

The Governance of Regulatory Agencies: A Case Study of the Ontario Energy Board

by Robert B. Warren | January 2015

A Forum for Dialogue



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The Council for Clean & Reliable Electricity

The Council for Clean & Reliable Electricity (CCRE) is a federally incorporated non-profit organization that was formed by a group of volunteers to provide a platform for open public dialogue and a solutions-oriented approach to the challenges of the energy sector. Representatives from universities, public and private sector business leaders, and labour have collaborated to broaden the public debate on energy issues. The Council has organized conferences on distributed generation, biomass, coal and nuclear, as well as public sector governance in the electricity sector. The organization regularly publishes the *CCRE Commentary* that presents reasoned opinions and points of view about significant and timely issues relevant to the electricity sector.

DECLARATION OF INTEREST

The content of this paper represents the views of its author. The views expressed in the paper are personal ones and should not be viewed as representing the views of his firm, his clients, or of the Council for Clean & Reliable Electricity.

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Executive Summary

Regulatory agencies play a critical role in the operation of modern society. They perform functions which none of the legislature, the government, or the courts have the time, the expertise, or the capacity to perform. Because of the importance of regulatory agencies, it is essential that they be subject to effective governance.

This paper examines the governance of regulatory agencies, using the Ontario Energy Board (OEB) as a case study. This paper uses the Organization for Economic Co-operation and Development's (OECD) principles for governance of regulatory agencies as the standard by which to assess the governance of the OEB.

This paper examines the operations of the OEB against that standard and identifies aspects of the OEB's operations which do not meet the standard. It then examines the OEB's existing governance instruments – principally judicial review by the courts, and compliance with the Memorandum of Understanding between the responsible Minister and the chair of the OEB – to determine whether those instruments are adequate to address the deficiencies. This paper argues that those instruments are not adequate.

This paper concludes by suggesting that what is required is an independent examination of the OEB's operations, first to determine what practices need to be improved in order to meet the OECD standard and, second, to determine whether the existing governance instruments can be enhanced or whether they need to be replaced.

The Governance of Regulatory Agencies: A Case Study of the Ontario Energy Board

by **Robert B. Warren**

This paper considers the governance of regulatory agencies.

Regulatory agencies play a critical role in the functioning of Ontario's society. They are responsible for the oversight of essential parts of the economy. They play an important role, as well, in protecting the safety and ensuring the well-being of the province's residents.

The importance of regulatory agencies was recently summarized by the Organization for Economic Co-operation and Development ("OECD") as follows:

They [regulatory agencies] play a vital role in the delivery of public policy and are responsible for ensuring investment in sectors and industries, as well as for protecting the neutrality of markets. They protect citizens (including workers and consumers) for fairness and safety, and they also protect the environment and manage its future. They ensure the reliability of vital infrastructure. If the lights go out, they are held to account.¹

Given the importance of regulatory agencies, it is essential that they be subject to appropriate oversight and control. On this point, the OECD has stated:

The governance arrangements of a regulator are critical. The legal remit of the regulator, the powers it is given, how it is funded and how it is held accountable are all key issues that should be carefully designed if the regulator is to succeed in combining effective regulation with high standards of integrity and trust. Regulators are pivotal in making regulatory regimes work for sustainable growth and equitable societies.²

Regulatory agencies exercise powers delegated to them by legislatures. Such delegation is necessary in a complex and highly-specialized economy. Legislatures do not have the expertise, the time, or the information

to apply detailed regulatory standards to individual circumstances.

Delegation entails carrying out the objectives of the legislation. It also entails carrying out the government policies that inform the legislation. To that extent, regulatory agencies are not independent of the government. At the same time, however, the proper exercise of delegated powers in some circumstances requires regulatory agencies to act as quasi-judicial decision-makers. Acting in that capacity requires regulatory agencies to have a measure of independence.

Regulatory agencies are subject to oversight, to varying degrees and in different ways, by the legislature, the government, and the courts. They are subject, in other words, to three sources of external governance. The question this paper addresses is whether those sources, alone or in combination, provide sufficient governance.

Because of the need for a measure of independence in carrying out their quasi-judicial function – and indeed because of the very reason for their existence, such as the need for a body with a level of expertise which the legislature does not have – there are limits on the effectiveness and the appropriateness of the government, and the legislature, as sources of governance. At the same time, through the evolving jurisprudence on judicial deference, the courts have allowed regulatory agencies considerable freedom in finding facts, interpreting their own statutes, and, indeed, making law. As a result, there are limits on the role of courts in the governance of regulatory agencies. There are, thus, gaps in the nature and extent of the oversight by the legislature, the courts, and the government.

Rather than undertake an examination of the governance of regulatory agencies in the abstract, this paper uses the governance of the Ontario Energy Board ("OEB" or "Board") as a case study.

To provide a frame of reference for that examination, this paper measures OEB governance against the principles for the governance of regulatory agencies developed by the OECD.³

This paper is in the following parts:

1. In Part II, I discuss what governance of regulatory agencies consists of, and why it is important;
2. In Part III, I describe the OECD's principles for the governance of regulatory agencies;
3. In Part IV, I provide general background information regarding the regulation of the energy sector in Ontario and the role of the OEB in that sector, in order to provide a context for the assessment of OEB governance;
4. In Part V, I measure aspects of the OEB's operations against the OECD principles;
5. In Part VI, I examine the OEB's existing governance mechanisms, including the OEB's own governance processes, the Memorandum of Understanding ("MOU")⁴ between the Chair of the OEB and the responsible Minister, and the oversight principles applied by the superior courts to regulatory agencies, including the OEB;
6. In Part VII, I set out the conclusions of the analysis and make suggestions for how those conclusions might be applied.

II WHAT IS GOVERNANCE OF REGULATORY AGENCIES AND WHY IT IS IMPORTANT

In this part, I examine what governance for regulatory agencies consists of and why such governance is important. I also compare considerations of governance in the private and public sectors.

For regulatory agencies, governance may be defined, broadly, as the mechanisms or instruments, processes, and relations by which a regulator is controlled and directed, and by which its decisions and actions are measured and held to account. The mechanisms or instruments would include the governing legislation,

any regulations made under that legislation, and the rules governing the regulatory agency's relations with government, the legislature, and the courts. It would also include the regulatory agency's own structures, rules, and practices.

The importance of good governance for regulators has been described by the OECD in the following terms:

How a regulator is set up, directed, controlled, resourced and held to account — including the nature of the relationships between the regulatory decision-maker, political actors, the legislature, the executive administration, judicial processes and regulated entities — builds trust in the regulator and is crucial to the overall effectiveness of regulation. Improving governance arrangements can benefit the community by enhancing the effectiveness of regulators and, ultimately, the achievement of important public policy goals.⁵

The Task Force for the Independent Review of the British Columbia Utilities Commission made the following observation about the British Columbia Utilities Commission in its Interim Report:

To be effective, the BCUC needs to have credibility, public confidence, and independence within the exercise of its mandate as set by government.⁶

The governance arrangements are critical to ensuring effective regulation and high standards of integrity and trust

Governance is essential to ensuring that regulatory agencies have those qualities. The OECD indicates that there are two aspects of governance relevant to regulators. They are:

- external governance (looking out from the regulator) — the roles, relationships and distribution of powers and responsibilities between the legislature, the Minister, the

Ministry, the regulator's governing body and regulated entities; and

- internal governance (looking into the regulator) – the regulator's organisational structures, standards of behaviour and roles and responsibilities, compliance and accountability measures, oversight of business processes, financial reporting and performance management.⁷

In this paper, I examine aspects of the OEB's operations from the perspective of both external and internal governance.

The governance of corporations, and in particular, publicly-traded corporations, is much discussed in the business press, in academic programs, and in academic publications. Because of the visibility of the discussion in the corporate sector, it is necessary to compare, briefly, the nature of the governance of corporations with the nature of the governance of regulatory agencies.

The literature on governance in the corporate sector is extensive, while consideration of the governance of regulatory agencies has been less extensive⁸. While the considerations of governance in the two share a common vocabulary, there are important differences.

Corporate governance has been defined as follows:

“Corporate governance” means the process and structure used to direct and manage the business affairs of the corporation with the objective of enhancing shareholder value, which includes ensuring the financial viability of the business. The process and structure define the division of power and establish mechanisms for achieving accountability among shareholders, the board of directors and management. The direction and management of the business should take into account the impact on other stakeholders such as employees, customers, suppliers and communities.⁹

Courts recognize that corporations have obligations to a variety of stakeholder groups.¹⁰ In the final analysis, however, governance in the private sector is driven principally by the need to protect and enhance the interests of shareholders.

Unlike corporations, regulatory agencies are

created by statute¹¹, are required to fulfil a specific statutory mandate, and are subject to a formal accountability framework to the courts, to the legislature that created them, and to the government, albeit in different ways and for different functions. Unlike corporations, which have an overriding obligation to give priority to the interests of their shareholders, regulatory agencies have an obligation to balance a number of competing interests and not favour one interest over another. Unlike corporations, regulatory agencies are subject to a body of law (the principles of administrative law), which requires them to make certain decisions according to certain principles. For example, unlike regulatory agencies, corporations are not required to make decisions based on publicly-available evidence, and they are not required to allow stakeholders to participate in the decision-making process.

One concept which is at the core of the discussions of good governance in the corporate sector is independence. The effective governance of corporations often turns on the role of independent directors in overseeing the operations of the corporation. Although considerations of effective governance for corporations and for regulatory agencies are in most respects quite different, the role of the equivalent of independent directors, in the governance of regulatory agencies, is one that may have value and it is considered in part VII below.

III THE OECD'S PRINCIPLES FOR THE GOVERNANCE OF REGULATORS

In this part, I describe the OECD's principles for the governance of regulators. I supplement those principles with suggestions for additional governance criteria.

The OECD suggests that there are four of what it calls “necessary and mutually reinforcing elements” that must be in place to ensure good governance for regulators. They are:

1. Well-designed rules and regulations that are efficient and effective;
2. Effective, consistent and fair operational processes and practices;

3. Appropriate institutional frameworks and related governance arrangements;
4. High quality and empowered institutional capacity and resources, especially in leadership.¹²

The OECD's inclusion of "operational processes and practices" gives rise to questions which occur, at various points, throughout this paper. The principles of administrative law address, among other matters, the processes of decision making by regulatory agencies. They address whether those affected by a decision are given adequate notice of what the decision might entail, whether they know the evidence that might be used to support the decision, whether they have an opportunity to examine and to challenge that evidence, whether they have an opportunity to lead their own evidence, whether the decision maker is free of bias, and so forth. The courts will enforce adherence to those principles, ensuring that the process of decision making meets the required standards. The question is whether the OECD principles require anything further. I believe that they do, for the reasons discussed below.

Periodic independent reviews of the regulatory scheme and of the performance of the regulator are essential

The OECD sets out principles within seven areas which it indicates need to be considered to support the good governance of regulators. They are:

1. Role clarity

According to the OECD, role clarity requires, among other things, the following:

- Legislation [granting] regulatory authority to a specific body should clearly state the objectives of the legislation and the powers of the authority;¹³
- Where a regulator has a range of functions, it is important that these are complementary and not potentially in conflict. This means that the performance of one function should not limit, or appear to compromise, the regulator's ability to fulfil its other functions (including its core regulatory function);¹⁴
- Policy formulation, in its primary sense, belongs to elected governments. Governments determine the principles, objectives, priorities and approaches they take to governing. These are given effect principally through legislation introduced to the legislature, including through funding for specific programs;¹⁵
- The respective roles of the regulator and the Ministry should be clear and agreed;¹⁶
- Major and periodic policy reviews and evaluation of a regulatory scheme, including the performance of the regulator, should be carried out independently of the regulator. This should be through a transparent process that involves input from the regulator and those affected by its activities.¹⁷

2. Preventing undue influence and maintaining trust

Under this rubric, the OECD makes the following statements:

A high degree of regulatory integrity helps achieve decision making which is objective, impartial, consistent, and avoids the risks of conflict, bias or improper influence. The nature of some regulatory decisions can at times involve higher risks to the integrity of the regulatory process, for example, due to pressures from the affected interests or the contentious and sometimes politically sensitive nature of the decisions.¹⁸

Establishing the regulator with a degree of independence (both from those it regulates and from government) can provide greater confidence and trust that regulatory decisions are made with integrity. A high level of integrity improves outcomes of the regulatory decisions.

Regulators should have provisions for preventing undue influence of their regulatory decision-making powers and maintaining trust in their competence and delivery.¹⁹

According to the OECD, preventing undue influence and maintaining trust requires, among other things, the following:

- Defining a regulator's relationship, responsibilities and lines of accountability to the relevant minister, ministry and the legislature is central to both external governance arrangements and independence.²⁰
- Enshrining a regulator's independence in legislation does not guarantee that the regulator's behaviour and decisions will be independent (Thatcher, 2002; 2005). A culture of independence, strong leadership and an appropriate working relationship with government and other stakeholders are essential to independent regulatory behaviour.²¹
- An important aspect of institutional arrangements that protect the independence of regulators are the provisions relating to terms of appointment of independent board members. . . . Term limits can be useful to guard against perceived capture, but must avoid unnecessarily depriving the regulatory system of the useful expertise and experience built up by a regulator.²²

3. Decision making and governing body structure for independent regulators

The principal focus of the OECD principles in this category is with the relationship between the government and the regulator, with particular attention to the process for the appointment of members of the regulator. However, as will be discussed below, decision making also involves consideration of the processes by which a regulator makes its decisions.

4. Accountability and transparency

Under this heading, the OECD makes the following statement:

The regulator exists to achieve objectives deemed by government and the legislator to be in the public interest and operates within the powers attributed by the

legislature. A regulator is therefore accountable to the legislature, either directly or through its minister, and should report regularly and publicly to the legislature on its objectives and the discharge of its functions, and demonstrate that it is efficiently and effectively discharging its responsibilities with integrity, honesty and objectivity.²³ A system of accountability that supports this ideal needs to clearly define what the regulator is to be held accountable for, how it is to conduct itself and how this will be assessed.²⁴

5. Engagement

Under this rubric, the OECD states that "One objective of good regulator governance is to enhance public and stakeholder confidence in the regulator, its decisions and its actions."²⁵ To achieve that, the OECD suggests that "Regulators should undertake regular and purposeful engagement with regulated entities and other stakeholders focused on improving the operation and outcomes of the regulatory scheme."²⁶

6. Funding

Under this heading, the OECD states that "Clarity about regulators' sources and levels of funding is necessary to protect their independence and objectivity. Transparency about the basis of funding can also enhance confidence that the regulator is efficient, as well as effective."²⁷

The OECD further recommends that "Any funding of representative or policy advocacy organizations should be the responsibility of the relevant Ministry, not the regulator."²⁸

7. Performance evaluation

Under this heading, the OECD makes the following points:

- Regulators should clearly define and agree the scope of their mandate that will be assessed with key stakeholders;²⁹
- Regulators should determine which regulatory decisions, actions and interventions will be evaluated in the performance assessment;³⁰
- The regulator should report against a comprehensive set of meaningful performance indicators,

set with reference to the goals it is expected to achieve.³¹

- A regulator's performance measures should incorporate quantifiable aspects of the regulator's activities that provide metrics to assess their performance, as well as the costs they impose.³²
- Regulators should conduct internal performance evaluations as part of good internal governance practices.³³

To the OECD principles, I suggest adding the following governance criteria, some or all of which may be implicit in the OECD principles.

As discussed further in part VI below, the courts' recent jurisprudence on the standard of review is premised on the basis that regulatory agencies have specialized expertise. Courts in effect assume expertise in specialized regulatory agencies. Courts do not, in other words, examine the nature and extent of the expertise of the members of the regulatory agency making the decision under review. Good governance would, I suggest, assess the members of a regulatory agency to ensure that they have the requisite expertise.

The courts also allow regulatory agencies a broad discretion in determining what evidence they should admit and what evidence should form the basis for their decisions. I suggest that good governance would require that regulatory agencies assess the standards they apply to the evidence they admit and assess whether, in applying those standards, the evidence is adequate for the decisions they are required to make.

Finally, regulatory agencies establish rules and processes that are designed to achieve certain objectives. I suggest that the principles of good governance would require a regular assessment about whether those objectives are being fulfilled by those rules and processes.

IV THE OEB AND THE REGULATION OF THE ENERGY SECTOR

In order to assess the governance of the OEB, it is necessary to start with a description of how it is constituted and what its functions are. It is also necessary to understand the larger context within which the

OEB operates. Accordingly, in this part I describe the OEB and its functions. To establish the larger context, I describe the changes in the energy sector in Ontario over the past 15 years that have affected the operations of the OEB and its governance.

By way of general overview, the operations of the province's utilities represent about 2.1 percent of provincial GDP³⁴. Since energy is an essential commodity, it is a sector that is critical to the welfare of the province's residents. It is also critical to the health of the provincial economy.

The OEB regulates many aspects of the energy sector. It is thus, in part, responsible for the health of that sector. As the cost of energy is critical to the success of businesses and to the lives of individuals, how the OEB regulates the sector is a matter of considerable political sensitivity, a reality which has an impact on the governance of the OEB.

The OEB has an annual budget of approximately \$35 million. It employs 188 people³⁵.

The OEB is created by a statute, the Ontario Energy Board Act, 1998³⁶ ("OEB Act"), as an independent regulator.³⁷ At the same time, however, the OEB is required, both explicitly in its governing legislation and implicitly by commonly accepted norms of political governance, to be responsive to provincial government policy.³⁸ Most of the entities which the OEB regulates are owned by the provincial government or by municipalities.

In approving rates for the distribution and transmission of electricity and natural gas, the OEB is required to balance competing interests, including those of residential consumers, large and small businesses, the government, and the utility shareholders. The OEB is required, in approving rates, to act as a quasi-judicial tribunal. As such, it is required to abide by the principles of administrative law. It is accountable to the courts for any failure to comply with those principles.

The functions of the OEB, and the powers granted to it to carry out those functions, are contained principally in the OEB Act and in the Electricity Act³⁹ ("EA").

The OEB's legislated functions include the following:

- Licencing electricity and natural gas distributors, transmitters and retailers

- Approving the construction of natural gas and electricity transmission facilities
- Approving rates for the distribution and transmission of electricity
- Approving rates for the distribution and storage of natural gas
- Establishing the codes that govern the activities of natural gas distributors and transmitters, and retailers
- Monitoring, and ensuring compliance with, those codes
- Monitoring, and ensuring compliance with, the rules for the marketing of electricity

In addition, the OEB regulates aspects of the operations of the Ontario Power Authority and the Independent Electricity System Operator (now amalgamated as the Independent Electricity System Operator).

Pursuant to the authority granted by the OEB Act, the OEB has issued a number of codes prescribing, for example, the rules governing the relationship between a regulated utility and its affiliates.

Although not required by legislation, the OEB has taken on the role of educating consumers about the factors affecting energy costs, including how distribution rates are set.

Some of the functions of the OEB are purely administrative: that is, functions which require a limited exercise of discretion, such as a determination of whether utilities comply with uniform accounting rules. Others involve the exercise of a broad discretion, the best example being the approval of rates for the distribution and transmission of natural gas and electricity.

The power to approve rates, prescribed in the OEB Act, is set out in general terms. The OEB is to approve rates which are “just and reasonable”⁴⁰. The OEB Act does not define what constitutes “just and reasonable”. As a result, the OEB has a broad discretion as to what the term means.

In exercising the power to approve rates, the OEB is required to hold a hearing⁴¹. In approving rates, the OEB is, thus, carrying out a quasi-judicial function. It must carry out that function in accordance with the principles of administrative law, including those codified in the Statutory Powers Procedure Act⁴². Failure to comply with these principles makes the OEB subject to judicial review by the superior courts.

The OEB Act establishes the formal elements of the internal management structure of the OEB. Subsection 4.2(1) requires that the OEB have a management committee composed of the Chair and two vice-chairs. Subsection 4.2(2) provides that the management committee is to manage the affairs of the OEB, including the OEB’s budgeting and the allocation of the OEB’s resources. Section 4.6 provides that, every three years, the Chair of the OEB and the Minister are to enter into the MOU governing specified matters. Section 4.9 requires the Board to deliver an annual report to the Minister, which the Minister must, in turn, lay before the Legislature. Section 4.10 permits the Management Committee to make by-laws governing, among other things, the internal management of the OEB.

Various sections of the OEB Act authorize the Minister to issue directives on specified subjects to the OEB and requires the OEB to implement those directives.

The OEB Act sets out “objectives” to which the OEB must have regard in making decisions with respect to electricity and natural gas.⁴³ Although the OEB must have regard to the objectives, it reserves the discretion as to how it applies them. The OEB is not, in other words, required to apply the objectives in any particular way.

The OEB does not operate in isolation. Considerations of OEB governance must be seen in the context of the governance of the energy sector as a whole.

Over the course of the past fifteen years, there have been major changes in the structure of the energy sector in the province and, equally importantly, in the policies of the provincial government with respect to that sector. The most extensive of the changes have been in the electricity sector. Those changes include requiring local electricity distribution utilities to

become Ontario Business Corporations Act⁴⁴ corporations and to be subject to OEB regulation. Legislation, and directives issued pursuant to it, required both gas and electricity utilities to meet conservation and demand management targets and to integrate renewable energy sources into their systems. Electricity rates for consumers have been frozen, unfrozen, and subject to rebates.⁴⁵

All of these changes have had an impact on the operations of the OEB. To begin with, the material increase in the number of utilities to be regulated has increased the OEB's workload substantially, and required it to adopt forms of regulation, and processes by which that regulation is effected, in the interests of efficiency. The frequency of changes in the government's policies towards the sector has required the OEB to, in turn, adapt to the changes. The clearest example of this need to adapt is the response to the province's green energy legislation. The OEB had to adapt to a material shift in the focus of regulation towards conservation, demand management, and the incorporation of renewable energy sources.

Frequent changes in government policies have damaged the governance of the OEB

Because of its critical role in the economy of the province and in the lives of its residents, the energy sector has been, virtually from its inception, subject to interference by the governments of the day. What has been unusual about the past 15 years has been the scope of the changes in the electricity sector and the degree of explicit direction from the government in the operations of the gas and electricity utilities. One of the chosen instruments giving effect to that explicit direction is the OEB. Some of the direction has been explicit, in legislation, regulations, and directives issued pursuant to that relationship. The consequent loss of independence has had an impact, discussed further below, on the governance of the OEB.

The nature and extent of the government's interest in, and control over, the energy sector and the OEB is

reflected in a letter dated September 25, 2014, from the Premier to the Minister of Energy, Mr. Chiarelli. In that letter, the Premier listed what she described as "your ministry's specific priorities". Those priorities are stated to include "working with the Ontario Energy Board to incorporate the Conservation First policy into local distributor planning processes for electricity and natural gas utilities – and the natural gas demand-side management framework under development".⁴⁶ That statement would seem to suggest that the government views the OEB less as an independent regulator than as an instrument of government policy.

V OEB GOVERNANCE

In this part, I examine aspects of the OEB's operations against the OECD principles.

1. Role clarity

The OECD's principles of role clarity require that "The legislation that grants regulatory authority to a specific body should clearly state the objectives of the legislation and the powers of the authority."⁴⁷ All of the OEB's objectives and its powers are contained in the OEB Act, the EA, and the directives issued pursuant to the OEB Act.

The MOU requires that the OEB produce a business plan, describing the actions it intends to take over a three-year period. The OEB produces that business plan. The OEB Act also requires that the OEB produce an annual report. The MOU provides that the annual report is to include an account of the OEB's activities and an assessment of whether it has met its own performance criteria. The OEB produces those annual reports. In addition, the OEB publishes policy statements.

All of these materials are, on the surface, consistent with the OECD's principles of role clarity and of accountability. Whether this reflects the reality is the question that needs to be addressed. As will be apparent from the analysis below, there is an important difference between complying with the OEB Act's and the MOU's formal governance and accountability requirements, on the one hand, and the substance of that compliance, on the other.

There are aspects of the OEB's operations which arguably are inconsistent with the OECD's concept of role clarity. They include the following:

1. As noted in Part IV above, the OEB Act requires that the OEB have a management committee, consisting of the Chair and two vice-chairs, and assigns responsibilities to that management committee. In addition, section 8.3 of the MOU assigns responsibilities to the management committee. The OEB Act and the MOU thus recognize the importance of the role of the management committee in managing the operations of the OEB.

Notwithstanding the requirements of the OEB Act and of the MOU, no second vice-chair has been appointed for approximately three years. It would seem inconsistent with the principles of good governance to ignore provisions requiring that there be two vice-chairs on the management committee.

Ignoring the statutory obligations for the management of the OEB undermines confidence in the governance of the OEB

The OEB Act and the MOU assign significant managerial responsibilities to the management committee. In carrying out those responsibilities, the vice-chairs should bring areas of expertise, such as in administrative law, to the management of the OEB. Members of the management committee should operate, if not as a team of rivals, at least as a counterbalance to the power of the Chair in providing a diversity of opinion and expertise to the management of the OEB. The structure of decision making is important in that it helps to ensure a greater degree of independence, for the members of the OEB and OEB staff. It helps to ensure, to use the words of the OECD, the required "culture of independence".

Section 8.5 of the MOU assigns responsibilities to the position of the Chief Operating Officer ("COO"). Included in the designated responsibilities is "the general supervision of Employees". Aside from any

other consideration, it is apparent that the Minister and the Chair, in entering into the MOU, felt that the position of the COO was sufficiently important that it be identified in the MOU, and be granted specific responsibilities. The OEB's own By-Law #1⁴⁸, which by its terms relates to the internal affairs of the OEB, describes how the COO is to be appointed and how his or her responsibilities are to be determined.

It is interesting to note that the Task Force for the Independent Review of the British Columbia Utilities Commission commented in its Interim Report on the importance of having a strong executive director, in the following terms:

The BCUC needs a strong Executive Director who can lead staff participation in all proceedings. With an Executive Director in place, the Chair may be relieved of many administrative duties, making the Chair more available to lead the Commissioners and participate directly in proceedings.

As the accountable lead staff, reporting to the Chair, an Executive Director will provide overarching oversight, coordination, and quality control, resulting in more consistent processes and improved outcomes.⁴⁹

Section 5.1 of the OEB's By-Law #1 requires the management committee to appoint a COO. Notwithstanding that, and the requirements of the MOU related to the COO, the position of the COO at the OEB has been eliminated.

During a period when the required management structure of the OEB has not been in place and the OEB has apparently not followed its own organizational and management requirements, the OEB has undertaken significant changes to its operations. The number of full-time Board members has been reduced, and the number of part-time members has increased. This represents a fundamental change in the make-up of the Board. The Board has changed its management structure, eliminating the position of COO and requiring all positions to report directly to the Chair. During this period, the Board has also made significant changes to the way applications for the approval of distribution rates are to be presented, changes which arguably alter the nature of the way rates are to be set. Were the OEB a publicly-traded

corporation, such extensive changes would almost certainly have warranted considerable scrutiny by the board of directors.

By contrast, the scrutiny the Board has provided to the Minister, the Legislature, and the public on these changes is limited. Nowhere in its business plans or annual reports does the Board refer to the absence of a second vice-chair or the reasons for that absence. In its 2014-2017 Business Plan, the OEB described the changes to its organizational structure under the words “Align the Board’s organizational structure with the Board’s mandate and vision”. It then summarized the changes to its organizational structure, as follows:

During 2013 the Board undertook a review of its organizational structure. That review considered a number of objectives, including enhancing the Board’s understanding of consumer expectations and utility operations, building our capacity to monitor the performance of utilities, clarifying accountabilities, improving the effectiveness of Board operations, and acknowledging the need for fiscal restraint. On the basis of that review, the Board implemented a restructuring of the Executive leadership that better aligns and supports the Board’s mandate and vision.⁵⁰

None of that describes how the changes were required in order to align with the Board’s “mandate and vision”. There is no indication as to how the changes build the Board’s capacity to monitor the performance of utilities, clarifies accountabilities, or improves the effectiveness of Board operations.

The requirements of OEB Act and of the MOU, with respect to the membership in and the responsibilities of the Management Committee, and of the Board’s By-Law #1 and the MOU with respect to the position of the COO, are there for a reason. The failure to comply with the requirement for the appointment of a second vice-chair, and the elimination of the position of the COO, alone or in combination with the changes in the Board’s management structure, give rise to questions about how the operations of the OEB are being managed. If all decisions of consequence are now being made by the Chair, without the balance provided by the vice-chairs and, as will be discussed below, expert staff with a strong measure of independence, then the culture of

independence recommended by the OECD may be absent. That would require, among other things, an examination of the following questions:

- (i) How are the operations of the Board being managed in the absence of a full management committee and a COO?
- (ii) What are the reasons for, and the effects of, the change in the organizational structure of the Board?
- (iii) What is the effect of having all positions now report to the Chair?
- (iv) What are the respective roles of the Chair and of the members of the management committee and of the other members of the OEB in setting the policies of the OEB?
- (v) What are the respective roles of the Chair and of the members of the OEB who do not hear applications for the approval of rates in discussing the outcomes of those applications?⁵¹
- (vi) What is the relationship of the Chair and of the members of the OEB with OEB staff, and in particular with OEB staff who participate in the hearing of applications?

Included in the OECD’s four “necessary and mutually re-enforcing elements” that must be in place to ensure good governance are effective, consistent, and fair operational processes and practices. Ignoring the legislative requirement for the management of the OEB, and seemingly placing all responsibility for the management of the OEB in the hands of the Chair, gives rise to the need to consider whether the OEB has, to use the words of the OECD, “effective, consistent and fair operational processes and practices”. The OECD emphasises the importance of these things because, as it notes, “How a regulator is established, directed, controlled, resourced and held to account ... builds trust in the regulator and is crucial to the overall effectiveness of regulation.”⁵²

2. The OECD principles state that “policy formulation, in its primary sense, belongs to elected

governments⁵³. Canadian courts have recognized that there is a value in regulatory agencies issuing policies and guidelines with respect to the decision-making process. Such policies and guidelines, commonly referred to as “soft law”, have the virtue of promoting consistency and efficiency in the decision-making process.

There are, however, limits to the policy-making function of a regulatory agency, particularly in circumstances where the nature and extent of the policies may have the effect, however subtle, of limiting the regulatory agency’s discretion in carrying out its legislative functions.

The OEB has embraced an expansive policy-making role. That it has done so raises three possible concerns. The first is whether the policies may have the effect of limiting the Board’s discretion to make decisions based on individual circumstances and the evidence in applications for the approval of rates. Were the Board to do that, it would represent a movement away from the decision-making process required by the OEB Act, a movement towards a more purely administrative process rather than a process involving the exercise of an unfettered discretion. The second is whether the policies are developed after a meaningful consultation, or engagement, to use the word of the OECD, with those affected by the policies. The third is whether the processes employed within the Board to develop the policies are, again to use the OECD language, based on “effective, consistent and fair operational processes and practices”. I will address each of these possible concerns, in turn.

There are two examples of the first concern. The first is in the policies, arising from the Board’s so-called regulatory reform process, which require, in effect, third-party validation for virtually every aspect of a utility’s application for the approval of rates. That requirement may reflect a movement towards what amounts to an administrative, rather than a quasi-judicial, process considering and approving applications. The quasi-judicial process is required by the OEB Act.

A second example of the concern is the statement by the Board Chair that Board policies are designed to create a consumer-focused regulatory regime.⁵⁴ Because the OEB is required to balance a number of competing interests, such policies risk narrowing the

concept of just and reasonable rates and are inconsistent with an obligation to balance competing interests.

With respect to the second possible concern, the Board typically produces its policies after consultation with stakeholders. It is an open question, however, whether the Board actually incorporates the input from the stakeholders or merely uses the consultation to disguise the reality that the Board arrives at a pre-determined policy.

With respect to the third concern, many of the policies with far-reaching implications (for example, those dealing with regulatory reform in the electricity sector), were developed during a time when the management structure of the OEB was incomplete. The application of the OECD’s principles suggest that policies should first be developed internally through a process that reflects a rigorous consideration of potentially conflicting perspectives from experts who feel at liberty to express, candidly, positions that may differ from those of, for example, the Chair. Given the organizational changes at the Board, described above, it is an open question whether such conditions existed when the policies were developed.

The nature, extent, and limits of the OEB’s policy-making powers have never been prescribed, by the legislature or otherwise. In the absence of such a prescription, the exercise of a broad policy-making power may be inconsistent with the principle of role clarity.

I suggest that the principles of good governance require that the nature and extent of the OEB’s policy-making functions, as well as the policies themselves, should be reviewed to determine whether, or to what extent, they may have the effect of impinging on the discretion to consider an application for approval of rates on its merits.

The processes by which policies are developed should also be assessed to determine whether they are the product of, first, rigorous and independent consideration by the OEB’s staff experts and, second, meaningful engagement with stakeholders.

Finally, I suggest that any policies developed by the OEB should be subject to measurements of their effectiveness in at least two ways. In the first, the costs of implementing the policies should be forecast, that is the policies should be subject to an impact analysis. In the second, the effectiveness of the policies in achieving their stated objectives

should be assessed, along with an evaluation of whether the impact of implementing the policies exceeded the forecast.

A transparent relationship between the Minister and the OEB is critical to the independence of the OEB

3. The EA and the OEB Act assign many functions to the OEB. Some are purely administrative, involving a limited exercise of discretion. Some, however, require the exercise of a broad discretion. Those functions are carried out by the same people, whether members of the OEB or OEB staff, whether alone or in combination. It is important that how each function is carried out and by whom is defined and separated, in order to avoid the appearance of a conflict of interest. A conflict might arise, for example, where the administrative function of determining whether an application for approval of rates complies with detailed filing requirements may conflict with the exercise of a discretion to determine whether the resulting rates are just and reasonable.

As noted above, one of the points that the OECD makes, under the rubric of role clarity, is that there should be structural separation of conflicting functions. An aspect of the operations of the OEB which may be inconsistent with a structural separation of conflicting functions is the role of OEB staff. The uncertainty about the role of OEB staff and the appropriateness of whatever role they play is particularly apparent in applications for the approval of rates, a matter discussed later in the context of the OEB's decision making on contested applications. The precise role of OEB staff in those applications has never been defined and appears to shift from case to case. Among other things, it is unclear from whom OEB staff receive instructions, what those instructions are, and what relationship, if any, OEB staff or the person from whom they receive instructions has with the members of the OEB, including the panel hearing an application.

2. Preventing undue influence and maintaining trust

Preventing undue influence and maintaining trust would require, I suggest, an assessment of the nature and extent of the Chair's control of the activities of the members of the OEB and of OEB staff. The undue influence that is a concern to the OECD may be exercised by external forces, such as by the Minister, but may also be exercised by internal forces, such as by the Chair. These considerations are particularly important in light of the changes in the management of the OEB, discussed above, which now vest virtually absolute control of the management of the Board in the hands of the Chair.

The following aspects of the OEB's operations are also relevant to this principle:

(a) The relationship of the OEB to the Minister and to the utilities it regulates

Subsections 8.2.1(a) and (b) of the MOU describe the responsibilities of the Chair as including the following:

(a) Keeping the Minister advised of issues or events relating to the Board that concern or can reasonably be expected to concern the Minister in the exercise of ministerial responsibilities related to energy matters and advising the Minister of these issues or events in a timely manner, and in advance if it is possible to do so, having regard to the seriousness of the event or issue;

(b) Ensuring that significant initiatives undertaken by the Board that would be of importance to the Minister are brought to the attention of the Minister in a timely manner, and in advance if it is possible to do so, having regard to the seriousness of the initiative;

On the surface, those responsibilities can be read as requiring only the provision of information to the Minister. However, the requirement that the information be provided creates the opportunity for the Minister to influence the decisions the Board might take. There is no protocol, in the MOU or elsewhere, that requires those communications to be recorded. Anecdotal evidence over many years suggests that

the contact between the responsible Minister and the Chair of the OEB is both frequent and intrusive. There is no mechanism which requires either the Minister or the Chair of the OEB to disclose the nature and extent of the communications between them. The absence of such a mechanism creates, fairly or unfairly, concerns about the appearance, and the possibility, of undue influence. That the communications between the Minister and the Chair of the OEB be open and transparent is particularly important in light of the fact that the OEB regulates three entities, Hydro One Networks Transmission Inc., Hydro One Networks Distribution Inc., and Ontario Power Generation Inc., which are wholly owned by the Ontario government.

Contacts between the Chair of the OEB, and indeed members of the OEB, with the utilities the OEB regulates and with other stakeholders should, in like fashion, be recorded. Those communications should be as open and transparent as the communications between the Chair and the responsible Minister.

(b) Directives

The OEB Act grants the power to the Minister to issue directives to the OEB. The power to issue the directives covers specific subject areas.⁵⁵ Where the Minister issues a directive, the OEB is required to implement it. In other words, the OEB has no discretion to determine whether the directives should be implemented.

To date, the Minister has issued 13 directives to the OEB. In addition to those directives, the Minister has issued letters to the OEB asking that it consider and report on certain subjects. Unlike the case with the directives, the OEB is not required to implement what is contained in the letters.

None of the directives deal with the OEB's discretion to approve just and reasonable rates. Having said that, however, the directives would, in most cases, have cost implications for the utilities to which they apply and would accordingly have an impact on the rates which the utilities are allowed to charge.

The directives represent a limitation on the independence of the OEB in two senses. The first, and most obvious, sense is that the directives require the OEB to do certain things. The second, but less obvious, sense, but arguably a more important one,

is that the directives deprive the OEB of the ability to assess whether what they have been directed to do is in the public interest. Directives are issued without an impact analysis. The OEB is precluded by the terms of the directive from undertaking any such analysis. The result is that the public is deprived of an "independent" analysis of the impact of implementing the directives. The unfortunate effect of that is highlighted in the analysis of the Smart Metering Initiative in the 2014 Annual Report of the Auditor General.⁵⁶

The directives have impaired the ability of the OEB to protect the interests of consumers

Since directives have an impact on the independence of the OEB, they would appear to be a violation of the OECD's principles addressing the prevention of undue influence. Having said that, however, the OEB is created by statute, and the statute authorizes the Minister to issue directives. A governance analysis could properly include an assessment of the effect of the directives on the exercise of the OEB's discretion to approve just and reasonable rates.

It is beyond the scope of this paper to assess whether the power to issue directives, let alone the content of the directives that have been issued, is good public policy. There is no question that it is the government's prerogative to issue the directives. Whether it would have been preferable, in the public interest, for the government to issue broad policies and to leave to the OEB the discretion as to how to apply those policies is, again, beyond the scope of this paper. I note, in passing, that, the Interim Report of the Independent Review of the British Columbia Utilities Commission expresses the following concern about the relationship between directives and the BCUC:

To be effective, the BCUC needs to have credibility, public confidence, and independence within the exercise of its mandate as set by government. The growth in directives to the Commission suggests that government may have lost confidence in the BCUC's decision making capability and ability to implement public policy objectives....

The Province should establish clear, general policies that are to be applied to utility regulation. These should be set out for the BCUC in clear legislation, regulations or policy documents. The Province should have confidence in the regulator to implement these policy objectives in the public interest.⁵⁷

(c) OEB appointments

Maintaining trust in the operations of the OEB requires that there be confidence that the members appointed to the OEB have the requisite expertise to adequately carry out their responsibilities. As will be discussed in Part VI below, one of the reasons why the courts have come increasingly to defer to the decision making of regulatory agencies is that those agencies have specialized expertise. That deference underscores the importance of members of regulatory agencies having the requisite expertise.

As noted in Part IV, above, the regulatory obligations of the OEB have increased very substantially over the course of the last decade.

Interestingly, over that same period of time, the number of full-time Board members has been reduced from 8 in 2002 to 4, including the Chair, in 2014.

Perhaps to make up for the reduction in the number of full-time Board members, the government has adopted the practice of appointing part-time members. That practice may undermine the perception that the members have the necessary expertise. While part-time members may have expertise in one aspect of utility operations, it would be difficult for a part-time member to develop the overall expertise, including the institutional memory, required to create confidence that they have the requisite expertise to carry out their decision-making functions.

In its Interim Report, the Task Force for the Independent Review of the British Columbia Utilities Commission made the following observation:

Any Commission's credibility with stakeholders is largely a reflection of the individual Commissioner's integrity, expertise and dedication. The BCUC must be strengthened and seen to be strengthened. This requires attraction of more full time Commissioners with recognized expertise in areas relevant to the mandate of the Commission.

Part time Commissioners can be a valuable part of the Commission. They bring flexibility and needed expertise to particular issues, but they are not a substitute for a core of knowledgeable full-time Commissioners.⁵⁸

Another weakness in part-time members is that they may be particularly vulnerable as a result of undue influence in the form of control exercised by the Chair. That vulnerability creates the concern that, if the Chair does not like the decisions made by a part-time member, that member's workload can be reduced.

(d) Training for OEB members

It is a given that the regulation of the energy sector is immensely complex, requiring as it does knowledge of the technical aspects of the generation and distribution of electricity and natural gas, the economics of regulation, and the principles of administrative law. Incoming OEB members may now have access to a course on the basics of administrative law, which was developed by the Society of Ontario Adjudicators and Regulators ("SOAR"). There is no comprehensive training program for incoming OEB members, beyond what may be offered by SOAR, which raises a concern as to whether the members have the comprehensive knowledge base required to properly fulfil their functions.

(e) OEB staff

OEB staff play a variety of roles in the operation of the OEB. Many of those roles require them to manage complex tasks. To operate effectively, OEB staff must have sufficient expertise. They must also have a measure of independence, in the sense that they are able to provide candid advice without the need to comply with directions and without the fear of reprisal, in the event that their advice is contrary to a position a member of the Board or the Chair wants to take.

It is also essential that the roles of OEB staff be precisely defined. It is important, for example, that the nature of the advice which staff is being asked to provide, to whom the advice is given, and for what purpose be specified. This is particularly important in the context of contested hearings, a matter discussed below.

Any indication of a lack of expertise or the absence of independence would be matters of concern because it would erode trust in the Board's processes and in the overall effectiveness of regulation. Effective governance would, I suggest, require assessments of the expertise and independence of OEB staff.

If one of the reasons that the OEB relies so heavily on intervenors in contested rate applications is because OEB staff does not have sufficient expertise to properly assess rate applications, that suggests a deficiency in OEB staff expertise that should be corrected.

(f) **The decision-making process for contested applications**

The various roles of OEB staff need to be clarified to avoid conflicts of interest

The scope of the OEB's statutory obligations require it to make decisions on a wide range of matters. Some of those decisions are largely administrative in nature, and do not involve the exercise of discretion. It is in the case of contested applications for the approval of rates where the OEB is called upon to exercise its discretion where the exercise of that discretion is most visible. Because of the importance, to individuals and businesses, of energy rates, it is also the area where public confidence in the OEB's governance is most important. Because of that, the processes by which those decisions are made is an important area for a governance analysis.

The exercise of the Board's discretion in determining contested applications for the approval of rates is the OEB function that is, I believe, particularly fraught with difficult issues of governance. I say that for a number of reasons.

The first is that the OEB's decision making is subject to judicial review if it does not meet the principles of administrative law. If the decision-making process complies with those principles, would the OECD principles require anything further?

If the governance by the courts through judicial review does not address all of the OECD principles,

there is still the MOU. The problem with the MOU is that the Board's decision making is not obviously covered by it. The MOU's reporting requirements do not require the Board to assess and report on how it processes contested applications for approval of rates. In addition, the MOU's reporting requirements depend for their effectiveness, in part, on the establishment of metrics. The exercise of the discretion involved in decision making is less susceptible to the establishment of those metrics that can be readily measured and reported on. The Board may, for example, set a standard that contested applications will be disposed of within a specified period of time. That metric, while useful, does not address the substance or the quality of the decision-making process.

In sum, any flaws in the decision-making process leading to the approval of rates may be more difficult to detect under the existing governance instruments. Here, as elsewhere, the questions are whether applying the OECD principles will require more rigorous and detailed governance standards and, if so, how, or through what instruments, those standards should be applied.

I suggest that the OECD's principles of good governance would require the following of the decision-making process:

- (1) That the decisions be made fairly, without undue influence, whether internal or external, and be based on the best available evidence;
- (2) That the roles of the participants in the decision-making process be clearly defined, and that those affected by the decisions be effectively and efficiently represented;
- (3) That the decision-making processes be efficient;
- (4) That the decision-making processes are reviewed on a regular basis to ensure that they are consistent with the principles of good governance.

In parts of this analysis, I refer to the concept of the integrity of the decision-making process. In using those words I am not referring to financial integrity; there is no suggestion that any aspect of the OEB's decision-making process is illegal or fraudulent. The concept as I use it would include traditional

considerations of natural justice, such as whether decisions are made without undue influence. The concept would also include making decisions based on evidence which reflects the interests of all of those affected by the decisions. I include, as well, making decisions which reflect the participation of parties who represent identifiable interests and are accountable to those interests. Finally, I include considerations of efficiency in the sense that decisions are made without either a waste of time or resources, particularly, in the case of the OEB, at ratepayers' expense.

Before analysing whether the OEB's decision-making processes for approving the rates for the transmission and distribution of electricity and natural gas are consistent with the principles described above, I will describe the process, briefly.

The OEB approves the rates of more than 70 local distribution electricity utilities, as well as the transmission and distribution rates of Hydro One Networks Inc., three natural gas utilities, and the generation rates of Ontario Power Generation Inc. Because of the number of utilities whose rates it must approve, the OEB has adopted a regime of performance based regulation, under which the rates for most utilities will be determined by formula for periods between three and five years. At the end of the period, rates must be re-set based on an assessment of the utility's costs. It is this "re-basing" process which, for the larger utilities, often results in contested hearings. In those cases, the procedure for the consideration of the application is that determined by the Rules.

The Board's Rules oblige the utility to publish the evidence in support of its application. It allows those who may be affected by the decision on the application to intervene in the application. The filing of interventions triggers the full play of the adversary process, including the delivery of written interrogatories by intervenors and OEB staff (often numbering 1000 or more), technical conferences to resolve any uncertainties in the answers to those interrogatories, settlement discussions and, if no settlement is reached, an oral hearing.

The number and identity of intervenors varies, depending on whether it is an application by a gas or an electric utility and on the size of the utility. In all but the very largest of the utility applications, the number of intervenors is typically three or four. While there may be a more heterogeneous group

of intervenors in the applications of Hydro One Networks Inc., there is a core of between four and six intervenor groups which intervene in almost all contested cases. It is always the same intervenor groups represented by the same counsel and consultants.

The adversary process for the determination of contested applications is both time-consuming and costly. The question of whether the adversary process is appropriate for determining rates is interesting but academic, given that the OEB Act requires that decisions to approve rates be made after a hearing. I will limit my analysis to a consideration of whether the decision-making process that the OEB has adopted for the approval of transmission and distribution rates satisfies the governance principles discussed above. In doing so, I will focus on the following components of the process:

- (i) The role of settlements;
- (ii) The role of intervenors;
- (iii) The role of intervenor funding;
- (iv) The role of OEB staff.

(i) **Settlements**

Where applications for approval of rates are contested, with the prospect of an oral hearing, the rules require there be settlement discussions. In an increasing number of cases, those discussions result in settlements.

The OEB has come to rely on the resolution of applications by means of settlements. I use the word "rely" advisedly because it is apparent that the OEB encourages settlements as a way of reducing the number of contested applications it must hear. That is a legitimate practical consideration given that the OEB is required to approve the rates for some 70 local distribution electricity utilities. However, given the importance of settlements in resolving rate applications and therefore in determining just and reasonable rates, it is important that the settlements, and the processes for which they are made, be subject to the principles of good governance.

The resolution of contested cases by settlements is not unique to the OEB. It is, for example, a feature of decision making by the Ontario Municipal Board. There is no question that the use of settlements enhances the efficiency of decision making by regulatory agencies. However, I suggest that the principles of governance, particularly that decisions be made by processes that are transparent and accountable, requires something more than just efficiency in the decision-making process.

A settlement of an application for approval of rates is made between utilities and intervenors who claim to represent constituencies affected by the settlement. In determining whether to approve such a settlement, the OEB implicitly relies on the fact that the intervenors actually represent a constituency that will be affected by the decision to approve the settlement. For the settlement process to meet the OECD principles of fairness, transparency and accountability it is essential that the OEB be able to determine whether the intervenors in fact represent the constituencies they claim to represent, how they receive instructions from those constituencies, and how they account to those constituencies for the positions they take.

The settlement process is opaque. The OEB has no insight into how it operates. As a result, the OEB cannot determine the following:

- (1) Whether the intervenors have behaved responsibly, adopting positions which reflect only the interests of their constituency;
- (2) Whether there is overlap or duplication in the positions taken by the intervenors;
- (3) Whether the settlement process is efficient;
- (4) Whether the intervenors get instructions from the constituencies they claim to represent.

Because settlements are required, and because utilities know that the Board encourages settlements, it is possible that the OEB's reliance on settlements may have distorted the ratemaking process. It may have encouraged the utilities to design their applications, and implicitly design the entire economics of their

operations, on the assumption that they will have to settle for something less than what they apply for.

The OEB approves all settlements. But it often does so without providing detailed reasons for doing so. Even where reasons are provided, the approval of a settlement is premised on the assumption that it reflects the interests of and instructions from ratepayers whose representatives have agreed to the settlement. If the parties to the settlement do not represent the interests of ratepayers, then the underlying premise on which the Board approves a settlement may be flawed.

In relying on settlements, the OEB risks delegating its decision-making responsibilities to the utilities and the intervenors. If so, the reliance on settlements would represent a violation of the OEB's legislated obligation to exercise its discretion to set just and reasonable rates. In carrying out that legislated function, the OEB is not determining a dispute, analogous to a dispute between two parties in a civil action, between the utilities and intervenors, but balancing a number of competing interests with a view to approving rates in the public interest.

Settlements are not, *per se*, bad. However, the settlement process needs to be reviewed to ensure that it complies with the OECD principles of transparency, accountability, and fairness, and to ensure that the settlements do not undermine the integrity of the Board's decision-making processes.

(ii) **Intervenors**

Those affected by the OEB's rate-making decisions – ratepayers for the most part, but also unions and environmental groups – participate in the contested hearing processes. Their ability to do so is, in most cases, facilitated by the funding system, which is discussed in the next section below.

Having ratepayers represented in contested hearings has a number of benefits. It makes the rate-making process more transparent. It allows, at least in theory, ratepayers to have input into the rates they will have to pay. It compels utilities to be more open about their costs. It helps to legitimize OEB decisions, in that the OEB can say that those affected by the decisions have participated.

Ratepayers are a large, heterogeneous group. As a practical matter, the Board must rely on representatives of ratepayers; otherwise, the decision-making process would be unmanageable. To do that, the Board has, in effect, institutionalized the intervenor system. That system, in addition to making the decision-making process in contested applications more efficient, has allowed the development of a measure of expertise in the intervenors.

But the intervenor system only satisfies the OECD principles if the intervenor representatives are truly representative, in that they reflect the views of the constituencies they represent, and are accountable to them. In some cases, where intervenors represent a discrete interest, for example, manufacturers, the representative status of the intervenors and their accountability to their constituency can reasonably be assumed. But for large ratepayer groups that assumption is more problematic.

The representatives of intervenors, particularly those who have participated in contested rate applications for a long period of time, have developed an expertise which the Board acknowledges assists the Board in making its decisions. It is important, however, to distinguish between the importance of the contributions of expertise, on the one hand, and the representative status of the intervenors, on the other. People purporting to represent a constituency of ratepayers may have useful expertise without necessarily representing that constituency.

If the OEB must rely on intervenors to fill gaps in the expertise it requires, that suggests that there may be deficiencies in the expertise of Board staff. If that is the case, it would seem to be preferable to enhance the requisite expertise in Board staff rather than rely on intervenors. The role of intervenors should be confined to the representation of ratepayers.

The OEB has recognized that the role of intervenors in the decision-making process needs to be reviewed.⁵⁹ In its report on the First Phase of that review, the OEB stated that “The Board’s view is that the ongoing contribution of intervenors would be better understood and managed if the framework provided for greater transparency, clearer accountability and clearer expectations regarding the participation by intervenors in Board proceedings.” To accomplish

those objectives, the Board made certain modifications to its intervenor framework.

A deficiency in the Board’s review is that it did not examine the role of intervenors as part of a comprehensive review of its decision-making process. It did not, for example, examine the question of whether the expertise of OEB staff should be enhanced rather than relying on expertise provided by intervenor representatives. It did not examine whether the role that intervenors have played was affecting the way distribution utilities were developing their applications for approval of rates. It did not examine the role of settlements in the decision-making process, and in particular the role of intervenors in the settlements themselves.

The promised second phase of the Board’s review of the role of intervenors may go further in its assessment of the adequacy of the representation of constituencies affected by the Board’s decisions. In that second phase, the Board will be examining the question of whether there ought to be a public interest advocate for energy issues.⁶⁰ There is nothing in the description of the second phase of the review, however, to suggest that the Board will examine the role of intervenors as part of the examination of the entire decision-making process.

With the exception of expert evidence on, for example, the cost of capital, intervenors rarely lead any evidence, and certainly no evidence from the constituencies they claim to represent or even from experts about the interests of the constituencies they claim to represent. As a result, the OEB is compelled to make its decisions not on the best evidence but rather on the basis of assertions by intervenors about what the interests of various constituencies are.

The OEB has taken steps to gather more information, by itself, about consumer attitudes and interests (see, for example, the remarks of Rosemarie T. Leclair to the Toronto Region Board of Trade on December 3, 2014⁶¹). It is unclear whether that effort is intended to be a substitute, in whole or in part, for the role of intervenors and utilities in providing information about the views of consumers. One way or another, the effort is only worthwhile if the OEB is, as the OECD principles require, independent, which I have suggested it may well not be. It may also conflict with the OEB’s obligation to balance a number of competing interests.

(iii) Intervenor funding

Section 30 of the OEB Act permits the OEB to order that a person pay all or a part of a person's costs of participating in a proceeding before the OEB. That authority is the basis for the development of the intervenor funding system.

In the adversarial system in the civil courts, the requirement that parties pay their own costs and risk paying the costs of another party if they are unsuccessful provides an essential discipline to the process. That discipline ensures, among other things, that parties act only on the basis of the client's instructions, that they limit their involvement to only the issues directly relevant to client's interests, and that they do not prolong the process unnecessarily.

The OEB's funding system allows people to participate without requiring a contribution from the constituencies they represent. As a result, the discipline present in the civil courts, and in the proceedings of other regulatory agencies, is absent. As a result, it is possible that parties may act without instructions, and may involve themselves in matters which are beyond the interests of the constituencies they claim to represent, and do so without fear of having costs awarded against them. When clients do not have to pay the costs of their participation and do not face the risk of a cost award against them, their involvement in the process, and their responsibility for the actions of their counsel and consultants, may become attenuated to the point where it does not exist. That has an impact on the cost and the efficiency of the OEB's decision-making processes. More importantly, however, it undermines the integrity of the OEB's decision-making process and violates the OECD principles of transparency and accountability.

The OEB has rules governing cost awards. Intervenors must initially apply for cost eligibility. At the end of the hearing process, they must have their claim for costs assessed. Since the OEB has only a limited ability to assess the behaviour of parties to determine whether costs should be awarded, the effectiveness of that assessment process depends, in large measure, on whether utilities object to the cost claims. In most cases, utilities offer little more than a proforma objection to individual cost claims.

That the utilities so rarely offer serious, detailed challenges to cost claims raises the question of whether, in this context, the utilities may have a conflict of interest, particularly in circumstances where the utilities and the intervenors have reached a settlement. It would not be surprising if the utilities were reluctant, having achieved a settlement, to challenge intervenors' claims for costs.

The intervenor funding system was established with a salutary objective of allowing those affected by OEB rate decisions an opportunity to participate in the process by which those decisions were made. Such participation has a number of corollary benefits, including enhancing the transparency of the utility's operations and educating ratepayers about the bases for utility rates. Any assessment of the intervenor funding system should include an analysis of whether those salutary objectives are being achieved and, if so, at the least cost and in the most effective manner.

Cost awards are the most important way the OEB has of controlling the role of intervenors in its decision-making process, ensuring that its decision-making processes are efficient, and limiting the impact of intervenor costs on ratepayers. Effective control of the intervenor funding system is critically important to overall OEB governance.

In the final analysis, the funding system cannot create a circumstance analogous to the civil courts if what is required is accountability and transparency. The oversight of the funding system, in an attempt to satisfy the principles of transparency and accountability, would require an inquiry into whether the intervenors received instructions on particular issues. That inquiry violates the privilege that should protect such communications. To achieve true transparency and accountability, the solution may be to eliminate the funding system and replace it with a public advocate for the broad array of consumers. Adopting a system of the kind used in Alberta and in several jurisdictions in the United States would make the representation of the larger consumer groups more transparent and accountable and, I believe, more effective.

(iv) The role of OEB staff

OEB staff play an active role in contested rate applications. They are present throughout the

settlement discussions, although their role is circumscribed. They are precluded from revealing to the hearing panel what has transpired in the settlement discussions. Recent changes in the OEB's "Practice Direction on Settlement Conferences"⁶² require OEB staff to opine on whether a settlement proposal "represents an acceptable outcome from a public interest perspective". When an application goes to oral hearing, OEB staff cross-examine utility witnesses and make final argument on substantive and procedural issues.

OEB staff's participation in settlement and conferences in contested oral hearings gives rise to a number of questions. To begin with, it is unclear what role, if any, OEB staff play in evaluating an application for the approval of rates and providing expert advice to the hearing panel on the application. Their role, if any, in

The decision-making process in rate hearings do not meet governance principles

doing those things, should be distinguished from that of the OEB staff in the hearing.

With respect to participation of OEB staff in the hearing itself, it is unclear from whom OEB staff receive instructions. What are the rules, if any, that are in place to ensure the person from whom OEB staff receives instructions is not, in turn, receiving instructions from OEB members? What is the interest that OEB staff represents? If it is the "public interest", how is that interest distinct from the interests of the intervenors, some of whom claim to represent the public interest?

In asking these questions I do not question the integrity or professionalism of the OEB staff lawyers. Indeed, they give every indication of being scrupulously attentive in concerns about the appearance and the reality of conflicts of interest. However, principles of good governance would suggest that the role of OEB staff, particularly in rate applications, be defined, and that there be a strict structural separation between OEB staff participating in rate applications and the OEB itself.

It is often the case that the decision-making processes of regulatory agencies in contested proceedings becomes calcified over time. The same parties, represented by the same counsel, make the same arguments on the same issues. The result can be that the process is infected by subtle, hard-to-detect conflicts of interest. This calcification could otherwise be characterized by saying that the quality of the decision-making process begins to degrade over time. One of the concepts used to describe the decision-making processes of regulatory agencies is regulatory capture. The term usually refers to a regulatory agency becoming captive to the entities it regulates. In the case of the OEB, there is, arguably, a different form of capture. The decision-making process becomes captive to the same limited number of participants who, for different reasons, have no interest in curing any defects in the decision-making process. The principles of governance require an examination of the entire decision-making process, focussing on the roles of all of the participants, including the OEB itself, its staff, the intervenors, and the utilities.

3. Accountability and Transparency

In discussing its principles of accountability and transparency, the OECD makes the following observations:

- Independent regulators should report on their performance annually to the legislature, such as legislative oversight committees, directly or via their minister, and publish a report.⁶³
- In addition to publishing objectives, clear operational policies covering compliance as well as enforcement and decision reviews should be made publicly available by the regulator, with any necessary guidance material to aid understanding of these matters.⁶⁴

The OEB formally complies with the obligations reflected in those two statements. Pursuant to the requirements of the OEB Act and the MOU, it provides the Minister, and through the Minister, the legislature, with an annual report on its activities. The OEB publishes its Rules, guidelines, and policies.

The difficulty is in determining whether, in doing all of these things, there is true accountability and true transparency. I have suggested, above, that the Board's report on its organizational changes lacks both transparency and accountability. In discussing the OEB's compliance with the formal requirements of the MOU, in Part VI below, I suggest that formal compliance may disguise the reality that, in several respects, the OEB is neither accountable nor transparent.

4. Engagement

In its discussion of its principle of engagement, the OECD makes the following observation:

Whatever mechanisms are used, engagement with key stakeholders should be institutionally structured to produce concrete, practical opportunities for dialogue based on achieving active participation and, where possible, exchange of empirical data, rather than on a desire to achieve consensus.⁶⁵

The OEB undertakes frequent consultations with stakeholders in the process of arriving at new policies and rules. I use the word "arriving" rather than the word "developing" because it is unclear whether the Board's consultation processes are intended to give the appearance of engagement, in the sense of receiving and acting on input from stakeholders, as opposed to using consultations to disguise the reality that the Board is arriving at a pre-ordained conclusion.

The question is whether the Board's consultations obscure the reality than those affected by the rules and policies may have little or no meaningful input into the ultimate content of these governing instruments. The consultation processes typically begin with a staff report which outlines the nature of the issues to be considered and suggests possible outcomes. If, for example, the content of the staff report reflects not the independent judgment of expert staff, but the views of the Chair or other members of the Board, then the policy determination is skewed from the outset. If so, the consultations with stakeholders do not represent the meaningful engagement the OECD principles require.

5. Funding

The OECD's concerns with respect to this principle are with the levels of funding which a regulatory agency receives. The OEB has an annual budget of approximately \$36 million. I am unaware of any limits that have been placed on the amount of funding the OEB receives. Notwithstanding that, the OEB appears to have taken steps to reduce its expenses by, for example, not replacing departed staff, and by using part-time instead of full-time members. In describing changes to its organizational structure, the Board said those changes were predicated in part on "acknowledging the need for fiscal restraint". If the Board is under financial pressure, such that it does not believe that it can adequately perform its functions with the existing level of funding, then that is a matter that should be reported publicly so that steps can be taken to correct it.

6. Performance Evaluation

The MOU provides that the OEB must determine its own performance criteria and report annually on whether it has achieved the criteria. Whether such self-selected criteria are useful tools for good governance is discussed below in the context of the MOU's reporting requirements.

One material gap in the OEB's performance criteria is the failure to require that the OEB undertake any impact analysis of its policies or decisions. The OEB undertakes no such analysis. The OEB has, over the course of the last two years, set out detailed requirements that local electricity distribution utilities must meet both in their applications and their performance. The OEB has undertaken no assessment of the impact, for example, on the costs of the operations of the local electricity distribution utilities of those requirements. In addition, it has promulgated no tests by which it will determine whether the costs of complying with those requirements are a benefit to anyone.

VI THE EXISTING GOVERNANCE INSTRUMENTS

In the preceding section, I identified what I believe are elements of the Board's operations and processes which do not conform to the OECD's principles. The

implication of the analysis is that the OEB's existing governance instruments are inadequate. In this Part, I review those governance instruments and discuss the ways in which they may be inadequate.

I have stated that the OEB is subject to three types or sources of governance. The first is the supervisory role played by the courts. The second are the rules and processes created by the MOU. The third are the rules and processes established by the OEB itself. I will describe those mechanisms, and consider their effectiveness, separately.

(i) **The courts**

As noted above, the OEB, in approving just and reasonable rates, acts as a quasi-judicial decision maker. Because of that, its decisions are subject to judicial review. (I use the term “judicial review” to encompass reviews by the superior courts, whether by way of an appeal or an application for judicial review.) As a result, the courts form part of the governance structure of the OEB. The questions, then, are what is the nature and what are the limits of the role the courts play.

It is beyond the scope of this paper to evaluate in detail the courts' approach to the review of the decisions of regulatory agencies. However, it is necessary to provide a brief summary of the courts' approach because it highlights the limits of the governance function exercised by the courts.

It is useful to begin this discussion by pointing out what the courts do not do when reviewing the decisions of regulatory agencies. One author has summarized that as follows:

Courts review neither the wisdom nor the merits of discretionary decisions made by tribunals pursuant to statutory authority. Nor do they review whether government policy accomplishes its intended purpose. A Court should not substitute its own decision for that of the tribunal just because it would have exercised the discretion differently had it been charged with the responsibility. A discretionary decision of a tribunal made in good faith, within the scope of its statutory authority, and pursuant to fair procedures, will be permitted to stand.⁶⁶

In the 2008 decision in the case of *Dunsmuir v. New Brunswick*, the Supreme Court of Canada sought to simplify the standards it would apply in reviewing the decisions of regulatory agencies. It did so by adopting two standards of review, the standard of correctness and the standard of reasonableness. The Court described what it would do in conducting a review for reasonableness in the following way:

A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.⁶⁷

Judicial deference underscores the need for other forms of effective governance

The reasonableness standard reflects an attitude of deference to the decisions of expert tribunals. The Supreme Court of Canada explained the rationale for deference as follows:

Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference “is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers” (*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at p. 596).⁶⁸

The Supreme Court of Canada also made the following observation:

In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.⁶⁹

Reduced to its essence, judicial deference means that the courts will intervene in the decisions of regulatory agencies only in the clearest of cases, such as where it is clear the regulatory agency has no authority for the decision it has made. As the court observed in *Dunsmuir*, the adoption of “judicial deference” is premised in part by the recognition by the courts that regulatory agencies have a specialized expertise that is not readily available to the courts themselves.⁷⁰

Judicial deference would not prevent a court from reviewing a decision of a regulatory agency where there was evidence of, for example, bias, or where the result had been dictated by someone other than the panel hearing the case. Bias or lack of independence are difficult to prove. It would only be in obvious cases where a decision would be overturned on one of those grounds.

Even without the limits which arise from the principle of judicial deference, there are practical limits on the role of the courts in the governance of regulatory agencies. The exercise of a governance role by the courts depends, in the first instance, on whether there is a challenge to a decision of a regulatory agency. Whether a decision is challenged is in large part a function of the resources of the parties. Parties without financial resources may be unwilling or unable to pay the costs of an appeal or an application for judicial review, particularly when they would be exposed to an adverse cost award should they lose.

The courts do not and cannot play an ongoing, continuous role in the governance of the OEB. In particular, it is unlikely that the courts would be willing or able to address the possible deficiencies in the OEB’s governance described above. I will illustrate that point with the following examples. As discussed above, the settlement process now plays a central role,

and arguably the central role, in the OEB’s decision making in rate applications. I have suggested that the settlement process is now largely immune to OEB oversight and therefore to effective governance. It is unlikely that the courts would ever review a decision arrived at through a settlement process, given that it is unlikely that any party would complain about it.

It is equally unlikely, given the courts’ deference to the authority of regulatory agencies to control their own processes, and given how opaque the settlement process is, that the courts would ever overturn a decision arrived at as the result of a settlement process, even if someone complained about it.

The courts generally defer to regulatory agencies to decide what evidence they will consider relevant and what evidence they will rely on in reaching a decision. There are, as I have suggested above, apparent deficiencies in the evidentiary basis for many OEB decisions as a result of, among other things, the near total absence of evidence from the intervenors. Again given the deference the courts accord to regulatory agencies’ reliance on evidence, it is questionable whether those deficiencies would ever cause a court to overturn an OEB decision.

Finally, the OEB may develop policies which create a fundamental shift in the way that the test of what constitutes just and reasonable rates is interpreted. For example, the OEB is now requiring electricity distribution companies to have third parties assess virtually every aspect of a rate application. That reliance on third party opinion may ultimately result in the OEB in effect devolving its jurisdiction to determine what constitutes just and reasonable rates onto the individual and collective opinions of third parties. Given that the courts have acknowledged the right of regulatory agencies to issue policies, and given the courts’ deference to the expertise of regulatory agencies in making decisions on issues within their jurisdiction, it is again highly unlikely that a court would overturn a decision because of the collective impact of policies.

One outcome of this analysis is that if, as I have suggested in the preceding Part, it is possible that the Minister or the Chair may be exercising undue influence in the management and decision making of the Board, the courts would not be likely to intervene. Rather, these concerns would likely be more effectively dealt with through other instruments of governance.

As the Supreme Court of Canada observed in *Dunsmuir*, the development of the concept of judicial deference is premised, in part, on a recognition of the importance of the role regulatory agencies play in the broader governance structure of the state.⁷¹ The combination of the importance of regulatory agencies and the more-limited role of judicial supervision underscores the importance of ensuring that other forms of governance are in place, and are effective.

(ii) **The MOU as a governance mechanism**

Section 4.6 of the OEB Act requires the Minister and the Chair of the OEB to enter into an MOU every three years. The current MOU is dated June 25, 2014. A copy of that MOU is attached hereto as Appendix “A”.

Section 1.1 of the MOU provides that it is the purpose “to establish the accountability relationships between the Minister of Energy and the Chair and the Management Committee”⁷². The MOU is, thus, intended to be the principal external governance mechanism for the OEB. I note, in passing, that the fact that the MOU exists indicates that the government believes that a governance mechanism for the OEB is necessary.

Compliance with the MOU gives the appearance but not the reality of effective governance

Section 1.1 of the MOU makes specific reference to the management committee. In addition, section 8.3 of the MOU sets out the responsibilities of the management committee which include “managing the activities of the Board, including the Board’s budgeting and the allocation of the Board’s resources”⁷³. These sections are particularly significant because, as discussed in Part V above, there has been no second vice-chair in place for a significant period of time, thus inevitably down-playing the role of the management committee. It is unclear what role, if any, the management committee now plays in the OEB’s operations.

Section 6 of the MOU sets out what are described as the “Accountability Relationships”⁷⁴. Reduced to

their essence, the Minister is responsible to the legislature for the OEB’s fulfillment of its mandate and the Chair and the management committee are accountable to the Minister for the performance of the OEB in fulfilling its mandate.

Section 8 of the MOU describes the “Roles and Responsibilities” of, among others, the Minister, the Chair, and the management committee⁷⁵.

Section 8.1.1 of the MOU sets out the roles and responsibilities of the Minister. They include, among other things, “consulting, as appropriate, with the Chair on significant new directions or initiatives affecting the energy industry and/or the Board”⁷⁶.

Section 8.2.1 of the MOU describes the roles and responsibilities of the Chair, which include “ensuring that significant initiatives undertaken by the Board that would be of importance to the Minister are brought to the attention of the Minister in a timely manner, and in advance if it is possible to do so, having regard to the seriousness of the initiative”⁷⁷.

Section 8.5 of the MOU assigns responsibilities to the position of the COO. As noted in Part V above, that position has been eliminated.

The respective consultation obligations of the Minister and the Chair are noteworthy because the nature and extent of those consultations do not have to be recorded. The absence of transparency in the relationship between the Minister and the Chair gives rise to a concern that the decision-making process of the OEB, which is an independent regulatory agency, may be subject to undue influence from the Minister. It may not be, but the perception of undue influence is, in some respects, as important as the reality.

Section 9.1.1 of the MOU requires that the management committee annually provide the Minister with the OEB’s business plan.⁷⁸ Section 9.1.2 requires that “Senior Board Employees and Senior Ministry staff shall discuss, during the drafting of the Board’s business plan, the contents of the business plan in respect of the alignment of the Board’s key initiatives, as identified in the business plan, with the Government’s policy directions, performance standards, and the plan’s compliance with the AEAD.”⁷⁹ The requirement to discuss the content of the business plan suggests that the OEB’s business plan is less an independent statement by the OEB than a joint document prepared by the government and the OEB.

Section 9.2.1 of the MOU requires that the “The Management Committee shall provide the Minister with a statement of the Board’s priorities in the Board’s annual business plan.”⁸⁰ Section 9.2.2 requires that “The statement of priorities shall include details of the Board’s policy and operational priorities and a description of how the Board intends to achieve its priorities”.⁸¹

Section 9.5.1 of the MOU requires that “The Management Committee shall ensure that the Board’s business plan includes a system of performance standards for the Board”.⁸²

Finally, 9.4.1 requires that “Within six months after the end of each fiscal year, the Management Committee shall deliver to the Minister an annual report on the affairs of the Board for that Fiscal Year in accordance with section 4.9 of the Act”.⁸³

The requirements of the MOU, individually and collectively, give the appearance of creating an effective governance mechanism for the OEB. They do not, however, address any of the deficiencies in OEB governance described in the preceding section of this paper. For example, the performance measures described in the OEB’s 2014-2017 business plan are framed in such general terms that it would be difficult, if not impossible, for the Minister to assess whether they had been achieved or whether there was any value in their having been achieved. For example, one of the stated initiatives is to “review and enhance the Board’s policy consultation process”. The stated target for that initiative is to “implement modification to the Board’s policy consultation process as appropriate”, (emphasis added). The OEB provides no definition of what constitutes “as appropriate”. As a result, the initiative and the target are impossible to measure within any precision.

I have noted, in Part V above, the report the OEB provided in its 2014-2017 Business Plan on the changes in its organizational structure. The report explains the reasons for the changes and what the effects will be in language which is devoid of meaning. This report, which is on a topic of importance to the structure and operations of the OEB is, thus, the very opposite of what you would expect from the requirements of accountability and transparency. Yet it was apparently satisfactory to the Minister and to the legislature.

Finally, the OEB’s annual report, with respect to the achievement of the initiatives and targets, simply notes that they are “complete” or “partially complete”. There is no way of knowing whether completing an initiative is a measure of effective governance.

An assessment of the OEB’s performance would be quite different were, for example, the OEB to undertake an impact analysis of its policies, and then assess whether the effect of those policies was consistent with that impact analysis. In this context, the OECD suggests that “As part of the performance assessment, regulators should also conduct periodic post-implementation reviews of new regulations or changes that have been made to the existing regulatory framework.”⁸⁴

The fact that the targets the OEB sets for itself in its business plans are subject to an independent audit is meaningless, given that the targets and the criteria for determining whether they have been met are self-defined and vague.

If, as I suggest, the MOU as it currently operates is an inadequate governance mechanism, then the question is whether an alternative legislative mechanism is available that would be more effective. One alternative mechanism is the Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009 (“the Accountability Act”).

The stated purpose of the Accountability Act is to “ensure that adjudicative tribunals are accountable, transparent and efficient in their operations while remaining independent in their decision-making”.⁸⁵ While many of the province’s adjudicative tribunals are subject to the Accountability Act, the OEB is not. The discussion which follows is premised on the question of whether, if the OEB were subject to the Accountability Act, it would provide an effective governance mechanism.

The Accountability Act requires that the tribunals subject to it produce what are described as “public accountability documents”. They include the following:

- (1) a mandate and mission statement;
- (2) a consultation policy;

- (3) a service standard policy;
- (4) an ethics plan;
- (5) a member accountability framework.⁸⁶

The Accountability Act also requires that the adjudicative tribunals that are subject to it are required to enter into a Memorandum of Understanding with their responsible Minister, are to produce a business plan, and to provide its responsible Minister with an annual report.⁸⁷

Most of the accountability requirements in the Accountability Act are contained in the MOU. As a result, it is unlikely that making the OEB subject to the Accountability Act would result in improvements in the governance of the OEB.

(iii) **The OEB's own governance rules and processes**

The OEB has a number of governance instruments. They include:

1. By-Law #1, which, among other things, prescribes the rules for the meetings of the management committee and requires the management committee to appoint a COO;
2. The rules and guidelines which the Board has promulgated which, while not limiting the authority of the Board of prescribing how it will act, provide guidance as to how the Board will exercise its powers. Those rules and guidelines make the decision making of the Board more transparent and, in some measure, shape and constrain that decision making. Those rules and guidelines are consistent with the OECD's principles.
3. The MOU, which is the primary governance instrument for the OEB. Compliance with that instrument is intended to make the OEB accountable. But, as discussed above, compliance with the MOU gives the appearance, rather than creating the reality, of accountability, transparency, and appropriate governance.

VII CONCLUSIONS

The importance of regulatory agencies in the governance structure of our society requires that they themselves be subject to effective governance. Regulatory agencies are subject to external governance from the government, the legislature, and the courts. But there are gaps in that external governance structure because of the limits of what the legislature and the government can and should do, without unduly circumscribing the independence of regulatory agencies, and what the courts have elected to do or, perhaps more accurately, not to do.

The OEB's operations do not in critical respects comply with the OECD principles

Those gaps may be filled in one of two ways. The first way would be by making the processes under the existing governance instruments more detailed and more rigorously supervised. The second way would be insuring that the regulatory agency itself has internal governance mechanisms and that those mechanisms are independently assessed.

Using the OEB as a case study of these issues, I have identified the apparent discrepancy between the existence of a formal governance structure and compliance with the requirements of that formal structure, on the one hand, and the evident gaps in governance, on the other.

On one level, the OEB's governance complies with the OECD's governance principles. There is role clarity in the formal description of the roles of the OEB Chair and the Minister in both the OEB Act and the MOU. The nature and extent of the OEB's powers are set out in the OEB Act. There is accountability and transparency, not just in compliance with the formal requirements of the MOU in the delivery of business plans and annual reports, but in the OEB's publication of its policies, policies that result from public consultation. Finally, there is performance evaluation in the form of the annual reports which assess the OEB's performance against objectives that are set out in the

OEB's business plans, evaluations which are subject to some form of third party audit.

There are, however, areas of the OEB's operations and processes which do not comply with the OECD principles. They include:

1. The absence of actual, as opposed to apparent, transparency in the relationship between the Minister and the Chair of the OEB. This violates the OECD's principles dealing with role clarity and the prevention of undue influence;
2. The failure of the Minister and the Chair of the OEB to adhere to the requirements of the OEB Act, the MOU, and the OEB's own By-Law #1, with respect to the structure and role of the management committee of the OEB. This again violates the OECD's principles of role clarity and the prevention of undue influence;
3. The fact that the OEB's performance evaluation is based on vague, self-created criteria, making it difficult to measure actual performance. This violates the OECD's principles of accountability and the importance of meaningful performance indicators;
4. The performance criteria adopted by the OEB in its business plans do not address all, or even many of, the deficiencies identified in this paper. This again violates the OECD's principles of the need for meaningful performance indicators;
5. The absence of clarity in the respective roles of the members of the OEB and OEB staff, creating in some instances the appearance of a conflict of interest. This violates the OECD's principles of role clarity and the prevention of undue influence, and it undermines the perception, if not the reality, of the integrity of the OEB's decision-making processes;
6. The absence of any assessment of the effectiveness of the decision-making process in contested applications, including the reliance on the settlement process, and the role of intervenors, raising questions about the integrity and efficiency of the OEB's decision-making processes;
7. The reliance on part-time appointees, and the absence of training for OEB members, risking undermining the confidence in the quality of the OEB's decision making and the independence of part-time members;
8. The absence of defined limits on policy-making processes combined with aggressive policy making, risking undermining confidence in the OEB's decision-making processes.

The question is how these apparent deficiencies in the governance of the OEB might be addressed. One way would be to try to enhance the effectiveness of the MOU by, for example, requiring more detailed performance standards against which to measure the OEB's performance and requiring that the nature and extent of communications between the Chair and the Minister be disclosed.

There are several advantages to trying to enhance the MOU as a governance instrument. One is that it exists as the accountability instrument, and so it is both the logical place and the easiest place to effect improvements. The second is that it is a flexible instrument. It can be adapted to deal, for example, with the kinds of management decision-making issues discussed in Part V above, neither of which would be readily accessible to judicial review. The third advantage is that the MOU allows for transparency in that what is produced to comply with the MOU is available for public scrutiny.

There are, however, difficulties in trying to use the MOU as a governance instrument. The first is that those principally responsible for the effectiveness of the MOU have apparently not seen any deficiencies in it; indeed, they have allowed the requirements of the MOU, with respect to the make-up of the OEB's management committee, to be ignored for some

three years. The second is that the MOU allows those responsible for its effectiveness to select how it is to be interpreted and applied. The reality is that the decisions of the OEB have significant political impact. That means that it is in the interest of the government to control, in any way it can and to the extent it can, the decisions the OEB makes. That, in turn, suggests that the government would be unlikely to want enhanced, independent scrutiny of the operations of the OEB.

My analysis leads me to the conclusion that meaningful changes to the MOU would have to follow an independent review of the Board's existing management and decision-making processes.

I suggest that the required first step is an independent examination of the OEB's processes to address the issues identified herein. An examination would address the following questions:

1. Why have the requirements of the OEB Act and of the MOU, with respect to the management structure of the OEB, been ignored?
2. What effects, if any, has the absence of the required management structure had on the operations of the OEB?
3. How are decisions on applications and policies now being made?
4. What is the influence of the Minister and the Chair on how those decisions are being made?
5. Does OEB staff have the requisite expertise and independence to fulfil its functions?
6. Are part-time appointments to the OEB sufficient to allow the OEB to carry out its functions?
7. Is the training of OEB members sufficient?
8. Is the decision-making process of the OEB in contested hearings efficient, fair, accountable, and transparent?
9. What are the proper limits of OEB policy-making?
10. Is there genuine engagement with stakeholders in the development of policies?

I conclude this case study with the following recommendations:

1. That there be an independent review of the OEB's operations to address the issues listed above;
2. That the review include an assessment of whether the governance of the OEB needs to be changed and, if so, how;
3. That the independent review assess whether the existing external governance mechanism, the MOU, is adequate;
4. That if the independent review determines that the MOU is not adequate, it recommend how the MOU can be changed to ensure that it is adequate;
5. That the independent review assess whether additional governance measures are required within the OEB and, if so, what those measures should consist of. In this context, consideration might be given to requiring the use of the equivalent of the independent directors used in the corporate sector to assess the OEB's compliance with the governance standards.

An independent review of the OEB is required to determine whether its governance mechanisms need to be improved or replaced

This paper uses the OEB as a case study for the governance of regulatory agencies and for the application of the OECD principles in particular. It is dangerous to generalize from the issues identified in one regulatory agency to the circumstances at other regulatory agencies. Regulatory agencies vary in size, in the nature of their legislative mandate, and so forth. It is also arguable that the circumstances of the OEB are unique, because of the political sensitivity of some of its decisions and, accordingly, its susceptibility to political influence.

Having said all of that, however, some general conclusions may be appropriate. The first is that the OECD principles impose more onerous standards for the governance of regulatory agencies than currently apply in Ontario. The second is that the reliance on judicial deference creates a gap in the governance of regulatory agencies. The third is that other governance instruments, for example the MOU and the Accountability Act, do not fill the gap created by the courts' reliance on judicial deference. The final point is that the legislature is unwilling or unable to operate effectively as the ultimate oversight body.

All of this suggests that it is necessary to review the governance standards for regulatory agencies to ensure, among other things, that they are consistent with the OECD principles. It is also necessary to review the instruments by which those standards are applied. It may well be the case that the application of a uniform set of governance standards, such as those embodied in the OECD principles, will vary depending on the circumstances of individual regulatory agencies. I suggest that consideration be given in that review process to the use of independent members of oversight committees to review and comment on the governance of individual regulatory agencies before governance reports are filed with the legislature.

Endnotes

¹ Organization for Economic Co-operation and Development, *The Governance of Regulators* (Paris: OECD Publishing, 2014) at 9 [OECD Principles].

² *Ibid.*

³ OECD Principles, *supra* note 1.

⁴ Ontario Energy Board and Ontario Minister of Energy Bob Chiarelli, *Memorandum of Understanding Between the Minister of Energy and the Chair of the Ontario Energy Board* (Toronto: 2014), online: http://www.ontarioenergyboard.ca/oeb/_Documents/About%20the%20OEB/Memorandum_of_Understanding_OEB_Ministry.pdf [MOU].

⁵ Organization for Economic Co-operation and Development, *Principles for the Governance of Regulators: Public Consultation Draft: 21 June 2013* (Paris: OECD Publishing, 2013).

⁶ Peter Ostergaard, Michael Costello & R. Brian Wallace, *Independent Review of the British Columbia Utilities Commission: Interim Report* (1 October 2014), online: <http://www.empr.gov.bc.ca/EEC/Strategy/EEA/Documents/BCUC%20Review%20Interim%20Report%20Oct%207.pdf> at 12 [Interim Report]. The final report had not been issued at the time this paper was completed.

⁷ OECD Principles, *supra* note 1 at 19.

⁸ Professor Guy Holburn, in a paper entitled *Guidelines for Governance of the Electricity Sector in Canada* (online: <http://sites.ivey.ca/energy/files/2012/09/Guidelines-for-Governance-of-the-Electricity-Sector-in-Canada-Jan-2011.pdf>), dated January 2011, examines the governance of the electricity sector as a whole. His analysis includes some recommendations on changes to the governance of regulatory agencies in that sector.

⁹ Toronto Stock Exchange Committee, *Report of the Toronto Stock Exchange Commission on Corporate Governance in Canada* (Toronto, TSX, 1994) at 7.

¹⁰ See, for example, the decision of the Supreme Court of Canada in *BCE Inc v 1976 Debenture Holders*, [2008] 3 SCR 560 at 585 where the court said, "In considering what is in the best interests of the corporation, directors may look to the interests of, inter alia, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions".

¹¹ There are some corporations which are created by statute, though the number is small. In addition, non-share capital corporations (for example, charities) have members and not shareholders.

¹² OECD Principles, *supra* note 1 at 22.

¹³ *Ibid* at 31.

¹⁴ *Ibid* at 33.

¹⁵ *Ibid* at 37.

¹⁶ *Ibid* at 38.

¹⁷ *Ibid* at 38.

¹⁸ *Ibid* at 47.

¹⁹ *Ibid* at 47.

²⁰ *Ibid* at 56.

²¹ *Ibid* at 48.

²² *Ibid* at 60.

²³ OECD, 2012; Department of Public Enterprise, 2000.

²⁴ OECD Principles, *supra* note 1 at 81.

²⁵ *Ibid* at 91.

²⁶ *Ibid* at 91.

²⁷ *Ibid* at 99.

²⁸ *Ibid* at 101.

²⁹ *Ibid* at 106.

³⁰ *Ibid* at 106.

³¹ *Ibid* at 107.

³² *Ibid* at 107.

³³ *Ibid* at 108.

³⁴ Ontario Ministry of Finance, Ontario Economic Accounts, October 2014 (Toronto: Queen's Printer for Ontario, 2014) at 11.

³⁵ Ontario Energy Board 2011-2014 Budget, online: http://www.ontarioenergyboard.ca/oeb/_Documents/Corporate/OEB_Business_Plan_2011-2014_Budget.pdf.

³⁶ Ontario Energy Board Act, 1998, SO 1998, c 15, Schedule B [OEB Act].

³⁷ The extent to which regulatory agencies are “independent” has been the subject of extensive judicial and academic analysis. For purposes of this paper, which focusses primarily on the exercise of the OEB’s authority to approve rates, I use independent in the sense employed by the Divisional Court in the case of *Union Gas Ltd. v. Ontario (Energy Board)*. In that case, the Divisional Court said that, in its power to approve rates, “the Board is not fettered in any manner in making orders to ensure that rates are just and reasonable”. (*Union Gas Ltd. v. Ontario (Energy Board)* 2013 ONSC 7048, para 28 (“*Union Gas*”). That “fettering” can take a number of forms. It can take the form of external directions from the government. It can take the form of internal constraints resulting from the OEB’s own rules or policies, or pressures from within the Board to achieve certain objectives.

³⁸ Chief Justice McLachlin, in the *Ocean Port* decision, described administrative tribunals in the following words: “They [administrative tribunals] are, in fact, created precisely for the purpose of implementing government policy.” That statement should be read in the context of the decision as a whole, and risks understating the freedom of administrative tribunals to interpret and, depending on the facts, ignore government policy. (*Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 at para 24).

³⁹ Electricity Act, 1998, SO 1998, c 15, Schedule A.

⁴⁰ OEB Act, *supra* note 35 at ss 36, 78.

⁴¹ *Ibid* at s 21.

⁴² Statutory Powers Procedure Act, RSO 1990, c S.22.

⁴³ OEB Act, *supra* note 35 at ss 1, 2.

⁴⁴ Business Corporations Act, RSO 1990, c B.16.

⁴⁵ The frequency of changes in the electricity sector has had an adverse impact on the governance of that sector, a subject discussed by Professor Guy L. F. Holburn, in his paper “Utility Governance and Performance” delivered to the CCRE – Ivey Business School Conference, February 27, 2014.

⁴⁶ Mandate letter from Ontario Premier Kathleen Wynne to the Ontario Minister of Energy Bob Chiarelli (25 September 2014), online: <http://www.ontario.ca/government/2014-mandate-letter-energy>.

⁴⁷ OECD Principles, *supra* note 1 at 31.

⁴⁸ Ontario Energy Board, By-Law #1 (in force 1 August 2003), online: http://www.ontarioenergyboard.ca/oeb/_Documents/About%20the%20OEB/OEB_bylaw_1.pdf

⁴⁹ Interim Report, *supra* note 5 at 32.

⁵⁰ Ontario Energy Board, Ontario Energy Board 2014-2017 Business Plan (Toronto: Ontario Energy Board, 2014) at 18.

⁵¹ The Supreme Court of Canada, in a trilogy of cases beginning with *IWAV Consolidated-Bathurst Packaging Ltd.* [1991 SCR 282] addressed the issue of whether individual applications could be considered by members of a regulatory agency who had not heard the evidence. The Court held that such consideration was useful in promoting coherence. However, the use of such so-called full-board consideration is subject to the requirement that the members who heard the case not be subject to any pressure to decide the case a particular way. The important point here is that the fact of any such consultations with the Chair or other members of the OEB should be disclosed.

⁵² OECD Principles, *supra* note 1, at 15.

⁵³ *Ibid* at 37.

⁵⁴ Rosemarie T. Leclair, “Efficient, Effective, Consumer Focused – Inside and Out” (Paper delivered at the Ontario Energy Association Annual Conference, 18 October 2012), online: http://www.ontarioenergyboard.ca/oeb/_documents/speeches/speech_leclair_oea_20121017.pdf.

⁵⁵ The relevant sections of the OEB Act, and the matters covered by them, are the following:

1. 27.1 – policy directives concerning general policy and the objectives to be pursued by the Board;
2. 27.2 – directives with respect to establishing conservation and demand management targets to be met by distributors and other licencees;
3. 28 – directives concerning market rules made under s. 32 of the Electricity Act, 1998, and existing or proposed licence conditions;
4. 28.1 – directives with respect to conditions in licencees;
5. 28.2 – directives with respect to risks and liabilities associated with customer billing and payment cycles;
6. 28.3 – directives relating to the government’s smart metering initiative;

7. 28.4 – directives with respect to the treatment of costs with respect to the implementation of the smart metering initiative;

8. 28.5 – directives with respect to the establishment, implementation or promotion of a smart grid;

9. 28.6 – directives with respect to the connection of renewable energy generation facilities to transmission and distribution systems;

10. 28.7 – directives with respect to the marketing of gas and retailing of electricity.

⁵⁶ Office of the Auditor General of Ontario, Annual Report 2014, by Bonnie Lysyk (Toronto: Queen’s Printer for Ontario, 2014) at 8, online: http://www.auditor.on.ca/en/reports_en/en14/2014AR_en_web.pdf.

⁵⁷ Interim Report, *supra* note 5 at 12.

⁵⁸ *Ibid* at 17.

⁵⁹ Letter from Ontario Energy Board (24 April 2014), Review of the Framework Governing the Participation of Intervenor in Board Proceedings – Completion of First Phase, OEB File No EB-2013-0301, online: http://www.ontarioenergyboard.ca/oeb/_Documents/EB-2013-0301/tr_Intervenor_Participation_First_Phase_20140424.pdf.

⁶⁰ The role of a public interest energy advocate was recently analyzed in a report of the Mowat Centre’s Energy Research Hub entitled “Re-energizing the Conversation”, dated October 14, 2014. The report was authored by Richard Carlson and Eric Martin and it is available online at http://mowatcentre.ca/wp-content/uploads/publications/99_re-energizing_the_conversation.pdf.

⁶¹ Rosemarie T. Leclair, “Ontario’s Energy Future: Evolving Our Regulatory Framework” (Paper delivered at the Toronto Region Board of Trade, 3 December 2014), online: http://www.ontarioenergyboard.ca/oeb/_Documents/Speeches/Speech_Leclair_Board_of_Trade_20141203.pdf.

⁶² Ontario Energy Board, Practice Directions on Settlement Conferences, revised 24 April 2014 (Toronto: Ontario Energy Board, 2014) at 6.

⁶³ OECD Principles, *supra* note 1 at 82.

⁶⁴ *Ibid* at 83.

⁶⁵ *Ibid* at 93.

⁶⁶ Sara Blake, *Administrative Law in Canada*, 5th ed (Markham: LexisNexis Canada, 2011).

⁶⁷ *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47.

⁶⁸ *Ibid* at para 48.

⁶⁹ *Ibid* at para 49.

⁷⁰ Since 1990, decisions of the OEB have been reviewed by the Divisional Court, and in some instances by the Ontario Court of Appeal, some 37 times. In many of those cases, the courts have had occasion to comment on the expertise of the OEB and on the resulting deference to be paid to the OEB's decisions. The following citations are examples of the courts' statements to that effect:

a) "Deference to the Board is not limited to matters involving fact finding, the exercise of discretion or policy making. As a statutory tribunal with exclusive jurisdiction to hear and determine all questions of law raised in matters properly before it, the Board has a long-recognized expertise in statutory interpretation when it involves interpreting its own statute." (*Union Gas*, *Op. Cit.* at para 23).

b) "First, the OEB is a specialized and expert tribunal dealing with a complicated and multi-faceted industry. Its decisions are, therefore, entitled to substantial deference." (*Graywood Investments Ltd. v. Toronto Hydro Electric System Ltd.* [2006] OJ No. 2030, at para 24.

⁷¹ See, for example, the analysis contained in Suzanne Comtois' paper "From Deference to Governance" (2013) 26 *Can J Amin L & Prac* 23.

⁷² MOU, *supra* note 4 at 3.

⁷³ *Ibid* at 11.

⁷⁴ *Ibid* at 7-8.

⁷⁵ *Ibid* at 9-12.

⁷⁶ *Ibid* at 9.

⁷⁷ *Ibid* at 10.

⁷⁸ *Ibid* at 12.

⁷⁹ *Ibid* at 13.

⁸⁰ *Ibid* at 13-14.

⁸¹ *Ibid* at 14.

⁸² *Ibid* at 14.

⁸³ *Ibid* at 14.

⁸⁴ OECD Principles, *supra*, note 1 at 108.

⁸⁵ *Adjudicative Tribunals Accountability, Governance and Appointments Act*, 2009, SO 2009, c 33, Schedule 5 at s 1.

⁸⁶ *Ibid* at ss 3-7.

⁸⁷ *Ibid* at ss 11-13.

APPENDIX A

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Memorandum of Understanding

THE MINISTER OF ENERGY AND THE CHAIR OF THE ONTARIO ENERGY BOARD

1 PURPOSE OF THIS MEMORANDUM

1.1 The purposes of this Memorandum are as follows:

- (a) to establish the accountability relationships between the Minister of Energy and the Chair and Management Committee of the Ontario Energy Board.
- (b) to clarify the operational roles and responsibilities of the Minister and Deputy Minister of Energy, and the Chair and the Management Committee, as well as officers and employees of the Ontario Energy Board, and to record their mutual understanding in respect of these matters.
- (c) to set out the expectations for the operational, administrative, communications, financial, auditing and reporting arrangements between the Ontario Energy Board and the Ministry of Energy.
- (d) to satisfy the requirements under section 4.6(1) of the Ontario Energy Board Act, 1998, and the Agency Establishment and Accountability Directive (as defined in article 2 herein), requiring the Chair of the Ontario Energy Board to enter into a memorandum of understanding with the Minister of Energy.

1.2 This Memorandum does not affect, modify or limit the powers or responsibilities of the Ontario Energy Board or the powers or responsibilities of individuals or entities that are derived from the Ontario Energy Board, as set out in applicable legislation, or as otherwise established by law. In the event of a conflict between the provisions of this Memorandum and any applicable legislation (as defined in article 2 herein), the legislation shall prevail.

1.3 The Minister and the Chair agree and acknowledge any references in this Memorandum to the

roles, responsibilities, accountability, rights, duties, powers and obligations of the following :

- (a) the Management Committee, the Chief Operating Officer, or to any other person, position, office or employee of the Ontario Energy Board; or,
- (b) the Deputy Minister, staff or employee or employees of the Ministry of Energy; are deemed to be references to the Chair's and the Minister's understanding of the said roles, responsibilities, accountability, rights, duties, powers and obligations in respect of the persons or positions being referred to herein.

2 DEFINITIONS AND INTERPRETATION

2.1 For the purposes of this Memorandum, the following definitions shall have their corresponding meanings:

“AEAD” means the Agency Establishment and Accountability Directive, approved by the Treasury Board/Management Board of Cabinet of the Government of Ontario;

“Act” means the Ontario Energy Board Act, 1998, as may be amended from time to time;

“Board” means the Ontario Energy Board, continued under Part II of the Act;

“By-law” means a by-law made by the Management Committee of the Ontario Energy Board pursuant to section 4.10 of the Act;

“Cabinet” refers to the Executive Council of Ontario and is comprised of the Premier and the ministers of each of the Government's portfolios;

“Chair” means the member of the Ontario Energy Board designated by the Lieutenant Governor in Council to be chair of the Board pursuant to section 4.1(6) of the Act, who is also the chair of the Management Committee and the chief executive officer of the Board, pursuant to sections 4.1(9) and 4.2(1) of the Act;

“COO” means the chief operating officer of the Board who is appointed by the Management Committee from among the Board's employees pursuant to section 5 of the Act;

“Deputy Minister” means the Deputy Minister of the Ministry of Energy;

“Employee” or “employee” means an employee of the Board, and does not include a Member of the Board;

“Fiscal Year” means the 12 month financial reporting period beginning April 1st and ending March 31st;

“Government” means the Government of Ontario;

“LGIC” means the Lieutenant Governor in Council;

“Legislation” means all statutes duly enacted by the Legislative Assembly of Ontario or the Parliament of Canada, as applicable to the Board, including all regulations made under any such statute or statutes;

“Management Committee” means the management committee of the Ontario Energy Board, composed of the Chair and two vice-chairs, established under section 4.2 of the Act;

“MBC” means the Management Board of Cabinet;

“Member” means a member of the Ontario Energy Board appointed to the Board by the LGIC pursuant to section 4.1(2) of the Act, and includes the Chair and the vice-chairs;

“Memorandum” means this memorandum of understanding between the Minister of Energy and the Chair of the Board, entered into on behalf of the Ministry, and the Board and its Management Committee, respectively, as may be amended from time to time by mutual agreement of the parties;

“Minister” means the Minister of Energy;

“Ministerial Directive” means a directive issued by the Minister with the approval of the LGIC under sections 27, 27.1, 27.2, 28, 28.1, 28.2, 28.3, 28.4, 28.5, 28.6 and 28.7 of the Act, or any other applicable sections of the Act;

“Ministry” means the Ministry of Energy of the Government of Ontario; “MOF” means the Ministry of Finance of the Government of Ontario; “PSOA” means the Public Service of Ontario Act, 2006;

“Regulatory Agency” refers to a specific classification of Ontario agencies described by the AEAD in Schedule A, and shall be read as an agency which makes independent decisions (including inspections, investigations, prosecutions, certifications, licensing and rate-setting) that may limit or promote the conduct, practice, obligations, rights and responsibilities of an individual, business or corporate body;

“TB” means the Treasury Board of Cabinet; and,

“Vice-Chair” means a member designated by the LGIC as a vice-chair of the Ontario Energy Board under section 4.1(6) of the Act.

2.2 Any reference to the Act or any other Legislation (or section therein) shall be deemed to be a reference to the current Act or Legislation (or section therein), as may be amended from time to time.

2.3 The parties hereto agree and acknowledge that throughout this Memorandum, references to the Management Committee shall be read and interpreted as references to the Chair, on behalf of its Management Committee, unless the context requires otherwise.

2.4 The parties hereto agree and acknowledge that amended, revised or successive versions of the directives listed in Appendix 2 continue to apply to the Board. Where a directive applies, all associated policies, procedures and guidelines also apply.

3 AGENCY STATUS

3.1 The Board is an agent of Her Majesty in right of Ontario, pursuant to section 4(4) of the Act.

3.2 The Board is a corporation without share capital and is comprised of at least five members appointed by the LGIC.

3.3 Pursuant to Ontario Regulation 146/10 (Public Bodies and Commission Public Bodies - Definitions), made under the PSOA, the Board is prescribed as a public body for the purposes of the PSOA, which requires the compliance by Members and Employees of the Board with the ethical framework of the PSOA.

3.4 The Board is classified by the provisions in the AEAD as a Regulatory Agency with a governing board.

4 GUIDING PRINCIPLES

4.1 The Minister recognizes that the Board is a statutory entity and that the Board, the Chair, and the Management Committee exercise powers and perform duties in accordance with the Act and other applicable Legislation. The Minister also recognizes that as a statutory entity, the exercise of the Board's powers and duties is subject to limitations, constraints and conditions that flow from applicable Legislation, from the Board's status as an independent quasi judicial tribunal or from both. The Minister acknowledges that the Board's adjudicative and regulatory decisions must be made, and be seen by the public to be made, independently and impartially. The parties agree that this Memorandum and all obligations contained in it shall be interpreted and applied in a manner that is compatible with the foregoing.

4.2 The Chair, on behalf of himself or herself and the Management Committee, acknowledges that the Chair and the Management Committee are accountable to the Minister, in respect of the Board's fiscal management and business operations, consistent with any applicable TB/MBC/MOF directives. The Chair acknowledges that accountability is a fundamental principle to be observed in the management, administration and operations of the Board, consistent with its status as an agency of the Crown pursuant to section 4(4) of the Act.

4.3 The Chair agrees to ensure that the Board, including its Management Committee, conducts its affairs according to the management principles of the Government. These principles include: ethical behaviour; the prudent, efficient and lawful use of public resources; fairness; and high-quality service to the public.

4.4 The Minister and the Chair agree that the exchange of information, on an appropriate basis, at the earliest possible time is of mutual benefit and promotes accountability.

4.5 The Minister and the Chair agree to develop and implement mutually satisfactory procedures and

channels for the exchange of information to meet the requirements of this Memorandum.

5 MANDATE AND LEGISLATIVE FRAMEWORK

5.1 The mandate of the Board is set out in the Act.

5.2 The Board also exercises powers and authorities under a number of other Ontario statutes including, but not limited to, the Electricity Act, 1998, the Municipal Franchises Act and the Statutory Powers Procedure Act. A list of statutes of particular application to the Board is set out in Appendix 1. It is understood that Appendix 1 does not contain all of the statutes that apply to the Board and that there are other statutes that apply to the Board or give the Board powers, duties, or responsibilities.

6 ACCOUNTABILITY RELATIONSHIPS

6.1 Minister

6.1.1 The Minister is accountable to the Legislative Assembly of Ontario for the fulfillment by the Board of its mandate and its compliance with applicable Legislation and directives. For these purposes, the Minister reports and responds to the Legislative Assembly on the affairs of the Board.

6.1.2 The Minister is accountable to Cabinet for the performance of the Board and its compliance with applicable Legislation and directives.

6.2 The Chair and the Management Committee

6.2.1 The Chair is accountable to the Minister for the performance of the Board in fulfilling its mandate, and for carrying out the roles and responsibilities assigned to the Chair under the Act, and for providing oversight in respect of the Board's compliance with applicable Legislation, Ministerial Directives, TB/MBC/MOF directives and this Memorandum.

6.2.2 The Management Committee is accountable to the Minister for the management of activities of the Board, including budgeting and the allocation of the Board's resources, and shall perform such duties as are assigned to the Management Committee under the Act, other applicable Legislation, directives, and this Memorandum.

6.3 The Deputy Minister

6.3.1 The Deputy Minister is accountable to the Secretary of Cabinet and the Minister for the performance of the Ministry in its administrative and organizational support to the Board, and for carrying out the roles and responsibilities assigned to the Deputy Minister by the Minister, applicable TB/MBC/MOF directives, and this Memorandum.

6.4 The Chief Operating Officer

6.4.1 The COO is accountable to the Management Committee, for such matters as are assigned to the COO by the Management Committee as set out in the Board's By-law #1.

7 ETHICAL CONDUCT

7.1 The Board is prescribed as a public body under section 8 (1.1) (a) of the PSOA. As Board Members and Employees are considered public servants under section 2 of the PSOA, they are governed by the ethical framework on conflict of interest, political activity, and protected disclosure of wrongdoing provisions, as well as any other duties and responsibilities as provided for under the PSOA.

7.2 The Board shall follow the conflict of interest rules established under the PSOA, which are set out in Ontario Regulation 381/07 (Conflict of Interest Rules for Public Servants (Ministry) and Former Public Servants (Ministry), made under the PSOA. All Members and Employees of the Board are subject to the conflict of interest rules set out under the PSOA.

7.3 In addition, in order to demonstrate its commitment to the highest standard of ethical conduct and governance, the Board has established conflict of interest rules which apply to:

- (a) current employees of the Board and Board members; and
- (b) former senior employees and former Board members.

7.4 The conflict of interest rules address post-service restrictions on the activities of former senior employees and Board members and form part of the Board's Code of conduct. To the extent of any conflict between the conflict of interest rules

created by the Board and the PSOA, the PSOA shall govern.

8 ROLES AND RESPONSIBILITIES

8.1 The Minister

8.1.1 Without limiting any other responsibilities and duties set out in the Act, other applicable Legislation, Ministerial Directives, the AEAD and other applicable TB/MBC/MOF directives, the Minister is responsible for:

- (a) developing the Government's overall energy policy priorities and broad policy directions;
- (b) informing the Chair of the Government's overall energy policy priorities and broad policy directions that may impact the Board;
- (c) reporting and responding to the Cabinet and the Legislative Assembly of Ontario on the affairs of the Board;
- (d) attesting, reporting and responding to TB/MBC on the Board's performance, compliance with the AEAD, other applicable TB/MBC/MOF directives and Government operational policies.
- (e) reviewing and approving, on a timely basis, the Board's annual business plan and submitting the Board's business plan to TB/MBC for review upon request;
- (f) receiving the annual report from the Board and tabling it in the Legislative Assembly within one month of receiving the annual report from the Board;
- (g) reviewing by-laws made by the Management Committee, and approving by-laws(s) made under section 4.10(e) of the Act governing the remuneration and benefits of the Chair, the Vice-Chairs and the other Members of the Board;
- (h) meeting with the Chair regularly and as necessary to discuss issues relating to the effective discharge of the Board's mandate and the need for services or support to be provided by the Ministry to the Board;
- (i) consulting, as appropriate, with the Chair on significant new directions or initiatives affecting the energy industry and/or the Board;

- (j) directing that a periodic review of the Board be conducted as and when necessary, and making subsequent recommendations to TB/MBC; and
- (k) following consultation with the Chair, as appropriate, making recommendations to Cabinet relating to the appointment and reappointment of the Chair, Vice-Chairs, and other Members, pursuant to the process established by the Public Appointments Secretariat of Ontario .

8.2 The Chair

8.2.1 Without limiting any other responsibilities and duties set out in the Act, other applicable Legislation, Ministerial Directives, the AEAD and other applicable TB/MBC/MOF directives, the Chair is responsible for:

- (a) keeping the Minister advised of issues or events relating to the Board that concern or can reasonably be expected to concern the Minister in the exercise of his or her ministerial responsibilities related to energy matters and advising the Minister of these issues or events in a timely manner, and in advance if it is possible to do so, having regard to the seriousness of the event or issue;
- (b) ensuring that significant initiatives undertaken by the Board that would be of importance to the Minister are brought to the attention of the Minister in a timely manner, and in advance if it is possible to do so, having regard to the seriousness of the initiative;
- (c) consulting with the Minister with respect to the Board's roles and responsibilities in meeting Government public policy objectives, current priorities and initiatives;
- (d) providing orientation to Members of the Board with regard to the statutory objects of the OEB, as well as Government public policy objectives and current priorities;
- (e) providing orientation to new Members to ensure that the new Members are made aware of the requirements with regard to the ethical framework under the PSOA;
- (f) ensuring the Board's compliance with applicable Legislation and all applicable directives;
- (g) attesting, reporting and responding to the Ministry on the Board's compliance with the AEAD and other applicable TB/MBC/MOF directives, and Government operational policies as required or as requested by the Ministry;
- (h) at the request of the Minister, preparing material, attending and/or making presentations before Cabinet, the Legislative Assembly or Committees of either, on matters affecting or pertaining to the Board;
- (i) providing the Board with such information, assistance and advice as either the Board or its Management Committee requires to meet its responsibilities under the Act and other applicable Legislation;
- (j) notifying the Minister of upcoming vacancies in Order-in-Council appointments to the Board, and making recommendations to the Minister on persons appropriate to fill such vacancies;
- (k) presiding over meetings of the Management Committee; and
- (l) meeting with the Minister regularly, or as requested by either party, to discuss issues relating to the fulfillment by the Board of its mandate.

8.3 The Management Committee

8.3.1 Without limiting any other responsibilities and duties of the Management Committee set out in the Act, other applicable Legislation, Ministerial Directives 1, the AEAD and other applicable TB/MBC/MOF directives, the Management Committee is responsible for:

- (a) managing the activities of the Board, including the Board's budgeting and the allocation of the Board's resources;
- (b) ensuring that all of the Board's reporting requirements and specific obligations set out in this Memorandum, including the reporting and documentary requirements listed in Appendix 3 for review and approval by the Minister, are met;
- (c) ensuring that the Board has an appropriate risk management framework and mitigating strategy in place to provide the proper level of assurance that the Board can continue to carry out its functions; and

- (d) acting as the equivalent to a Board of Directors for providing approvals under applicable TB/MBC/MOF directives, where Board of Directors approvals are required.

8.4 The Deputy Minister

8.4.1 Without limiting any other responsibilities and duties of the Deputy Minister set out in the Act, other applicable Legislation, Ministerial Directives, the AEAD and other applicable TB/MBC/MOF directives, the Deputy Minister is responsible for:

- (a) advising and assisting the Minister in discharging his or her delegated ministerial responsibility with respect to the Board, including the Minister's responsibilities for approving the Board's business plan(s) and by-laws governing the remuneration and benefits of the Chair, the Vice-Chairs or other Members of the Board;
- (b) monitoring the activities of the Board on behalf of the Minister to ensure that its mandate is being fulfilled and that it is acting in accordance with all applicable Legislation and applicable directives;
- (c) ensuring that the Board has an appropriate risk management framework and a risk management plan in place for managing risks that the Board may encounter in meeting its mandate and business plan;
- (d) ensuring that the Board, where and when appropriate, receives such information and guidance as required or as requested to meet its responsibilities under the Act, other applicable Legislation, applicable Ministerial Directives, TB/MBC/MOF directives, and this Memorandum;
- (e) undertaking, on behalf of the Minister, assessments of whether or not the Board is fulfilling its legislative mandate;
- (f) attesting to TB/MBC as required, on the Board's compliance with all mandatory requirements of the AEAD;
- (g) meeting with the Chair on a regular and as needed basis on matters of mutual importance; and
- (h) requiring that the Deputy Minister's senior staff meet with the COO and Board's senior

management on a regular and as needed basis to discuss on-going issues.

8.5 The Chief Operating Officer

8.5.1 Without limiting any other responsibilities and duties as may be specified by applicable Legislation or by the Management Committee, the COO is responsible for:

- (a) the general supervision of Employees, and the financial, administrative and other affairs of the Board.
- (b) such other duties as are assigned by the Management Committee as set out in the Board's By-law #1, as may be amended from time to time.

9 REPORTING REQUIREMENTS AND OTHER SPECIFIC OBLIGATIONS

9.1 Business Plan

9.1.1 Each year, the Chair, on behalf of the Management Committee, shall provide the Minister with the Board's business plan for approval at least 60 days before the beginning of the new Fiscal Year. The business plan shall cover, at a minimum, the Board's next three-year fiscal years.

9.1.2 Senior Board Employees and Senior Ministry staff shall discuss, during the drafting of the Board's business plan, the contents of the business plan in respect of the alignment of the Board's key initiatives, as identified in the business plan, with the Government's policy directions, performance standards, and the plan's compliance with the AEAD.

9.1.3 The Board shall consult, as and when appropriate, with stakeholders on the Board's goals, objectives and strategic directions .

9.1.4 The Management Committee shall ensure that the Board's business plan meets the requirements of the AEAD, and the other requirements described in this Memorandum.

9.1.5 Ministry staff shall exercise due diligence in their review of the Board's business plan prior to making any recommendation for approval by the Minister. Ministry staff may request additional information and analysis from the Board, as necessary, for the purpose of this review.

9.1.6 The Minister shall review the Board's annual business plan in a timely manner, and shall advise the Management Committee whether or not the Minister concurs with the direction proposed by the Board's Management Committee. The Minister will advise the Management Committee where and in what manner the Board's plan varies from Legislation, the Government's energy policy objectives or priorities, or from any applicable directives, and the Management Committee will reconsider the business plan accordingly.

9.1.7 The business plan must clearly articulate, among other things, how the Board's activities are aligned with the Government's energy policy objectives, which include the objectives of promoting electricity conservation and demand management, implementation of a smart grid, and generation of electricity from alternative and renewable energy sources.

9.1.8 The business plan should include: projected revenues of the Board and their sources; capital and operating expenditures; and any other items required under applicable TB/MBC/MOF directives.

9.1.9 The Minister or TB/MBC may require the Management Committee to submit the Board's business plan to TB/MSC for review at any time.

9.1.10 The Management Committee shall publish the approved business plan on the Board's website and shall make a paper copy available to the public upon request.

9.2 Statement of Priorities

9.2.1 The Management Committee shall provide the Minister with a statement of the Board's priorities in the Board's annual business plan.

9.2.2 The statement of priorities shall include details of the Board's policy and operational priorities and a description of how the Board intends to achieve its priorities.

9.2.3 The Management Committee shall report any material changes to the Board's operational priorities during the course of the year to the Minister.

9.3 Regulatory Calendar

9.3.1 The Management Committee shall publish and regularly update the Board's regulatory calendar on the Board's website in a timely manner, and shall make a paper copy available to the public upon request.

9.4 Annual Reports

9.4.1 Within six months after the end of each fiscal year, the Management Committee shall deliver to the Minister an annual report on the affairs of the Board for that Fiscal Year in accordance with section 4.9 of the Act.

9.4.2 The Chair shall ensure that the Board's annual report fulfills the requirements of the AEAD and other applicable TB/MBC/MOF directives, and other requirements as described in this Memorandum.

9.4.3 Ministry staff shall exercise due diligence in their review of the annual report prior to making any recommendation for acceptance by the Minister. Ministry staff may request additional information and analysis from the Board, as necessary, for the purpose of this review.

9.4.4 The Management Committee, in accordance with the Government Appointees Directive and any other applicable MBC/TB/MOF directives and Legislation, shall ensure that the total annual remuneration of Members is included in the annual report¹.

9.4.5 The Minister shall lay the annual report before the Assembly by delivering the report to the Clerk in accordance with section 4.9 (2) of the Act.

9.4.6 After the annual report has been tabled in the Legislative Assembly, Ministry staff shall advise the Board that the annual report has been tabled, and the Management Committee shall ensure the annual report is published on the Board's website in a timely manner, and shall make a paper copy available to the public upon request.

9.5 Performance Standards of the Board

9.5.1 The Management Committee shall ensure that the Board's business plan includes a system of performance standards for the Board.

9.5.2 The system for measuring performance shall include, but is not limited to, the following measures:

- (a) the achievement of proposed outcomes that align with the goals, strategic objectives and vision identified in the Board's business plan; and
- (b) the efficiency in the operations of the Board.

9.5.3 The Management Committee shall ensure that the Board seeks continuous improvement in its performance.

9.5.4 The Management Committee shall ensure that the Board establishes annual as well as longer-range performance standards for operating and financial results.

9.6 Performance Results of the Board

9.6.11 The Management Committee shall ensure that an independent auditor reviews and reports on the Board's past year's achievement of the performance standards contained in its business plan.

9.6.2 The Management Committee shall provide the Minister with the auditor's report on the Board's achievement of the performance standards contained in its business plan within 90 days after the end of each fiscal year, and as soon as it is completed and accepted by the Management Committee.

9.6.3 The auditor's report on the Board's performance shall include a description of performance achieved as against the performance standards established by the Management Committee and a discussion of significant variances between actual and planned results.

9.6.4 The auditor's report described in article 9.6.2 of this Memorandum shall be reviewed by the Chair and the Minister annually.

9.6.5 A summary of the auditor's report described in section 9.6.2 of this Memorandum shall be included in the Board's annual report.

9.6.6 The Management Committee shall publish the auditor's report described in article 9.6.2 of this Memorandum on the Board's website and shall make

a paper copy available to the public upon request. The Management Committee shall ensure that the publication of the auditor's report on the Board's website shall be made available and posted together with the annual report for the corresponding year.

9.7 Remuneration

9.7.1 The Management Committee may make By-law(s) governing the remuneration and benefits of the Chair, the Vice-Chairs and other Members of the Board. Any remuneration By-law must be submitted to the Minister for review and approval in accordance with sections 4.10(3) to 4.10(7) of the Act.

9.7.2 The Management Committee shall establish a pay for performance plan for the full-time Members of the Board that links the payments to the achievement of performance standards. Full-time Members include the Chair, the Vice-Chairs and other full-time Board Members.

9.7.3 The Management Committee shall submit the pay for performance plan and any material proposed changes to the pay for performance plan to the Minister for approval.

9.7.4 The determination of the pay for performance of the Chair, Vice-Chairs and the full-time Board Members will be based on the audited achievements of the performance standards and shall be administered in accordance with the Minister-approved pay for performance plan, and any other applicable Legislation, and applicable Minister's Directives and TB/MBC/MOF directives .

9.7.5 The Management Committee shall publish the Minister-approved pay for performance plan on the Board's website and shall make a paper copy available to the public upon request.

9.7.6 The Management Committee shall ensure the comparator group for total senior management compensation is comparable to other regulatory organizations in Ontario.

9.8.1 The Management Committee may make by-laws in accordance with section 4.10 of the Act:

- (a) governing the administration, management and conduct of the affairs of the Board;

- (b) prescribing emergency circumstances in which the quorum of the Management Committee is one member;
- (c) governing the appointment of an auditor;
- (d) setting out the powers, functions and duties of the Chair, the Vice-Chairs and the officers employed by the Board;
- (e) governing the remuneration and benefits of the Chair, the Vice-Chairs and the other Members of the Board; and
- (f) governing the composition and functions of the Market Surveillance Panel and the appointment, removal and remuneration of members of the Market Surveillance Panel.

9.8.2 The Management Committee shall deliver to the Minister a copy of every by law passed by it.

9.8.3 The Management Committee shall publish every by-law made under section 4.10(1) of the Act on the Board's website as soon as practicable after the by law becomes effective.

9.8.4 Within 60 days after the delivery of a by-law made under section 4.10(1)(e) of the Act (a remuneration and benefits by-law), the Minister may approve, reject or return it to the Management Committee for further consideration.

9.8.5 A by-law made under section 4.10(1)(e) of the Act that is approved by the Minister becomes effective on the date of the approval or on such later date as the by-law may provide.

9.8.6 A by-law made under section 4.10(1)(e) of the Act that is rejected by the Minister does not become effective.

9.8.7 A by-law made under section 4.10(1)(e) of the Act that is returned to the Management Committee for further consideration does not become effective until the Management Committee returns it to the Minister and the Minister approves it.

9.8.8 If, within the 60-day period referred to in article 9.8.4 of this Memorandum, the Minister does not approve, reject or return the by-law for further consideration, the by-law becomes effective on the

75th day after it is delivered to the Minister or on such later date as the by-law may provide.

9.9 Consumer Protection

9.9.1 The Chair and the Management Committee acknowledge that consumer protection in energy markets is a key priority for both the Government and the Board. The Chair and the Management Committee shall ensure that the Board has the management focus and processes necessary to discharge its responsibilities in the areas of consumer protection, consumer education, complaint handling, licensing, inspections, compliance, and enforcement in a timely manner.

9.9.2 The Management Committee shall ensure that the Board provides public reporting on the Board's website of any assurance of voluntary compliance by a regulated entity, any compliance order issued by the Board against a regulated entity, and any compliance activities that the Board has undertaken. This information should be maintained as a historical record on the Board's website.

9.9.3 The Management Committee shall maintain and periodically review rules governing practice and procedure under section 25.1 of the Statutory Powers Procedure Act that govern interim and final awards of costs to organizations representing consumers.

9.9.4 The Management Committee shall ensure that the rules referred to in article 9.9.3 of this Memorandum can be found in the Board's Rules of Practice and Procedure and the Board's Practice Direction on Cost Awards. The Management Committee shall review the Practice Direction on Cost Awards periodically. Any material changes shall be reported to the Minister on a timely basis.

9.10 Stakeholder Input

9.10.1 The Management Committee shall ensure that there are one or more processes for stakeholder input by which consumers, distributors, generators, transmitters and other persons who have an interest in the Board may provide advice and recommendations for consideration by the Board in accordance with section 4.5 of the Act.

9.11 Financial and Other Reports

9.11.1 The Management Committee shall provide to the Minister, in a timely manner, the Board's financial and any other relevant information for consolidation into the budget of the Province of Ontario Public Accounts and for other Government financial planning and reporting purposes .

9.11.2 The Management Committee shall provide to the Minister, in a timely manner, audited annual financial statements, and will include them as part of the Board's annual report. The statements will be provided in a format that is in accordance with the Province's stated accounting policies issued by the Office of the Provincial Controller.

9.11.3 The Management Committee shall submit to the Minister of Finance its salary information according to the Public Sector Salary Disclosure Act, 1996.

9.11.4 The Management Committee shall provide to senior Ministry staff a report on the Board's progress and results in meeting Government energy public policy initiatives, as identified in the Board's business plan. The written report is to be provided annually within 60 days after the end of the fiscal year, and on a more frequent basis if requested by the Ministry.

9.11.5 The Management Committee shall also provide to the Ministry, at the request of the Ministry, such other reports, information and analysis as may be necessary, to support the Ministry in agency governance and policy development.

9.11.6 In accordance with section 4.7 of the Act, the Management Committee shall give the Minister such information about the Board's activities, operations and financial affairs as the Minister requests.

10 COMMUNICATIONS

10.1 The Chair and the Minister recognize that timely exchange of information and effective consultation, when necessary and as appropriate, are essential to the effective discharge of their respective responsibilities.

10.2 The Minister and the Chair will consult with each other on key public communications strategies. They will keep each other informed of the results of stakeholder and other public consultations.

10.3 The Minister and the Chair shall consult with each other, as appropriate, on key communication issues that may affect the Ministry or the Board they will keep each other informed, as appropriate, of key communication issues in a timely manner, and in advance if it is possible to do so, having regard to the seriousness of the key public communication issue and the quasi-judicial nature of the Board.

10.4 The Ministry and the Board shall appoint persons to serve as public communications "leads". Coordination on key public communications matters shall be the responsibility of the Board and the Ministry leads.

10.5 The public communications leads of the Board and the Ministry shall maintain timely and effective communication about the matters provided for in this Article in respect of the Board and the Ministry, as applicable.

10.6 The public communications leads shall ensure that inquiries received from the general public by the Minister's Office or the Ministry regarding a Board proceeding in progress must be re-directed to the Board.

11 STAFFING AND APPOINTMENTS

11.1 Staffing

11.1.1 Employees of the Board are subject to such provisions of the PSOA and its regulations as are made applicable thereby.

11.2 Appointments

11.2.1 The members of the Board shall be appointed by the LGIC pursuant to section 4.1(2) of the Act.

11.2.2 The LGIC, by order, shall designate a Member of the Board as Chair and two Members as Vice-Chairs.

11.2.3 Subject to article 11.2.4 below, and notwithstanding any other provision of this Memorandum, Members of the Board shall be governed by the TB/ MSC Government Appointees Directive.

11.2.4 The provisions related to the rates of remuneration of appointees in the Government Appointees Directive are not applicable to Members of the Board by virtue of section 4.10(e) of the Act.

11.2.5 Without limiting the generality of the foregoing, and in accordance with section 4.7 of the Act, the Management Committee shall provide the Minister, upon request and in a timely manner, information relating to the proposed remuneration applicable to Board Members. Such information includes any information, research and analysis considered by the Management Committee.

12 AUDIT ARRANGEMENTS

12.11 The Management Committee shall prepare financial statements according to Generally Accepted Accounting Principles established by the Public Sector Accounting Board, and in a format that is in accordance with the Province's stated accounting policies issued by the Office of the Provincial Controller. The financial statements must present the financial position, results of operations and changes in the financial position of the Board for its most recently completed fiscal year .

12.2 The Management Committee, as part of its business planning process, must annually evaluate operational and financial risks, determine the level of internal audit, if any, appropriate to the organization and include a summary statement of its decision regarding the need for an internal audit in the business plan.

12.3 The Management Committee shall appoint one or more auditors licensed under the Public Accounting Act, 2004 to audit the financial statements of the Board for each fiscal year .

12.4 The Internal Audit Division of the Government may also carry out an internal audit, if approved to do so by the Ministry's Audit Committee or by the Corporate Audit Committee.

12.5 The Chair may request an external audit of the financial transactions or management controls of the Board.

12.6 Furthermore, the Board is subject to audit by the Auditor General of Ontario under the Auditor General Act.

12.7 Regardless of any annual external audit, the Minister may direct that the Board be audited at any time.

12.8 The Chair, the Management Committee, and the COO shall cooperate in any audit of the Board.

12.9 The results of any material audits will be shared with the Management Committee and the Minister.

12.10 The Chair shall provide a copy of every report from an audit to the Minister and the Minister of Finance within 7 days of the release of the report. If the Chair responds to the audit report and any recommendations therein, the Chair shall also provide a copy of the response to the Minister and the Minister of Finance.

12.11 The Chair shall advise the Minister annually on any outstanding audit recommendations .

13 FINANCIAL ARRANGEMENTS, BORROWING, AND INVESTMENT POWERS

13.1 The parties hereto acknowledge that, in accordance with section 4.11 of the Act, the Board shall not, without the approval of the LGIC,

- (a) create a subsidiary;
- (b) purchase or sell real property;
- (c) borrow money, pledge, mortgage or hypothecate any of its property, or create or grant a security interest in any of its property;
- (d) enter into a contract of a class prescribed by the regulations; or
- (e) exercise other rights, powers or privileges under section 4(2) of the Act that are prescribed by the regulations.

13.2 Financial procedures of the Board must be in accordance with applicable legislation and applicable TB/MBC/MOF directives .

13.3 The operations of the Board are funded by fees payable under section 12.1 of the Act, assessments payable under section 26 of the Act, costs payable to the Board under section 30 of the Act, and administrative penalties payable under section 112.5 of the Act.

14 ADMINISTRATIVE ARRANGEMENTS

14.1 Applicable TB/MBC/MOF Directives

14.1.1 The Board is subject to the TB/MBC/MOF directives set out in Appendix 2 of this Memorandum.

14.1.2 Where the same matters dealt with in the directives referred to in article 14.1.1 are the subject of the provisions in the Act, the regulations and the rules thereunder, the provisions in the Act, the regulations and the rules made thereunder shall govern.

14.1.3 The Chair and the Minister acknowledge that TB/MBC and MOF may amend directives, operational policies and guidelines that apply to the Board from time to time over the duration of this Memorandum. The Board is responsible for complying with all TB/MBC/MOF directives, operational policies and guidelines to which it is subject.

14.2 Freedom of Information and Protection of Privacy

14.2.1 For the purposes of the Freedom of Information and Protection of Privacy Act, the Chair is the head of the Board. The Board is designated as an institution for the purposes of that Act and for the purposes of Regulation 460 made thereunder .

14.2.2 The Board shall respond to access requests and privacy investigations and shall fulfill all requirements under the Freedom of Information and Protection of Privacy Act in a timely manner .

14.3 Records Management

14.3.1 The Management Committee is responsible for ensuring that a system is in place for the creation, collection, maintenance, and disposal of records.

14.3.2 The Management Committee is responsible for ensuring that the Board complies with the Archives and Recordkeeping Act, 2006.

14.4 Service to Stakeholders and the Public

14.4.1 The Board shall have one or more formal processes in place for responding to complaints about the quality of the Board's services received by the public and stakeholders that is consistent with the Government's service quality initiative.

14.4.2 The Board's process for responding to complaints about the quality of services is separate from any statutory provisions about re-consideration, appeals, etc. of the Board's adjudicative or regulatory orders or decisions .

14.4.3 The Board's annual business plan will include performance standards for responding to complaints received from members of the public and stakeholders about the quality of services they received from the Board.

14.4.4 The Board shall ensure that it delivers its services at a quality standard that adheres to the principles of the Service Directive of the Ontario Public Service.

14.5 Agreement with Third Parties

14.5.1 The Board has, pursuant to section 4(2) of the Act, the capacity and the rights, powers and privileges of a natural person for the purpose of exercising and performing its powers and duties under the Act or any other Legislation, except as otherwise provided for in the Act. As such, the Board may enter into agreements with third parties, subject to any limitations provided for in the Act or in any other Legislation or in any TB/MBC/MOF directive applicable to the Board.

14.6 Procurement Arrangements

14.6.1 The Board is subject to the TB/MBC Procurement Directive.

14.6.2 Any relevant by-laws made by the Management Committee shall be in accordance with the Procurement Directive.

14.7 Other Arrangements

14.7.1 Where the Deputy Minister or other senior staff of the Ministry request that Board staff provide assistance to Ministry staff, the Deputy Minister and the COO, or their designates shall agree on a timetable for the provision of that assistance and for any other matters relating to the provision of such services.

15 LIABILITY AND PROTECTION INSURANCE

15.1 The Management Committee acknowledges that the Board shall put into effect, and maintain for the period during which this Memorandum is in effect, insurance coverage with insurers that are licensed to underwrite in Ontario.

15.2 The Management Committee shall conduct periodic reviews of its insurance portfolio and report to the Minister on any material changes .

16 PERIODIC REVIEW

16.1 The Board may be subject to a periodic review at the discretion and direction of TB/MBC or the Minister. The review may cover such matters relating to the Board that are determined by TB/MBC or the Minister, and may include, but are not limited to, the mandate, powers, governance structure and/or operations of the Board.

16.2 In requiring a review, TB/MBC or the Minister will determine the timing and responsibility for conducting the review, the roles of the Chair, the Management Committee and the Deputy Minister, and how any other parties should be involved.

16.3 The Minister will consult with the Chair as appropriate during any such review.

16.4 The Chair, the Management Committee and the COO will cooperate in any such review.

17 THE ONTARIO PIPELINE CO-ORDINATION COMMITTEE

17.1 The Ontario Pipeline Co-ordination Committee (“OPCC”) , representing a number of ministries and agencies concerned with the impact of proposed hydrocarbon pipelines and associated facilities and chaired by a Board Employee, will provide technical assistance to the Ministry, which may intervene before the National Energy Board on behalf of the Government when such matters are under federal jurisdiction. The primary function of the OPCC is to ensure that proposals for the construction of hydrocarbon facilities brought before the Board adhere to Ontario regulations and codes and have minimal undesirable effects on the environment and resources of the Province of Ontario.

18 PROCESS FOR APPROVAL, REVIEW AND AMENDMENT

18.1 Effective Date of the Memorandum

18.1.1 This Memorandum becomes effective on the date it is signed by the Minister.

18.1.2 This Memorandum shall remain in effect for a period of three years from the date of the Minister’s signature unless earlier amended or replaced.

18.2 Approval and Execution

18.2.1 The Minister is responsible for recommending to the TB/MBC the approval of this Memorandum prior to execution by either party to it. Once this Memorandum has been approved by the TB/MBC, it shall then be signed by the Chair, and lastly by the Minister.

18.2.2 The Minister shall ensure an original signed copy of this Memorandum is filed with the Legal Services Branch of the Ministry of Energy. The Minister shall also ensure that a copy of the signed Memorandum is shared with the Secretary, MSC.

18.2.3 The Management Committee shall publish this Memorandum on the Board’s website as soon as practicable after this Memorandum is signed by both parties.

18.3 Review and Amendment

18.3.1 This Memorandum shall be reviewed upon the request of either party to it.

18.3.2 If a new Minister or Chair takes office before this Memorandum expires, that individual must affirm this Memorandum by letter. The letter of affirmation must be provided to the Secretary, MBC, within six months of the new party taking office.

19 SIGNATURES

Rosemarie Leclair
Chair, Ontario Energy Board

Date

Honourable Bob Chiarelli
Minister of Energy

Date

APPENDIX 1: STATUTES OF PARTICULAR APPLICATION

- Accessibility for Ontarians with Disabilities Act, 2005
- Archives and Recordkeeping Act, 2006
- Auditor General Act
- Broader Public Sector Accountability Act, 2010
- Electricity Act, 1998
- Energy Consumer Protection Act, 2010
- Environmental Assessment Act
- Financial Administration Act
- Freedom of Information and Protection of Privacy Act
- French Language Services Act
- Management Board of Cabinet Act
- Municipal Franchises Act
- Oil, Gas and Salt Resources Act
- Ontario Clean Energy Benefit Act, 2010
- Ontario Energy Board Act, 1998
- Public Accounting Act, 2004
- Public Sector Compensation Restraint to Protect
- Public Services Act, 2010
- Public Sector Expenses Review Act, 2009
- Public Sector Salary Disclosure Act, 1996
- Public Service of Ontario Act, 2006
- Statutory Powers Procedure Act
- Toronto District Heating Corporation Act, 1998

APPENDIX 2: APPLICABLE TB/MBC/MOF DIRECTIVES

Governance and Accountability

- Accountability Directive
- Advertising Content Directive
- Agency Establishment and Accountability Directive
- General Expenses Directive
- Government Appointees Directive
- Internal Audit Directive
- Perquisites Directive

Business Planning and Financial Management

- Accounting Advice Directive
- Delegation of Authority Key Directive
- Indemnification Directive
- Realty Directive
- Travel, Meal and Hospitality Expenses Directive

Human Resources Management

- Disclosure of Wrongdoing Directive (for employees/ appointees of public bodies)

Procurement

- Procurement Directive, October 2012
- Procurement Directive on Advertising, Public and Media Relations, and Creative Communications Services

Information and Information Technology Management

- Management of Recorded Information Directive

General

- Communications in French Directive
- Visual Identity Directive

Note: Amended, revised or successive versions of the directives listed above continue to apply to the Board. Where a directive applies, all associated policies, procedures and guidelines also apply,

APPENDIX 3: SUMMARY OF KEY REPORTING REQUIREMENTS

REPORT/ DOCUMENT	DUE DATE	NOTES
Annual Business Plan	Annually , 60 days before the beginning of the new fiscal year (by February 11)	For approval by the Minister
Public Sector Salary Disclosure (PSSD)	Annually, around February - March	PSSD related information and analysis due to the Ministry, PSSD reporting due to Ministry of Finance
Attestation of Compliance with the AEAD	Annually, around May	For Minister's approval, and the Minister's report back to TB/MBC
Audited financial statements	Annually, around May - June	Submit to the Ministry for consolidation in the Public Accounts
Auditor's Report on the Board's achievements of its business plan	Annually, within 3 months after the end of fiscal year (by July 1)	For review by the Minister
Internal Trade Procurement Report	Annually , September - October	Submit to the Ministry for consolidation, the report back to the Ministry of Government Services
Annual Report, including audited financial statements	Annually, by October 1	For acceptance by the Minister and Tabling in the Assembly
Financial information for Estimates	Annually, around November	Submit to the Ministry for review and inclusion in the Ministry's Results Based Plan
Reports on progress and results of Board's public policy initiatives identified in the business plan.	Annually, within 2 months after the fiscal year end, and as required by the Ministry	For Ministry's information
Audit reports	Within 7 days of the release of the report	The audit report and the Chair's response to the Ministers of Energy and Finance for review
Outstanding audit recommendations	Annually	Advise the Ministry on any outstanding audit recommendations
All By-laws, except remuneration and benefits by-law	Immediately after the by-law is passed by the MC	Advise the Minister of by-laws, including amending by-laws
Reports as required by applicable legislation and TB/MBC/MOF directives	As required	Submit to the responsible Minister, copy to the Minister of Energy as appropriate
Remuneration and Benefits By- law	As soon as it is passed by the MC	For Minister's approval, including amending by-law
Pay for Performance Plan for the Chair and the full-time members	Prior to setting the Plan	For Minister's approval, including proposed changes
Other Reports and information requests	At the request of the Minister, Deputy Minister or designated staff	As required by the Ministry for the purpose of agency oversight and policy development

Acknowledgements from the Author

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