makes Disasters Less Likely](#)” (2018))

The basic problem with Alberta’s approach to oil and gas liabilities is that it has been driven virtually exclusively to minimize the sector’s costs at the total expense of reducing environmental risk (first goal) and endangering the polluter-pays principle (second goal) (Yewchuk, Fluker, and Olszynski (2023) at 2). In designing a reclamation regime for electricity generation, the AUC ought not ignore economic costs but should strive to reasonably balance all three.

A. Transparency & Legislative Constraints

In our paper, “A Made-in-Alberta Failure: Unfunded Oil and Gas Closure Liability,” Drew Yewchuk, Shaun Fluker and I observe that this failed regime’s design and implementation have been marked by a culture of secrecy, excessive regulatory discretion, and regulatory capture:

Lack of transparency: To avoid scrutiny of both its own actions and the actions of the industry it regulates, the [Alberta Energy Regulator] has been and continues to be intensely non-transparent. The culture of secrecy and confidentiality at the Regulator allowed the inactive and orphan site problem to grow without sufficient public scrutiny...

Excessive discretion: The legislative framework remains far too reliant on the Regulator’s exercise of discretion to trigger legal obligations on closure work. There remains a troubling absence of legislated timelines or quota amounts for closure work. Moreover, neither the Legislature nor the [Alberta Energy Regulator] has set binding and measurable public targets for the liability management system, such that the performance of the system cannot be easily assessed...

Regulatory capture: The [Alberta Energy Regulator] has prioritized its relationship with the oil and gas industry over accountability to the public, and continues to do so, thereby allowing industry to have excessive influence on the design and administration of the liability management regime. Some illustrations of this influence documented in this paper are: (1) the Regulator’s reluctance to demand adequate security deposits from industry for closure work; (2) the design of the flawed LLR program which grossly underestimated actual closure liabilities; and (3) a severely undercapitalized orphan fund. These errors were made in close consultation with industry, generally at industry’s urging, and industry was given voting positions on key decision-making committees.

(Yewchuk, Fluker, and Olszynski at 24)

As we note in our paper, a lack of transparency, excessive discretion, and regulatory capture have actually long since been understood in the environmental law and policy literature as defects that undermine the effectiveness of such laws and policies (at 2-3). I was not at all surprised, therefore, to see these issues reflected in Dr. Colin Mackie’s report, which addresses the need for both transparency (see e.g., recommendations 3 and 5) and appropriate legislative constraints (see e.g., recommendation 1 – 3) in future reclamation security requirements (or RSR). Subject to the caveats and modifications set out above and below, I generally support the thrust of Dr. Mackie’s recommendations.

With respect to legislation, I would go further than Dr. Mackie and recommend that, in addition to a legislated principle of “restorative responsibility” (which can be considered functionally equivalent or similar to the “polluter pays” principle already enshrined in the *Environmental Protection and Enhancement Act*, [RSA 2000, c E-12 \(EPEA\)](#) at s 2(i)), and in addition to an explicit

legislative authority for RSR (see *EPEA* s 84(1), which requires the payment of security where required by regulations, e.g., section 17 of the *Conservation and Reclamation Regulation*, [Alta Reg 115/1993](#)), the primary elements of what Dr. Mackie describes as guidelines (“*Reclamation Security Requirements for Power Plants*”) be set out in *legislation*, rather than in the form of subordinate rules or regulations promulgated by the executive branch, whether by a relevant ministry or the regulator itself.

The rationale for this recommendation is tied to my concerns for fairness and maintaining the AUC’s independence and credibility. Simply put, the current government has made it clear that it is prepared to use – and misuse – Alberta’s regulatory regimes and apparatus for ideological, political, or other ends. The events preceding this inquiry make this abundantly clear, as recently reported in the media:

The government cited two letters to justify the decision: one [letter from the Alberta Electricity System Operator](#) — and [one from the Alberta Utilities Commission](#). The system operator manages the provincial grid, while the commission is the regulator in charge of power projects.

Both letters were dated July 21 and were attached to the [government news release](#) announcing the pause. “This approach is in direct response to a letter received from the [Alberta Utilities Commission] and concerns raised from municipalities and landowners,” the news release said.

However, the utilities commission letter did not ask for a pause and the system operator letter simply said it would support the process as it is implemented. Smith continued to reiterate the government was asked for a pause regardless [...]

A newly obtained [briefing note for Neudorf](#), prepared by his own ministry, dated July 20, suggests the government had already solidified its plans before the Alberta Utilities Commission letter — which the government had claimed asked for the pause — was penned.

(See Drew Anderson, “[Danielle Smith’s government made false statements about reason for Alberta renewables pause: documents](#)”. See also Nigel Bankes and Martin Olszynski, “[An Incredibly Ill-Advised and Unnecessary Decision](#)”.

In addition to the contradictory and deceptive messaging that preceded this inquiry, there is the matter of the glaring double standard between the government’s purported concern for reclamation liabilities associated with renewable energy projects on the one hand, and its refusal to meaningfully address closure liabilities in the oil and gas sector on the other, where total liabilities are officially estimated at \$105 billion (\$60 billion for the conventional oil and gas sector as noted above, and approximately \$45 billion for oil sands mines according to the [AER](#)) but may be as high as \$260 billion according to [media reports in 2018](#).

Simply put, clear legislative provisions and constraints regarding RSR are required to not only ensure their effective implementation, but also to protect the renewable energy sector from

arbitrary and discriminatory treatment by the provincial government, whether current or future. Such arbitrary treatment is enabled where legislative provisions are sparse and grant broad discretionary authority to regulators who are insufficiently insulated from political pressure.

B. Fairness

The AUC and the Government of Alberta find themselves on the horns of a dilemma. On the one hand, it seems plain that Alberta should learn from its past mistakes, especially from the oil and gas sector. On the other hand, subjecting the renewable energy industry to anything resembling a functional reclamation security regime – when the oil and gas industry has for decades benefited from the absence of one – raises basic questions of fairness and exposes the government to accusations of arbitrary or discriminatory treatment.

As noted by Dr. Mackie, lax RSR regimes are fundamentally a form of state subsidy:

The issue is that in the presence of lax (or, indeed, no) RSRs, where a regulatee defaults on their reclamation obligations, the costs are often passed to society and the environment (i.e., they are ‘externalized’). This is a form of indirect state subsidization. It has this effect as where a regulatee ceases to trade prior to performing reclamation then, in the absence of having provided (effective) security, it has been permitted to place energy on the market without bearing the true social cost of its generation. This confers upon them a competitive advantage over those regulatees that operate within a stringent RSR regime which requires that they internalize their reclamation costs. Thus, as lax (or no) RSRs mimic state subsidization of reclamation, this connects an issue that many classify as purely environmental, to a larger political conversation around economic equity in energy generation at the domestic and international level.

(Mackie Report, Executive Summary)

In formulating its recommendations, then, the AUC cannot feign ignorance of the plainly relevant but also unprecedented regulatory failure of liability management in the oil and gas sector. However, this means not just avoiding the problematic elements of that regime (e.g., rarely requiring *any* security and the absence of *any* timelines whatsoever for reclamation) but also calibrating the stringency of RSR for electricity generating projects in a way that acknowledges the indirect subsidization that the oil and gas sector has benefitted from for the past two decades (between \$105 – \$260 billion in deferred or unsecured liabilities) and seeks to ensure, as much as possible, a level playing field.

Some of Dr. Mackie’s recommendations (e.g., Recommendation 4 – allowing estimated scrappage and resale value to reduce the amount of security to be provided to a maximum of 50% of that value, and Recommendation 7 – provisions for ‘undue financial hardship’) provide useful starting points for such calibration. Whether the 50% limit should be higher or lower, or what period of delay for the posting of security is appropriate for a regulatee that can show undue financial hardship, are the kinds of questions that the AUC ought to consider from a fairness perspective.

C. Maintaining Independence, Credibility and Trust

In 2021, the Chair of Alberta’s Coal Policy Committee expressed concerns about regulatory trust in Alberta:

In an hour-long CBC Radio phone-in show, Ron Wallace said he’s concerned by results of a recent government survey on coal mining. Wallace pointed out that of about 25,000 respondents, 85 per cent said they were not confident that the industry was being adequately regulated.

“If people have diminished confidence that the regulators are protecting the public interest, then that's a major thing,” he told CBC Calgary's [Alberta@Noon](#) program.

(Bob Weber, “[Head of coal-mining panel says Albertans' trust in resource regulators to be examined](#)”

Mr. Wallace’s concerns are pertinent in the context of this inquiry and the above-noted deceptive communications strategy that preceded it (and that continues to cast a shadow over it). From my vantage point as a keen observer and occasional critic of Alberta’s regulatory regime over the past decade, the AUC is currently generally well-regarded and has managed to avoid the types of controversies that plague the AER, including well-substantiated allegations of regulatory capture (Yewchuk, Fluker, and Olszynski (2023), at 3). But while regulatory trust is difficult to build – the result of consistency and competence accumulated over time – it is very easy to destroy, and by enlisting the AUC to provide political cover for this inquiry and accompanying six-month moratorium, the current government has pushed the AUC towards a precipice in this respect.

I therefore conclude my submissions by urging the AUC, in its analysis and recommendations to the Government of Alberta, to re-assert its role as an independent, expert, and evidence-based regulator, and to ensure that its recommendations are grounded first and foremost in the evidence before it, free from political direction or influence.

Best regards,

Martin Olszynski
Associate Professor
UCalgary Faculty of Law

This post may be cited as: Martin Olszynski, “Building a Reclamation Security Regime for Electricity Generation: Transparent, Constrained, Fair, and Credible” (24 November 2023), online: ABlawg, http://ablawg.ca/wp-content/uploads/2023/11/Blog_MO_AUC_Submission.pdf

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