John A.D. Vellone
T (416) 367-6730
F 416.367.6749
jvellone@blg.com

Borden Ladner Gervais LLP
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada M5H 4E3
T 416.367.6000
F 416.367.6749
blg.com

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Delivered by Email, RESS & Courier

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
Suite 2701
Toronto, ON M4P 1E4

Dear Ms. Walli:

Re: Submissions on the draft report titled *Corporate Governance Guidance for OEB Rate-Regulated Utilities*, EB-2014-0255 released on March 28, 2018

Borden Ladner Gervais LLP ("**BLG**") makes these submissions on behalf of Energy+ Inc. and Oakville Hydro Electricity Distribution Inc. in response to the Draft Report of the Ontario Energy Board ("**OEB**" or the "**Board**"), titled *Corporate Governance Guidance for OEB Rate-Regulated Utilities*, EB-2014-0255 (the "**Draft Report**") released on March 28, 2018.

In the Draft Report, Board proposes that the following guidance apply to all rate regulated utilities:

a. "Utilities should have a board of directors at the utility level and a majority of those directors should be independent of the shareholder and any affiliate."[1]

b. "Shareholder agreements or directions that limit the board of directors from exercising its independent judgment should be avoided."[2]

c. "The board should comprise no less than five directors"[3] and "The board as a whole must possess the complete range of skills necessary to execute its governance function and discharge its responsibilities effectively."[4]

It is widely recognized that corporate governance is not a one-size-fits-all mechanism, rather it is a flexible set of tools intended to protect the rights and ensure the equitable treatment of all shareholders, which in turn result in the protection of other stakeholders.[5]

The G20/OECD Principles of Corporate Governance dated November 30, 2015[6] (the "**Principles**") offer a set of principles designed to help policy makers evaluate and improve the legal, regulatory,

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[1] Draft Report at p.7
[2] Draft Report at p. 7
[3] Draft Report at p. 7
[4] Draft Report at p. 10
[5] *BCE Inc. v 1976 Debentureholders* 2008 SCC 69
[6] OECD, *G20/OECD Principles of Corporate Governance*, (Paris: OECD 2015) online: OECD <http://www.oecd.org/corporate/principles-corporate-governance.htm>.

and institutional framework for corporate governance. They also provide guidance for stock exchanges, investors, corporations, and others that have a role in the process of developing good corporate governance.

The proposals as set out in Draft Report are not consistent with the Principles in numerous material respects.

1. "There is no single model of good corporate governance."[7]

The Draft Report is presented as "best practices" despite the widely acknowledged principle that there is no single model for good corporate governance. While there may be some common elements that underlie good corporate governance, there are also limitations. What may be "best practice" for large, widely held multi-jurisdictional utilities like Enbridge, may result in a costly and unnecessary bureaucratic burden for a smaller regional utility that is wholly owned by one or more municipal owners.

Recommendation: The OEB guidance should include a clear acknowledgement that there is no single model of good corporate governance.

2. "The Principles do not intend to prejudice or second-guess the business judgment of individual market participants, board members and company officials. What works in one company or for one group of investors may not necessarily be generally applicable to all of business or of systemic economic importance."[8]

The Draft Report does not include a similar qualification. The implication is that the OEB does intend to prejudice and second-guess the business judgement of individual utilities, board members and company officials. This despite the Supreme Court of Canada's ruling in *Peoples Department Stores v Wise*[9] ("***Peoples***") and affirmed in *Kerr v Danier Leather Inc*[10] ("***Kerr***") that:

> "*Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making […]*"[11]

The OEB is in no better position than courts are in this regard.

Recommendation: The OEB guidance should expressly indicate that it should not be used to second-guess the application of business expertise to the considerations that are involved in corporate governance. What works in one company may not be necessary or applicable in another.

3. The Principles distinguish between the rights of a company's shareholders, on the one hand, and the role of other stakeholders, on the other. Shareholders' rights are detailed in Chapter II of the Principles, while other stakeholders are addressed in Chapter IV of the Principles. Specifically:

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[7] *Ibid* at 10.
[8] *Ibid* at 9.
[9] *Ibid*.
[10] *Kerr v Danier Leather Inc*, 2007 SCC 44.
[11] *Peoples*, *supra* note **Error! Bookmark not defined.** at para 67.

a. "The corporate governance framework should protect and facilitate the exercise of shareholders' rights and ensure the equitable treatment of all shareholders, including minority and foreign shareholders. All shareholders should have the opportunity to obtain effective redress for violation of their rights."[12]

b. "The corporate governance framework should recognise the rights of stakeholders established by law or through mutual agreements and encourage active co-operation between corporations and stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises."[13]

The Principles are focused on ensuring the rights and equitable treatment of all **shareholders, including minority and foreign shareholders**. An ancillary benefit of this approach is that other stakeholder rights, including consumer rights, will also be protected.

By focusing on shareholder rights first, the Principles are consistent with the OFSI Corporate Governance Guidelines and corporate governance requirements stipulated under securities law across Canada and the US.[14]

As explained in Appendix "A", good corporate governance developed a set of practices that were designed to protect shareholder rights, and by extension the rights of other stakeholders. Even the OFSI Corporate Governance Guidelines, which are intended to protect the integrity of the financial markets as a whole, seek to achieve this objective by ensuring that shareholder rights are protected.

Recommendation: The OEB guidance should be revised to reflect the importance of equitable treatment of shareholder rights, not only consumer rights. The existing shareholder protections and responsibilities provided at law represent a fundamental part of the regulatory compact between shareholders and ratepayers. The OEB guidance should not be used to upset the balance of this compact.

The G20/OECD further concedes that some of the Principles may be more appropriate for larger than for smaller and unlisted companies. The Draft Report fails to reflect these aspects of the Principles.

Recommendation: To the extent the OEB intends to impose the same guidance on all rate-regulated utilities, then it should be accompanied by a new deferral/variance account to reflect the costs associated with adapting to meet the OEB guidance requirements. This would facilitate prompt transitioning for utilities that wish to adopt the OEB guidance. This is particularly important for smaller rate regulated utilities, many of which have voluntary boards.

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[12] *Ibid* at 18.
[13] *Ibid* at 34.
[14] The guidelines released by the Office of the Superintendent of Financial Institutions ("OSFI"): January 2013 OSFI Corporate Governance Guideline (the "**OSFI Guideline**"); the Organization for Economic Co-operation and Development ("OECD"): *G20/OECD Principles of Corporate Governance*, (Paris: OECD 2015) online: OECD <http://www.oecd.org/corporate/principles-corporate-governance.htm> and securities legislation in Ontario and Canada.

A. Independence

In the Draft Report, the OEB prescribed that an LDC board have a majority of independent directors.

The Draft Report states that "a director is considered independent if she or he is neither an employee nor director of an affiliate (including the parent or holding company) nor an employee or director of the majority or controlling shareholder."[15]

The definition of independence in the Draft Report is inconsistent with the definition of independence currently used for other corporate governance guidelines, including National Policy 58-201 – Corporate Governance Guidelines ("**NP-58-201**"), the CSA Governance Guidelines, the OFSI Guidelines, and G20/OECD Principles.[16]

National Instrument 52-110 – *Audit Committees,* contains the provisions for determining "independence". In particular, an audit committee member is independent if he or she has no direct or indirect "material relationship" with the issuer. A "material relationship" is a relationship which could, <u>in the view of the issuer's board of directors</u>, be reasonably expected to interfere with the exercise of the member's independent judgement. The determination of independence is made by the board of directors, based on the facts at hand.

All directors are legally required to comply with a fiduciary duty to act in the best interests of the corporation. Simply being an employee or director of an affiliate or a majority or controlling shareholder is not sufficient, on its own, to disqualify an individual from being independent.

By using a novel definition of independence, the Draft Report flips the entire purpose of corporate governance best practices on its head. Rather than being a tool to protect shareholder rights, the OEB is proposing corporate governance guidelines that are intended to derogate from shareholder rights. <u>**No other regulator has ever attempted such an unprecedented change to the underlying policy rationale of corporate governance best practices.**</u>

In addition, the Draft Report fails to differentiate between large widely held utilities and smaller, closely held entities owned by local municipal governments.

In situations where a utility is entirely owned by one or more municipalities, the requirement for the majority of the board members to be independent from both the LDC affiliate and the shareholder is unnecessary. This is because the municipality's constituent (taxpayers) and the OEB's constituent (ratepayers) are by and large the same group of people.

Justifying the independence requirement on the basis of a hypothetical opposition between the interests of ratepayers and the interests of the shareholders overlooks the situation where the ratepayers, municipal voters and taxpayers are the same group.

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[15] Draft Report at p. 8

[16] See footnote 8; Both National Policy 58-201 – Corporate Governance Guidelines ("**NP 58-201**") and National Instrument 58-101 ("**NI 58-101**") – Disclosure of Corporate Governance Practices, and National Instrument 52-110 – Audit Committees ("**NI 52-110**" and together with NI 58-201 and NI 58-101, the "**CSA Governance Guidelines**").

For example, in Oakville Hydro's circumstances, there is an additional level of accountability for ratepayers, because all directors have been and are required (based on the Shareholder Direction) to be residents of Oakville. This means that each director is both an Oakville Hydro ratepayer and a Town of Oakville taxpayer and voter.

Where the ratepayers and stakeholders are the same, there is no need for the independence requirement stipulated in the Draft Report. Ratepayers themselves can exercise control over the municipal shareholder through the municipal election process. In determining the makeup of the local municipal council, the ratepayer control the direction of the utility and ensure that the utility board is acting in the best interests of the local ratepayer.

Moreover, the majority independence of the utility board from its affiliate boards would not necessarily result in a more efficient or effective utility board. No empirical evidence has been cited in the Draft Report to support the OEB's proposition that "the quality of governance is likely improved if the proportion of independent directors is greater than the current requirement under ARC. The OEB is of the view that a majority (over 50 percent) of directors should be independent."[17]

Before prescribing general rules regarding director independence, the OEB should specifically consider the interests which may exist at the local level in the context that still describes many existing utility whose boards include councillors and/or municipal employees and whose majorities are not independent in the sense defined in the Draft Report.

Finally, the Draft Report also proposes that over half of the directors should be independent, an increase over ARC's requirement of 1/3 independent directors.[18] If the OEB wishes to amend the requirements in ARC, for the policy reasons stipulated in ARC, then it should do so in that forum. The majority independence requirement as currently constructed in the Draft Report runs contrary to corporate governance principles and best practices.

Shareholders have a legitimate interest and a legal right to protecting their interests in the company, including by participating in the governance of the company by serving on the board.

Recommendation: The Board should revise its definition of independence in its guidance to align with the definition of independence used in National Policy 58-201 – Corporate Governance Guidelines ("**NP-58-201**"), the CSA Governance Guidelines, the OFSI Guidelines, and G20/OECD Principles.

To the extent the OEB wishes to modify its Affiliate Relationship Code requirements related to 1/3 independence (independence is defined in ARC differently, because ARC is seeking to address a different policy concern), that should be done in the context of an amendment to the ARC. It should not be done as part of the OEB's corporate governance guidance. Proceeding as proposed would result in the OEB adopting corporate governance guidance that is inconsistent with corporate governance best practices internationally.

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[17] Draft Report at p. 9.
[18] The OEB states that it "will consider amending the ARC in due course", Draft Report at p. 9

Energy+ and Oakville Hydro reserve the right to take such position as they each deem appropriate in respect of any potential ARC amendment.

B. Shareholder Agreements

The OEB recommends that any restrictions on directors' duties and responsibilities be avoided in a unanimous shareholders' agreement or a shareholder declaration.

At law the OEB itself must comply with directives issued by the Provincial Government under the *Ontario Energy Board Act, 1998*.

Similarly, at law, a corporation is required to comply with the terms of a unanimous shareholders' agreement or a shareholders' declaration, as applicable (for ease of reference, both shall be referred to as "**USAs**").

When the Ontario legislature determined that municipal corporations must cease the generation, transmission, distribution or retail of electricity, except through a corporation incorporated under the *Business Corporations Act* (Ontario) under Section 144 of the *Electricity Act, 1998*, the legislature expressly authorized the use of USAs to place restrictions on directors' duties and responsibilities.

This has formed the basis of the regulatory compact between municipal shareholders and ratepayers since deregulation. The Draft Report attempts to fundamentally alter the regulatory compact in a way that was not intended by the Ontario legislature, and is not in compliance with applicable law.

Corporations formed under the Ontario *Business Corporations Act*[19] (the "**OBCA**"), which include nearly all of Ontario's electricity distributors, and the *Canada Business Corporations Act* (the "**CBCA**") continue to have access to an important feature in Canadian corporate law to deal with the management-shareholder agency problem: a shareholder declaration (in the case of a single shareholder) or a unanimous shareholders' agreement (in the case of multiple shareholders).

A unanimous shareholders' agreement rises to the level of a "constating document"[20] and is read alongside a corporation's articles of incorporation and its bylaws.[21]

It is customary in many USAs for the shareholders to remove or restrict certain discretionary powers from the directors to make fundamental changes to the corporation or the business, including the ability to (i) issue new equity (share capital) to any person, (ii) incur new indebtedness, and (iii) divest or acquire assets above a pre-determined threshold outside of the ordinary course of business. The loss any one of those types of controls on a board of directors of a company could be detrimental to the ability of shareholders to control and protect their invested capital. Furthermore, the loss of such shareholder controls could make an LDC unattractive for private investment and private capital (such controls are often required to be in place as a pre-condition to investment).

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[19] RSO 1990, c B.16.
[20] *Duha Printers (Western) Ltd. v. R.*, [1998] 1 S.C.R. 795 at para 60, *Peoples Department Stores Inc. (Trustee of) v. Wise*, [2004] SCJ No 64 at para 31.
[21] *Power v. Vitrak Systems Inc.*, 2006 PESCTD 33 (PEI TD) at paras 50 – 51.

USAs permit shareholders to restrict the discretion of boards of directors, in whole or in part, to manage or supervise the management of a corporation by transferring some or all of the duties, together with the associated liabilities for those decisions, to shareholders. USAs, while not feasible or practical in the context of publicly traded firms, offer shareholders in controlled companies the power to restrict the discretion of the board and management. Simply put, there can be no agency problem between management and shareholders with respect to decisions that are removed from the scope of the board's authority. One other key advantage of using a USA includes the ability of minority shareholders to bargain for and guarantee participation in corporate decisions through consent rights, which participation would not ordinarily occur based solely on voting rights. USAs can be entered into, amended, replaced or repealed at any time by shareholders in accordance with their terms and the provisions of the OBCA.

Shareholders agreements represent an integral aspect of corporate governance best practices in Canada. Restricting the freedom of shareholders to take on the duties and responsibilities (and the liabilities) of the board would undermine a fundamental safeguard of governance.

In this context, the OEB suggests that the use of these instruments runs contrary to the principle that independent directors are able to exercise their judgment on all key aspects of the business. Specifically, the OEB argues that the transfer of significant decision making authority to shareholders reduces the board's roles and responsibilities, and according to the OEB, may result in a lesser quality of governance.[22]

The OEB's analysis is flawed at law. To the extent a USA is used to restrict the discretion or powers of the directors to manage or supervise the management of the business and affairs of the corporation, the shareholder must assume all the rights, powers, duties and liabilities of a director of a corporation.[23] This means that the shareholder must act honestly and in good faith with a view to the best interests of the corporation, and must exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.[24]

The OEB argues that where restrictions affect the ability of directors to act in the best interests of the utility and its customers, they should not be included in the shareholder agreement. This misses the point entirely. By virtue of the OBCA, the shareholder that assumes the duties and liabilities of a director of a corporation would have to comply with its statutory obligations and its obligations at common law to take into account various ancillary interests:

> "*In considering what is 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. Courts should give appropriate deference to the business judgment of directors who take into account these ancillary interests, ...*"[25]

In addition, the shareholder that uses a USA to restrict the discretion or powers of the directors to manage or supervise the management of the business and affairs of the corporation also loses the

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[22] Draft Report at p. 10
[23] OBCA at s. 108(5).
[24] OBCA at s. 134(1).
[25] *BCE Inc. v 1976 Debentureholders* 2008 SCC 69 at para 40.

benefits of its limited liability status.[26] This acts as a natural check-and-balance that exists within the OBCA governance framework, which ensures the USA remedy is only utilized in the most exceptional circumstances. Exactly the circumstances where shareholder protections are most needed.

Restrictions placed on a board of directors by the shareholders are intended to protect fundamental shareholder rights and therefore are the primary purview of corporate governance best practices.

The OEB has focused exclusively on the protections of other stakeholders and neglected the protection of shareholders in its Draft Report in a manner that is inconsistent with the regulatory compact.

Recommendation: The OEB should remove any limitations on the use of USAs from its guidelines. Such limitations are inconsistent with corporate governance best practices, and are not consistent with applicable law.

C. Board Size and Composition

The OEB has stated that: "The board as a whole must possess the complete range of skills necessary to execute its governance function and discharge its responsibilities effectively"[27] and that "[t]he board should comprise no less than five directors."[28] With respect to the minimum requirement of a number of directors we note that "[t]here is no single model of good corporate governance."[29]

Rate regulated utilities have developed different corporate governance structures depending on their size, ownership structure, nature, scope and complexity of their operations, corporate strategy and risk profile. While there may be some common elements that underlie good corporate governance, there are also limitations. What may be "best practice" for large widely held multi-jurisdictional utilities like Enbridge, may result in a costly and unnecessary bureaucratic burden for a small LDC that is wholly owned by a single municipal owner.

This is especially so with the requirement for boards to have a certain range of skills and a minimum number at smaller LDCs that relies on local, volunteer directors.

In principle, we are not opposed to the requirement of ensuring a full complement of skills necessary for the board to discharge their duties. However for some LDCs, particularly smaller LDCs that have locally based voluntary boards, it may be difficult to meet this requirement without increasing governance costs.

Recommendation: The OEB should establish a deferral/variance account to track any incremental costs incurred by a utility to adapt to the OEB's new corporate governance guidelines in advance of the utilities next cost of service rate application. This could include the introduction of a per-meeting stipend for directors and committee members (to attract the skilled talent the OEB recommends), and costs for ongoing director training, including travel and accommodations (which

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[26] OBCA at s. 92.
[27] Draft Report at p.10
[28] Draft Report at p. 7
[29] *Ibid* at 10.

are cost prohibitive for geographically remote utilities). This would help facilitate the widespread adoption best practices across the sector.

Conclusion

We are generally supportive of corporate governance guidance. It should be flexible and must account for the variation in size and composition of rate regulated utilities across Ontario. In addition, the guidance should facilitate the protection of both shareholder and stakeholder interests. It should not, as the Draft Report does, focus entirely on stakeholder interests at the expense of legitimate shareholder protections. Finally, to the extent incremental costs are incurred by a utility to adapt to the OEB's new corporate governance guidelines, a deferral/variance account should be created to track those costs for future disposition.

Yours very truly,

BORDEN LADNER GERVAIS LLP

Original signed by John A.D. Vellone

Per:

John A.D. Vellone

CC: Oakville Hydro and Energy+ Inc.

Appendix "A"

Corporate Governance Background

Modern corporate governance rules and practices were developed and implemented in the United States in response to the public company accounting crisis of 2002 and 2003.

The crisis involved accounting-based scandals at large, widely-held publicly traded firms that shook the confidence of investors, caused a dramatic drop in the equity values of publicly traded firms as well as adversely affecting the credit ratings of a number of publicly traded companies, often resulting in downgrades to junk status.[30]

The widespread nature of the crisis in publicly traded firms resulted in, among other things, (i) the bankruptcy of large firms such as Enron, WorldCom, Adelphia Communications and Global Crossing, (ii) a mounting number of financial restatements at firms such as AOL Time Warner, Bristol-Myers Squibb and Tyco, and (iii) the dissolution of Arthur Andersen LLP, formerly one of the "big five" accounting firms.

The widespread failure and loss of confidence in financial reporting spurred the introduction of the *Sarbanes-Oxley Act* ("**SOX Act**") which made significant changes to the corporate governance and disclosure obligations of publicly traded companies.[31] A number of principles from the SOX Act were adopted by provincial securities regulators in Canada through a series of national instruments and policies, including NI-52-109 *Certification of Disclosure in Issuer's Annual and Interim Filings*, and NI- 52-110 *Audit Committees*.[32]

The brief history of the origins of modern corporate governance rules outlined above is of crucial importance when assessing whether such a regime (or something based on its principles) is appropriate in the context of rate regulated utilities (RRUs).

One underlying cause of the accounting crisis that remains an ongoing concern for publicly traded firms is the so-called "agency problem" between, on the one hand, directors and senior management, and on the other hand, shareholders.[33]

Shareholders in widely-held, publicly traded firms are oftentimes disparate, unrelated groups of investors who are largely anonymous from one another, and their identities as shareholders may change on a very frequent (if not daily) basis. In that regard, many shareholders of publicly traded firms are either unable or unwilling to work together in sufficient numbers to act as a counterweight to control a board of directors and/or senior management. The SOX Act, and the Canadian securities instruments that followed, were in large part designed to provide a framework of rules and practices

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[30] Anup Agrawal and Sahiba Chadha, "Corporate Governance and Accounting Scandals" (2005) XLVIII JL & Econ 371 at 371.
[31] Carol Hansell, *Corporate Governance: What Directors Need to Know* Toronto: Carol Hansell, 2003 at 1.
[32] Canada, Parliamentary Information and Research Service, *Canadian Response to the U.S. Sarbanes-Oxley Act of 2002: New Directions for Corporate Governance*, by Tara Gray, Economics Division, PRB 05-37E (Ottawa: Library of Parliament, 2005) at 7-8.
[33] Karl Hofstetter, "One Size Does Not Fit All: Corporate Governance for 'Controlled Companies'," (2005) 31 NCJ Int'L L & Com Reg 597 at 600.

to provide more stringent internal controls over financial reporting delivered to public shareholders by management.

Corporate Governance – Notable Exceptions

Companies with a large controlling shareholder, or a small group of controlling shareholders, do not have the same level of agency conflict between management and shareholders that is present in widely-held, publicly traded firms.[34]

Indeed, the corporate governance requirements of both the NYSE[35] and NASDAQ[36] exempt "controlled companies" (defined as listed companies of which more than 50% of the voting power for the election of directors is held by an individual, a group or another company) from certain governance requirements, including majority board independence, independent compensation committees and an independent corporate governance and nominating committee. Canadian corporate governance guidelines and continuous disclosure requirements also contain a set of reduced requirements and significant exemptions for smaller or "junior" public company issuers that are listed on the TSX Venture Exchange.

Rationale for Corporate Governance

A landmark paper published by Harvard Law School and Harvard Business School entitled "*SOX after Ten Years: A Multidisciplinary Review*" reviewed and assessed the research findings from 120 papers in accounting, finance, and law to evaluate the impact of the SOX Act. The paper noted that the direct costs of the SOX Act were substantial and fell disproportionately on smaller companies, although the paper notes that cost fell over time and in response to changes in its implementation. [37] The paper also concludes that while financial reporting quality appears to have gone up research on causal attribution is weak, and that on balance, research on the SOX Act's net social welfare remains inconclusive (e.g., the SOX Act did not, for example, prevent the great financial crisis of 2008). [38]

We are not aware of any weakness in financial reporting or widespread financial fraud in Ontario's RRUs as the impetus for imposing a corporate governance regime. Rather, the rationale cited by the OEB – that corporate governance will enhance the effectiveness of the OEB's rate regulation with the aim of reducing costs for customers of RRUs – is not a traditional objective of shareholder oriented corporate governance, nor is any empirical evidence cited by the OEB that directly ties corporate governance to cost savings and/or lower rates.

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[34] *Ibid*.
[35] Section 303A, NYSE Company Manual (http://nysemanual.nyse.com/LCMTools/PlatformViewer.asp?selectednode=chp%5F1%5F4%5F3&manual=%2Flcm%2Fsections%2Flcm%2Dsections%2F)
[36] NASDAQ Marketplace Rule 4350(c)(5) and Rule 4350(c)(5).
[37] *SOX after Ten Years: A Multidisciplinary Review,* John C. Coates, IV, Harvard Law School, Suraj Srinivasan Harvard Business School, January 12, 2014, Harvard Law and Economics Discussion Paper No. 758, page 26.
[38] Ibid.

On the contrary, the history of the adoption of corporate governance in the public company context suggests material upfront costs to implement and sustain a compliance regime, which will either be borne by RRUs (and ultimately shareholders).

Current Sources

Corporate governance requirements, and directors duties and liabilities which follow from those requirements, are based in a variety of sources, all of which a director needs to understand.

These sources include:

1. Statutory and regulatory regimes, primarily under corporate and securities laws, but also under a variety of other statutes. The OBCA applies to companies incorporated in Ontario, while the *Canada Business Corporations Act*[39] (the "**CBCA**") is the corporate statute that applies to federally-incorporated companies. Both of these statutes provide the primary framework for the duties and obligations of directors. Each province in Canada has its own corporate statute.

2. Section 125.2 of the Ontario *Energy Board Act*[40] ("***OEB Act***") imposes a prudence standard on directors and officers of transmitters, distributors, retailers of electricity, gas marketers and unit sub-meter providers, which mirrors the standard set forth in s. 134(1) of the OBCA. In other words, the OEB can already enforce the same standard of prudence on directors and officers as available to shareholders under the OBCA.

3. The common law, which comprises jurisprudence developed over centuries by courts both interpreting statutes and making law in certain areas, notably in respect of the fiduciary duties of directors. Some of the key common law principles are discussed further below.

4. The constating and governing documents of a company (such as the articles or by-laws, or unanimous shareholder agreements, if applicable).

5. Securities legislation in Ontario and the other Canadian Provinces.

6. Guidelines and best practices prepared by certain organizations and exchanges, such as the Toronto Stock Exchange, the Office of the Superintendent of Financial Institutions ("OSFI"), or the G20/OECD.

7. Other federal and provincial statutes which impose duties in the areas of employee standards and compensation, environmental law, income and commodity taxes, and bankruptcy, to name a few.

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[39] RSC 1985, c C-44.
[40] SO 1998, c15, Sched B.