

# Closing the Door:

**How Ontario Bill 87  
Ended Impartial and  
Independent Energy  
Regulation in Ontario**

---

**INQUISITIVE ENERGY**

By Karen J. Taylor, CFA, ICD.D

February 22, 2022

# Closing the Door:

## How Ontario Bill 87 Ended Impartial and Independent Energy Regulation in Ontario

By Karen J. Taylor, CFA, ICD.D

### I. Introduction

Ontario Bill 87 – *Fixing the Hydro Mess Act, 2019, S.O. 2019, c.6.* imported the governance structure of the Alberta Energy Regulator (AER) to Ontario and adopted it for use at the Ontario Energy Board (OEB). As discussed in the report “A Square Peg for a Round Hole”<sup>1</sup>, this structure may not have been an appropriate choice. In addition, the regulatory scheme of the AER, including: (i) social regulation mandate; (ii) rules-based, command-and-control legislative and regulatory framework; (iii) lack of independence from government; (iv) marginalized quasi-judicial processes and limited natural justice rights; (v) reduced reliance on public interest tests; and (vi) limited regulatory policy discretion also suggests that this form of regulatory scheme is not fit for purpose by an economic regulator like the OEB.

This paper:

1. defines the status of the OEB as a regulatory agency of the Ontario government with rights-determining functions and describes the OEB’s place in Canada’s system of administrative law;
2. identifies the key principles of administrative law that inform the processes and functions of the regulator and sets out the concepts of impartiality and independence from an administrative law perspective;

---

<sup>1</sup>Taylor, K. “A Square Peg for a Round Hole: Importing the Governance and Regulatory Scheme of the Alberta Energy Regulator to Ontario”. Inquisitive Energy. October 4, 2021. <https://inquisitiveenergy.com/a-square-peg-for-a-round-hole>

3. discusses how Ontario Bill 87 undermines and potentially defeats the impartial and independent decision-making that is central to the OEB's mandate, expected by the public, and promised by government; and
4. argues why the impartiality and independence of the regulator promised by government and supported by administrative law principles matters or should matter to Ontarians.

## **II. Ontario's System of Provincial Agencies, Boards, Commissions, Tribunals**

The entrenchment of the welfare state in Canada after the second world war means that government is now heavily involved in virtually every aspect of Canadian life. Government is now overwhelming in both size and complexity, and a network of agencies, boards, commissions, and tribunals (together Administrative Agencies or Agencies) has been created over time to assist with the business of government and provide the expertise needed to implement government policy.<sup>2</sup> There are four primary benefits provided by this network of Administrative Agencies: (i) providing specialized and technical resolutions to different situations; (ii) ensuring greater innovation, flexibility and efficiency in the delivery of governmental programs and strategies; (iii) providing an informal and rapid forum for public hearings, thereby minimizing time and costs related to litigation before ordinary courts; and (iv) relieving politicians from what might be otherwise very sensitive political issues.<sup>3</sup>

The size and scope of the government of Ontario has similarly increased. There are over 170 Agencies in Ontario and over 360 community organizations and boards, all responsible and authorized to perform a public function or service<sup>4</sup>.

The Agencies and Appointments Directive<sup>5</sup> (Directive) issued by the Management Board of Cabinet pursuant to the Ontario *Management Board of Cabinet Act*<sup>6</sup> sets out the rules and accountability framework for Ontario provincial Administrative Agencies, remuneration guidelines for government appointments, and provides a framework for classifying various Ontario Agencies, which is largely dependent upon whether or not the agency is authorized to make operating decisions.

---

<sup>2</sup> Régimbald, G. "Canadian Administrative Law, Third Edition". LexisNexis Canada Inc. 2021. Page 3.

<sup>3</sup> Ibid.

<sup>4</sup> <https://ontario.ca/page/agencies-boards-and-commissions>

<sup>5</sup> <https://www.ontario.ca/page/agencies-and-appointments-directive>

<sup>6</sup> *Management Board of Cabinet Act, R.S.O. 1990, c. M.1.*

In general, there are a number of notable takeaways from the Agencies and Appointments Directive that are relevant to this discussion.

First, the Directive states that although provincial Administrative Agencies provide goods or services, they are not organizationally part of a ministry but are part of government.

Second, the Directive provides that provincial Administrative Agencies are accountable to the government through the responsible minister and must use public resources efficiently and effectively to carry out its mandate(s).

Third, the mandate(s) of each provincial Administrative Agency is established by its respective constituting instrument(s) or statute(s) and each Agency is provided only those powers needed to fulfil its mandate(s) and deliver its programs and services.

Fourth, for those provincial Administrative Agencies with operational responsibilities, ministries and provincial Agencies must balance the need for agency flexibility with the minister's accountability for the agency to Cabinet and the Legislative Assembly.

Finally, and perhaps most importantly, the Directive stipulates that for provincial Administrative Agencies with adjudicative and regulatory responsibilities, *impartial decision-making is the paramount requirement*.

Pursuant to the framework set out in the Directive, the OEB is considered to be a board-governed agency. It has the financial and operating authority to carry on a business and conduct operations in support of its mandate. The OEB's board of directors is accountable to the minister for the achievement of its mandate and the chair is the board's representative to the minister. The OEB has its own staff and organizational structure and does not rely on government ministries for these functions.

The OEB meets the functional definition of a *regulatory agency* with a governing board, described in the Directive as being:

- authorized to make *independent* decisions for a designated sector (in the case of the OEB, energy) that include inspections, investigations, prosecutions, certifications, licensing, and rate setting. These decisions may *limit, promote, or correct the conduct, practice, obligations, rights, and responsibilities of an individual, business, or corporate body*; and

- self-funding.

The OEB is not a prescribed adjudicative<sup>7</sup> tribunal<sup>8</sup> and not subject to the *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*, the purpose of which is to “ensure that adjudicative tribunals are accountable, transparent and efficient in their operations while remaining independent in their decision-making”<sup>9</sup>.

The OEB’s mandate and the processes to be used to fulfill its mandate are set out in the following statutes:

- *Ontario Energy Board Act, 1998* (OEB Act);
- *Electricity Act, 1998*;
- *Energy Consumer Protection Act, 2010*;
- *Municipal Franchise Act*; and
- *Statutory Powers Procedure Act* (SPPA).

The OEB describes its own mandate as follows<sup>10</sup>:

- Set the delivery rates energy utilities can charge;
- Approve major new electricity transmission lines and natural gas pipelines;
- Approve corporate changes by energy utilities;
- Establish and enforce the rules for energy companies operating in Ontario;
- Monitor the wholesale electricity market and the financial and operational performance of utilities;
- *Develop new energy policies and provide unbiased advice to government*;
- License energy companies in the electricity sector and natural gas marketers; and

---

<sup>7</sup> “Adjudication is the process of receiving and considering the evidence and arguments presented by both sides in a dispute and making a binding decision by applying relevant law to evidence that is relevant to the issues in the case.” Reference: “*A Manual for Ontario Adjudicators*”. Society of Ontario Adjudicators and Regulators. Revised First Edition June 2000. Page 24.

<sup>8</sup> *Ontario Regulation 126/10 – Adjudicative Tribunals and Clusters*

<sup>9</sup> *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*. Section 1.

<sup>10</sup> <https://oeb.ca/about-oeb/what-we-do>

- Provide information and tools to help consumers understand the rules that protect them and their responsibilities.

In general, the OEB is usually described as an economic regulator, responsible for:

regulating entities – public utilities – that operate in the presence of multiple market failures, notably failures of the functions of a competitive price system with respect to capital attraction, efficiency-incentive, consumer-rationing, and compensatory income transfer...the mandate of the OEB reflects key aspects of the four primary components of public utility regulation: control of entry, price fixing, prescription of quality and conditions of service, and the obligation to serve all customers under reasonable conditions.<sup>11</sup>

The public interest criteria or objectives that guide the realization of this mandate are set out in sections 1, 2, and 2.1 of the OEB Act and reflect the view that the “public interest” includes common interest, balance of interests, economic interest, and procedural components<sup>12</sup>.

OEB objectives, electricity:

1. To inform consumers and protect their interests with respect to prices and the adequacy, reliability, and quality of electricity service;
2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale, and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry;
3. To promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario, including having regard to the consumer’s economic circumstances;
4. To facilitate innovation in the electricity sector.

---

<sup>11</sup> Taylor, K. “A Square Peg for a Round Hole: Importing the Governance and Regulatory Scheme of the Alberta Energy Regulator to Ontario”. Inquisitive Energy. October 4, 2021. Page 9. <https://inquisitenergy.com/a-square-peg-for-a-round-hole>

<sup>12</sup> Hierlmeier, J.L. “The Public Interest”: Can it Provide Guidance for the ERCE and NRCB?”. Journal of Environmental Law and Practice. August 2008. Pages 282 – 289.



OEB objectives, gas:

1. To facilitate competition in the sale of gas to users;
2. To inform customers and protect their interests with respect to prices and the reliability and quality of gas service;
3. To facilitate rational expansion of transmission and distribution systems;
4. To facilitate rational development and safe operation of gas storage;
5. To promote gas conservation and demand management in a manner consistent with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances;
6. To facilitate the maintenance of a financially viable gas industry for the transmission, distribution, and storage of gas;
7. To promote communication within the gas industry.

OEB objectives, implementation plans:

The OEB shall be guided by the objective of facilitating the implementation of any directives issued under subsections 25.30 (2) of the *Electricity Act, 1998* in accordance with the implementation plans submitted by the OEB under clause 25.31 (5) (a), and any amendments submitted by the OEB and approved under that clause<sup>13</sup>.

In general, the OEB fulfills its mandate as a regulator by engaging in actions across a spectrum - at one extreme, the OEB performs tasks that are solely administrative, meaning that actions are taken to implement government policy and do not involve the use of discretion to achieve an outcome that is in the public interest. In these cases, it is the minister or Lieutenant Governor in Council who has decided what is in the public interest and has directed the OEB to implement a designated solution, using its technical expertise.

---

<sup>13</sup> Section 25.30 (2) of the *Electricity Act, 1998* states that the Minister may, subject to the approval of the Lieutenant Governor in Council, issue a directive to the Board setting out the Government of Ontario's requirements respecting the implementation of the long-term energy plan in respect of matters falling within the Board's jurisdiction and the date by which the Board must submit an implementation plan to the Minister under subsection 25.31 (2).

Section 25.31 (2) requires the Board, within the time specified in the directive, to submit to the Minister an implementation plan containing an outline of the steps the Board intends to take to meet the requirements set out in the directive.

An example of this type of action is the requirement, pursuant to Ontario Bill 100, *Electricity Restructuring Act, 2004* (and subsequently section 79.16 of the OEB Act), that the OEB develop the Regulated Price Plan (RPP)<sup>14</sup>, and includes the January 2022, announcements by the Ontario government that RPP electricity prices will be set 24 hours a day at the current off-peak rate of 8.2cents per kilowatt-hour<sup>15</sup>. While the OEB may have used a notice and comment process to inform its technical expertise relating to what the RPP should look like, the rights-determining issues and consequences were previously decided by the minister, as a matter of policy.

At the other end of the spectrum, the OEB engages in actions or functions that have rights-determining consequences and the OEB has the broad discretion to determine what is in the public interest, in the context of specific facts placed before it. For example, unless limited by statute or regulation, the OEB has “broad discretion to determine the methods it may use to examine costs”<sup>16</sup> to be included in just and reasonable rates, one of the OEB’s most significant and involved rights-determining functions. Other actions, in addition to rate-setting, include infrastructure approvals, financial audits and examination of books and records, expropriation of lands for the purpose of siting energy infrastructure, compliance and enforcement processes, licensing, and consumer protection. Depending on the rights at issue and the potential consequences, the OEB may use court-like processes to resolve specific fact-based situations.

The OEB has been conferred by the OEB Act the statutory power of decision<sup>17</sup>, meaning the power or right to decide or prescribe: (a) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party; or (b) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, and whether the person is legally entitled thereto or not<sup>18</sup>. In addition, the OEB is further obligated by the OEB Act to hold or to afford the parties to the proceeding an opportunity for a hearing before making a decision<sup>19</sup>. As a result, the SPPA applies to the OEB’s rights-determining processes. The OEB Act requires the OEB to make any determination in a proceeding by order<sup>20</sup> and further provides that it shall not make an order until it has held a hearing<sup>21</sup>.

In general, the SPPA sets out the “basic rules of procedural fairness”<sup>22</sup> and describes the minimum standards for what a “fair” hearing held by an Ontario Administrative Agency looks like. It is important to note that the OEB has authority, and has acted on this authority, under section 25.0.1 of the SPPA to determine its own procedures

<sup>14</sup> <https://www.oeb.ca/industry/policy-initiatives-and-consultations/regulated-price-plan-rpp>

<sup>15</sup> <https://news.ontario.ca/en/release/1001399/ontario-providing-supports-for-small-businesses-workers-and-families>

<sup>16</sup> *Ontario (Energy Board) v. Ontario Power Generation Inc.* 2015 SCC 44. Paragraph 80.

<sup>17</sup> *Statutory Powers Procedure Act, R.S.O. 1990, Chapters S.22, section 1. (1)*

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.* Section 3. (1), subject to exceptions.

<sup>20</sup> *Ontario Energy Board Act, 1998 S.O. 1998, Chapter 15 Schedule B, section 19 (2).*

<sup>21</sup> *Ibid.*, section 21 (2), subject to exceptions.

<sup>22</sup> “A Manual for Ontario Adjudicators”. Society of Ontario Adjudicators and Regulators. Revised First Edition June 2000. Page 18.



and practices and may for that purpose: (a) make orders with respect to the procedures and practices that apply in any particular proceeding; and (b) establish rules (pursuant to section 25.1 of the SPPA) governing the practice and procedure before it for both general and specific application.

The OEB has in all matters within its jurisdiction exclusive<sup>23</sup> authority to hear and determine all questions of law and fact<sup>24</sup>. OEB orders, rules issued under section 44 of the OEB Act and codes issued under section 70.1 can be appealed to Ontario Divisional Court only on a question of law or jurisdiction<sup>25</sup>. Notably, OEB orders, rules and codes cannot be petitioned to the Lieutenant Governor in Council<sup>26</sup>.

As discussed at the beginning of this section, “as a result of the complexity of modern society and the establishment of the welfare state, the legislature often delegates the responsibility of implementing statutory programs to specialized administrative bodies in order to implement statutory programs designed to address particular social or regulatory issues”<sup>27</sup>. However, it is “the role of the judiciary to oversee the exercise of delegated responsibility, to ensure that administrative bodies and tribunals remain within their competence, and act in accordance with fundamental constitutional principles”<sup>28</sup>. In general, this means that a decision of an Administrative Agency “will not be set aside on judicial review unless it is unreasonable...however the rule of law requires that certain questions with potential effects in other cases are answered correctly”<sup>29</sup>.

As illustrated in *Hydro One Networks Inc. v. Ontario Energy Board*, 2020 ONSC 4331, the reviewing court was “empowered to set aside an incorrect decision on a question of law”<sup>30</sup>. As noted in that decision, even if the standard of review was the more deferential reasonableness standard, the decision could not be upheld, as it lacked an internally coherent and rational chain of analysis that leads from the evidence to the conclusion reached – the decision could not be said to be transparent, intelligible, and justified<sup>31</sup>.

### **III. Key Administrative Law Principles**

Although it may be relevant from a legislative or policy perspective to “classify” an Administrative Agency as administrative, quasi-judicial, or judicial, how a process or statutory function of an Administrative Agency is

---

<sup>23</sup> *Ontario Energy Board Act, 1998 S.O. 1998, Chapter 15 Schedule B, section 19 (6)*.

<sup>24</sup> *Ibid*, section 19 (1).

<sup>25</sup> *Ibid*, section 33(2).

<sup>26</sup> *Ibid*, section 34.

<sup>27</sup> Régimbald, G. “*Canadian Administrative Law, Third Edition*”. LexisNexis Canada Inc. 2021. Page 441.

<sup>28</sup> *Ibid*.

<sup>29</sup> *Ibid*.

<sup>30</sup> *Ibid*.

<sup>31</sup> *Hydro One Networks Inc. v. Ontario Energy Board*, 2020 ONSC 4331. Paragraphs 52 – 54.

classified no longer determines whether there is a duty to be fair<sup>32</sup>. When an Administrative Agency engages in decision-making that “relates directly to the rights, [privileges], and interests of particular individuals, groups, or businesses in distinct circumstances...the [state] decision maker is legally obligated to follow the rules of natural justice and [duty of] fairness”<sup>33</sup>, the two most important elements of which are: (1) the right to be heard before a decision is made affecting a person’s interest; and (2) the right to an impartial decision maker.

There are a number of observations about this statement that are relevant.

First, the rules of natural justice and the duty of fairness are interchangeable; there is no difference between natural justice and acting fairly. In addition to the right to be heard and the right to an impartial decision maker, there are eleven follow-on requirements<sup>34</sup>:

- The requirement to provide a form of hearing;
- The requirement to give all parties an adequate and equal opportunity to be heard;
- The requirement to give adequate notice;
- The requirement to allow the parties to be present;
- The requirement to allow the parties to be represented;
- The requirement to provide parties with an opportunity to present evidence;
- The requirement to provide an opportunity to challenge the evidence of other parties;
- The requirement to provide an impartial and unbiased decision maker;
- The requirement that (s)he who hears must decide;
- The requirement to base the decision solely on the evidence; and
- The requirement to stay within the tribunal’s jurisdiction.

Second, when exercising administrative powers that affect rights, the term “right(s)” is used broadly and refers to an extensive range of legally recognized interests, including but not limited to property rights, contractual

---

<sup>32</sup> Régimbald, G. “*Canadian Administrative Law, Third Edition*”. LexisNexis Canada Inc. 2021. Page 277.

<sup>33</sup> Johnson, D., “*Bonus Chapter to Thinking Government*”, 4<sup>th</sup> Edition. University of Toronto Press. 2016. Page 10.

<sup>34</sup> “*A Manual for Ontario Adjudicators*”. Society of Ontario Adjudicators and Regulators. Revised First Edition June 2000. Pages 38 – 52.

rights, and liberties of the person<sup>35</sup>; “privileges” refer generally to benefits, such as a licence, permission to engage in a trade, or ability to enter the country<sup>36</sup>; and “interest” is generic and includes claims that cannot be included in the terms “right” or “privilege”.

Third, the right to an impartial decision maker introduces two further elements: the right to an unbiased decision and the right to an independent decision maker. “Impartial” generally refers to a state of mind or attitude of the tribunal that connotes absence of bias, actual or perceived. Alternatively, it can be described as a state of mind in which the adjudicator is disinterested in the outcome and is open to persuasion by the evidence and submissions. In effect, “no one should be a judge in his or her own cause”<sup>37</sup>. The right to an unbiased decision maker is absolute and cannot be remedied by the fact that the decision is correct<sup>38</sup>.

“Bias” is a lack of neutrality on the issue to be decided, actual or perceived. A biased decision maker is one who has an unauthorized predilection towards a particular result or who is subject to unauthorized factors which lead to a particular result<sup>39</sup>. “Independence” is distinct from impartiality and refers not only to the impartial state of mind of the adjudicator, but also to its status and relationship to others, and the extent to which the tribunal, in making a decision, is free from interference of the Executive or the person who appointed them<sup>40</sup>.

Fourth, the concept of independence in administrative law also includes a number of additional considerations.

- The independence of a tribunal is a matter of its status. The status of a tribunal must guarantee not only its freedom from interference by the Executive and legislative branches of government, but also any other external force, such as business or corporate interests or other pressure groups<sup>41</sup>.
- The three main components of judicial independence, namely security of tenure, financial security, and institutional independence, are applicable in the case of an administrative tribunal, where the tribunal is functioning as an adjudicative body settling disputes and determining the rights of parties<sup>42</sup>.

---

<sup>35</sup> Régimbald, G. *“Canadian Administrative Law, Third Edition”*. LexisNexis Canada Inc. 2021. Page 290.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid. Page 393.

<sup>38</sup> Ibid. Page 394.

<sup>39</sup> Ibid. Page 395.

<sup>40</sup> Ibid. Page 426.

<sup>41</sup> Ibid. Page 429.

<sup>42</sup> Ibid. Page 430.

- The requisite level of institutional independence will depend on the nature of the tribunal, the interests at stake and other indices of independence in order to determine whether a reasonable and right-minded person, viewing the whole procedure as set out...would have a reasonable apprehension of bias on the basis that the members of the...tribunals were not independent<sup>43</sup>.
- The guarantee of institutional independence in adjudicative tribunal settings is not a constitutional right, but rather a common law protection, and as such, is vulnerable to the government overriding it through ordinary statutory language at any time for any reason<sup>44</sup>. Specifically, absent constitutional constraints, the degree of independence required of a particular government decision maker or tribunal is determined by its enabling statutes. It is the legislature or Parliament that determines the degree of independence required of tribunal members. The statute must be construed as a whole to determine the degree of independence the legislature intended<sup>45</sup>.
- There is no bright line test upon which a tribunal's independence can be gauged. Indeed, the multiple roles played by an administrative tribunal [has been used by the Court] as a justification for curtailing its independence<sup>46</sup> in favour of the tribunal's role implementing policy.

Finally, the duty of procedural fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected. The factors relevant to determining the precise content of the duty of fairness include<sup>47</sup>:

1. The nature of the decision being made, and process followed in making it. The more the process, the function, the nature of the decision-making body and the determination required to reach a decision resemble judicial decision-making, the more the duty of fairness will require participatory rights similar to those that apply in the judicial model.
2. The nature of the statutory scheme and the terms of the statute pursuant to which the body operates.

---

<sup>43</sup> Ibid. Page 431.

<sup>44</sup> Sossin, L. and Smith, C.W., *"The Politics of Transparency and Independence before Administrative Boards"*. Saskatchewan Law Review 75.1 (2012). Page 31.

<sup>45</sup> Ibid.

<sup>46</sup> Kristjanson, F., *"Procedural Fairness at the McLachlin Court: The First Decade"*. Canadian Bar Association Conference. Ottawa. June 19, 2009.

<sup>47</sup> Régimbald, G. *"Canadian Administrative Law, Third Edition"*. LexisNexis Canada Inc. 2021. Pages 286 – 288.

3. The importance of the decision to the individual or individuals affected. The stringency of procedural protection is directly proportional to the importance of the decision to the lives of those affected and the nature of its impact on them.
4. The legitimate expectations of the person challenging the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness.
5. The choice of procedure made by the Agency itself – particularly when the statute grants the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances. This factor is not determinative; however, weight must be given to the agency’s choice of procedures and its institutional constraints. This fifth factor, the nature of the deference due the decision maker, calls upon the reviewing court to acknowledge that the public body may be better positioned than the judiciary in certain matters to render a decision and to examine whether the decision in question falls within this realm.

Determining the extent of procedural fairness owed puts the decision maker, ultimately master of its own procedure, in a difficult cost-benefit analysis – that is, whether the cost and inconvenience of a hearing outweigh the benefits it could achieve particularly in light of the interests at stake<sup>48</sup>.

The OEB is mandated to engage in actions or functions that have rights-determining consequences. The most important of which is rate setting. A duty of fairness is owed to those affected by its determinations. This includes the right to an impartial decision-maker, and the follow-on rights of an unbiased decision and an independent decision-maker.

However, the degree to which the key administrative law principles apply to these rights-determining functions is unclear and the present state of the law is unhelpful. The courts continue to differentiate between the OEB’s regulatory role and the role of other tribunals adjudicating individual disputes between two or more parties, with the view that the foregoing principles are applied less stringently in the case of the rights-determining actions of an economic regulator<sup>49</sup>. In addition, despite recent changes to the standard of review of Administrative Agency decisions<sup>50</sup>, at the present time, “even if the formal standard of review [for procedural fairness] is that of correctness, tribunals and agencies which make reasonable procedural choices in light of the

---

<sup>48</sup> Ibid. Page 284.

<sup>49</sup> *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44. Paragraphs 56 and 61.

<sup>50</sup> *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

factors listed above are entitled to considerable deference when challenged on judicial review or statutory appeal on procedural grounds<sup>51</sup>.

#### **IV. Ontario Bill 87 – Closing the Door on Impartial, Unbiased and Independent Regulation**

Ontario Bill 87, *Fixing the Hydro Mess Act, 2019*, was the legislative response to the recommendations in the Final Report of the Ontario Energy Board Modernization Review Panel (Modernization Panel)<sup>52</sup>, which was ostensibly tasked with “providing advice on opportunities to strengthen the governance and operational framework of the OEB in ways that increase the confidence of the regulatory community”<sup>53</sup>.

In brief, consistent with the recommendations of the Modernization Panel, Bill 87 amended the OEB Act in the following ways<sup>54</sup>:

- Transitions from the OEB’s unitary governance structure to a triumvirate structure, similar to that of the AER<sup>55</sup>: a separate corporate board of directors, management led by a Chief Executive Officer (CEO), and distinct adjudicative functions.
- Empowers a Board of Directors to manage and supervise the management of the OEB’s business and affairs and perform such other duties as are assigned to the Board of Directors by the government. The Lieutenant Governor in Council shall appoint a chair and may appoint a vice-chair.
- Tasks the Chair of the Board of Directors with overseeing the efficient administration of the business of the Board of Directors; presiding over meetings of the Board of Directors, being accountable to the Minister for the effective delivery of the OEB’s objectives, as previously discussed; being accountable to the Minister for the independence of persons and entities hearing and determining matters within the OEB’s jurisdiction in their decision-making; and performing such other duties as assigned.

---

<sup>51</sup> Mullan, D., “2020 Developments in Administrative Law Relevant to Energy Law”. *Energy Regulation Quarterly*. April 2021 – Volume 9, Issue 1 2021.

<sup>52</sup> “*Final Report*”. Ontario Energy Board Modernization Review Panel. October 2018.

<sup>53</sup> *Ibid.* Page 5.

<sup>54</sup> Bill 87: An Act to amend various statutes related to energy. Royal Assent May 9, 2019.

[https://www.ola.org/sites/default/files/node-files/bill/document/pdf/2019/2019-05/b087ra\\_e.pdf](https://www.ola.org/sites/default/files/node-files/bill/document/pdf/2019/2019-05/b087ra_e.pdf)

<sup>55</sup> Taylor, K. “A Square Peg for a Round Hole: Importing the Governance and Regulatory Scheme of the Alberta Energy Regulator to Ontario”. *Inquisitive Energy*. October 4, 2021. Pages 3-4. <https://inquisitenergy.com/a-square-peg-for-a-round-hole>



- Requires the Board of Directors to appoint a person to the position of CEO.
- Makes the CEO responsible for the efficient and effective management of the operations of the OEB.
- Requires the Board of Directors, on the recommendation of the CEO, to appoint at least five and no more than 10 Commissioners for the hearing and determination of matters over which the OEB has jurisdiction. The Board of Directors, on the recommendation of the CEO, must also appoint a Chief Commissioner.
- Tasks the Chief Commissioner with ensuring the efficiency, timeliness and dependability of the hearing and determining matters over which the OEB has jurisdiction, including by directing and supervising commissioners with respect to efficiency, timeliness and dependability; reporting to the CEO with respect to the efficiency, timeliness, and dependability of the hearings and determination of matters over which the OEB has jurisdiction; responsibility for training commissioners; and performing other duties as required. The Chief Commissioner is also authorized to make rules under section 25.1 of the SPPA governing practice and procedure respecting the hearing and determination of matters over which the OEB has jurisdiction.
- Requires the OEB to apply a method that provides for the recovery of amounts paid or to be paid to a transmitter pursuant to a procurement contract entered into under clause 25.32 (2) (d) of the *Electricity Act, 1998* when approving or fixing just and reasonable rates for transmitting of electricity.
- Requires the OEB to accept as valid and not inquire into the basis of (a) amounts payable under the procurement contract entered into under clause 25.32 (2) (d) of the *Electricity Act, 1998*, including prices and costs provided for by the procurement contract, and any costs associated with the procurement contract; or (b) any procurement process relating to a procurement contract referred to in (a), when considering an application under section 92 of the OEB Act (re: leave to construct electricity transmission or distribution lines).

Although the Modernization Panel cited a number of respected academic and non-government research organizations, including some of the OECD principles for regulatory best practices, as the basis for its recommendations, it was clearly inspired by the governance structure of the AER and the academic work that supported the governance and operating structure of the AER. This included the adoption of the vision or goal of “regulatory excellence”, and the “modernization” and “efficient” terminology previously adopted by the

Alberta government and mandated for use in the business planning processes of the AER<sup>56</sup>. This may not have been appropriate, given the OEB's statutory mandate and the nature of its rights-determining functions<sup>57</sup>.

The governance structure and oversight responsibilities set out in Bill 87 are expanded upon in a number of governance documents, including:

- Memorandum of Understanding (MOU) between the Minister of Energy, Northern Development and Mines and the Chair of the Ontario Energy Board, dated February 11, 2021<sup>58</sup>;
- Ontario Energy Board By-Law #1, effective October 2, 2020<sup>59</sup>; and
- Mandate Letter to the Chair of the Ontario Energy Board Dated November 15, 2021<sup>60</sup>.

Taken together, Bill 87 and the above-mentioned governance documents have created a more comprehensive and complex governance structure. In general, these governance documents refer to the independence of the decision-making process, as it relates to OEB Commissioners.

However, there are also new institutional structures, inspired by the legislative and governance schemes of the AER, that simultaneously operate to compromise the OEB's impartiality and reduce its independence, such that it may not, as an institution, be reasonably viewed as credibly meeting the duty of fairness or natural justice in its rights-determining decision processes, notably those rate-setting processes that effect the property rights of customers (i.e., cash or money). In addition, the revised structures and reporting relationships institutionalized in Bill 87 may affect the capability of the Commissioners to meet the standard of an unbiased decision maker.

The first of these new institutional structures is set out in section 5 of the MOU. Section 5 delineates a number of principles that will guide the relationship between the Minister and the Chair of the Board of Directors. These principles envision a relationship that exceeds that which is set out in the OEB's governing statutes and are inconsistent with the Agencies and Appointments Directive, previously discussed. The OEB is expected to: have a co-operative relationship with government, not only to facilitate effective administration, but to fulfill its

---

<sup>56</sup> These documents include: *"The Alberta Model for Regulatory Excellence"*, Alberta Energy Regulator. April 2016; Coglianesse, G., *"Listening, Learning, Leading: A Framework for Regulatory Excellence"*. Alberta Energy Regulator and UPenn Program on Regulation. 2015.

<sup>57</sup> Taylor, K. *"A Square Peg for a Round Hole: Importing the Governance and Regulatory Scheme of the Alberta Energy Regulator to Ontario"*. Inquisitive Energy. October 4, 2021. <https://inquisitiveenergy.com/a-square-peg-for-a-round-hole>

<sup>58</sup> <https://www.oeb.ca/sites/default/files/Memorandum-of-Understanding-OEB-Ministry-2021.pdf>

<sup>59</sup> <https://www.oeb.ca/sites/default/files/OEB-bylaw-1-20201002.pdf>

<sup>60</sup> <https://www.oeb.ca/sites/default/files/mandate-letter-from-the-Minister-of-Energy-20211115-en.pdf>

statutory mandate (section 5.1); play a meaningful role in the development of the policies and programs of government, in addition to the implementation of those policies and delivery of programs (section 5.5); and exchange information, on an appropriate basis, at the earliest possible time to produce and promote accountability (section 5.8).

Similarly, section 11 of the MOU sets out what the information exchange should look like, including the coordination on key public communications, informing the Chair of the OEB of government initiatives and broad policy directions that may affect the OEB's mandate and functions, and the provision of drafts by the OEB to the Ministry of proposed policy, rules, or codes prior to the publication for public comments and prior to the release of a final decision on policy-making. The MOU suggests that this latter advance notice is for communication purposes only, however it will not be possible to transparently confirm this is the case.

Together, these sections inappropriately integrate the Chair and CEO of the OEB with the Ministry of Energy and the Executive of government. The requirement to be actively engaged in legislative policy making, which is the exclusive role of the Executive, means that the OEB is engaged in a political activity and is no longer impartial – it has “skin in the game” and is no longer disinterested in the outcome of its activities, including its rights-determining processes. The OEB is, in effect, a judge in its own cause. In addition, these sections upset the balance between the accountability of the OEB to the Minister, and subsequently to the legislature, and the effective operation of the regulator by sacrificing OEB impartiality and independence for greater ministerial control, contrary to the Agencies and Appointments Directive.

Second, Bill 87 gives the CEO of the OEB the authority to make rules and codes pursuant to sections 44 and 70 of the OEB Act that are enforceable provisions under the OEB Act. This authority had been vested with Members of the OEB who acted in the previous unitary governance structure as regulatory policy makers and rights-determining decision makers, and to whom a presumption of impartiality, lack of bias, and independence could reasonably apply. However, given the integration of the OEB and the Ministry of Energy, the CEO and the Chair of the Board of Directors cannot be considered impartial, unbiased, and independent of the Executive or external business forces.

An additional concern is section 70.1 (7) of the OEB Act, which envelopes a number of critically important codes and gives the CEO the authority to change or amend them in a manner consistent with the processes set out, and in accordance with the discretion vested with the CEO, in the OEB Act. These codes include:

- The Affiliate Relationships Code for Electricity Transmitters and Distributors.
- The Distribution System Code.
- The Electricity Retailer Code of Conduct.

- The Retail Settlement Code.
- Transmission System Code.

The integration of the CEO and therefore OEB staff in the legislative policy process of the Executive means that although the CEO may use a notice and comment process to make, amend, or withdraw a rule or code, it cannot be transparently known whether the final form of an enforceable rule or code is supported by submissions from affected parties, or the preferences of the Executive that are not publicly disseminated. The mandated interaction delineated in the MOU and reinforced in the Mandate Letter is not transparent – it is not known what issues are discussed and debated, alternatives assessed, and what criteria drive CEO decision-making. Nor is it clear the weight given to advice from the rate-regulated community and other groups seeking to have costs and investments reflected in future rates<sup>61</sup> by actively engaging with the Executive.

Third, section 121(1) of the OEB Act provides the Board of Directors with authority to make rules governing the practice of OEB employees to whom certain powers and duties of the Commission may be delegated<sup>62</sup>. A wide variety of functions have now been delegated to staff on a formal basis, reflecting the recommendations of the November 2020 Ontario Energy Board Financial Review Report<sup>63</sup>, all 21 of which were accepted by the OEB. Delegated authorities include certain matters relating to: (i) rates<sup>64</sup>; (ii) licences, codes, rules, and associated approvals<sup>65</sup>; (iii) cost awards<sup>66</sup>; (iv) Registrar<sup>67</sup>; (v) OEB Act section 71 exemptions relating to the authorization of a transmitter or distributor to carry on a business activity other than transmitting or distributing electricity except through an affiliate<sup>68</sup>; and (vi) facilities<sup>69</sup>.

The Board of Director’s authority to make such rules also includes those relating to the responsibilities of the Registrar, who reports to the Chief Operating Officer & General Counsel of the OEB<sup>70</sup>. Bill 87 legitimized the appointment of the Registrar, via section 5 of the OEB Act. The “Registrar” function, an import from the administrative regulatory structures in the United Kingdom and Australia and a feature of Ontario’s securities

<sup>61</sup> <https://www.ieso.ca/en/Learn/Ontario-Power-System/etno/Overview>

<sup>62</sup> See “Delegations under Section 6 of the Ontario Energy Board Act, 1998” at <https://www.oeb.ca/about-oeb/corporate-governance-and-reports>

<sup>63</sup> Rafi, S. “The Ontario Energy Board Financial Review Report: Submitted to Susanna Zagar, CEO Ontario Energy Board”. November 2020. <https://www.oeb.ca/sites/default/files/OEB-Financial-Review-Report-20210129.pdf> and “OEB Financial Review Management Response”. Ontario Energy Board. January 29, 2021. <https://www.oeb.ca/sites/default/files/OEB-Financial-Review-Management-Response-20210129.pdf>

<sup>64</sup> <https://www.oeb.ca/sites/default/files/delegated-powers-and-duties-1-Rates.pdf>

<sup>65</sup> <https://www.oeb.ca/sites/default/files/delegated-powers-and-duties-2-Licences-20211217.pdf>

<sup>66</sup> <https://www.oeb.ca/sites/default/files/delegated-powers-and-duties-3-Cost%20Awards.pdf>

<sup>67</sup> <https://www.oeb.ca/sites/default/files/delegated-powers-and-duties-4-Registrar.pdf>

<sup>68</sup> <https://www.oeb.ca/sites/default/files/delegated-powers-and-duties-5-Section-71-Exemptions.pdf>

<sup>69</sup> <https://www.oeb.ca/sites/default/files/delegated-powers-and-duties-6-Facilities.pdf>

<sup>70</sup> Ontario Energy Board 2020-2021 Business Plan. Page 15.

regulatory framework, is a relatively new structural addition to the OEB. The position was adopted by the OEB prior to 2018, without statutory support, in order to increase the overall efficiency and timeliness of the OEB's rights-determining processes.

In general, some powers and duties delegated to the Registrar<sup>71</sup> are similar to those previously undertaken by the Board Secretary. However, many of the powers delegated would have been decided by a panel of Members of the OEB seized to hear a rights-determining application, including whether two or more proceedings or any part of them could be combined or two or more proceedings could be heard at the same time; the bifurcation of an application into two or more proceedings; or the phasing or sequencing of a proceeding.

Notably, the first Procedural Order is now issued by the Registrar rather than a panel of Commissioners<sup>72</sup>. In addition, it is the Registrar who now determines what persons are granted intervenor status, what persons are eligible to apply for an award of costs, and for what issues cost eligible parties may make a cost claim in a proceeding before the OEB. These determinations may affect whether an issue has any substantive examination in a proceeding and the extent of that examination. Although subject to exceptions, intervenors will generally not be able to participate in a hearing without a cost award. Applicants, on the other hand, generally have an allowance for hearing costs, including the cost of legal counsel, built into rates.

It is important to note that none of the institutional mechanisms in Bill 87 that notionally protect OEB Commissioners from undue influence apply to the Registrar and OEB staff. The hierarchical reporting and accountability structure applicable to the Registrar and staff do not protect delegated decision makers from the influence of OEB senior management, the Board of Directors, and the political staff and Executive of government. Nor does it exempt the Registrar and staff from acting in a manner that is consistent with the OEB's business plan, targeted performance metrics, and mandate set out by the Minister in his Letter. Indeed, it is also an open question whether staff involved in delegated decision making are also actively engaged in the Executive policy making function of government, the administrative actions of the OEB to implement statutory policy, and the review and comment of staff submissions in those rights-determining applications placed before a panel of Commissioners. Staff making delegated decisions cannot therefore be described as impartial, unbiased, or independent.

Moreover, the OEB's Board of Directors is required to establish an Adjudication Committee, the purpose of which is to<sup>73</sup>: (i) receive information as the Committee may require from the Chief Commissioner respecting the

---

<sup>71</sup> <https://www.oeb.ca/sites/default/files/delegated-powers-and-duties-4-Registrar.pdf>

<sup>72</sup> Ibid. The first Procedural Order typically includes a hearing schedule, including all procedural steps up to the end of the discovery phase, the schedule and process for any procedural steps related to any motions, confidentiality claims, or interlocutory requests made at the application stage.

<sup>73</sup> Ontario Energy Board By-Law #1. Section 4.2 Adjudication Committee. October 2, 2020.

efficiency, timeliness and dependability of the hearing and determination of matters; (ii) monitor the Board's Adjudication Instruments and Adjudication Policies having regard to the just, expeditious and efficient hearing and determination of matters by Panels and Delegated Employees; (iii) exercise such powers and performing such duties as may be delegated to it by resolution of the Board of Directors; and (iv) report to the Board of Directors on tasks (i) through (iii). This Committee and the Board of Directors wield significant influence over the Commissioners and the processes used to hear rights-determining issues.

Fourth, Bill 87, the MOU, Mandate Letter, and the recommendations of the OEB Financial Review Report have the cumulative effect of undermining the rights-determining processes of the OEB that comply with the duty of procedural fairness. The focus on OEB processes via the reform of the OEB governance structure and reallocation of responsibilities and authorities under the OEB Act is unprecedented. Under the guise of "modernization", "top quartile", and "efficiency", it is clear that Commissioners are no longer in control or masters of their own process. It is the Minister, Executive of government, the Chair of the Board of Directors and CEO of the OEB, and the rate-regulated community who have collectively determined the cost-benefit trade-off that governs the procedural choices of the Commissioners.

The OEB Financial Review Report was the work product resulting from an OEB-commissioned high level assessment of the financials of the OEB and the financial implications of the OEB on the Energy Sector<sup>74</sup>. This mandate lacks any rational degree of proportionality, given that the OEB's annual budget for the year ending March 31, 2021, was approximately \$44.3 million<sup>75</sup>, whereas 2020 Ontario electricity distribution revenue was approximately \$3.9 billion<sup>76</sup>, 2020 natural gas distribution revenue was \$4.5 billion<sup>77</sup>, 2020 Uniform Transmission Costs were \$1.7 billion<sup>78</sup> and the OEB approved revenue requirement for Ontario Power Generation in 2020 was approximately \$3.6 billion<sup>79</sup>. In other words, OEB costs were about 0.325% of the \$13.7 billion of costs recovered in OEB-approved rates and paid by customers for public utility service.

Notably, the OEB Financial Review Report engaged in a process that did not involve customers or their representatives. The interviews conducted to inform the recommendations in the Financial Review Report included the Deputy Minister of Energy, Northern Development and Mines; Chair of the OEB Board of Directors

---

<sup>74</sup> Rafi, S. "The Ontario Energy Board Financial Review Report: Submitted to Susanna Zagar, CEO Ontario Energy Board". November 2020. Page 2.

<sup>75</sup> Ontario Energy Board Annual Report 2020 – 2021. Page 20.

<sup>76</sup> Yearbook of Electricity Distributors. Ontario Energy Board. September 10, 2021. Page 3.

<sup>77</sup> 2020 Yearbook of Natural Gas Distributors. Ontario Energy Board. September 10, 2021. Page 3.

<sup>78</sup> Decision and Rate Order: EB-2020-0251. 2021 Uniform Transmission Rates. Ontario Energy Board. December 17, 2020. Page 8.

<sup>79</sup> Payments Amounts Order: EB-2016-0152. Ontario Power Generation Inc. – Application for Payment Amounts for the Period from January 1, 2017 to December 31, 2021. Ontario Energy Board. March 29, 2018. Page 27.



and CEO of the OEB and OEB senior staff; and CEO's and leaders of selected regulated entities<sup>80</sup>. Some of the recommendations in the OEB Financial Review Report include<sup>81</sup>:

- Comprehensive review of all procedures, processes, rules, codes, and requirements with the goal of increasing efficiency within the adjudicative process; reducing the costs of rate filings; and delivering increased value to ratepayers. In addition, it should also examine various thresholds (e.g., leave to construct thresholds need to be updated to reflect current costs to construct).
- Assess assertive case management models for their applicability in adjudicative hearings for the OEB, for example: (i) more effectively managing issues lists; (ii) be more deliberate about managing "in scope" requirements; (iii) assess cross examinations based on their relevance to directly informing an adjudicative decision; (iv) consider a more strict definition of who is impacted by a decision; and (iv) track duplicative requests and cluster together for efficiency, if possible.
- Engage with applicants outside of application, notwithstanding the potential prejudice to the adjudicative decision; there needs to be "space" to have these types of dialogue, without prejudice to any future decision.
- Re-apply filed information in subsequent hearings with the objective of examining and reducing the total cost of rate filings.
- Consider changes to the filing requirements of local distribution companies (LDCs) by size; consider whether small LDCs need to file a capital plan every five years – extending timeframe would reduce filing costs.
- Research and assess the future application of blockchain solutions, micro-grids, crypto currencies, the "internet of things" devices and their impact on the grid, role of aggregators, future development of smarter energy grids; etc.

---

<sup>80</sup> Rafi, S. "The Ontario Energy Board Financial Review Report: Submitted to Susanna Zagar, CEO Ontario Energy Board". November 2020. Page 2.

<sup>81</sup> "2021 Financial Review: Management Response". Ontario Energy Board. January 29, 2021.

Finally, the potential dismantling of OEB rights-determining processes that must meet the requirements of procedural fairness ignores the fundamental realities of Ontario's electricity and natural gas industries that speak to why regulation by the OEB is necessary in the first instance: to protect the interests of customers with respect to price, adequacy, reliability and quality of electricity and natural gas service in the face of the rent-seeking behaviours of state-sanctioned monopolies and to promote economic efficiency and cost effectiveness in the public utility sector while maintaining industry financial viability.

It is abundantly clear that Bill 87 and the associated governance documents have closed the door on impartial, unbiased, and independent energy regulation in Ontario.

## **V. Why It Matters or Should Matter to Ontarians**

There are several reasons why this discussion matters or should matter to Ontarians.

First, undermining the rights-determining processes of the OEB has real-life consequences for Ontarians who are customers of public utilities<sup>82</sup>. OEB-approved costs arising as the result of rights-determining processes or via administrative processes required by government are significant, perpetual customer obligations. For example, an average monthly electricity bill of \$250.00 translates to an ongoing perpetual customer obligation with a present value of approximately \$100,000<sup>83</sup>. Similarly, an average monthly natural gas bill of \$125.00 represents an additional ongoing perpetual customer obligation with a present value of \$50,000. These obligations give rise to energy policy issues relating to energy system affordability and fuel poverty.

Second, it is essential that customers have confidence in the regulatory processes and outcomes that create these significant financial obligations, particularly since it is not possible, even for a reasonably informed individual, to determine whether the costs paid for gas and electricity service are fair. There is no cost-effective price discovery process<sup>84</sup>, given that service is provided by state-sanctioned monopoly service providers. Customers also have no ability to determine whether the public utility is:

---

<sup>82</sup> There were 5.3 million electricity customers in Ontario in 2020, 4.8 million of whom were residential customers. "2020 Yearbook of Electricity Distributors". Ontario Energy Board. September 10, 2021. Page 3.

[https://www.oeb.ca/oeb/Documents/RRR/2020\\_Yearbook\\_of\\_Electricity\\_Distributors.pdf](https://www.oeb.ca/oeb/Documents/RRR/2020_Yearbook_of_Electricity_Distributors.pdf)

<sup>83</sup> Assuming a discount rate of 3%.

<sup>84</sup> Discovery processes include the cross-examination of evidence in an oral proceeding or via the submission of interrogatories and receipt of answers in a written process, or both. This process reflects the view that "evidence not tested by cross-examination is nearly always misleading and practically valueless", as per Janisch, H.N. "Policy Making in Regulation: Towards a New Definition of the Status of Independence Regulatory Agencies in Canada." Osgoode Hall Law Journal 17.1 (1979): 46 – 106. Page 76. Footnote 106.

- using utility rates to cross-subsidize non-regulated businesses, therefore inappropriately interfering in competitive markets;
- erecting barriers that prevent customers from adopting distributed energy technologies that by-pass existing monopoly energy systems or reduce dependence on these systems;
- lobbying Executive policy makers in government to include disruptive technologies in rates when the regulated business model should not apply<sup>85</sup>;
- lobbying Executive policy makers in government to put operating and capital costs in rates that do not provide utility service on a cost-effective basis or on a commercial scale;
- keeping assets and costs in rates when they can no longer provide public utility service; or
- transferring risks to customers that are usually borne by the public utility as a normal part of the financial and business risk profile of a rate regulated entity.

These functions, and many others, are the job of the regulator. Customers must be confident that when rights-determining issues are to be decided, the OEB has the full range of process options at its disposal, particularly processes that meet a high standard of procedural fairness.

Third, the OEB will play a critical oversight role in the expected public utility infrastructure build-out associated with meeting Canada's climate change objectives, and those of Ontario. The challenge associated with transforming Ontario's energy supply and delivery systems to meet the imperative of climate change requires comprehensive legislative policy relating to energy supply and demand, including the energy resource mix (fuel-type, large-scale versus small scale generation, role of behind the meter applications), infrastructure requirements, and the planning and pacing of investment. Most of this policy does not currently exist.

The OEB must be able to implement the legislative policy of government in an impartial, unbiased, and independent manner, as critical rights will be at issue – the financial viability of the rate regulated community and the property and quality of life rights of customers. The OEB will consider issues conventionally decided by the regulator, including but not limited to: (i) creating an appropriate balance between higher customer rates, affordability, and achieving climate change targets; (ii) determining the need for particular infrastructure investments; (iii) ensuring utilities plan, pace and prioritize investments to minimize rate shock and inter-generational inequity; (iv) ensuring utility cost efficiency; (v) measuring performance outcomes including

---

<sup>85</sup> There are five key questions that determine whether disruptive technologies should be included in the rate base of public utilities: (1) Do new natural monopolies result? (2) Are the costs the same for similar customers? (3) Are there market failures? (4) Are there principal-agent problems? (5) Is there a lack of incentive to be operationally efficient? If the answer to these questions is “no”, rate regulation is probably not an optimal business model. Taylor, K., “*The LDC of the Future: Session Three – Financial and Regulatory Implications*”. Centre for Urban Energy. June 3, 2015.

whether asset additions achieve climate change targets; (vi) approving appropriate cost allocation and rate design between customer classes to ensure benefits follow costs and minimize free-riding by some customer classes at the expense of others; and (vii) ensuring that the build-out of the rate regulated energy sector occurs commensurately with the construction of new electricity generation.

The Climate Action Plan<sup>86</sup> filed by Toronto Hydro Corporation with the City of Toronto on September 30, 2021, illustrates many of the rights-determining issues facing the OEB:

- Managing the impact of higher customer rates in a manner consistent with the OEB’s objectives in the OEB Act. Approximately 75% of the City of Toronto’s Net Zero Strategy requires up to \$10 billion in direct utility investments by Toronto Hydro<sup>87</sup>. If completed by 2050, these investments would effectively triple the utility’s OEB-approved 2024 rate base of \$5.6 billion and potentially increase residential customers’ distribution costs to \$1,871 per annum in 2050 versus OEB-approved annual distribution revenue per residential customer of \$528.38 in 2024<sup>88</sup>. The Climate Action Plan did not address the incremental costs to residential customers arising from additional electricity consumption, higher energy costs than the status quo due to changes in fuel-mix to meet climate change targets and the construction of between 76,000 MW and 114,000 MW<sup>89</sup> of new electricity generation, and the additional costs associated with the investment in more high voltage transmission to move much larger amounts of electricity into the city.
- Managing the governance challenge of the City of Toronto as climate change policy maker for the municipality and as the 100% owner of an electric distribution utility, with powerful incentives to reduce natural gas utilization in favour of electricity. Assuming the successful investment of \$10 billion in utility assets with full cost recovery in customer rates, Toronto Hydro’s annual return on equity would increase by approximately \$320 million per annum in 2050<sup>90</sup>.

---

<sup>86</sup> “Climate Action Plan: Powering Forward – Building a greener city through climate action”. Toronto Hydro Corporation. September 30, 2021.

<sup>87</sup> Ibid. Page 3.

<sup>88</sup> Ibid. Page 41. Analysis assumes: Base 2024 OEB-approved distribution revenue requirement per residential customer of \$528.38 (THESL\_Sch01-5 – 2024 RRWF\_updated\_20200212.xls) inflated by 8.5% in 2025 – 2029 inclusively; 5.5% in 2030 – 2034 inclusively; and 3.75% in 2035 – 2050 inclusively, where 3.75% is the CAGR of the increase in the residential revenue requirement approved by the OEB for the five-year period 2020 – 2024 as per EB-2018-0165. Residential customers also include competitive sector multi-unit residential, as per presentation in the OEB Yearbook of Electricity Distributors.

<sup>89</sup> Ontario would need to expand the electricity system’s effective capacity by 200 to 300 percent of its current capacity to meet [the province’s] peak needs. Ibid. Page 39. Ontario’s current installed capacity (wholesale market only) is approximately 38,000 MW. <https://www.ieso.ca/en/Learn/Ontario-Supply-Mix/Ontario-Energy-Capacity#:~:text=The%20current%20installed%20capacity%20on,within%20Ontario's%20local%20distribution%20systems>

<sup>90</sup> Assumes total differential investment of \$10 billion and the following rate-setting assumptions: 40% deemed equity, an 8% allowed return on equity and routine capital investment over the forecast period that offsets depreciation.

- Ensuring that Toronto Hydro plans, prioritizes, and paces utility asset investments to minimize the construction of assets prior to the in-service dates of the requisite transmission and generation needed to achieve stated climate change policies.
- Monitoring and policing the relationship between the rate regulated entity and its non-regulated affiliates in a manner consistent with the Affiliate Relationship Code.

Customers will be depending on the OEB to ensure the only costs that are put in rates are those that meet its legislated objectives and are necessary to achieve legislated climate change policies. This means the highest standard of natural justice must apply to OEB rights-determining functions and processes.

Finally, the government has promised that OEB rights-determining regulatory processes will have a high degree of procedural fairness: they will be impartial, unbiased, and independent. Since 1960<sup>91</sup>, the OEB has used court-like processes to fulfill its statutory mandate and undertake rights-determining decision-making, the most important of which is rate-setting. Customers have a legitimate expectation that applications for rates will be decided in impartial, unbiased, and independent processes, not only within an institutional context, but by the individual decision-makers tasked with hearing an application. It is disingenuous for government to describe impartial and independent decision making as being paramount in the Agencies and Appointments Directive and then act to undermine it in specific legislation and subsequent governance structures.

Bill 87 did nothing to protect the OEB from the continued overreach of the Executive. Government continues to swing between making rights-determining decisions as a matter of legislative policy, which does not attract a duty of procedural fairness, when it is politically expedient to do so, and turning matters back to the OEB when the political cost-benefit equation is not a positive one. At the same time, however it continues to make policy that limits OEB discretion and compromise the OEB's impartiality via regulations, directives and governance arrangements that are relatively invisible to the public and arguably different from the status of the regulator set out in its enabling statutes.

It is a matter of good governance for government that the public have a high degree of confidence in the rights-determining processes of the OEB and in the resulting outcomes. All of which speaks to the need for the OEB to be impartial, unbiased, and independent in law and in practice.

---

<sup>91</sup> <https://www.oeb.ca/about-oeb>

## VI. Conclusion

It is ironic that Ontario Bill 87 was intended to strengthen the governance and operational framework of the OEB in order to increase the confidence of the regulatory community, when in fact, the new institutional arrangements compromise the impartiality of the OEB, close the door on independent and unbiased decision making, and remove from OEB Commissioners control over their own rights-determining processes.

Without any publicly available analysis that: (i) illustrated the superiority of the legislative and governance structure of the AER versus the status quo; (ii) assessed the rights-determining functions of the OEB as an economic regulator versus decision making in the social regulatory function of the AER; and (iii) scrutinized the outcomes of the AER's legislative and governance scheme, being the AER's lack of independence from the Executive of government and capture by industry, it can only be assumed that these outcomes were the intended consequences of Bill 87 and the recommendations of the Modernization Panel. This is unfortunate, as these outcomes are simply out of step with the OEB's status as a regulator with rights-determining functions and a duty of fairness owed to parties, notably consumers.

Implementing a legislative and governance scheme that compromises the OEB's primary responsibility of protecting the interests of consumers with respect to prices and the adequacy, reliability, and quality of electricity service at this critical juncture is likely to result in significant harm to consumers in the form of materially higher energy bills, energy poverty, and further reductions in the confidence in energy sector decision making in Ontario.

It did not have to be this way. There is no one governance structure that can be applied *carte blanche* to all Administrative Agencies, particularly those Agencies functionally defined as regulators and have rights-determining functions that owe parties a duty of fairness. The misapplication of the AER's statutory and governance framework to the OEB should strike a cautionary note for other Canadian jurisdictions considering its adoption.



## References

- Taylor, K., “A Square Peg for a Round Hole: Importing the Governance and Regulatory Scheme of the Alberta Energy Regulator to Ontario”. Inquisitive Energy. October 4, 2021. <https://inquisitiveenergy.com/a-square-peg-for-a-round-hole>
- Régimbald, G., “Canadian Administrative Law, Third Edition”. LexisNexis Canada Inc. 2021.
- <https://ontario.ca/page/agencies-boards-and-commissions>
- <https://www.ontario.ca/page/agencies-and-appointments-directive>
- Management Board of Cabinet Act, R.S.O. 1990, c. M.1.*
- Ontario Regulation 126/10 – Adjudicative Tribunals and Clusters*
- Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009.*
- <https://oeb.ca/about-oeb/what-we-do>
- Ontario Energy Board Act, 1998 S.O. 1998, Chapter 15 Schedule B.*
- “A Manual for Ontario Adjudicators”. Society of Ontario Adjudicators and Regulators. Revised First Edition June 2000.
- <https://www.oeb.ca/industry/policy-initiatives-and-consultations/regulated-price-plan-rpp>
- <https://news.ontario.ca/en/release/1001399/ontario-providing-supports-for-small-businesses-workers-and-families>
- Ontario (Energy Board) v. Ontario Power Generation Inc.* 2015 SCC 44.
- Statutory Powers Procedure Act, R.S.O. 1990, Chapters S.22.*
- Hierlmeier, J.L., “The Public Interest: Can it Provide Guidance for the ERCE and NRCB?”. *Journal of Environmental Law and Practice*. August 2008. Pages 282 – 289.
- Ellis, R., “*Unjust by Design: Canada’s Administrative Justice System*”. UBC Press. 2013.
- The Minister of Citizenship and Immigration v. Daniel Thamore*, 2007 FCA 198.
- Johnson, D., “Bonus Chapter to *Thinking Government*”, 4<sup>th</sup> Edition. University of Toronto Press. 2016.
- Richard, J.D., “Administrative Tribunals in Canada – An Overview”. Remarks Bangkok. 2007.
- Janisch, H.N., “*Policy Making in Regulation: Towards a New Definition of the Status of Independent Regulatory Agencies in Canada*”. *Osgoode Hall Law Journal* 17.1 (1979): 46-106.
- Sossin, L. and Smith, C.W., “*The Politics of Transparency and Independence before Administrative Boards*”. *Saskatchewan Law Review* 75.1 (2012): 13-54.

Houle, F. and Sossin, L., “*Tribunals and Policy-Making: From Legitimacy to Fairness*”. Essays in Administrative Law and Justice (2001 – 2007). Pages 95 – 143.

Kristjanson, F., “*Procedural Fairness at the McLachlin Court: The First Decade*”. Canadian Bar Association Conference. Ottawa. June 19, 2009.

Sossin, L. and Hoffman, S., “*The Elusive Search for Accountability: Evaluating Adjudicative Tribunals*”. Windsor Yearbook of Access to Justice. 2010. Pages 343 – 360.

Jacobs, L., “*Tribunal Independence and Impartiality: Rethinking the Theory after Bell and Ocean Port Hotel – A Call for Empirical Analysis*”. Essays in Administrative Law and Justice. (2001 – 2007). Pages 45 – 61.

Jacobs, L., “*A Wavering Commitment? Administrative Independence and Collaborative Governance in Ontario’s Adjudicative Tribunals Accountability Legislation*”. Windsor Yearbook of Access to Justice. 2010. Pages 285 – 307.

Stratas, D., “*Agencies’ Administrative Guidelines: Legitimate Regulatory Tool or Threat to the Independence of Tribunal Decision-Making?*”. <http://www.davidstratas.com/22.pdf>

*Bell Canada v. Canadian Telephone Employees Association*. 2003 SCC 36.

*Walter Valente v. The Queen*. [1985] 2 R.C.S.

*Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*. 2001 SCC 52.

Ellis, R., “*Quasi-Judicialism: The Cuckoo Chick in the Administrative Justice Nest*”. Canadian Journal of Administrative Law & Practice 289. December 2012.

Ellis, R., “*The Justicizing of Quasi-Judicial Tribunals – Part I*”. Canadian Journal of Administrative Law & Practice 303. October 2006.

*Hydro One Networks Inc. v. Ontario Energy Board*, 2020 ONSC 4331.

*Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44.

*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

Mullan, D., “*2020 Developments in Administrative Law Relevant to Energy Law*”. Energy Regulation Quarterly. April 2021 – Volume 9, Issue 1 2021.

Mandate Letter from the Minister of Energy to the Chair of the Ontario Energy Board dated November 15, 2021. <https://www.oeb.ca/sites/default/files/mandate-letter-from-the-Minister-of-Energy-20211115-en.pdf>

Ontario Energy Board By-Law #1, effective October 2, 2020. <https://www.oeb.ca/sites/default/files/OEB-bylaw-1-20201002.pdf>

Memorandum of Understanding between the Minister of Energy, Northern Development and Mines and the Chair of the Ontario Energy Board, February 11, 2021. <https://www.oeb.ca/sites/default/files/Memorandum-of-Understanding-OEB-Ministry-2021.pdf>

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

“2021 – 2024 Business Plan”. Ontario Energy Board.

“Top Quartile Regulator Report: Phase 1 – March 2021”. Ontario Energy Board.

“The Alberta Model for Regulatory Excellence”. Alberta Energy Regulator. April 2016.

Coglianesse, G., “Listening, Learning, Leading: A Framework for Regulatory Excellence”. Alberta Energy Regulator and UPenn Program on Regulation. 2015.

Bill 87: An Act to Amend Various Statutes Related to Energy. Royal Assent May 9, 2019.

[https://www.ola.org/sites/default/files/node-files/bill/document/pdf/2019/2019-05/b087ra\\_e.pdf](https://www.ola.org/sites/default/files/node-files/bill/document/pdf/2019/2019-05/b087ra_e.pdf)

Energy Transformation Network of Ontario.

<https://www.ieso.ca/en/Learn/Ontario-Power-System/etno/Overview>

“Delegations under Section 6 of the Ontario Energy Board Act, 1998”. <https://www.oeb.ca/about-oeb/corporate-governance-and-reports>

Rafi, S. “The Ontario Energy Board Financial Review Report: Submitted to Susanna Zagar, CEO Ontario Energy Board”. November 2020. <https://www.oeb.ca/sites/default/files/OEB-Financial-Review-Report-20210129.pdf>

“OEB Financial Review Management Response”. Ontario Energy Board. January 29, 2021.

<https://www.oeb.ca/sites/default/files/OEB-Financial-Review-Management-Response-20210129.pdf>

<https://www.oeb.ca/sites/default/files/delegated-powers-and-duties-1-Rates.pdf>

<https://www.oeb.ca/sites/default/files/delegated-powers-and-duties-2-Licences-20211217.pdf>

<https://www.oeb.ca/sites/default/files/delegated-powers-and-duties-3-Cost%20Awards.pdf>

<https://www.oeb.ca/sites/default/files/delegated-powers-and-duties-4-Registrar.pdf>

<https://www.oeb.ca/sites/default/files/delegated-powers-and-duties-5-Section-71-Exemptions.pdf>

<https://www.oeb.ca/sites/default/files/delegated-powers-and-duties-6-Facilities.pdf>

Ontario Energy Board 2020-2021 Business Plan.

*Ontario Energy Board Annual Report 2020 – 2021.*

*Yearbook of Electricity Distributors.* Ontario Energy Board. September 10, 2021.

*2020 Yearbook of Natural Gas Distributors.* Ontario Energy Board. September 10, 2021.

Decision and Rate Order: EB-2020-0251. 2021 Uniform Transmission Rates. Ontario Energy Board. December 17, 2020.

Payments Amounts Order: EB-2016-0152. Ontario Power Generation Inc. – Application for Payment Amounts for the Period from January 1, 2017 to December 31, 2021. Ontario Energy Board. March 29, 2018.

“2020 Yearbook of Electricity Distributors”. Ontario Energy Board. September 10, 2021.

[https://www.oeb.ca/oeb/Documents/RRR/2020\\_Yearbook\\_of\\_Electricity\\_Distributors.pdf](https://www.oeb.ca/oeb/Documents/RRR/2020_Yearbook_of_Electricity_Distributors.pdf)

Taylor, K., “*The LDC of the Future: Session Three – Financial and Regulatory Implications*”. Centre for Urban Energy. June 3, 2015.

“*Climate Action Plan: Powering Forward – Building a greener city through climate action*”. Toronto Hydro Corporation. September 30, 2021.

<https://www.ieso.ca/en/Learn/Ontario-Supply-Mix/Ontario-Energy-Capacity#:~:text=The%20current%20installed%20capacity%20on,within%20Ontario's%20local%20distribution%20systems>

<https://www.oeb.ca/about-oeb>