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June 21, 2021

VIA RESS, EMAIL AND COURIER

Ms. Christine E. Long
Registrar
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor Toronto,
Ontario M4P 1E4

Dear Ms. Long:

RE: EB-2020-0194 – Hydro One Networks Inc. Reply to Intervenor Cost Claim Submission and Book of Authorities

Please find enclosed Hydro One Networks Inc.'s Submission and Book of Authorities regarding intervenor cost claims made in respect of the above proceeding.

Yours truly,

McCarthy Tétrault LLP

Gordon M. Nettleton
GMN

Encls.

cc: Intervenors in EB-2020-0194

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998,* S.O. 1998, c. 15, Schedule B, as amended (the "OEB Act");

AND IN THE MATTER OF proceeding EB-2020-0194, established by the Board on its own motion to implement the decision of the Divisional Court dated July 16, 2020 in its File #200/19, and for an Order or Orders approving or fixing just and reasonable rates for Hydro One Networks Inc. for the transmission and distribution of electricity as of January 1, 2021.

HYDRO ONE NETWORKS INC. REPLY SUBMISSIONS ON COSTS

June 21, 2021

PART I. OVERVIEW

1. Hydro One Networks Inc. ("**Hydro One**") provides these submissions in response to the cost claims filed by intervenors following the Ontario Energy Board ("**Board**") Decision and Order dated April 8, 2021 ("**Final Decision**").

2. The Board granted the following parties intervenor status in these proceedings with eligibility for cost awards:[1]

- Association of Major Power Consumers in Ontario ("**AMPCO**")
- Canadian Manufacturers & Exporters ("**CME**")
- Consumers Council of Canada ("**CCC**")
- Energy Probe Research Foundation ("**Energy Probe**")
- London Property Management Association ("**LPMA**")
- Power Workers' Union ("**PWU**")
- School Energy Coalition ("**SEC**")
- Society of United Professionals (the "**Society**")
- Vulnerable Energy Consumers Coalition ("**VECC**")

3. Seven intervenors have filed costs claims:

Party	Date	Cost Claim	Description
LPMA	May 31, 2021	$3,281.52	Legal/consultant/other fees
Energy Probe	June 1, 2021	$5,452.80	Legal/consultant/other fees
CCC	June 9, 2021	$5,034.15	Legal/consultant/other fees
AMPCO	June 10, 2021	$5,127.38	Legal/consultant/other fees
VECC	June 10, 2021	$7,031.54	Legal/consultant/other fees
CME	June 10, 2021	$902.87	Legal/consultant/other fees
SEC	June 10, 2021	$29,766.46	Legal/consultant/other fees

[1] EB-2020-0194 Notice and Procedural Order No. 1 (October 2, 2020).

4. Hydro One does not object to the cost claims of LPMA, Energy Probe, CCC, AMPCO, VECC, or CME. However, Hydro One objects to SEC's cost claim on the basis that the costs SEC seeks to recover from ratepayers are disproportionate to SEC's level of assistance to the Board.

5. Hydro One has four main concerns:

i. SEC's written interrogatories and Motion were a clear attempt to undermine the Court Decision and expand the scope of this proceeding by seeking information that was not relevant. Though the Board soundly rejected SEC's Motion, it caused significant delay and increased the costs for all parties. The Motion amounts to 35% of SEC's total cost claim.

ii. When its Motion was denied, SEC refused to change course, instead reiterating irrelevant arguments and presenting its own ratemaking proposal in its lengthy final submissions.

iii. SEC continued to raise irrelevant concerns in its comments on Hydro One's Draft Rate Order, which the Board did not accept.

iv. The Board's policy of modernization demands robust oversight of intervenor cost claims. Failing to do so will provide perverse incentives to intervenors who ignore the Board's clear directions in the future.

6. Hydro One urges the Board to carefully scrutinize SEC's cost claim and only award costs where SEC's participation meaningfully assisted the Board in making the Final Decision. For the reasons outlined below, Hydro One proposes a reduction from $29,766.46 to $10,830.49.

PART II. FACTS

7. On October 2, 2020, the Board issued Notice and Procedural Order No. 1 ("**PO#1**")[2] to implement the Court's clear direction that all the Future Tax Savings should be allocated to Hydro One's shareholders. The effect of PO#1 was to limit the scope of this proceeding to three issues: (i) quantum of recovery; (ii) recovery period; and (iii) recovery method, including carrying costs.

[2] EB-2020-0194 Notice and Procedural Order No. 1 (October 2, 2020).

8. On December 4, 2020, Hydro One responded to written interrogatories from intervenors, but declined to provide information that was not relevant to the issues.[3] On December 9, 2020, SEC filed a Notice of Motion ("**SEC Motion**")[4] seeking an order requiring Hydro One to provide further responses (including to SEC Interrogatories 2-6). SEC justified its request for all this information so that it could prepare alternative methodologies for recovery.[5]

9. The Board postponed the remaining procedural steps set out in PO#1 until after the hearing of the SEC Motion.[6] On February 8, 2021, the Board issued Notice and Procedural Order No. 3 ("**PO#3**")[7] dismissing the SEC Motion. The Board stated that SEC Interrogatories 2 through 6 were intended "to get on the record the full calculation of the Future Tax Savings in order to examine ways that the amount owing from ratepayers to shareholders can be repaid." The Board rejected that justification, concluding the information sought by SEC was not relevant to the issues at hand and emphasizing the narrow scope of the proceeding.[8] The Board proceeded to reschedule the remaining procedural steps set out in PO#1.

10. From December 9, 2020 when the SEC Motion was filed until the Board's Decision in PO#3 on February 8, 2021, two months and countless hours were wasted in this proceeding.

11. SEC was undeterred by the Board's direction in PO#3. Its final argument, which comprised 33 pages, included a full ratemaking proposal that would affect ratemaking methodologies well beyond the prescribed period, based on evidence that was not on the record.[9] Additionally, SEC made multiple misleading and incorrect assertions, including that:

- the Board's task was to "re-decide" the Original Decision and calculate the misallocated amounts (relying on a "paraphrased" statement not found in the Court Decision);[10]
- the Board should interpret the Court Decision in a way that permits the Board to <u>continue</u> the misallocations going forward and then to only return it decades later;

[3] Hydro One DTA Remittance IRRs (December 4, 2020), Response to SEC Interrogatory #2.
[4] EB-2020-0194 Notice of Motion (December 9, 2020).
[5] SEC Notice of Motion dated December 10, 2020 at para 24, footnote 12.
[6] EB-2020-0194 Notice and Procedural Order #2 (December 11, 2020).
[7] EB-2020-0194 Notice and Procedural Order #3 (February 8, 2021).
[8] EB-2020-0194 Notice and Procedural Order #3 (February 8, 2021) at 7-8 [underlining added].
[9] SEC Final Argument (February 26, 2021).
[10] SEC Final Argument (February 26, 2021) at 1.2.5 (pp. 5-6).

- Hydro One was asking ratepayers to pay the full amount of the DTA to its shareholders;
- there was no real 'cost' to Hydro One because the DTA was financed by the issuance of common shares;[11] and
- the Board must oversee the DTA collection[12] (even though it falls outside the costs required to provide rate-regulated service).

12. The Board issued its Decision and Order on April 8, 2021 ("**Final Decision**").[13] The Board accepted none of SEC's proposals or assertions.

13. On the first issue (quantum), the Board explicitly rejected SEC's submission that the Board should rehear the issue as if it was the original panel.[14] On the second issue (method of recovery), the Board accepted Hydro One's submission that recovery must be accompanied by a carrying charge[15] and approved Hydro One's proposed accounts.[16] On the third issue (recovery period), the Board adopted a short two-year period to minimize carrying costs and intergenerational inequities.[17] The Final Decision stands in stark contrast to SEC's proposal: recovery over 30 years for transmission and 23 years for distribution, with no carrying cost.[18]

14. On April 30, 2021, SEC filed comments on Hydro One's Draft Rate Order ("**DRO**"). SEC noted that "the presentation of bill impacts, while technically correct, understates the actual impacts by including only the distribution riders" and SEC would prefer "a more comprehensive reporting of bill impacts for all classes".[19] Again, the Board rejected these considerations.[20]

[11] SEC Final Argument (February 26, 2021) at 3.3.
[12] SEC Final Argument (February 26, 2021) at 2.4.
[13] EB-2020-0194 Decision and Order (April 8, 2021) [**Final Decision**].
[14] Final Decision at 8.
[15] Final Decision at 10.
[16] Final Decision at 12.
[17] Final Decision at 16.
[18] SEC Submissions (February 26, 2021).
[19] SEC Comments on Hydro One DRO (April 30, 2021).
[20] OEB Decision and Interim Rate Order (May 27, 2021) at p. 7.

PART III. APPLICABLE LAW

15. The Board has considerable discretion to determine the appropriateness and amount of legal costs for interveners in its proceedings.[21] The party claiming costs bears the burden of establishing that the costs were incurred directly and necessarily for the party's participation.[22]

16. The Board's *Practice Direction on Costs Awards* outlines key factors in awarding costs, including whether the intervenor participated responsibly and assisted the Board in understanding the relevant issues. In determining the amount of a costs award, the Board may consider, among other things, whether the party has demonstrated through its participation and documented in its cost claim that it has:

> (a) participated responsibly in the process;
>
> (b) contributed to a better understanding by the Board of one or more of the issues in the process;
>
> (c) complied with the Board's orders, rules, codes, guidelines, filing requirements and section 3.03.1 of this Practice Direction with respect to frequent intervenors, and any directions of the Board;
>
> (d) made reasonable efforts to combine its intervention with that of one or more similarly interested parties, and to co-operate with all other parties;
>
> (e) made reasonable efforts to ensure that its participation in the process, including its evidence, interrogatories and cross-examination, was not unduly repetitive and was focused on relevant and material issues;
>
> (f) engaged in any conduct that tended to lengthen the process unnecessarily; or
>
> (g) engaged in any conduct which the Board considers inappropriate or irresponsible.[23]

17. The Board has applied these factors in recent proceedings. In EB-2018-0165, the Board awarded costs to SEC after finding that SEC had coordinated its efforts with other intervenors and "SEC's participation was of significant value in assessing the application".[24] Nonetheless, the Board noted that SEC's cost claim was "significantly greater than other intervenors" and reduced

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[21] *Ontario Energy Board Act*, *1998,* SO 1998, c 15, Schedule B, s. 30(2) [not reproduced]; see also Ontario Energy Board, *Practice Direction on Cost Awards* (revised April 24, 2014) [***Practice Direction***], s. 2.01: https://www.oeb.ca/oeb/_Documents/Regulatory/Practice_Direction_on_Cost_Awards.pdf [**TAB 1**].

[22] *Practice Direction,* s. 6.03 [**TAB 1**].

[23] *Practice Direction,* s. 5.01 [underlining added] [**TAB 1**].

[24] *Toronto Hydro-Electric System Ltd., Re*, 2020 CarswellOnt 8938 (Docket: EB-2018-0165) at para 33 [**TAB 2**].

it by 20 hours.[25] In EB-2020-0030, the Board reduced the costs claimed by SEC and other intervenors by 30% because they made submissions outside the scope delineated in the Procedural Order on Hydro One's annual rate update application for distribution. The Board held:

> As the scope of activities for which costs awards were available was clearly set out in PO #1, the OEB finds that costs will not be available after the fact for other issues. Intervenors who intended to claim costs in relation to these issues should have asked the OEB to expand the limits set out in PO #1.[26]

18. The guiding principle is that when an intervention is not of assistance to the tribunal, costs should be reduced or denied:

> It is not in the public interest to have intervention merely for the sake of intervention: there should be some perceptible value to it, and the Board has left open for consideration in any given case whether the services of the consultant were in some way or to some extent of value, and not merely misconceived or frivolous. I do not see error in law in this. It guards against abuse which could arise if the Board were to abdicate its discretion over costs.[27]

19. With these considerations in mind, and for the reasons articulated below, Hydro One objects to SEC's cost claim.

PART IV. SEC'S COSTS SHOULD BE REDUCED

20. Hydro One urges the Board to consider the governing principles discussed above, and specifically the following four points, when assessing SEC's cost claim.

21. First, the SEC Motion was nothing more than a fishing expedition which delayed this proceeding and wasted significant time and resources for Hydro One, the other intervenors, and the Board. SEC's characterization of the Motion as an "Issues Conference" which "essentially operated as a determination of scope"[28] is misleading. An Issues Conference typically occurs before a list of issues is prepared or finalized, which was not the case here. The Board clearly established the issues in this proceeding in PO#1.

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[25] *Ibid* [**TAB 2**].

[26] Decision and Order on Cost Awards in EB-2020-0030 (February 5, 2021) at 3.

[27] *Green, Michaels & Associates Ltd v Alberta (Public Utilities Board),* 1979 ALTASCAD 8 (CanLII) at para 25 [***Green***] [**TAB 3**], cited in *Consumers' Coalition of Alberta*, *Re*, 2018 CarswellAlta 3363 (23833-D01-2018) [not reproduced], adopted by the Ontario Divisional Court in *Hamilton-Wentworth (Regional Municipality) v Hamilton-Wentworth Save the Valley Committee Inc*. (1985), 19 DLR (4th) 356, 1985 CarswellOnt 386, leave to appeal ref'd [**TAB 4**].

[28] SEC Cost Claim (June 10, 2021), cover page.

22. Removing the "Issues Conference" façade, it becomes clear that SEC should not recover any of its costs for the Motion. SEC's submissions on the SEC Motion not only disregarded the Board's direction in PO#1 on the scope of this proceeding, but also attempted to undermine the Court Decision and accepted ratemaking principles. Even though the SEC Motion was ultimately rejected by the Board and did not advance the issues in any meaningful way, it halted the entire proceeding for two months and increased the costs for all parties. Indeed, SEC's claimed costs for the Motion amount to approximately 35% of its overall cost claim.

23. Hydro One also proposes reducing SEC's costs for preparing Interrogatories by 50%, since 4/8 of SEC's Interrogatories did not relate to the issues set out in PO#1.

24. Second, SEC's final submission was a further attempt to circumvent the Board and Court's decisions and expand the issues in this proceeding. Despite the Board's clear instructions in PO#3 that the Board would not engage in re-litigation of past decisions, SEC nonetheless proceeded to prepare argument attempting to do exactly that. SEC also proposed an alternative methodology based on evidence that was not on the record, contrary to the Board's findings in PO#3. SEC's Final Argument accounts for 43% of its overall cost claim.

25. Hydro One was forced to spend a disproportionate amount of time reviewing and responding to SEC's Final Argument. A large portion of Hydro One's Final Argument filed on March 8, 2021 was directed at SEC's unwarranted criticisms of Hydro One's proposal and SEC's alternative proposal. None of SEC's arguments were accepted by the Board in its Final Decision.

26. Hydro One is mindful that SEC's submissions addressed some relevant matters, such as the issue of carrying costs. As such, Hydro One is not proposing a complete denial of SEC's costs incurred to prepare Final Argument. However, those costs should be reduced by 50% to account for SEC's alternative ratemaking proposal and out-of-scope arguments.

27. Third, SEC's comments on Hydro One's DRO again raised irrelevant considerations, suggesting that Hydro One should report on bill impacts for all classes.[29] In its Decision approving the DRO, the Board referred to SEC's comments but gave them no weight, instead accepting Hydro One's presentation of the bill impacts.[30] While SEC is not claiming costs related to the DRO, it is worth noting that SEC's comments were neither helpful nor reasonable.

[29] SEC Comments on Hydro One DRO (April 30, 2021).

[30] OEB Decision and Interim Rate Order (May 27, 2021) at p. 7.

28. Applying the factors from the Board's *Practice Direction on Cost Awards,* it is clear that SEC's cost claim is disproportionate to its degree of assistance, including because SEC:

- did not participate responsibly in the process;
- failed to contribute to a better understanding by the Board of any issues;
- did not comply with the Board's directions regarding the scope of the proceeding;
- did not remain focused on the relevant and material issues; and
- lengthened the process unnecessarily for all parties.

29. All these factors favour a significant reduction of SEC's costs.

30. Fourth, the Board has embarked on a policy of modernization,[31] consistent with regulators in other jurisdictions. To be effective, this must include adopting assertive case management steps and reducing cost recovery to intervenors whose participation adds no value. The Board recently recognized that assertive case management involves, among other things, effectively managing issues lists and scope requirements.[32]

31. A recent report prepared for the Alberta Utilities Commission advocated for regulators to disallow costs where an intervenor's behaviour tended to lengthen or overcomplicate proceedings.[33] The Report specifically criticized "multiple rounds of information requests [or] so-called "fishing expeditions";[34] the number and materiality of motions to compel further and better responses to information requests;[35] and a failure on the part of interveners to confine themselves to matters appropriately before the regulator.[36] The Committee endorsed the role of costs as a form of discipline, emphasizing that "there should be consequences for subpar participation."[37]

32. SEC's cost claim represents an opportunity for the Board to address such concerns. Where intervenors contribute to regulatory delay, fail to confine their motions and submissions to

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[31] See e.g. Ontario Energy Board Modernization Review Panel Final Report (October 2018): https://files.ontario.ca/endm-oeb-report-en-2018-10-31.pdf [**TAB 5**].

[32] Ontario Energy Board Financial Review Management Response (2021) at 8: https://www.oeb.ca/sites/default/files/OEB-Financial-Review-Management-Response-20210129.pdf [**TAB 6**].

[33] Report of the AUC Procedures and Processes Review Committee (August 14, 2020) [**AUC Report**] [**TAB 7**].

[34] AUC Report at 25-26.

[35] AUC Report at 34.

[36] AUC Report at 45.

[37] AUC Report at 50.

the issues at hand, and do not provide meaningful assistance, the Board should discourage such behaviour by reducing costs.

PART V. PROPOSED REDUCTION

33. Hydro One urges the Board to consider the aforementioned concerns when assessing SEC's cost claim for $29,766.46 and only award costs to the extent that SEC's participation truly advanced the Board's understanding of the issues in this proceeding.

34. Specifically, Hydro One proposes reducing SEC's costs as follows:

Description	**Cost Claimed**	**Proposed Reduction**	**Reduced Cost**
Prepare Interrogatories: 9.8 hours @ $330 2.9 hours @ $230	$4,408.13	50% reduction	$2204.07
Interrogatory Responses: 5.3 hours @ $330 0.8 hours @ $230	$2,184.29	None	$2,184.29
Prepare Motion and Submissions ("Issues Conference"): 26.2 hours @ $330 2.0 hours @ $230	$10,289.78	100% reduction	$0
Prepare Final Argument: 32.6 hours @ $330 2.0 hours @ $230	$12,884.26	50% reduction	$6,442.13
		Total Reduced Costs: $10,830.49	

35. The proposed reductions would bring SEC's costs closer to those of the other intervenors in this proceeding, though still considerably higher.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of June, 2021

Gordon Nettleton
McCarthy Tétrault LLP
Counsel for Hydro One Networks Inc.

FILE NO.: EB-2020-0194

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, (Schedule B), as amended (the "OEB Act");

AND IN THE MATTER OF a proceeding on the Board's own motion to implement the decision of the Divisional Court dated July 16, 2020 in its File #200/19, and for an Order or Orders approving or fixing just and reasonable rates for Hydro One Networks Inc. for the transmission and distribution of electricity as of January 1, 2021;

BOOK OF AUTHORITIES OF HYDRO ONE NETWORKS INC.

Date: June 21, 2021

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AND TO: Intervenors of Record

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2	Toronto Hydro-Electric System Ltd., Re, 2020 CarswellOnt 8938 (Docket: EB-2018-0165)
3	Green, Michaels & Associates Ltd v Alberta (Public Utilities Board), 1979 ALTASCAD 8 (CanLII)
4	Hamilton-Wentworth (Regional Municipality) v Hamilton-Wentworth Save the Valley Committee Inc. (1985), 19 DLR (4th) 356, 1985 CarswellOnt 386, leave to appeal dismissed
5	Ontario Energy Board Modernization Review Panel Final Report (October 2018)
6	Ontario Energy Board Financial Review Management Response (2021)
7	Report of the AUC Procedures and Processes Review Committee (August 14, 2020)

TAB 1

ONTARIO ENERGY BOARD

Practice Direction

On

Cost Awards

Revised April 24, 2014

ONTARIO ENERGY BOARD

PRACTICE DIRECTION ON COST AWARDS

1. DEFINITIONS

1.01 In this Practice Direction, words have the same meaning as in the *Ontario Energy Board Act, 1998* or the Ontario Energy Board's Rules of Practice and Procedure, unless otherwise defined in this section.

"Act" means the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Schedule B;

"applicant" means:

(a) when used in connection with a process commenced by an application to the Board, the person(s) who make(s) an application;
(b) when used in connection with a process commenced by reference, Order in Council, or on the Board's own initiative, the person(s) named by the Board to be the applicant; and
(c) when used in connection with a notice and comment process under section 45 or 70.2 of the Act or any other consultation process initiated by the Board, the person(s) from whom cost awards will be recovered in relation to the process, as determined by the Board;

"intervenor", in respect of a proceeding, means a person who has been granted intervenor status by the Board and, in respect of a notice and comment process under section 45 or 70.2 of the Act or any other consultation process initiated by the Board, means a person who is participating in that process, and "intervention" shall be interpreted accordingly;

"municipality" has the same meaning as in the *Municipal Act, 2001,* S.O. 2001, c.25;

"party" means an applicant, an intervenor and any other person participating in a Board process;

"person" includes (i) an individual; (ii) a company, sole proprietorship, partnership, trust, joint venture, association, corporation or other private or public body corporate; and (iii) an unincorporated association or organization;

"process" means a process to decide a matter brought before the Board whether commenced by application, reference, Order in Council, notice of appeal or on the Board's own initiative, and includes a notice and comment process under section 45 or 70.2 of the Act and any other consultation process initiated by the Board;

"Tariff" means the Cost Award Tariff contained in Appendix A to this Practice Direction;

"*Travel, Meal and Hospitality Expenses Directive*" means the Ministry of Government Services, Management Board of Cabinet, *Travel, Meal and Hospitality Expenses Directive*,

dated April 1, 2010, as may be revised from time to time; and

"wholesaler" means a person who purchases electricity or ancillary services in the IESO-administered markets or directly from a generator or who sells electricity or ancillary services through the IESO-administered markets or directly to another person, other than a consumer.

2. COST POWERS

2.01 The Board may order any one or more of the following:

(a) by whom and to whom any costs are to be paid;
(b) the amount of any costs to be paid or by whom any costs are to be assessed and allowed;
(c) when any costs are to be paid;
(d) costs against a party; and
(e) the costs of the Board to be paid by a party or parties.

2.02 The timelines set out in this Practice Direction shall apply unless, at any stage in a particular process, the Board determines or orders otherwise.

3. COST ELIGIBILITY

3.01 The Board may determine whether a party is eligible or ineligible for a cost award.

3.02 The burden of establishing eligibility for a cost award is on the party applying for a cost award.

3.03 A party in a Board process is eligible to apply for a cost award where the party:

(a) primarily represents the direct interests of consumers (e.g. ratepayers) in relation to services that are regulated by the Board;
(b) primarily represents an interest or policy perspective relevant to the Board's mandate and to the proceeding for which cost award eligibility is sought; or
(c) is a person with an interest in land that is affected by the process.

3.03.1 A party that frequently applies for intervenor status and cost award eligibility in Board proceedings shall file with the Board, at least annually, the following information about the party:

(a) its mandate and objectives;
(b) its membership and the constituency it represents;
(c) the types of programs or activities that the party carries out;
(d) the identity of the individual(s) that represent the party in Board proceedings;
(e) any other information that could be relevant to the Board's consideration of the party's application for intervenor status and cost award eligibility; and
(f) updates to any information previously filed.

3.04 In making a determination whether a party is eligible or ineligible, the Board may:

(a) in the case of a party that is an association or other form of organization comprised of two or more members, have regard to whether the individual members would themselves be eligible or ineligible;
(b) in the case of a party that is a commercial entity, have regard to whether the entity primarily represents its own commercial interest (other than as a ratepayer) , even if the entity may be in the business of providing services that can be said to serve an interest or policy perspective relevant to the Board's mandate and to the proceeding for which cost eligibility is sought;
(c) in the case of a party that frequently applies for intervenor status and cost award eligibility in Board proceedings, have regard to whether the party has conformed with section 3.03.1 of this *Practice Direction*; and
(d) also consider any other factor the Board considers to be relevant to the public interest.

3.05 Despite section 3.03, the following parties are not eligible for a cost award:

(a) an applicant;
(b) an electricity transmitter, wholesaler, generator, distributor, retailer, and unit sub-meter provider, either individually or in a group;
(c) a gas transmitter, gas distributor, gas marketer and storage company, either individually or in a group;
(d) the Independent Electricity System Operator;
(e) the Ontario Power Authority;
(f) the Smart Metering Entity;
(g) the government of Canada (including a department), and any agency, Crown corporation or special operating agency listed in a schedule to the *Financial Administration Act* (Canada) that has not at the relevant time been privatized;
(h) the government of Ontario (including a ministry), and any public body or Commission public body listed in Table 1 of Ontario Regulation 146/10 (Public Bodies and Commission Public Bodies – Definitions) made under the *Public Service of Ontario Act, 2006* (Ontario)*;*
(i) a municipality in Ontario, individually or in a group;
(j) a conservation authority established by or under the *Conservation Authorities Act* (Ontario) or a predecessor of that *Act*, individually or in a group;
(k) a corporation, with or without share capital, owned or controlled by the government of Canada, the government of Ontario or a municipality in Ontario; and
(l) a person that owns or has a controlling interest in a person listed in (a), (b) or (c) above.

For the purposes of paragraph (k), control has the same meaning as in the *Business Corporations Act* (Ontario).

For the purposes of paragraph (l): (i) a person has a controlling interest in another person listed in (a), (b) or (c) that is a limited partnership if the person is a general partner; (ii) a person has a controlling interest in another person listed in (a), (b) or (c) that is any other form of partnership if the person is a partner; and (iii) a person

has a controlling interest in another person listed in (a), (b) or (c) that is a corporation if the person controls the corporation or controls a corporation that holds 100 percent of the voting securities of the first-mentioned corporation, control having the same meaning as in the *Business Corporations Act* (Ontario).

3.06 Notwithstanding section 3.05, a party which falls into one of the categories listed in section 3.05 may be eligible for a cost award if it is a customer of the applicant.

3.07 Also notwithstanding section 3.05, the Board may, in special circumstances, find that a party which falls into one of the categories listed in section 3.05 is eligible for a cost award in a particular process.

3.08 The Board may, in appropriate circumstances, award an honorarium in such amount as the Board determines appropriate recognizing individual efforts in preparing and presenting an intervention, submission or written comments.

4. COST ELIGIBILITY PROCESS

4.01 A party that will be requesting costs must make a request for cost eligibility that includes the reasons as to why the party believes that it is eligible for an award of costs, addressing the Board's cost eligibility criteria (see section 3). The request for cost eligibility shall be filed as part of the party's letter of intervention or, in the case of a notice and comment process under section 45 or 70.2 of the Act or any other consultation process initiated by the Board, shall be filed by the date specified by the Board for that purpose. For information on filing and serving a letter of intervention, refer to the Board's Rules of Practice and Procedure.

4.02 An applicant in a process will have 10 calendar days from the filing of the letter of intervention or request for cost eligibility, as applicable, to submit its objections to the Board, after which time the Board will rule on the request for eligibility.

4.03 The Board may at any time seek further information and clarification from any party that has filed a request for cost eligibility or objected to such a request, and may provide direction in respect of any matter that the Board may consider in determining the amount of a cost award, and, in particular, combining interventions and avoiding duplication of evidence or interventions.

4.04 A direction mentioned in section 4.03 may be taken into account in determining the amount of a cost award under section 5.01.

5. CONSIDERATIONS IN AWARDING COSTS

5.01 In determining the amount of a cost award to a party, the Board may consider, amongst other things, whether the party has demonstrated through its participation and documented in its cost claim that it has:

(a) participated responsibly in the process;
(b) contributed to a better understanding by the Board of one or more of the issues in the process;

(c) complied with the Board's orders, rules, codes, guidelines, filing requirements and section 3.03.1 of this *Practice Direction* with respect to frequent intervenors, and any directions of the Board;
(d) made reasonable efforts to combine its intervention with that of one or more similarly interested parties, and to co-operate with all other parties;
(e) made reasonable efforts to ensure that its participation in the process, including its evidence, interrogatories and cross-examination, was not unduly repetitive and was focused on relevant and material issues;
(f) engaged in any conduct that tended to lengthen the process unnecessarily; or
(g) engaged in any conduct which the Board considers inappropriate or irresponsible.

6. COSTS THAT MAY BE CLAIMED

6.01 Reference should be made to the Board's Tariff.

6.02 Cost claims shall be prepared using the applicable Board-approved form attached to this Practice Direction as Appendix "B".

6.03 The burden of establishing that the costs claimed were incurred directly and necessarily for the party's participation in the process is on the party claiming costs.

6.04 A party that is a natural person who has incurred a wage or salary loss as a result of participating in a hearing may recover all or part of such wage or salary loss, in an amount determined appropriate by the Board.

6.05 A party will not be compensated for time spent by its employees or officers in preparing for or attending at Board processes. When determining whether an individual is an officer or employee of the party, the Board will look at the true nature of the relationship between the individual and the party and the role the individual performs for the party. The Board may deem the individual to be an officer or employee of the party regardless of the individual's title, position, or contractual status with the party. Furthermore, an employee or officer of a company or organization that is affiliated with or related to the party that is eligible for an award of costs will be deemed to be an employee or officer of the party.

6.06 Counsel fees will be accepted in accordance with the Board's Tariff.

6.07 Paralegal fees will be accepted in accordance with the Board's Tariff. To qualify for consideration as a paralegal service, a paralegal must have undertaken services normally or traditionally performed by legal counsel, thereby reducing the counsel's time spent on client affairs.

6.08 Where appropriate, fees for articling students may be accepted in accordance with the Board's Tariff.

6.09 Cost awards will not be available in respect of services provided by in-house

counsel and supporting employees, including in-house paralegal and articling students.

6.10 Analyst / Consultant fees including for case management will be accepted in accordance with the Board's Tariff. A copy of the analyst / consultant's curriculum vitae must be attached to the completed form attached to this Practice Direction as Appendix "B" if the consultant has not already provided a curriculum vitae to the Board in another process within the preceding 24 months.

6.11 No differentiation will be made between the rates for preparation and attendance. Travel time spent working should be claimed as preparation time with the appropriate time documented. There will be no compensation for other hours spent in travel, although reasonable disbursements for travel costs will be allowed as set out in section 7.01.

6.12 The Board may award costs to a party on the basis of a fixed amount per day for participation in workshops, working groups, advisory groups, stakeholder meetings, technical conferences, issues conferences, settlement conferences or pre-hearing conferences.

7. DISBURSEMENTS

7.01 Reasonable disbursements, such as photocopying, transcript costs, travel and accommodation, directly related to the party's participation in the process, will be allowed in accordance with the Board's Tariff, including as applicable the principles and rules set out in the *Travel, Meal and Hospitality Expenses Directive* referred to in the Tariff.

7.02 A party may be compensated for the reasonable disbursements of an employee or officer of the party which are necessarily and directly incurred as a result of participation in a Board process.

7.03 Itemized receipts must be submitted with the cost claim (credit card slips or statements are not sufficient). If an itemized receipt cannot be provided, a written explanation must be submitted to explain why the receipt is unavailable and a description itemizing and confirming the expenses must be provided.

8. GROUP INTERVENTIONS

8.01 In a case where a number of eligible parties have joined together for the purpose of a combined intervention, the Board will normally allow reasonable expenses necessary for the establishment and conduct of such a group intervention.

8.02 The reasonable costs of meeting room rentals and associated costs required for the formation and coordination of a group, and which are specific to the intervention, will normally be allowed. The travel costs and personal expenses of group members attending such meetings will, however, normally be excluded.

8.03 Attendance at a hearing should be limited to the number of representatives required

to effectively monitor and provide input into the processes. When groups are not represented by counsel and/or experts, the reasonable out of pocket disbursements directly incurred for the attendance of a maximum of four group members will normally be accepted. When the group is represented by counsel and/or experts, the reasonable out of pocket disbursements incurred for the attendance of a maximum of two group members, as advisors, will normally be accepted.

9. HARMONIZED SALES TAX ("HST")

9.01 A party will be compensated for the HST it pays on goods and services which are determined by the Board to be eligible for an award of costs.

9.02 To be compensated, a party shall provide the following required HST information when completing the applicable form attached to this Practice Direction as Appendix "B":

(a) the tax status of the party, e.g. full registrant, unregistered, qualifying non-profit, zero-rated, tax exempt, etc;
(b) the HST registration number, if any; and
(c) the details of costs incurred showing the HST related to each item of cost.

10. COST CLAIMS

10.01 All cost claims will be subject to review by the Board for compliance with the Board's Tariff, including as applicable the principles and rules set out in the *Travel, Meal and Hospitality Expenses Directive* referred to in the Tariff.

10.02 Cost claims pertaining to a process must be accompanied by a letter addressing the reasons why costs should be awarded, and shall be filed with the Board and served on the party(ies) paying the cost awards within the time and in the manner determined by the Board in respect of the process.

10.03 Cost claims shall be prepared using the applicable Board-approved form attached to this Practice Direction as Appendix "B" and shall be provided in a clear and legible format.

10.04 Where a party who is a natural person represents himself or herself in a process and claims costs, the Board may accept the claim in the form of a letter providing details of the costs directly and necessarily incurred by the individual as a result of his or her participation in the process.

11. COST ASSESSMENT

11.01 A party which the Board has determined shall pay the costs shall have 10 calendar days from the date of submission by a party claiming costs to file any objection to any aspect of the costs claimed. One copy of the objection is to be filed with the Board and one copy is to be served on the party against whose claim the objection is being made.

11.02 The party claiming costs shall have 7 calendar days from the date of the filing of an

objection to file a reply with the Board and to serve a copy on the objecting party.

11.03 The Board will then issue its Decision and Order directing to whom and by whom costs are to be paid and detailing the costs to be awarded to each party. The Decision and Order may also address the Board's costs.

12. SPECIAL PROVISIONS FOR CONSULTATION PROCESSES INITIATED BY THE BOARD

12.01 Persons who will be ordered to pay cost awards for any consultation process initiated by the Board will be informed of their obligation at the commencement of the consultation process.

12.02 If the persons being ordered to pay the cost awards are part of a class of regulated entities who have to pay cost assessments under section 26 of the Act, the cost awards may be apportioned between the members of the class in the same manner as costs are apportioned within the class under the Board's Cost Assessment Model or as otherwise determined by the Board.

12.03 If the persons being ordered to pay cost awards are part of more than one class of regulated entities who have to pay cost assessments under section 26 of the Act, the cost awards may be apportioned between the classes in the same manner as costs are apportioned between the classes under the Board's Cost Assessment Model or as otherwise determined by the Board.

12.04 In some cases, the Board may act as a clearing house for all payments of cost awards in consultation processes initiated by the Board. In those cases, invoices for cost awards will be sent out to regulated entities who have to pay cost assessments under section 26 of the Act at the same time as the invoices for cost assessments are sent out. The persons paying the cost awards shall submit their payment to the Board in accordance with the invoices issued by the Board. Payment of these invoices will be due at the same time that cost assessments are due.

12.05 The Board will not send out the payments for the cost awards to persons eligible to receive the cost awards until at least eighty percent (80%) of the total amount owed by the payor(s) has been received by the Board.

13. PUBLICATION OF COST AWARD INFORMATION

13.01 The Board may, in its discretion, publish a summary of the costs awarded to each party in relation to that party's participation in Board processes. This publication is in addition to the publication of information pertaining to cost award eligibility and cost awards within the scope of a given process.

14. EFFECTIVE DATE

14.01 This revised Practice Direction on Cost Awards shall come into effect on June 2, 2014, and applies to all cost eligibility requests, cost claims and other cost award-related materials filed on or after that date.

APPENDIX "A"

COST AWARD TARIFF

NOTE: All tariffs are exclusive of applicable HST.

Legal Fees - Hourly Rates

Provider of Legal Services	Completed Years Practising	Maximum Hourly Rate
Lawyer	20+	$330
Lawyer	11 to 19	$290
Lawyer	6 to 10	$230
Lawyer	0 to 5	$170
Articling Student/Paralegal	-	$100

Analyst/Consultant Fees - Hourly Rates

Consultants are experts in aspects of business or science such as finance, economics, accounting, engineering or the natural sciences such as geology, ecology, agronomy, etc.

Time spent providing expert evidence, providing expert professional advice to the Board, or acting as an expert witness will be compensated at the appropriate analyst/consultant rate set out in the table below. A copy of the analyst/consultant's curriculum vitae must be attached to the cost claim if the analyst/consultant has not already provided a curriculum vitae to the Board in another process within the preceding 24 months.

If a consultant provides case management services, these hours are to be listed separately and will be compensated at the case management rate.

Analyst/Consultant Fees (including Case Management)

Provider of Service	Years of Relevant Experience	Maximum Hourly Rate
Analyst/consultant	20+	$330
Analyst/consultant	11 to 19	$290
Analyst/consultant	6 to 10	$230
Analyst/consultant	0 to 5	$170
Case Management	-	$170

Disbursements

Reasonable disbursements, such as photocopying, transcript costs, travel and accommodation, directly related to the party's participation in the process, will be allowed, as applicable in accordance with the principles and rules set out in the *Travel, Meal and Hospitality Expenses Directive* which is available on the Ministry of Government Services website. Except as provided in section 7.03 of this Practice Direction, itemized receipts substantiating the disbursement must accompany the cost claim.

APPENDIX “B”

COST CLAIM FORMS

The form of “Cost Claim for Hearings” and the form of “Cost Claim for Consultations” are attached as separate documents.

TAB 2

2020 CarswellOnt 8938
Ontario Energy Board

Toronto Hydro-Electric System Ltd., Re

2020 CarswellOnt 8938

TORONTO HYDRO-ELECTRIC SYSTEM LIMITED

Application for electricity distribution rates beginning January 1, 2020 until December 31, 2024

Lynne Anderson Member, Susan Frank Member, Michael Janigan Member

Judgment: April 9, 2020
Docket: EB-2018-0165

Proceedings: Additional reasons, Dec 19, 2019, Doc. EB-2018-0165 (Ont. Energy Bd.)

Counsel: Counsel — not provided

Subject: Natural Resources; Public

Headnote

Natural resources
Public law

Decision of the Board:

INTRODUCTION AND SUMMARY

1 This is a decision of the Ontario Energy Board (OEB) on cost claims filed with respect to this Toronto Hydro-Electric System Limited (Toronto Hydro) proceeding.

2 Toronto Hydro filed a five-year Custom Incentive Rate-setting application with the Ontario Energy Board (OEB) on August 15, 2018 (updated September 14, 2018) under section 78 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, (Schedule B), seeking approval for changes to its distribution rates, to be effective January 1, 2020 to December 31, 2024.

3 The OEB granted the following parties intervenor status and cost award eligibility:

- Association of Major Power Consumers of Ontario (AMPCO)
- Building Owners and Managers Association, Greater Toronto (BOMA)
- Consumers Council of Canada (CCC)
- Distributed Resource Coalition (DRC)
- Energy Probe Research Foundation (Energy Probe)
- Greater Toronto Apartment Association (GTAA)
- Mr. Norman Hann (Mr. Hann)
- School Energy Coalition (SEC)

• Vulnerable Energy Consumers Coalition (VECC)

4 On February 20, 2020, the OEB issued its Decision and Rate Order in which it set out the process for intervenors to file their cost claims by March 5, 2020, for Toronto Hydro to object to the claims by March 12, 2020 and for intervenors to respond to any objections raised by Toronto Hydro by March 19, 2020.

5 AMPCO, BOMA, CCC, GTAA, SEC and VECC each filed cost claims by the March 5, 2020 deadline specified in the Decision and Rate Order. DRC and Energy Probe filed cost claims on March 9, 2020 and Mr. Hann filed his cost claim on March 11, 2020.

6 On March 12, 2020, the OEB issued Procedural Order No. 10 noting that a number of intervenors filed cost claims after the deadline and Toronto Hydro would be allowed a reasonable period of time in which to review the claimed costs. The revised schedule set out in Procedural Order No. 10 allowed Toronto Hydro to object to the cost claims by March 18, 2020 and allowed intervenors to respond to any objections raised by Toronto Hydro by March 25, 2020.

7 On March 18, 2020, Toronto Hydro filed a letter stating that it had no objections to the claims made by AMPCO, BOMA, CCC, GTAA, SEC and VECC. Toronto Hydro stated that it had concerns with DRC, Energy Probe, and Mr. Hann's cost claims as summarized below. DRC, Energy Probe and Mr. Hann responded to Toronto Hydro's objections. These responses are also summarized below.

DRC

8 Toronto Hydro submitted that DRC's claim was disproportionate to the narrow scope of DRC's interest and contribution to the proceeding as compared to other intervenors. Toronto Hydro noted that DRC's cost claim of $133,453.37 exceeded the average claim among all of the intervenors. Toronto Hydro further noted that DRC's claim was on par with (and in some instances higher than) the claims made by other parties (AMPCO, BOMA, CCC, SEC and VECC) whose interventions had a much broader scope in the proceeding and who contributed to exploring all of the material and relevant issues.

9 Toronto Hydro noted that DRC stated that its role as intervenor was to provide the OEB with the "unique perspective of DER residential customers, small commercial and industrial customers, as well as DER-related non-profit organizations, owners, and developers." [1] Toronto Hydro further noted that DRC stated in its costs claim that it "made reasonable efforts to ensure that its participation in the hearing was focused on material issues" and that it took a "surgical, principled, and coordinated approach" in addressing those issues. Toronto Hydro submitted that DRC's cost claim did not reflect such an approach. Rather, DRC sought costs at a level commensurate with, or higher than, other intervenors whose contributions assisted the OEB in exploring all of the relevant and material issues on the OEB-approved Issues List. Toronto Hydro submitted that the OEB should reduce the cost award to DRC to reflect DRC's proportionate contribution to the proceeding.

10 In response to Toronto Hydro's objection, DRC noted that Toronto Hydro failed to acknowledge that DRC was the only intervenor to incur the costs of expert evidence, which was sanctioned and relied upon by the OEB. DRC noted that even with the expert evidence and all attendant processes, DRC's costs were less than or consistent with most of the other intervenors.

11 DRC estimated that approximately 32% of its costs were associated with unanticipated expert evidence interrogatory and qualification challenges. DRC further noted that its expert evidence and submissions also contributed to the OEB's understanding of new and emerging issues directly in Toronto Hydro's application. DRC's interrogatories, submissions, and expert evidence probed key issues that were not addressed by any other intervenor relating to load forecasts, productivity, reliability, Operations, Maintenance & Administration (OM&A) costs, capital budget and plans, electrification of City of Toronto fleet resources, Toronto Hydro fleet renewal, data requirements, and energy storage proposals.

Energy Probe

12 Toronto Hydro noted that Energy Probe's claim of $140,606.59 [2] was disproportionate to Energy Probe's contribution to the proceeding, as demonstrated by the substantial and unexplained increase from the costs awarded to Energy Probe in Toronto Hydro's 2015-2019 Custom IR proceeding. [3]

13 Toronto Hydro stated that, in this proceeding, many intervenors were able to draw on their experience from Toronto Hydro's previous Custom IR proceeding to streamline their efforts and reduce costs. However, Energy Probe is the sole intervenor seeking more costs in the current proceeding. Toronto Hydro stated that the requested increase is not immaterial and is not justified by a greater contribution to the proceeding. Toronto Hydro submitted that the OEB should reduce Energy Probe's costs award to reflect a decrease from the 2015-2019 Custom IR proceeding, or at the very least be commensurate with the costs that the OEB awarded Energy Probe in that proceeding.

14 In response to Toronto Hydro's objection, Energy Probe noted that its cost claim has been revised to $135,686.29 to correct an error pointed out by OEB staff. Energy Probe also stated that its cost claim is lower than BOMA's claim of $157,692.80 and SEC's claim of $150,667.97.

15 Energy Probe noted that Toronto Hydro argued that the OEB should not award Energy Probe more than the $75,085.15 amount that it awarded to Energy Probe in Toronto Hydro's 2015-2019 Custom IR proceeding. Energy Probe submitted that although the two proceedings may seem similar at a high level, the evidence presented in support of the issues of concern to Energy Probe was very different. Energy Probe noted that in the current proceeding Toronto Hydro filed evidence claiming increased frequency of severe weather events in support of its capital and OM&A expenditures and Energy Probe was one of the few intervenors that tested this evidence by interrogatories and cross-examination and addressed it in argument.

16 Energy Probe also stated that it was one of the few intervenors that addressed system reliability, Total Factor Productivity and Total Cost Benchmarking. Energy Probe also stated that it was only intervenor to address the issue of revenue / cost ratios for the residential rate class and the OEB accepted Energy Probe's submission, resulting in a material reduction to residential rates for 2020-2024.

17 Energy Probe also noted that in the current proceeding, DRC filed evidence and put forward an expert witness dealing with matters of concern to Energy Probe but not to most other intervenors. Energy Probe posed interrogatories to DRC, cross-examined the DRC expert witness and filed argument on matters brought forward by DRC. Energy Probe noted that DRC was not an intervenor in Toronto Hydro's previous Custom IR proceeding.

18 Energy Probe submitted that its cost claim of $135,686.29 for its participation in the current proceeding is a reasonable amount for its effort in dealing with the many issues and the large amount of evidence in this case, and considering that it is lower than the amounts claimed by two other intervenors.

Mr. Hann

19 Toronto Hydro noted that Mr. Hann claimed a total of $96,071.66 in costs in this proceeding at the OEB consultant / expert rate of $330 per hour. However, the OEB was clear in granting him intervenor status that his participation would be as "an individual representing his own interests" and not as an expert or consultant.

20 Toronto Hydro stated that the OEB advised Mr. Hann in its November 27, 2018 letter, that section 6.04 of the *Practice Direction on Cost Awards* restricts the types of costs and disbursements that an individual such as Mr. Hann may claim in OEB proceedings. In particular, "while wage or salary losses incurred as a result of participating in an OEB hearing, may be claimed, legal or consultant fees are not generally permitted to be claimed by individuals under the OEB's Cost Award Tariff."

21 Toronto Hydro further stated that despite the individual nature of Mr. Hann's participation, his claim exceeded the claims of CCC and VECC that focused on all the relevant and material issues in the proceeding and contributed to a better understanding of all of these issues. Toronto Hydro submitted that, even if Mr. Hann is entitled to costs as an expert (which he should not be), any award should be substantially reduced to reflect Mr. Hann's proportionate contribution to the proceeding.

22 In response to Toronto Hydro's objection, Mr. Hann noted that in the OEB's November 27, 2018 letter, the OEB did not explicitly state that "legal or consultant fees" were not permitted for individuals. The letter stated the fees "are not generally permitted to be claimed by individuals". Mr. Hann further noted that Toronto Hydro did not provide any evidence to support the claim that Mr. Hann was not an expert nor that he only represented himself and did not represent the customers of Toronto Hydro.

23 Mr. Hann submitted that the total cost claim of $96,071.66 for his full professional participation in this proceeding was both reasonable and worthy of being awarded. Mr. Hann further submitted that this is based on his professional experience / expertise and the complexity and volume of the record. Mr. Hann also stated that for the key activities of Interrogatories Preparation, Argument Preparation and Oral Hearing Preparation and Attendance, the work effort was at or below the other intervenors.

24 Mr. Hann also stated that he represented all customers from a perspective that other intervenors, for the most part, did not. Mr. Hann stated that the *Practice Direction on Costs Awards* does not preclude an individual from receiving compensation provided they meet the requirements listed in sub-sections (a) to (g) of section 5.01 of *Practice Direction on Costs Awards*. Mr. Hann stated that Toronto Hydro did not argue that Mr. Hann did not adhere to those requirements.

25 Mr. Hann further submitted that he provided an important contribution, in terms of both quality and quantity of issues addressed in the proceeding, that he believes was of assistance to the OEB in reaching its decision.

Findings

26 The OEB has reviewed the claims filed to ensure that they are compliant with the *Practice Direction on Cost Awards*.

27 The OEB has assessed the costs claims and considered whether they are reasonable in the context of this proceeding, and the scope of the intervention by each intervenor.

28 The OEB approves the cost claims for AMPCO, CCC, GTAA, and VECC. The OEB concludes that the cost claims filed by the other intervenors must be adjusted to reflect appropriate levels of participation, informed by the OEB's assessment of the assistance provided to the hearing panel by that participation.

29 The OEB finds the preparation time claimed by BOMA to be excessive, and the cost award is reduced by 60 hours. The preparation time claimed by BOMA is more than 325 hours. The OEB believes that this time could have been reduced if BOMA had better coordinated its approach to assessing the application with other intervenors. In the absence of coordination, the OEB expects intervenors to focus on the areas that are the most important to their clients. The OEB is also reducing BOMA expenses by $679.80 to be compliant with the Government Travel, Meal and Hospitality Expenses Directive. Business class travel is not permitted, therefore the travel-related disbursement has been reduced to reflect an equivalent economy class fare. In addition, the maximum amount for accommodations is $200 per night, therefore the accommodation-related disbursement has been reduced to reflect this maximum amount.

30 DRC's intervention was specifically directed to issues related to distributed energy resources. The OEB acknowledges that DRC filed expert evidence, and was required to respond to interrogatories, to qualify the expert witness and to prepare for cross-examination. Even with these requirements, given the limited scope of DRC's intervention and the narrowly focused assistance that it provided to the OEB, the OEB concludes that DRC's claim for preparation for the oral hearing, argument preparation and case management of over 200 hours is excessive. The OEB is reducing the cost award for this time by 90 hours apportioned pro rata between legal counsel. The OEB permitted the filing of expert evidence based on DRC's estimate that the evidence would cost between $15,000 and $25,000 excluding hearing time. This provided a very broad range that should have been sufficient for the work that was provided including witness hearing time. The amount claimed was $30,538.25. The OEB is reducing the cost award for the expert evidence by $5,538.25 to $25,000, inclusive of HST.

31 The OEB concludes that Energy Probe's claim of over 235 hours for interrogatory preparation and oral hearing preparation is excessive and the OEB is reducing the cost award by 50 hours. When there is extensive preparation early in the proceeding, such as for interrogatory preparation, the OEB expects that preparation time later in the proceeding would be reduced.

32 Mr. Hann was granted intervenor status as an individual representing his own interests. Mr. Hann was not granted status as either an analyst or a consultant. On that basis, the OEB is not providing compensation that would be provided under the *Practice Directions on Cost Awards* for eligible analysts / consultants. This decision is not based on an individual intervenor's qualifications. Mr. Hann stated that he did not represent just himself as a customer but all customers who are trying to manage their electricity costs. The OEB disagrees. Toronto Hydro has nearly 800,000 customers. It would not be reasonable for the OEB to provide ratepayer-funded cost awards to individual customers in a regulatory proceeding. Self-appointment does not confer representative status on an individual intervenor. It is clear that the OEB did not grant Mr. Hann intervenor status in a representative capacity, but rather to advance his own interests and concerns with Toronto Hydro's application. Despite this, in recognition of the effort that Mr. Hann undertook in this proceeding, the OEB will grant an honorarium of $1,000 and recovery of the claimed disbursement costs.

33 While SEC's cost claim is significantly greater than other intervenors, the OEB notes that SEC coordinated its efforts with other intervenors and took the lead on numerous aspects of the application. The OEB also found that SEC's participation was of significant value in assessing the application. However, SEC recorded 96.1 hours for attendance at the oral hearing. The duration of the oral hearing was approximately 10 $^{1}/_{2}$ days, therefore 96.1 hours is difficult to reconcile with the record. No other intervernor claimed more than 65 hours for attendance at the oral hearing. Taking all of these factors into consideration, the OEB is reducing SEC's claim by 20 hours apportioned pro rata between legal counsel.

THE ONTARIO ENERGY BOARD ORDERS THAT:

34 Pursuant to section 30 of the *Ontario Energy Board Act, 1998*, Toronto Hydro-Electric System Limited shall immediately pay the following amounts to the intervenors for their costs:

• Association of Major Power Consumers of Ontario	$114,175.20
• Building Owners and Managers Association, Greater Toronto	$134,639.00
• Consumers Council of Canada	$84,275.40
• Distributed Resource Coalition	$102,935.53
• Energy Probe Research Foundation	$118,158.28
• Greater Toronto Apartment Association	$56,521.81
• Mr. Norman Hann	$2,168.61
• School Energy Coalition	$144,831.78
• Vulnerable Energy Consumers Coalition	$69,522.66

Footnotes

1 DER refers to Distributed Energy Resources.

2 On March 18, 2020, Energy Probe revised its total cost claim to $135,686.29 due to errors in its original filing.

3 EB-2014-0116.

TAB 3

Most Negative Treatment: Distinguished
Most Recent Distinguished: Hamilton-Wentworth (Regional Municipality) v. Hamilton-Wentworth Save the Valley Committee Inc. | 1985 CarswellOnt 386, 2 C.P.C. (2d) 117, [1985] O.J. No. 1881, 51 O.R. (2d) 23, 19 D.L.R. (4th) 356, 17 O.M.B.R. 411, 2 W.D.C.P. 462, 31 A.C.W.S. (2d) 501, 11 O.A.C. 8, 15 Admin. L.R. 86 | (Ont. Div. Ct., Jun 28, 1985)

1979 CarswellAlta 198
Alberta Supreme Court [Appellate Division]

Green, Michaels & Associates Ltd. v. Edmonton (City)

1979 CarswellAlta 198, [1979] 1 A.C.W.S. 261, [1979] 2 W.W.R. 481, 13 A.R. 574, 94 D.L.R. (3d) 641

Green, Michaels & Associates Ltd. et al. v. The Public Utilities Board

Clement, Haddad and Morrow JJ.A.

Judgment: January 19, 1979
Docket: Edmonton Appeal No. 11369

Counsel: *J.E. Redmond, Q.C.*, for appellants.
C.P. Clarke, for respondent.

Subject: Public
Related Abridgment Classifications
Administrative law
II Natural justice
II.1 Duty of fairness
II.1.a Procedural fairness
II.1.a.vi Reasons for decision
Headnote
Administrative Law --- Requirements of natural justice — Right to hearing — Procedural rights at hearing — Reasons for decision
Administrative law — Setting orders aside — Public utilities board disallowing certain costs to intervenors on rate hearing — Not erring in exercise of discretion to award costs but failing to give written reasons as required — The Public Utilities Board Act, R.S.A. 1970, c. 302, ss. 14(a), 60, 62(1), 64(1), (2) — The Administrative Procedures Act, R.S.A. 1970, c. 2, ss. 2(c), 8.
Public utilities — Determination of rates — Public Utilities Board disallowing certain costs to intervenors on rate hearing — Not erring in exercise of discretion to award costs but failing to give written reasons as required — The Public Utilities Board Act, R.S.A. 1970, c. 302, ss. 14(a), 60, 62(1), 64(1), (2) — The Administrative Procedures Act, R.S.A. 1970, c. 2, ss. 2(c), 8.
The appellants were intervenors in a hearing held by the respondent board to determine rates to be changed by Alberta Government Telephones. In December 1975 the board issued guidelines which it said would be applied to the hearings. One item of the guidelines stated that the costs of officials and employees of intervenors, and the costs of consultants who did not give evidence would not be awarded. The intervenors complained to the board that this item would cause them financial hardship and the guideline item was revised by the board to state that costs of intervenors' consultants who do not provide necessary and useful services in the proceedings would not be awarded. The hearings in question commenced in October 1975 and the applicants submitted costs up to 17th May 1976, which included expenses for expert consultants and counsel fees. On 11th February 1977 the board disallowed a portion of the costs by its order E77034, but, with one exception, did not give itemized reasons for the disallowances. The appellants appealed the order on the ground that the board erred in law in the exercise of its statutory discretion to award costs under s. 60 of the Public Utilities Board Act and on the ground that reasons of the disallowance were not given, contrary to the requirements of the Administrative Procedures Act.

Held, the appeal was allowed, the order vacated and the matter referred back to the board for redetermination. There was nothing to indicate that the board erred in the exercise of its discretion: it had acted in good faith, was entitled to establish guidelines, had not prejudiced the issue and had not acted arbitrarily or capriciously. However, as s. 8 of the Administrative Procedures Act required the board to give written reasons, the order should have stated clearly the findings of fact in respect of each particular item of the costs claimed and should have expressed adequate and intelligible reasons for the board's decision.

Table of Authorities

Cases considered:

Russell Food Equipment (Calgary) Ltd. v. Valleyfield Invts. Ltd. (1962), 40 W.W.R. 292 (Alta.) — *referred to*
R. v. JJ. of Merionethshire (1844), 6 Q.B. 162, 115 E.R. 63 — *referred to*
Re Northwestern Utilities Ltd. — *referred to*
Edmonton v. Public Utilities Bd. (1976), 2 A.R. 317 (C.A.) — *referred to*
Wrights' Can. Ropes Ltd. v. M.N.R., [1947] A.C. 109, [1947] 1 W.W.R. 214, [1947] C.T.C. 1, [1947] 1 D.L.R. 721 (P.C.) — *considered*
Re Northern Enrg. and Dev. Co. and Philip — *considered*
Re Mun. and Public Utility Bd., 38 Man. R. 541, [1930] 1 W.W.R. 615, [1930] 3 D.L.R. 387 (C.A.) — *considered*
Capital Cities Communications Inc. v. Can. Radio-Television Commn., [1978] 2 S.C.R. 141, 81 D.L.R. (3d) 609, 18 N.R. 181 — *considered*
Dome Petroleum Ltd. v. Public Utilities Bd. (1977), 2 A.R. 453, 13 N.R. 301, affirmed 2 A.R. 451, 13 N.R. 299 — *considered*
Padfield v. Minister of Agriculture, Fisheries and Food, [1968] A.C. 997, [1968] 1 All E.R. 694 (H.L.) — *applied*
Re Poyser and Mills' Arbitration, [1964] 2 Q.B. 467, [1963] 1 All E.R. 612 — *applied*

The judgment of the court was delivered by *Clement J.A.*:

1 This appeal is from order E77034, made by the Public Utilities Board on 11th February 1977 in the course of a rate hearing, by which the board fixed the costs of intervenors up to and including an intermediary stage designated as the "Manner of Regulation Proceeding". The appellant intervenors had submitted bills of costs up to that stage, which were substantially reduced by order E77034 as the following table shows:

	As Presented	As Allowed
City of Edmonton	$29,212.02	$ 9,750.00
Green, Michaels & Associates Ltd.	$32,893.07	$14,330.00
Consumers' Association of Canada	$81,686.52	$39,870.00

It should be noted that the manner of regulation proceeding hearing was held after phase I of the hearing had been commenced by Alberta Government Telephones ("A.G.T.") filing the documents supporting its application and while preparation was in progress by the intervenors for viva voce evidence based on the documents. The preparation required consultations with experts on the subject, the expenses of which up to the designated time are reflected in the bills of costs, which include all costs claimed from October 1975 to 17th May 1976.

2 The rate hearing was on an application by A.G.T. in September 1975 pursuant to the Public Utilities Board Act, R.S.A. 1970, c. 302, for an order fixing a rate base, just and reasonable new rates, tolls and charges, and interim rates. The jurisdiction of the board in respect of costs is given by s. 60:

> 60. (1) The costs of and incidental to any proceeding before the Board, except as otherwise provided in this Act, are in the discretion of the Board, and may be fixed in any case at a sum certain or may be taxed.
>
> (2) The Board may order by whom and to whom any costs are to be paid, and by whom the same are to be taxed and allowed.
>
> (3) The Board may prescribe a scale under which such costs are to be taxed.

The order granting leave to appeal (s. 62(1)) raises these questions of law:

> 1. "Did the Board by its Order E.77034 properly exercise its statutory discretion in taxing and fixing the costs of the Intervenors, having regard to all of the circumstances and the purposes of the Act?"
>
> 2. "Is Order E.77034 a sufficient compliance with the requirements of Section 8 of *The Administrative Procedures Act?"*

3 In October 1975 the board held a pre-hearing conference with A.G.T. and known intervenors, including the appellants. Intervenors' costs came under some discussion. In December the board issued a document entitled "Guidelines — Rate Hearing Costs". It appears from the record that they were to apply to all rate hearings. The items having a bearing on the appeal are these:

> 5. The Board will not, in future rate hearing decisions, order the Applicant to 'pay such reasonable costs of Intervenors as may be agreed upon and failing agreement, as may be fixed by the Board.'
>
> 6. Generally, the board will award reasonable Intervenor costs against the Applicant and will allow the Applicant to pass such costs on to the consumers through the rates.
>
> 7. Generally, the costs of officials and employees of Intervenors, and the costs of Intervenors' consultants who do not give evidence, will not be awarded against the Applicant.
>
> 8. The Board will evaluate the participation of counsel, expert witnesses, and officers and employees of both the Applicant and Intervenors and the Board will allow costs to be passed on to consumers through the rates in proportion to the Board's evaluation of such participation.

Provision was made that details be given of the costs claimed in a bill. It is principally item 7 and the alleged effect of its operation that is the subject of appeal. Subsequently, on 12th January 1976, further guidelines were issued relative to the procedure for seeking payment, but they have no particular bearing on the matter in controversy.

4 There were other rate hearings in progress at the time, conducted by different divisions of the board, and complaints were made on behalf of intervenors in them as well as in the A.G.T. hearing. A letter to the board written by the solicitor for Green, Michaels & Associates Ltd. on 17th January 1975 expresses the main complaint:

> Alberta Government Telephones has filed in support of its application, a brief weighing something in excess of ten pounds, comprising some hundreds of pages, many of which constitute graphs which are the synoptic analysis and interpretation of hundreds of pages of technical and financial data which only technical people, accountants and other experts are qualified to understand and challenge. The brief on behalf of Alberta Government Telephones in this application is massive, and for its compilation, Alberta Government Telephones has had at its disposal, a full time and regularly employed staff of bookkeepers, accountants, privately retained general counsel, professional engineers, stenographic and clerical help in almost unrestricted degree ...
>
> Yet, in the guidelines for rate hearing costs at Page 2, Point #7, it is stated that generally, the costs of officials and employees of intervenors and the costs of intervenor's [sic] consultants who do not give evidence will not be awarded against the applicant. The result of that policy as set out in Point #7 of the guideline is to prevent any effective intervention in any public utility rate hearing by any interested person or persons other than a very large and well-funded corporation.
>
> Yet, of course, the application for rate increase primarily affects the average and ordinary citizen who is not so funded. The result in this situation is that such a policy renders any invitation of the Public Utilities Board to the public at large to intervene a mere sham — a pretense ...
>
> To suggest that no expert will be entitled to costs for his consultants who do not give evidence is ridiculous. We seek to show that certain aspects of this application on behalf of Alberta Government Telephones are not well founded and may succeed in this endeavour by cross-examination, and the appli cation may accordingly be defeated in whole or in

> part out of the mouths of the witnesses of Alberta Government Telephones themselves, and without the necessity of even calling any witnesses, but in order to effectively carry out such cross-examination, it is certainly necessary to have the appropriate expert people available to assist in the preparation of that cross-examination, and subsequently, present at the hearing where they can be giving advisement on answers to the crossexamination. Despite the fact that this preparation has involved innumerable hours on their part, it appears that under the policy of this Board, unless they take the witness stand and contribute substantially in direct evidence, then Green Michaels & Associates Ltd. and any other intervenors are not entitled to be covered for the costs of its consultants and experts in the intervention.

5 It appears that the hearing on phase I resumed on 19th January 1976 and some discussion of costs again took place. The acting chairman of the board informed counsel that the guidelines would be applied according to the discretion of the sitting division of the board at any particular hearing. On 26th January counsel for Consumers' Association of Canada ("Consumers'") wrote at length to the board requesting a hearing on the effect of items 7 and 8 of the guidelines. In his letter he said:

> I am in complete agreement with the sentiment that the language of guideline No. 7 imposes upon interveners a serious financial risk with respect to consultants' fees. If consultants acting for interveners will not be paid their consultant fees unless they give testimony, the only fair inference that one can draw is that the Board does not recognize the absolute necessity of retaining consultants in order to assist in the preparation of cross-examination of highly qualified and experienced engineers, accountants, financial experts and rate of return expert witnesses. A lawyer is not qualified in any of these fields and cross-examination without the assistance of consultants would deprive the Board of the kind of assistance needed to assess a utility company's case ...
>
> The Consumers' Association of Canada is not in a financial position to take these risks and I am instructed to make the present application and the consultants have been instructed not to take any further steps in preparation of the hearing until the matter has been resolved.

He pointed out that A.G.T. had filed a further massive volume of material bearing on phase II of the hearing, which would require preparation for cross-examination and hearing as was involved in phase I. The position of experts retained by intervenors is illustrated by a letter written by a consultant to Consumers' to its solicitor, from which I extract the following:

> For my own part, it would obviously be both impractical and foolish for me to continue in the capacity of consultant in any hearings before the Board without some reasonable assurance that I will be able to recover my fees. In the case of the Consumers Association of Canada for whom we have acted on a number of occasions, it is my understanding that the CAC is and presumably will not be in a position to fund, by itself, any interventions before the Board. I must therefore regretfully advise you that I will not be able to continue acting as a consultant for you, at least until some satisfactory solution to the question of costs can be found.

6 The rate hearing resumed on 2nd February 1976, when an application for an adjournment was made by intervenors, one ground for which was asserted confusion over costs to be allowed for consultants' fees. Much was said by counsel. The gist of it is contained in the above extracts from correspondence, and I will refer only to one statement by counsel for Consumers':

> One guideline, No. 7, seems to indicate a radical departure from the past practices of the Board by placing intervenors, particularly the Consumers' Association of Canada, in a position whereby they will not be financially able to represent Consumers as an interested party in rate hearings as long as there is a risk that any consultants engaged for giving advice prior to and during public utility rate hearings might not be paid due to the possibility of guideline No. 7 being applied, and then the right of the CAC to have adequate representation could be seriously impaired ...
>
> Now, the costs of officials and employees of the Consumers' Association of Canada in rate hearings are of little significance, however, costs for fees charged by consultants engaged to assist in a rate hearing are quite another matter. Qualified consultants in the engineering, financial, economic aspects of a public utility rate case are needed by intervenors for important services besides presenting testimony.

7 The application for adjournment was denied. In respect of the ground of uncertainty and confusion arising out of the guidelines, the board in its written decision said this in part:

> 1. The application should be denied on the grounds that the Board's Rate Hearing Costs Guidelines were so uncertain and confusing as to require intervenors to suspend preparation.
>
> In view of the rulings of other divisions of the Board on January 19, 1976 and January 26, 1976, the Board considers that it would be reasonable for intervenors to expect this division not to make any major change in the past practices of the Board in respect to costs of the AGT rate hearing ...
>
> In respect to the application of the Board's rate hearings costs guidelines to this hearing, it is the ruling of this Division of the Board that Guideline No. 7 should be revised for the purpose of this hearing as follows:
>
> > 7. Generally, the costs of officials and employees of intervenors will not be awarded against the applicant. Generally, the costs of intervenor's consultants who do not provide necessary and useful services in the proceedings will not be awarded against the applicant.
> >
> > The board, of course, will hear any applications in respect to intervenor costs in the above categories and will of course exercise its discretion pursuant to Section 60 of the Public Utilities Board Act.

8 Nevertheless, the board, of its own motion, set the hearing over to March 1976 to enable counsel to prepare for an important step in the proceedings, namely, determination of the method by which A.G.T. should be regulated. It was accepted that this aspect would involve witnesses as well as counsel. After A.G.T. had presented its evidence and witness and views, there was to be a further adjournment to April to enable intervenors to prepare for cross-examination, and the presentation by witnesses and submissions of their own views on the proper method of regulation. It is apparent that the intervenors incurred expenses for expert consultants in the course of these preparations, as well as counsel fees.

9 The board invited intervenors and applicants to make submissions and attend a meeting on 15th March 1976 to discuss the guidelines. Extensive written submissions were filed and oral representations were made. Eventually the itemized bills of costs of the intervenors, including counsel fees, were delivered to the board with copies to A.G.T.

10 On 8th July 1976 the board issued decision E76090, which includes the following:

> While the Board appreciates the assistance provided by effective intervention, inasmuch as the costs of such intervention if awarded against the Applicant, may ultimately be passed on to the customers of the Applicant, the Board considers that the costs of each intervenor must be carefully scrutinized and the assistance provided must be evaluated by the Board in each particular case ...
>
> (13) AGT is hereby directed to pay the reasonable costs of the Intervenors incurred up to the filing of replies to argument in the Manner of Regulation Hearing, in such amounts as may be agreed upon by the parties, but subject before payment to the approval of the Board; and failing agreement between the parties within 30 days of the date of this Decision, in such amounts as shall be fixed by the Board upon application by AGT and/or any of the Intervenors.

11 Pursuant to provisions in the guidelines of 12th January 1976, A.G.T. reviewed in detail the several bills and reported to the board. In respect of the bill of Green, Michaels & Associates Ltd., certain deductions aggregating $2,317.58 were recommended from specific items. On other specific items A.G.T. requested or recommended evaluation or even stringent examination by the board of the basis for the items. On some items comments were made that the matter in the item did "not appear to have been used or useful to the Board". The specific deductions would reduce the bill from its original amount of $32,893.07 to $29,288.19. The reports of A.G.T. in respect of the bills of costs of the other two appellant intervenors do not appear in the appeal books but they are taken to be of the same character, and the details of each report would not necessarily advance consideration of the issues of law involved. There is in evidence, however, a "reconciliation" which the board directed A.G.T. to furnish to Consumers' Association of Canada. It shows that of the total of $81,686.52 claimed, A.G.T. disapproved of $7,330.65, approved

of $40,787.96, and left to the board $6,103.16 for evaluation. I am unable to appreciate that this amounts to a reconciliation, but it evidences the part played by A.G.T. in the matter.

12 On 31st August 1976 the board held a hearing on the bills and the reports made by A.G.T. Much was said, during which counsel for A.G.T. explained what was involved in its reports and the intervenors stated their positions in respect of various items and heads of claim. Of interest is the following observation made by counsel for A.G.T. in the course of his address to the board:

> Now the Board is currently considering the question of costs and cost guidelines and as yet has not handed down any replies, guidelines or decisions in that regard, but it is apparent that it is the basis of the current Board practices that interveners are granted in the main, full costs of consultants fees and disbursements in presenting an intervention to the Board. There are of course exceptions for specific reasons, but the policy of the Board generally has been to do that.

13 No decision on costs was reached, and the rate hearing continued intermittently.

14 In October 1976 A.G.T. gave notice of an application to the board for an order refusing all or a part of the costs claimed by Consumers' in respect of the services of its expert consultant, Dr. Star:

> ... on the basis that it is an abuse of the purpose of the Act and of the Board practices and procedures and in particular the information request procedure and practice of awarding solicitor-client or consultant-client costs, to allow any solicitor, consultant, intervenor or party to realize or attempt to realize a commercial gain from information supplied in support of an application before the Board.

15 Dr. Star had prepared a modification of a computer program that had been put in evidence by A.G.T., and what is involved here was made clear in the lengthy address by counsel to the board when the application was heard.

16 Eventually the intervenors served formal applications on the board to fix their interim costs. The matter was heard on 2nd December 1976. On the next day the board heard the application of A.G.T. above referred to. The complaint was, in the words of counsel, that Dr. Star "has re-worked an A.G.T. computer program and is now intending to gain commercially in respect of that re-work program." This observation is based on information given by Dr. Star in the course of his cross-examination by A.G.T. that he would make use of the modification for the benefit of other clients. It appears that Dr. Star had initially objected to putting his modification in evidence, probably from the same concern for his proprietary interests as was motivating A.G.T. in making the complaint. In the course of his address counsel went on to say:

> Now it is submitted that the failure of Dr. Star to deliver the program in time, or to place it before the Board has a material effect upon the credibility which can be given to his evidence with respect to the use of the program, however it is submitted that it is not of specific relevance to this application — I would emphasize that the question of whether Dr. Star delivered the document or didn't deliver the document, it is submitted is not of particular relevance to the application, what is relevant, it is submitted is the intention to realize a commercial gain.

17 The order in appeal was finally made, as I have noted, on 11th February 1977. Before discussing it, I must draw attention to a breakdown prepared by the board at the request of Consumers' and included in the appeal books, categorizing the amounts allowed by the board out of Consumers' bill of costs. It was given after the order was made and must be taken as prepared by the board from evidence submitted to it within s. 64(1) of the Act. It is in the form of a table:

	Claimed	Allowed
1. W.D. Abercrombie and A. Gerig		
Fees	$26,860	$ 8,720
Disbursements	5,186	2,926
2. Econ. Research (S. Star)		
Fees	31,465	12,500

	Disbursements	2,850	1,098
3.	Emjay & Associates		
	Fees	8,156	8,156
	Disbursements	785	638
4.	Millen Consulting Services		
	Fees	4,000	4,000
	Disbursements	705	483
5.	Anderson, Macor & Co.		
	Fees	800	800
	Disbursements	—	—
6.	Pat Brock		
	Fees	—	—
	Disbursements	462	549
7.	Total	$81,269	$39,870

For clarity, W.D. Abercrombie and A. Gerig were of counsel for Consumers'. The breakdown was accompanied by a letter from the board dated 8th March 1977, which included the following:

> The attached table provides the breakdown requested, and reflects the Board's evaluation of the contribution made by Counsel and experts retained by the CAC and adjustments to the disbursements claimed for the reasons given in Decision No. E77034.
>
> In anticipation of a request for further detail, the Board would like to clarify its position, with regard to Decision No. E77034, as follows:
>
> (1) The Board considers that it would be inappropriate to provide any further detail in respect to specific disbursements or fees of any lawyer or consultant.
>
> (2) It is emphasized that for the reasons stated in Decision No. E77034 the amounts ordered to be paid reflect the Board's judgment as to the amounts that should be borne by all the customers of AGT.
>
> (3) The Board considers that it should not become involved in the settlement of bills of account submitted by individual lawyers and consultants to their clients. In providing the details heretofore provided the Board should not be construed as interfering with any contractual arrangements between the lawyers, consultants and clients.

18 Coming now to order E77034, it deals first with the claim in the bill of Consumers' for payment of $34,315 to Dr. Star for professional consultant services and disbursements. On this the board said:

> The Board considers that any protection the original AGT computer program may have had as to copyright or proprietary interest was not in any way lessened by reason of its having been marked as an Exhibit in the proceedings, and that in this respect, if AGT feels that it has been wronged by Dr. Star's use of the program, it has its remedies elsewhere. The Board considers that it would not be proper to use its discretion in respect to costs to indicate a judgment of Dr. Star's conduct, or to suggest that documents before it have or have not lost some status by reason of being marked as Exhibits. The Board does consider, however, that Dr. Star's refusal to submit the modified program in time to permit effective cross-examination in respect to it, has detracted from the usefulness of his evidence to the Board based on the modified program.

I take it that the comment on the effect of the delay on the usefulness of the cross-examination reflects only a subjective impression of the board of its effectiveness, or the assistance it provided to the board on the issues of the rate hearing. I do not find in the record before the court that counsel asked for an adjournment or otherwise asserted that he had been hampered by

the delay in preparing for or carrying on the cross-examination. Indeed, his point had nothing to do with this, as I have noted above. There is no other reason given for the reduction of his fees and disbursements from $34,315 to $13,598.

19 The decision then proceeds to several pages of comments of a general nature under a number of headings dealing with particular categories of claim. In some, it is intimated that, for the future, continuing consideration may affect the attitude of the board. I put such comments aside as having no bearing on the present issues. Otherwise, I can find nothing in the generalized comments to attract the supervisory jurisdiction of the court. Indeed, they are not the subject of attack. The real objection is that they contribute nothing to the requirements of the Administrative Procedures Act, R.S.A. 1970, c. 2, in the way of informing the intervenors why, and on what heads of claim and what bases their respective bills were reduced so dramatically. Their position remains that it is in large measure impossible to determine what items of claim were reduced or disallowed, and for what reason. This applies even to the table provided to Consumers' by the board. By the operative part of the order, the board directed A.G.T.:

> ... to pay to the Intervenors the amounts shown below in respect to costs which the Board considers have been reasonably and necessarily incurred in connection with A.G.T.'s General Rate Application up to the conclusion of the Manner of Regulation Proceeding.

There follow, as far as the appellants are concerned, the figures I have set out at the beginning of the judgment, viz.: city of Edmonton, $9,750; Green, Michaels & Associates Ltd., $14,330; Consumers', $39,870. Save to the limited extent in respect of Consumers' bill, the order is bare of particulars by which the reductions were come to.

20 In respect of the first question on which leave to appeal was granted, the issue is whether the board erred in law in the exercise of its statutory discretion under s. 60. The common law has itself recognized that its supervisory jurisdiction is similarly limited when a right of appeal is given from the exercise of a discretion by an administrative tribunal which results in a decision adversely affecting a legitimate and significant interest of a subject. In *Wrights' Can. Ropes Ltd. v. Minister of National Revenue*, [1947] A.C. 109, [1947] 1 W.W.R. 214, [1947] C.T.C. 1, [1947] 1 D.L.R. 721 (P.C.), Lord Greene M.R. said at pp. 223-24:

> This right of appeal must, in their Lordships' opinion, have been intended by the Legislature to be an effective right. This involves the consequence that the Court is entitled to examine the determination of the Minister and is not necessarily to be bound to accept his decision. Nevertheless the limits within which the Court is entitled to interfere are in their Lordships' opinion strictly circumscribed. It is for the taxpayer to show that there is ground for interference, and if he fails to do so the decision of the Minister must stand. Moreover, unless it be shown that the Minister has acted in contravention of some principle of law the Court, in their Lordships' opinion, cannot interfere: the section makes the Minister the sole judge of the fact of reasonableness or normalcy and the Court is not at liberty to substitute its own opinion for his. But the power given to the Minister is not an arbitrary one to be exercised according to his fancy. To quote the language of Lord Halsbury in *Sharp v. Wakefield*, [1891] A.C. 173 at 179 (H.L.), he must act 'according to the rules of reason and justice, not according to private opinion; according to law, and not humour. It is to be not arbitrary, vague and fanciful, but legal and regular.' Again in a case under another provision of this very s. 6 (sec. 6, [1] [of the Income War Tax Act, R.S.C. 1927, c. 97]), where a discretion to fix the amount to be allowed for depreciation is given to the Minister, Lord Thankerton in delivering the judgment of the Board said:
>
> 'The Minister has a duty to fix a reasonable amount in respect of that allowance and, so far from the decision of the Minister being purely administrative and final, a right of appeal is conferred on a dissatisfied taxpayer; but it is equally clear that the court would not interfere with the decision unless, as Davis, J. states, "it was manifestly against sound and fundamental principles."' (*Pioneer Laundry and Dry Cleaners Ltd. v. Minister of National Revenue*, [1940] A.C. 127 at 136, [1939] 3 W.W.R. 567, [1939] 4 D.L.R. 481, [1939] 4 All E.R. 251 (P.C.).)

This passage makes it clear that this court is not to engage itself in the amounts fixed by the board in respect of the several bills, but only to determine whether in arriving at those amounts it erred in any way described by Lord Greene. A similar restriction exists on an appeal from the exercise of a discretion by a judge: *Russell Food Equipment (Calgary) Ltd. v. Valleyfield Invts. Ltd.* (1962), 40 W.W.R. 292 (Alta.).

21 With respect, I am of opinion that the views of Lord Greene M.R. reflect a growing recognition of the need in the general public interest for the supervisory jurisdiction of the court to keep pace with the increase of administrative functions created by legislatures. This did not engage the attention of the majority of the Manitoba Court of Appeal in delivering judgment in the earlier case of *Re Northern Enrg. and Dev. Co. and Philip; Re Mun. and Public Utility Bd.*, 38 Man. R. 541, [1930] 1 W.W.R. 615, [1930] 3 D.L.R. 387. Nevertheless, Trueman J.A., in discussing the scope of the discretion of that board in respect of costs, adopted a passage in 4 Encyc. Laws of England 609 as applicable to his considerations. It pointed out, in effect, that the grant of a discretion permits consideration of all the circumstances of the matter and the purposes for which the discretion is given, including "considerations of convenience or utility or saving of expense". I am of opinion that such factors are basically within the scope of the discretion of the board under s. 60 and that the determination of a question of law in the exercise of that discretion must recognize that this is so in applying the principle enunciated by Lord Greene M.R.

22 The attack on the awards is made by the intervenors on several fronts under the first question of law. I am of opinion that they all must fail on the facts. I will deal with them as briefly as possible, as in my view the justifiable matter of complaint arises out of the second question of law, namely, whether the requirements of the Administrative Procedures Act were adequately met.

23 It is urged that the board did not exercise its discretion in good faith, that is to say, reasonably or justly, in promulgating cost guidelines that were more restrictive than had been the practice in the past and in doing this at a time when some costs had already been incurred on the former footing and further costs were in the making. It will be recalled that the guidelines had first been promulgated in December 1975, only some two months after the pre-hearing conference. From that time onwards the intervenors apparently took up much hearing time and energy in complaining about and endeavouring to ease the restrictions. In January 1976 the board modified guideline 7, the principal ground of complaint, by what I consider to be a reasonable exercise of discretion. The record does not show whether or to what extent the costs actually incurred by the intervenors after the pre-hearing conference up to December 1975 or to January 1976 were reduced by the board. In my view either of these were the latest dates on which such complaints against the board could arguably have validity: thereafter the intervenors cannot be fairly said to have been misled; they were engaged in a rearguard action. In any event, I am of opinion that the circumstances were not so extensive as to raise a question of law. The degree by which the board departed from past practices in order E77034 is in dispute, but it certainly is clear that the board by its guideline 7 and subsequent amendment left no doubt of its intention to exercise more amply than in the past its discretion as to costs.

24 It is asserted that by establishing and following the guidelines the board disabled itself from the proper exercise of its discretion under s. 60. There is no inherent error in law in providing guidelines as a statement of matters that will be of concern to a tribunal. In *Capital Cities Communications Inc. v. Can. Radio-Television Commn.*, [1978] 2 S.C.R. 141, 81 D.L.R. (3d) 609, 18 N.R. 181, one issue was the validity of guidelines adopted by the commission, in which it made statements of its own policy. It was contended that the commission had not properly exercised its authority by deciding an application by reference to its own policy statements. I find adaptable to the broad discretion given by s. 60 this passage in the judgment of the majority, delivered by Laskin C.J.C., at p. 208-209:

> In my opinion, having regard to the embracive objects committed to the Commission under s. 15 of the Act [the Broadcasting Act, R.S.C. 1970, c. B-11], objects which extend to the supervision of 'all aspect [sic] of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 of the Act', it was eminently proper that it lay down guidelines from time to time as it did in respect of cable television. The guidelines on this matter were arrived at after extensive hearings at which interested parties were present and made submissions. An overall policy is demanded in the interests of prospective licencees and of the public under such a regulatory regime as is set up by the *Broadcasting Act*. Although one could mature as a result of a succession of applications, there is merit in having it known in advance.

25 The board was engaged in the balancing of interests. On the one arm there was — and is — the general public interest in the reasonable control of monopolistic utilities serving the public, an interest affirmed by the purpose of the Act itself and extending to the segment of the public served by the utility. That interest is aided by well considered intervention, a matter recognized explicitly by the board and inherently by the Act. Thus, on the other arm is the financing of intervenors. Intervention is in large

measure in the public interest undertaken by those who are legitimately concerned in that interest and who are sufficiently good citizens to become active in its aid. It is patent that in most case substantial expense must be incurred for useful intervention, which need be no more than adequate testing of the propositions and figures put forward by an applicant, whether by cross-examination or further evidence. These are factors to which the board has properly given recognition. The board is prepared to pass on to the public those costs of intervention which it has found to be of some value to the public interest. There is no error in law in this: rather, it is generally recognized as proper. The board has also announced by amended guideline 7 that, generally, the costs of consultants "who do not provide necessary and useful services in the proceedings will not be awarded against the applicant", which is to say, such costs will not be passed on to the public but will be borne by the intervenors themselves. This is a form of imposition of self-discipline which I do not find objectionable. It is not in the public interest to have intervention merely for the sake of intervention: there should be some perceptible value to it, and the board has left open for consideration in any given case whether the services of the consultant were in some way or to some extent of value and not merely misconceived or frivolous. I do not see error in law in this. It guards against abuse which could arise if the board were to abdicate its discretion over costs. On the other hand, one would expect the board to recognize the value of the services of qualified consultants in determining what aspects of an application should be subjected to vigorous scrutiny and what should be passed over as unexceptionable. Guidelines for such a policy, which in my view is within the discretion of the board, have a useful purpose.

26 In saying this, I exclude guidelines which would have the effect of pre-determining the exercise of the discretion. Guidelines of that nature would, of course, constitute an invalid fetter on the discretion, certainly if acted on: *R. v. JJ. of Merionethshire* (1844), 6 Q.B. 162, 115 E.R. 63. To adopt the words of Lord Denning M.R. in *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997 at 1008, [1968] 1 All E.R. 694 (H.L.), the board ought not to make up its mind in advance. I can find nothing in the record to establish that the board did so in respect of the bills under consideration.

27 Then, it is said that the board, in coming to order E77034, took into account irrelevant matter and failed to take into account relevant matter. This contention is rested on the ground that the board gave no reasons for the reductions it made in the several bills nor, save to a limited extent in the case of Consumers' bill, did it even relate any particular item of re duction to its statement of policy with reasons for the extent of the application of the policy to that particular item. From this circumstance we are asked to draw an adverse inference. In *Wrights' Can. Ropes Ltd. v. Minister of National Revenue*, supra, Lord Greene M.R. said at p. 224:

> In the present case the Minister's decision is attacked on the ground that there was before him no material on which he, as a reasonable man, could determine that any part of the commissions in question was in excess of what was reasonable for the business carried on by the respondents. The ground of attack is different from that which was successful in the *Pioneer Laundry* case [supra]. There the Minister had given a reason for his decision which was in law incapable of supporting it, whereas in the present case no reason was given by the Minister although certain suggestions were made in the hearing before their Lordships by counsel, as will presently appear. Their Lordships find nothing in the language of the Act or in the general law which would compel the Minister to state his reasons for taking action under sec. 6(2). But this does not necessarily mean that the Minister by keeping silence can defeat the taxpayer's appeal. To hold otherwise would mean that the Minister could in every case or at least the great majority of cases render the right of appeal given by the statute completely nugatory. The Court is, in their Lordships' opinion, always entitled to examine the facts which are shown by evidence to have been before the Minister when he made his determination. If those facts are in the opinion of the Court insufficient in law to support it the determination cannot stand. In such a case the determination can only have been an arbitrary one. If, on the other hand, there is in the facts shown to have been before the Minister sufficient material to support his determination the Court is not at liberty to overrule it merely because it would itself on those facts have come to a different conclusion. As has already been said, the Minister is by the subsection made the sole judge of the fact of reasonableness and normalcy but as in the case of any other judge of fact there must be material sufficient in law to support his decision.

The same view was expressed by Lord Reid in *Padfield v. Minister of Agriculture, Fisheries and Food* at pp. 1032-33.

28 The difficulty facing the intervenors is that in all of the circumstances disclosed in the record there is little ground for the contention save perhaps in respect of the treatment of the claim by Consumers' for reimbursement of the fees and dis bursements of Dr. Star. There, one is left with some doubt as to whether in the overall view the slashing of his account may have been in some measure the result of a perhaps unconscious resentment of the attitude of Dr. Star, despite the explicit statement by the board that this was not a factor. The value of the Administrative Procedures Act is apparent here, as elsewhere in the case.

29 Finally, it is urged that the board acted arbitrarily and capriciously. The record gives no support to this contention and this, I think, is made sufficiently clear by the foregoing review.

30 In the factum of the appellants a number of cases were noted dealing with the discretion exercisable by courts in the matter of costs of litigation, as well as statements propounded in texts on the subject. I do not find them sufficiently appropriate to warrant discussion. Such costs are influenced by Rules of Court, which in some cases provide block tariffs, and, in any event, are directed to lis inter partes. We are here concerned with the costs of public hearings on a matter of public interest. There is no underlying similarity between the two procedures or their purposes to enable the principles underlying costs in litigation between parties to be necessarily applied to public hearings on public concerns. In the latter case the whole of the circumstances are to be taken into account, not merely the position of the litigant who has incurred expense in the vindication of a right.

31 Coming now to the Administrative Procedures Act, it provides:

> 8. Where an authority exercises a statutory power so as to adversely affect the rights of a party, the authority shall furnish to each party a written statement of its decision setting out
>
> (*a*) the findings of fact upon which it based its decision, and
>
> (*b*) the reasons for the decision.

This provision complements provisions in the Public Utilities Board Act:

> 14. The secretary shall
>
> (*a*) keep a record of all proceedings conducted before the Board or any member thereof, ...
>
> 64. (1) On the hearing of the appeal, no evidence other than the evidence that was submitted to the Board upon the making of the order appealed from shall be admitted, and the court of appeal shall proceed either to confirm, vary or vacate the order appealed from and in the latter event shall refer the matter back to the Board for further consideration and redetermination.
>
> (2) On the hearing of the appeal the court may draw all such inferences as are not inconsistent with the facts expressly found by the Board and as are necessary for determining the question of jurisdiction or of law, as the case may be, and shall certify its opinion to the Board, and the Board shall make an order in accordance with that opinion.

Thus, the supervisory jurisdiction of the court is assisted beyond what it derives through the common law from comparing the record with the decision, in the absence of stated reasons. The function of s. 8 is well described in the judgment of Megaw J. in *Re Poyser and Mills' Arbitration*, [1964] 2 Q.B. 467 at 478, [1963] 1 All E.R. 612, and it appears to be necessary to state it again:

> Parliament provided that reasons shall be given, and in my view that must be read as meaning that proper, adequate reasons must be given. The reasons that are set out must be reasons which will not only be intelligible, but which deal with the substantial points that have been raised. In my view, it is right to consider that statutory provision as being a provision as to the form which the arbitration award shall take. If those reasons do not fairly comply with that which Parliament intended, then that is an error on the face of the award. It is a material error of form.

This formed the basis for the judgment of the majority of this court on the point in *Re Northwestern Utilities Ltd.; Edmonton v. Public Utilities Bd.* (1976), 2 A.R. 317, and of the judgment of this court delivered by Sinclair J.A. on this point in *Dome Petroleum Ltd. v. Public Utilities Bd.* (1977), 2 A.R. 453 at 472, 13 N.R. 301, affirmed 2 A.R. 451, 13 N.R. 299, where he said:

> As was pointed out by Megaw, J. in *Poyser and Mills' Arbitration* [supra], a case dealing with corresponding provisions of the *Tribunals and Inquiries Act, 1958* [(U.K.), c. 66], it must be kept in mind that the section is intended to enable persons whose rights are adversely affected by an administrative decision to know what the reasons for that decision were. The reasons must be proper, adequate and intelligible. They must also enable the person concerned to assess whether he has grounds of appeal.

The judgment of Sinclair J.A. was affirmed by the Supreme Court of Canada.

32 It is apparent that the board has not only failed to comply with the requirements of s. 8 but has deliberately set its face against doing so. It is asserted by its counsel as justification that the Act does not apply to order E77034, although the board itself has been brought within its operation. It is argued that this order does not constitute the exercise of a " statutory power" within the definition of that term given by the general words of s. 2(*c*) of the Administrative Procedures Act:

> 2. In this Act, ...
>
> (*c*) 'statutory power' means an administrative, quasi-judicial or judicial power conferred by statute, other than a power conferred on a court of record of civil or criminal jurisdiction or a power to make regulations, and for greater certainty, but without restricting the generality of the foregoing, includes a power ...

I omit the ensuing particularization, as I do not think that any of them can be strained to encompass the operation of order E77034.

33 I can see no merit in this contention. The board was exercising directly a discretion specifically given by the Act. The exercise of such a discretion is in my view the exercise of a statutory power.

34 We are here dealing with an order fixing costs. This is a different procedure from taxing costs in which each item in a bill is examined by the taxing officer in the presence of the claimant and whoever is adverse in interest, and a decision reached for reasons which are then stated. When the costs are not so taxed but are fixed by order, the importance of the requirements of the Administrative Procedures Act become even more urgent, and the order must state clearly the findings of fact in respect of each particular item of the claimed costs which the order affects, and express "adequate and intelligible" reasons for the decision in respect of it, in order that it can be determined whether the findings of fact are well grounded and the reasons based thereon are proper.

35 I would vacate order E77034 and refer the matter back to the board for further consideration and redetermination in conformity with the requirements of s. 8 of the Administrative Procedures Act.

36 In the light of s. 66(2) of the Public Utilities Board Act, there will be no costs against the board.

TAB 4

Most Negative Treatment: Distinguished
Most Recent Distinguished: Marvin Hertzman Holdings Inc. v. Toronto (City) | 1998 CarswellOnt 5761, 37 O.M.B.R. 426, 66 L.C.R. 71 | (Ont. O.C.H., Nov 26, 1998)

1985 CarswellOnt 386
Ontario Divisional Court

Hamilton-Wentworth (Regional Municipality) v. Hamilton-Wentworth Save the Valley Committee Inc.

1985 CarswellOnt 386, [1985] O.J. No. 1881, 11 O.A.C. 8, 15 Admin. L.R. 86, 17 O.M.B.R. 411, 19 D.L.R. (4th) 356, 2 C.P.C. (2d) 117, 2 W.D.C.P. 462, 31 A.C.W.S. (2d) 501, 51 O.R. (2d) 23

REGIONAL MUNICIPALITY OF HAMILTON-WENTWORTH v. HAMILTON-WENTWORTH SAVE THE VALLEY COMMITTEE INC. et al. *

Osler, J. Holland and Rosenberg JJ.

Heard: April 17, 18, 19, 1985
Judgment: June 28, 1985
Docket: No. 14/85

Proceedings: refused leave to appeal *Hamilton-Wentworth (Regional Municipality) v. Hamilton-Wentworth Save the Valley Committee Inc.* ((1985)), 1985 CarswellOnt 2055, 17 O.M.B.R. 511 ((Ont. C.A.)); additional reasons at *Hamilton-Wentworth (Regional Municipality) v. Hamilton-Wentworth Save the Valley Committee Inc.* ((1985)), 1985 CarswellOnt 1735, 51 O.R. (2d) 23 at 43, 2 C.P.C. (2d) 117 at 144, 15 Admin. L.R. 86 at 120, 19 D.L.R. (4th) 356 at 377, 17 O.M.B.R. 411 at 440, 11 O.A.C. 8 at 25 ((Ont. Div. Ct.)); reversed *Hamilton-Wentworth (Regional Municipality) v. Hamilton-Wentworth Save the Valley Committee Inc.* ((1984)), 1984 CarswellOnt 1831, 17 O.M.B.R. 411 at 413 ((O.M.B.)); reversed *Hamilton-Wentworth (Regional Municipality) v. Hamilton-Wentworth Save the Valley Committee Inc.* ((1984)), 1984 CarswellOnt 1832, 17 O.M.B.R. 411 at 416 ((O.M.B.)); additional reasons at *Hamilton-Wentworth (Regional Municipality) v. Hamilton-Wentworth Save the Valley Committee Inc.* ((1984)), 1984 CarswellOnt 1831, 17 O.M.B.R. 411 at 413 ((O.M.B.))

Counsel: *J.E. Sexton, Q.C.* and *T.R. Lederer* , for applicant.
H. Turkstra and *J. Grahek* , for respondents.
B.H. Kellock, Q.C. , for Union Gas.
I. Scott, Q.C., P. Muldoon and *D. Poch* , for intervenor Energy Probe and Canadian Environmental Law Association (C.E.L.A.).
A.J. Roman , for intervenor Ontario Energy Board.
Bruce Campbell and *Laura Forusa* , for Ontario Hydro.

Subject: Civil Practice and Procedure; Public; Municipal
Related Abridgment Classifications
Municipal law
XVIII Planning appeal boards and tribunals
XVIII.2 Practice and procedure
XVIII.2.f Costs
Headnote
Administrative Law --- Practice and procedure — Under statutory review provisions — General
Municipal Law --- Practice and procedure before municipal planning authorities — Costs

Costs — Nature of costs — Joint Board conducting hearing regarding road extension under Consolidated Hearings Act, S.O. 1980, c. 20 — Board having no jurisdiction to award costs prior to conclusion of proceeding — No jurisdiction to grant intervenor funding.

Parties — Adding or substituting parties — Adding parties on own application — Four entities permitted to intervene on application for judicial review where decision of Court would have profound effect on many parties not concerned with particular dispute — Ont. Rules of Civil Procedure, rr. 13.02, 13.03.

The regional municipality planned to extend a road and as such was required to obtain certain statutory approvals. For this purpose, a "Joint Board" was constituted under the Consolidated Hearings Act, S.O. 1981, c. 20. Two citizen groups had been engaged for some time in opposing the road and therefore requested the Joint Board to grant them intervenor funding. The Joint Board ordered the regional municipality to fund the intervention of the groups by way of costs in advance. The regional municipality sought an order quashing the Joint Board's cost orders. Four entities applied to be added as intervenors to the regional municipality's application for judicial review.

Held:

The orders of the joint board were quashed. The four entities were permitted to intervene.

The characteristics of costs are: (1) they are an award to be made in favour of a successful or deserving litigant payable by the loser; (2) of necessity, the award must await the conclusion of the proceeding as success or entitlement cannot be determined before that time; (3) they are payable by way of indemnity for allowable expenses and services incurred relevant to the case or proceeding; (4) they are not payable for the purpose of assuring participation in the proceedings. "Costs" in the legal sense are fundamentally different from a grant or intervenor funding. The Joint Board had no jurisdiction to make the orders, as its discretion to award costs does not extend that far.

The board clearly attempted to fund intervention in advance of a hearing and before the board had an opportunity to determine the value of the contributions to be made by the intervenor to the issue before it. While the board has a broad discretion in its power to award costs, the board had not awarded "costs" here, but rather, had attempted to compel the regional municipality to provide intervenor funding, something which the board has no jurisdiction to do.

The matter was a dispute which directly concerned the applicant, the two respondents and none other, however, it was almost inevitable that the decision of the Court would be made on grounds that would have a profound effect on many parties, including public utilities and public interest groups of one sort or another having frequent occasion to appear before a joint board, or, because of the similarity of the legislation, the Energy Board. Rule 13.03(1) makes it clear that leave to intervene in the Divisional Court may be granted by a panel of the Court or by certain Judges, and such leave must at least encompass intervention as a friend of the Court without becoming a party to the proceeding.

Table of Authorities

Cases considered:

Bell Can., Re, [1982] 2 F.C. 681, 63 C.P.R. (2d) 44, 132 D.L.R. (3d) 641, 41 N.R. 221 (Fed. C.A.) — *referred to*

Bell Can. and C.R.T.C., Re, [1984] 1 F.C. 79, 34 C.P.C. 121, 72 C.P.R. (2d) 162, 147 D.L.R. (3d) 37, 48 N.R. 197 (Fed. C.A.) . Leave to appeal to the Supreme Court of Canada granted 34 C.P.C. 121n, 72 C.P.R. (2d) 162n, 147 D.L.R. (3d) 37 (S.C.C.) — *considered*

Green, Michaels & Assoc. v. P.U. Bd., [1979] 2 W.W.R. 481, 94 D.L.R. (3d) 641, 13 A.R. 574 (Alta. C.A.) — *considered*

King v. King, [1943] P. 91, [1943] 2 All E.R. 253 (C.A.) — *considered*

Man. Soc. of Seniors Inc. v. Greater Winnipeg Gas Co. (1982), 18 Man. R. (2d) 440 (Man. C.A.) — *applied*

Nor. Enrg. & Dev. Co. and Philip; Re Mun. & P.U. Bd., [1930] 1 W.W.R. 615, 38 Man. R. 541, [1930] 3 D.L.R. 387 (Man. C.A.) *considered*

Ont. Hydro-Southwestern Ont. Transmission System Expansion Program, Re (1982), 11 C.E.L.R. 53 (Joint Board) — *applied*

Ryan v. McGregor, 58 O.L.R. 213, [1926] 1 D.L.R. 476 (Ont. C.A.) — *applied*

Thompson, Re, [1944] O.R. 290, [1944] 3 D.L.R. 74 (Ont. C.A.) ; reversed; [1945] S.C.R. 343, [1945] 2 D.L.R. 545 (sub nom. Thompson v. Lamport) (S.C.C.) — *considered*

Turner v. Mailhot (1985), 28 B.L.R. 222 (Ont. H.C.) — *referred to*

Victoria Hosp. Corp. Energy from Waste Facility, Re (1983), 15 O.M.B.R. 129 (Joint Bd.) — *applied*

Walker v. Gurney-Tilden Co. (1899), 19 P.R. 12 (Ont. H.C.) — *referred to*

Wallersteiner v. Moir (No. 2), [1975] 1 Q.B. 373, [1975] 1 All E.R. 849 (C.A.) — *referred to*

Statutes considered:

Administrative Procedures Act, R.S.A. 1970, c. 2.

Consolidated Hearings Act, S.O. 1981, c. 20, ss. 7, 11, 13, 14, 15(1)(c).

Courts of Justice Act, S.O. 1984, c. 11, s. 14(1).

National Transportation Act, R.S.C. 1970, c. N-17, s. 73.

Ontario Energy Board Act, R.S.O. 1980, c. 332.

Public Utilities Board Act, R.S.A. 1970, c. 302, s. 60.

Rules considered:

Ont. Rules of Civil Procedure, rr. 13.01, 13.02, 13.03.

Authorities considered:

Blackstone's Commentaries on the Laws of England, (1857), vol. 3, pp. 429-432.

Marshall, Law of costs, (1860), pp. 1-9.

Words and phrases considered:

COSTS

From the earliest times, it has been recognized that the power to award "costs" must be found in a statute.

The characteristics of costs . . . are:

(1) They are an award to be made in favour of a successful or deserving litigant, payable by the loser.

(2) Of necessity, the award must await the conclusion of the proceeding, as success or entitlement cannot be determined before that time.

(3) They are payable by way of indemnity for allowable expenses and services incurred relevant to the case or proceeding.

(4) They are not payable for the purpose of assuring participation in the proceedings

. . . . .

"Costs" in the legal sense are fundamentally different from a grant or intervenor funding. The argument of counsel for the respondents makes it clear that what the respondents had been seeking and continued to seek was intervenor funding. The concept that this could be accomplished under the guise of costs, was one which the Board did not at first accept, but, having been persuaded to the contrary by the intervenors, the Board interpreted its jurisdiction to do so by calling the allowance "costs" so as to ensure effective opposition.

No one suggests, nor could it be suggested, that this statute [*Consolidated Hearings Act*, S.O. 1981, c. 20, s. 7] granted the Board power to award intervenor funding, no matter how desirable it might be that the Board have such power for the purposes of ensuring effective opposition.

APPLICATION for judicial review of orders that the applicant pay costs to the respondents in advance of a hearing under the Consolidated Hearings Act.

The judgment of the Court was delivered by *J. Holland J.*:

1 The applicant (Region) seeks an order quashing two orders of a "Joint Board" (Board) dated October 16, 1984 and November 5, 1984, wherein the Board held that it had jurisdiction to order the applicant to fund, by way of an award of costs in advance, the participation of two citizen groups in the proceedings before it. These groups ("the respondents") are represented by the same law firm, "Turkstra Partners".

2 The Region, having determined to construct a new road connecting Highway 403 in Ancaster to the Queen Elizabeth Way in the eastern portion of Hamilton, was required to obtain the necessary approvals for the project under two or more statutes. For this purpose, a "Joint Board" was constituted under the Consolidated Hearings Act, S.O. 1981, c. 20.

3 At the commencement of the hearing before the Board, various interested groups appeared. The respondents or their predecessors prior to incorporation, had been actively engaged in opposition to the project from the outset and had sought public financial assistance for this purpose. The appeal book contains evidence of the request by these parties for intervenor funding both from the government and legal aid. They were unsuccessful. The respondents again sought funding before the Joint Board.

4 After extensive argument as to the jurisdiction of this Board to provide funds to the respondents under the Board's power to award costs, the Board concluded that it had such jurisdiction and made the orders under review. The Board reasoned:

> Notwithstanding the ambiguity of the sections in the Act dealing with costs, this Board has concluded that it does have the jurisdiction to make an award of costs in advance of the hearing in circumstances where not to do so would effectively frustrate the hearing process itself.

5 Having determined its jurisdiction to provide funds in advance in appropriate circumstances, by an award of costs, the Board then determined that the intervention by the respondents would further the hearing process and ordered that the applicant fund the intervention of the respondents by way of costs in advance.

6 The impugned orders are now set out in part:

```
B E F O R E:
M. I. Jeffery, Q.C.              )
Chairman                         )
                                 )
A. B. Ball                       )          TUESDAY, the 16th
Member                           )          day of
                                 )          OCTOBER, 1984
M. D. Henderson                  )
Member                           )
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Order of the Joint Board

7 UPON AN APPLICATION having been brought by Turkstra Partners on behalf of the Save the Valley Committee, Inc. and the Limeridge Road Property Owners Interest Group, Inc. for Orders and Directions as follows:

. . . . .

d) That the joint board award costs in favour of the Save the Valley Committee, Inc., in advance of the hearing;

. . . . .

8 AND THE BOARD UPON FURTHER APPLICATION having been brought by Mr. Colin Isaacs on behalf of the Hamilton and District New Democratic Party Area Council for an award of costs in advance of the hearing;

9 AND HAVING HEARD the submissions of the parties and other interested persons,

10 NOW, THEREFORE, the joint board hereby orders that:

. . . . .

(d) the Board is prepared to make an award of costs in favour of Save the Valley Committee Inc. and the Limeridge Property Owners Interest Group Inc., subject to the following specific conditions:

Counsel for the aforementioned groups shall submit for the Board's consideration a fully detailed budget to include the total projected expenditures with supporting documentation for both witnesses and counsel, also including projected scheduling of the timing of payments.

In addition, this detailed budget shall include a statement setting out the manner in which any expert or other witness shall be employed or sued in the course of the hearing.

After reviewing the documentation referred to herein, the Board shall fix the amount of the costs and determine a schedule of payments.

In considering both the amount and scheduling of payments, the board will have regard to the performance of counsel and witnesses.

With respect to any award of costs in advance, the Board is not prepared to make any such award to:

Any persons or organizations supporting the proponent's position

Any political parties or affiliates of political parties.

Any individual objectors whose interests, in the Board's opinion, be the same or similar as those groups represented by Mr. Turkstra, for the Board is not prepared to have the efforts of both experienced counsel and consultants duplicated at the expenses of the proponent.

Any such award of costs shall be payable by the proponent.

. . . . .

DATED at TORONTO this l6TH day of OCTOBER, 1984.

M. I. Jeffery, Q.C.

A. B. Ball

M. D. Henderson

B E F O R E:
M. I. Jeffery, Q.C.)
Chairman)
)
A. B. Ball) MONDAY, the 5th
Member) day of
) NOVEMBER, 1984
M. D. Henderson)

Member)

Order of the Joint Board

11 UPON AN APPLICATION having been brought by counsel for the Regional Municipality of Hamilton-Wentworth to review the budget submitted on October 31st, 1984 by counsel for Save The Valley Committee, Inc. and the Limeridge Road Property Owners Interest Group, Inc. with respect to the quantum of costs awarded by Order of this Board dated October 16th, 1984;

12 AND HAVING HEARD the submissions of the party thereto,

13 NOW, THEREFORE, the Joint Board hereby orders that:

14 1. The Regional Municipality of Hamilton-Wentworth shall pay to Counsel representing Save The Valley Committee, Inc. and the Limeridge Road Property Owners Interest Group Inc. the following amounts:

(a) The sum of $22,712.50 forthwith upon receipt of detailed Statements of Account, being the amount considered by the Board as proper costs and disbursements for the period up to and including November 1st, 1984;

(b) up to a maximum amount of $22,500.00 for consultants to be retained by counsel for Save The Valley Committee, Inc. and the Limeridge Road Property Owners Interest Group, Inc. to be paid forthwith after their respective accounts have first been submitted to and approved by the Board;

(c) further costs in advance of the conclusion of this hearing up to a maximum of $30,000.00, to be payable by the Regional Municipality of Hamilton-Wentworth in instalments, the amount of which shall be set out in detailed Statements of Account for legal fees and disbursements for the two-week period preceding the delivery of each Account.

15 2. Copies of all accounts tendered to the Regional Municipality of Hamilton-Wentworth, pursuant to this order, shall also be filed with the Board prior to payment of same by the Region.

16 DATED AT TORONTO this 5TH day of NOVEMBER, 1984.

M. I. Jeffery, Q.C.

A. B. Ball

M. D. Henderson

17 The Board gave reasons for its order of November 5, 1984. The relevant parts are found at pp. 22 to 25 of the appeal book:

This Board issued a ruling on October 16th awarding costs in favour of Save The Valley Committee, Inc. and the Limeridge Property Owners Interest Group, Inc. both clients of Mr. Turkstra with said costs to be paid by the Regional Municipality of Hamilton-Wentworth.

The amount and schedule of payments was to be determined by the Board after the Board considered a budget and submissions made thereon by Counsel for both the Region and the said intervenors. The budget, prepared by Mr. Turkstra and filed with the Board as Exhibit 59, was the subject of extensive argument which occupied a substantial part of the proceedings on Thursday, November 1st.

In addition to argument confined to matters set out in the budget, Mr. Sexton again questioned the Board's jurisdiction to provide funding by way of an award of costs in advance, particularly in the light of a recently discovered Manitoba decision. This decision appeared to hold, inter alia, that the Manitoba Public Utilities Board, in refusing to exercise a similar cost power for the purpose of enabling a party to retain experts to assist its case, was without jurisdiction to do so even if it had been prepared to do so.

It was readily acknowledged by Mr. Sexton that this case, cited as Manitoba Society of Seniors, Inc. v. Greater Winnipeg Gas Co., reported in (1982) 18 Man R. (2d) at p. 440, came to his attention only *after* this Board had heard argument on the jurisdiction issue and had delivered its ruling in connection therewith.

The issue in the Manitoba case before a single judge of the Court of Appeal was whether or not leave to appeal to that Court should be granted based upon submissions that there was a violation of the rules of natural justice and the Canadian Charter of Rights and Freedoms under the Constitution Act, 1982. Mr. Justice Huband refused to grant leave to appeal and did not find on the facts any denial of natural justice. He also held that s. 7 of the Charter had no application to the matters under consideration.

In the course of his decision, Mr. Justice Huband offered the opinion that, in his view, the Manitoba Board's power to award costs (which powers are similar in wording to this Board's powers under s. 7 of the Consolidated Hearings Act), did not permit an award to be made for the purpose of funding, except at the conclusion of a hearing.

Mr. Turkstra sought to distinguish this case on the grounds that the Public Utilities Board, under s. 24(4) of its rules of procedure had all the rights, powers and privileges as are vested in the Manitoba Court of Queen's Bench and that because of this provision, the interpretation placed upon the cost power by the Manitoba Court of Appeal was the same as would have applied to a 'court' as oppposed to an 'administrative tribunal'. In addition, it was argued that Mr. Justice Huband's comments concerning the Manitoba Board's jurisdiction to award costs in advance were '*obiter* ' as he had already held that the application for leave to appeal failed on the grounds that there was no denial of natural justice.

Whether or not Mr. Turkstra's arguments concerning the Manitoba decision have merit, this Board, after considerable and careful reflection, has concluded that it is not bound by the Manitoba decision. In the absence of a decision on point of a superior court of this province or of the Supreme Court of Canada, this Board is at liberty, if it so chooses, to confirm its earlier ruling.

This Board remains steadfastly committed to a fundamental principle underlying the hearing process; that principle, simply stated, is 'to ensure that parties to this hearing may participate and be heard in a fair, effective and meaningful fashion'.

Mr. Sexton advanced the submission that there is no duty upon the Board to ensure that there is opposition to the position put forward by the proponent. With respect, the Board would point out that it is not calling for opposition where there is none, for it is abundantly clear that there is in fact opposition to the proposals put forward by the Region. The Board does feel, however, that in appropriate circumstances and after applying a flexible set of criteria, it has the obligation to ensure that those parties who wish to participate have the means to do so, particularly where all other reasonable avenues of funding have been foreclosed or exhausted.

The concern of the government with respect to the need to ensure that intervenors' participation should not be limited or restricted solely because of the lack of financial resources is amply illustrated by the text contained in a letter signed by the Minister of the Environment dated October 12th, 1984 and filed in these proceedings as Exhibit 61. It is a concern that has been expressed by this Board since the commencement of this hearing and is reiterated in the reasons given for this Board's ruling of October 16th.

18 Further in its reasons, the Board recited the submissions of counsel as to the financial ability of the groups to fund their own intervention and the expenditures which had been made in the prior proceedings. The Board then stated at p. 27 of its reasons:

> Some adherence to basic principles of fairness and equity must be preserved and, accordingly, the Board is prepared to confirm its earlier ruling that this Board has the necessary jurisdiction to award costs in advance, and that such an award will be made provided that the Board is satisfied, on the facts of the particular application, that an award of costs in advance of the conclusion of the hearing is justified.

19 It will be seen from this, that what the Board has done is to provide these intervenor groups, which wish to oppose the application by the region, in advance of the hearings or any participation by them, with assured funding to be paid by the applicant, and subject only to the retained control by the *Board* to pass upon the propriety of any items and expenditures to be set out on accounts to be rendered. This, the Board considers, is an exercise of its jurisdiction to award "*costs* ".

20 It is the position of the region that such advance assurance of funding does not fall within the jurisdiction of the Board to award "costs". All agree that the jurisdiction to award "costs" as set out in the statute is the only basis upon which the impugned orders *could be* made.

21 The Consolidated Hearings Act, S.O. 1981, c. 20, s. 7 provides:

> 7.(3) Subject to this Act and the regulations, a joint board may determine its own practice and procedure.
>
> (4) A joint board may award the costs of a proceeding before the joint board.
>
> (5) A joint board that awards costs may order by whom and to whom the costs are to be paid.
>
> (6) A joint board that awards costs may fix the amount of the costs or direct that the amount be taxed, the scale according to which they are to be taxed and by whom they are to be taxed.

22 The applicant says that there is *no* jurisdiction given to the Consolidated Hearings Board by s. 7 to award money in advance under the guise of costs. It further asserts that should the language of s. 7 be interpreted to include the right to award costs in advance, it could only be so exercised in the most extraordinary cases and then only if prescribed criteria, need being one, have been established.

23 As I turn to the issues to be addressed, I do so with the acceptance that the language employed by the Legislature is clear and unambiguous. It is of significance that the words there used to authorize the Board to award costs are remarkably similar to those in s. 14(1) of the Courts of Justice Act from which Courts derive their "costs" jurisdiction. In s. 7 of the Consolidated Hearings Act, no words appear to lend credence to the suggestion that the Legislature intended to grant to the Joint Board any special powers beyond that traditionally exercised by Courts and it would require very clear and cogent language, embodied in the legislation, to do so. Under this Act, the tribunal's power over costs cannot exceed that of the Supreme Court of Ontario. The Legislature may, of course, grant such powers to a tribunal, but in my opinion, it has not done so in the Consolidated Hearings Act, s. 7.

24 This Board, being a creature of statute, can only exercise the powers conferred upon it by its enabling legislation.

25 No doubt the nature of the proceeding before the Board differs in certain respects from that before a Court, but each has its adversarial aspect, and in a real sense, it may be seen that there are winners and losers. Public hearings, such as here involved, generally have proponents and opponents. It is not surprising that in the present case, there are two groups — those that may here or in future be called upon to finance persons or groups who wish to appear at a hearing, and those that might be likely to receive such benefits.

26 Clearly, the Board may be called upon to conduct regulatory as well as quasi-judicial proceedings. It may, by s. 11, state a case for the opinion of the Divisional Court on any question that, in the opinion of the Joint Board, is a question of law. The Act (ss. 13, 14 and 15(1)(c)) provides that the only appeal from a decision of the Joint Board is by way of application to the Lieutenant Governor in Council.

27 The fundamental issue to be determined by this Court is whether the orders made by the Board can be supported as a lawful exercise of the Board's jurisdiction to award "costs".

28 The applicant, supported by certain intervenors, says that this is intervenor funding and not "costs". It is said that the word "costs" in the legal sense, has attained a specific meaning over the years and that the Legislature, in granting jurisdiction to the Board to award costs, must have intended this meaning.

29 For the respondents, and the intervenors who support them, it is said that there is a significant difference between the function of a Joint Board and that of a Court, and that the meaning to be attributed to the costs jurisdiction as used in the Consolidated Hearings Act must be such as to recognize this difference. In support of this position, the respondents rely upon: Re Nor. Enrg. & Dev. Co. and Philip; Re Mun. & Pub. Utility Bd., [1930] 1 W.W.R. 615, 38 Man. R. 541, [1930] 3 D.L.R. 387 (Man. C.A.) at p. 618; Re Bell Can. and C.R.T.C., [1984] 1 F.C. 79, 34 C.P.C. 121 at pp. 125-30, 72 C.P.R. (2d) 162, 147 D.L.R. (3d) 37, 48 N.R. 197 (Fed. C.A.) , presently under appeal to the Supreme Court of Canada; Green, Michaels & Assoc. Ltd. v. Public Utilities Board, [1979] 2 W.W.R. 481 at 494, 94 D.L.R. (3d) 641, 13 A.R. 574 (Alta. C.A.) .

30 The Normal Legal Meaning of "Costs": Is the award within that Meaning?

31 A point of commencement must be that "costs" as used in the legal sense, is a word having a well-defined meaning. From the earliest times, it has been recognized that the power to award "costs" must be found in a statute.

32 The characteristics of costs, developed over many years are:

(1) They are an award to be made in favour of a successful or deserving litigant, payable by the loser.

(2) Of necessity, the award must await the conclusion of the proceeding, as success or entitlement cannot be determined before that time.

(3) They are payable by way of indemnity for allowable expenses and services incurred relevant to the case or proceeding.

(4) They are *not* payable for the purpose of assuring participation in the proceedings.

33 In Ryan v. McGregor, 58 O.L.R. 213, [1926] 1 D.L.R. 476 (Ont. C.A.) , the Court of Appeal of this province considered whether a succesful party to proceeding, having been given an award of costs by reason of success, could tax portions of a bill of costs which related to services rendered to it by a solicitor employed by the insurer of that party. The issue had first been determined by the Taxing Officer who had disallowed such items by reasons of the principle in Walker v. Gurney-Tilden Co. (1899), 19 P.R. 12 (Ont. H.C.) Rose J., hearing an appeal from taxation referred the matter to the Divisional Court as he felt that Walker, supra, ought to be reconsidered.

34 In dismissing the appeal, Middleton J.A. for the Court stated:

> The fundamental principle is thus clearly stated by Bramwell, B., in the case of Harold v. Smith (1860), 5 H. & N. 381 at p. 385, 157 E.R. 1229 : — 'Costs as between party and party are given by the law as an indemnity to the person entitled to them: they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them. Therefore, if the extent of the damnification can be found out, the extent to which costs ought to be allowed is also ascertained.' This was not then put forward as any new idea. It is a particularly clear statement of the principle, in a case dealing with a matter widely different from that to be here discussed. I quote it, however, because in the case of Gundry v. Sainsbury, [1910] 1 K.B. 645 , the Court of Appeal accepted it as unchallengeable law, and for that reason refused any costs to the plaintiff, who had stated that his solicitor had agreed to conduct the litigation for him without charging him any costs. Being under no liablity, he needed no indemnity. I also quote this case because Cozens-Hardy M.R., in the decision in 1910, referred to the decision in Harold v. Smith, supra, as definitely formulating a principle of general application, and stated, at p. 649: — 'That is a decision which has remained undisturbed for fifty years, and I am not prepared to depart from it.'

> It must also be borne in mind that the question under discussion does not in any way deal with the right of the solicitor as against his client or any one with whom he may have a contract. The costs which are under discussion are in the nature of damages awarded to the successful litigant against the unsuccessful, and by way of compensation for the expense to which he has been put by the suit improperly brought. The foundation of the power of the common law Courts to award costs were purely statutory. The Courts, to use the langauge of an old statute, were authorized to direct the unsuccessful litigant 'to make recompense to the party unjustly vexed for the said unjust vexation'.
>
> Very early in the judicial history of this Province, a cognate question arose, and in the case of Jarvis. v. Gt. Western R. Co. (1859), 8 U.C.C.P. 280 , the Court had to consider the problem presented by an agreement between the defendant company and its attorney under which the company paid to the attorney an annual salary. In the event of litigation the attorney was entitled to claim against the company his actual disbursements, and he was to be entitled to keep for himself all costs which he might recover from adverse litigants. It was argued that this precluded the company from recovering anything but disbursements from the unsuccessful plaintiff. After a very careful examination of all the authorities, Draper, C.J., giving the judgment of the Full Court, held, at p. 288: — 'The principle of re-imbursement must govern and, therefore, the company, not having to pay anything to the solicitors beyond disbursements as a result of the litigation brought, could recover nothing beyond the disbursements so paid.

35 The Ryan case, supra, remains today as authority for that which is stated above, and an award of "costs" is to *indemnify* the party to whom they are given and must necessarily be given only after the proceeding has completed. It is not until then that the Court, *or I add* , the authority given the power to award costs, is in a position to determine to whom and to what extent they should be payable, and by whom.

36 Useful discussions of "Costs" may be found in: Marshall, Law of Costs, (1860), pp. 1-9 and in, Blackstones Commentaries on the Laws of England, (1857) Vol. 3, pp. 429-432.

37 There are, however, special cases where an award of costs has been made without regard to one or some of these characteristics. I will discuss them briefly.

(A) Matrimonial Causes

38 An award of costs, in the nature of necessaries, is founded on the common law rule that the wife has authority to employ legal help at the expense of the husband, for necessities in the contesting of a matrimonial proceeding. See King v. King, [1943] P. 91, [1943] 2 All E.R. 253 (C.A.) at p. 94:

> Serjeant Sullivan made two submissions before us. The first was that the principle underlying the practice of the Divorce Division to make orders for securing the wife's costs is that the common law regards the assistance of solicitor and counsel and the payment of court fees as necessaries for which the wife is entitled, as of right, to pledge the husband's credit.

39 And further at pp. 94-95:

> We do not think it necessary to discuss the second proposition, as the first was plainly enunciated in 1878 by the Court of Appeal (consisting of Bramwell, Baggallay and Thesiger L. JJ.) in Ottaway v. Hamilton, [1878] 3 C.P.D. 393, an action in which a wife's solicitor sued the husband for her costs in obtaining her divorce. That decision is sufficient to establish the common law rule that the wife has authority to employ legal help at the expense of the husband in such a case as the present. It is true that the reason for the rule of practice giving the wife security for her costs was evolved in the old ecclesiastical court and continued by the court created by the Act of 1857 at a time when the wife had no property (other than settled property) of her own out of which to defray such expenditure, and that, as Hill J. said in Williams v. Williams, [1929] P. 118 the Married Women's Property Acts have greatly modified the position of the wife. The practice, however, both before and after the Matrimonial Causes Acts of 1857 and 1873, has always been only to give the wife security in cases where she has not sufficient estate to pay her own costs. This practice was recently recognized as still right and proper by the Court of Appeal in Johnstone v. Johnstone, [1929] p. 165, 172, where Lord Hanworth M.R. said 'The old

rules of Ecclesiastical Courts were preserved by s. 22 of the Matrimonial Causes Act, 1857 (20 and 21 Vict. c. 85), and are now produced by s. 103 of the Supreme Court of Judicature (Consolidation) Act, 1925. The result is that the old rule as to the costs of the spouses is still applicable to costs in the Divorce Division, and the husband has to make provision for costs of the wife to enable her to contest the issue'.

(B) Trustee Cases

40 These cases recognize that the trustee, in litigious proceedings, is entitled to be indemnified from a common fund as to costs incurred without regard to the result when acting not on his own but in preservation of trust property or in a derivative position. A full discussion is found in Wallersteiner v. Moir (No. 2), [1975] 1 Q. B. 373, [1975] 1 All E.R. 849 (C.A.) and in Turner v. Mailhot, released February 25, 1985, now reported 28 B.L.R. 222 , where Reid J. of this Court cited Wallersteiner, supra, as authority which he adopted and followed.

41 In Re Thompson Estate, [1944] O.R. 290, [1944] 3 D.L.R. 74 (C.A.) , Riddell J.A. stated at p. 296:

The guiding principle to determine whether a trustee is entitled to indemnity against loss, including costs of proceedings in court, is whether the action was 'for the benefit of the trust estate': Walters v. Woodbridge (1878), 7 Ch. D. 504 ; in re Dunn; Brinklow v. Singleton, [1904] 1 Ch. 648 . Jessel M.R. in Walters v. Woodbridge, supra, at p. 509, states the rule thus: '... where an action is brought against a trustee in respect of the trust estate, whether it be an action of ejectment, trespass, or of any other description, and is defended by the trustee, not for his own benefit, but for the benefit of the trust estate, he is entitled to indemnity.' Jessel M.R. continues: 'Here the defence by the trustee was for the benefit of the trust estate; it is true that at the same time he defended his own character, but that was merely an incident ... The defence of his character, therefore, does not make the defence less a defence on behalf of the trust estate.' James L.J., at p. 510, says: 'his defence was beneficial to the trust estate, for it has been decided that the compromise was an advantageous one. In such a case it is impossible to split the defence, and say that because the trustee at the same time defended his own character he is only to have a part of the costs.'

The same principle which determines when liability lies for costs incurred by a trustee applies likewise to determine where such liability lies. The principle that a trustee is entitled to indemnity in respect of expenses properly incurred in the execution of his trust is founded in equity.

(C) Appeals in Forma Pauperis or by Special Leave

42 The very nature of these proceedings recognizes that special circumstances may exist in which a Court may depart from the general rule. It must be accepted, however, that in the leave cases, the Court has extended an indulgence as a condition to the grant of leave and all such indulgence has been that the appealing party will pay the costs of the other, regardless of the outcome. These costs are not, however, capable of determination until after the process has been completed.

(D) Security for Costs

43 These are not properly an exercise of the power to award costs but are ordered merely to secure that the successful party will have a fund to look to for indemnification of its proper costs after the completion of the litigation or proceeding.

44 "Costs" in the legal sense are fundamentally different from a grant or intervenor funding. The argument of counsel for the respondents makes it clear that what the respondents had been seeking and continued to seek was intervenor funding. The concept that this could be accomplished under the guise of costs, was one which the Board did not at first accept, but, having been persuaded to the contrary by the intervenors, the Board interpreted its jurisdiction to do so by calling the allowance "costs" so as to ensure effective opposition.

45 No one suggests, nor could it be suggested, that this statute granted the Board power to award intervenor funding, no matter how desirable it might be that the Board have such power for the purpose of ensuring effective opposition.

46 Whether the award is a lawful exercise of the Board's jurisdiction to give costs, cannot rest, in any way, upon the designation given to it by the Board. The award must have the well established characteristics of "costs" in order to be within the Board's jurisdiction.

47 It is not without significance, although not binding upon this Court, that on two prior occasions, Joint Boards under the Consolidated Hearings Act had rejected any such jurisdiction. In Re Victoria Hosp. Corp. Energy From Waste Facility (1983), 15 O.M.B.R. 129 (Joint Board pursuant to the Consolidated Hearings Act) , dated August 1983, is found [p. 159]:

> At the conclusion of the hearing the Coalition asked for costs of the proceedings. Previously, two motions were brought by them, one on the first day of the hearing, December 22, 1982, and the other on March 11, 1983. *These motions were denied by the board on the basis that they were more in the nature of a request for funding rather than for costs. The board took the position that only at the conclusion of the proceedings would it be able to determine whether a contribution to the proceedings had been made by the applicant and the extent of that contribution* .

[my underlining]

48 In Re Ont. Hydro — Southwestern Ont. Transmission System Expansion Program, (1982) 11 C.E.L.R. 53 (Joint Board pursuant to the Consolidated Hearing Act) at p. 54, Chairman Smith is reported as saying:

> At the outset the Board makes a distinction, at least for its purposes, between what is *commonly referred to as intervenor funding and an award of costs. Intervenor funding is a procedure whereby interested participants may apply to a designated public authority in some prescribed manner and subject to whatever terms and conditions may be imposed for funds to enable the applicant to participate in any hearing or approval process* .
>
> *An award of costs, on the other hand, is a statutory provision granting a discretion to the Joint Board to award costs of a proceeding before it and to prescribe by whom and to whom those costs are to be paid* .
>
> The Joint Board does not have a pool of funds upon which it may draw to provide intervenor funding no matter how meritous the application might be. *Funding is a policy decision to be made by the government or some public authority* .
>
> *The Board's powers are limited to stating, at the appropriate time, which party may and must reimburse another party for the costs incurred in the proceedings* .
>
> It seems to us manifestly unfair to expose a party at the outset of the hearing to such an order without an opportunity to present its case. The question of intervenor funding and award of costs was fully explained at the preliminary meeting held on December 2nd, 1981.

[my underlining]

49 The decision of the Manitoba Court of Appeal, Man. Soc. of Seniors Inc. v. Greater Winnipeg Gas Co. (1982), 18 Man R. (2d) 440, delivered by Huband J.A., dealt with the very issue before this Court and under a Manitoba statute empowering the Public Utilities Board to award costs, in language remarkably similar to that given to the Board by the Consolidated Hearings Act. This case was brought to the attention of the Board at the time of its second order, but the Board declined to follow it. At p. 443 is found the following:

> The affidavit material before me indicates that the Society is a non-profit corporation which champions causes important to senior citizens. It has 1,200 paid up individual members and approximately 3,000 additional members by virtue of affiliated clubs and organizations. Membership is open to any person, 55 years of age or over, who subscribes to the aims and objectives of the Society. There is nothing before me to indicate that the Society is without funds or incapable of raising funds. I am not prepared to make the assumption that its members are poor or that the Society itself lacks resources. I cannot see any denial of natural justice in the Board rejecting an application by the Society for a preliminary award in costs to enable the Society to hire experts.

> Moreover, I do not see authority for any such preliminary award in costs under the Public Utilities Board Act. Section 56 of the Act deals with the question of costs in these terms:
>
> 56(1) The costs of, and incidental to, any proceeding before the board, except as herein otherwise provided, are in the discretion of the board, and may be fixed in any case at a sum certain or may be taxed.
>
> 56(2) The board may order by whom and to whom, any costs are to be paid, and by whom the costs are to be taxed and allowed.
>
> 56(3) The board may prescribe a scale under which the costs shall be taxed.
>
> *I am of the view that s. 56 relates to an award of costs after a hearing. It is my view that the preliminary demand for costs could not be met by the Board under existing legislation. One can understand why the legislation does not provide for the Board to make a preliminary award in costs. The Board's function is not simply to provide a forum for a hearing, but rather to play an active part in any such hearing to protect the public interest, including the interests of senior citizens* .

[my underlining]

50 I turn now to the authorities relied on by the respondents and which largely turn on an acceptance that proceedings before a tribunal are different from those before a Court.

51 In Re Nor. Enrg. & Dev. Co. and Philip; Re Municipal & Public Utilities Bd., [1930] 1 W.W.R. 615, 38 Man. R. 541, [1930] 3 D.L.R. 387 (Man. C.A.) , the Court was called upon to determine an appeal by a successful applicant before the Public Utilities Board whose complaint was that the Board had wrongly exercised a discretion regarding costs by refusing to award them to him. The Court upheld the Board's *discretionary award* . The respondents rely on the following passage in the majority judgment at p. 618:

> Proceedings before the Board belong to a different category and are necessarily dealt with from a point of view that has no place in litigation between parties. The status and risks of suitors in an action are fixed by practice and authority. No rule has been laid down by the Board that persons appearing by counsel before the Board shall, subject to the Board's discretion, have costs in event of their success or pay costs in event of their failure. Whether such a rule should be adopted or not is a matter wholly for the Board. In the meantime, the matter is left by sec. 55 in the Board's absolute discretion, untrammelled by the principles which necessarily control the discretion of the Court or a Judge.

52 In Green, Michaels & Assoc. Ltd. v. P.U. Bd., [1979] 2 W.W.R. 481 at 494, 94 D.L.R. (3d) 641, 13 A.R. 574 (Alta. C.A.) , the issue before the Court of Appeal was whether the Public Utilities Board had erred in law in the exercise of its statutory discretion to award costs under s. 60 of the Public Utilities Board Act, and on the ground that the Board gave no reasons for the disallowance contrary to the requirements of the Administrative Procedures Act. The appeal was allowed only on the first ground and the matter remitted back to the Board so that reasons for the disallowance could be set out. At pp. 493-94, Clement J.A. states:

> This passage makes it clear that this court is not to engage itself in the amounts fixed by the board in respect of the several bills, but only to determine whether in arriving at those amounts it erred in any way described by Lord Greene. A similar restriction exists on an appeal from the exercise of a discretion by a judge: Russell Food Equipment (Calgary) Ltd. v. Valleyfield Invts. Ltd. (1962), 40 W.W.R. 292 (Alta.) .
>
> With respect, I am of the opinion that the views of Lord Greene M.R. reflect a growing recognition of the need in the general public interest for the supervisory jurisdiction of the court to keep pace with the increase of administrative functions created by legislatures. This did not engage the attention of the majority of the Manitoba Court of Appeal in delivering judgment in the earlier case of Re Northern Enrg. and Dev. Co. and Philip; Re Mun. and Public Utility Bd., 38 Man. R. 541, [1930] 1 W.W.R. 615, [1930] 3 D.L.R. 387 . Nevertheless, Trueman J.A., in discussing the scope of the discretion of that board in respect of costs adopted a passage in 4. Encyc. Laws of England 609 as applicable to his considerations.

> It pointed out, in effect, that the grant of a discretion permits consideration of all the circumstances of the matter and the purposes for which the discretion is given, including 'considerations of convenience or utility or saving of expense'. I am of the opinion that such factors are basically within the scope of the discretion of the board under s. 60 and that the determination of a question of law in the exercise of that discretion must recognize that this is so in applying the principle enunciated by Lord Greene M.R.

53 In Re Bell Can. and C.R.T.C., [1984] 1 F.C. 79, 34 C.P.C. 121, 72 C.P.R. (2d) 162, 147 D.L.R. (3d) 37, 48 N.R. 197 (Fed. C.A.) (leave to appeal to Supreme Court of Canada granted June 6, 1983), there were a number of issues before the Federal Court of Appeal relating to an award of costs made by the Commission to an intervenor after a hearing. These costs had been taxed, and the Federal Court of Appeal heard an appeal from the Commission which had dismissed an appeal from the Taxing Officer's finding after taxation. The Court was unanimous in dismissing the appeal but Urie J. rendered separate reasons on which the respondents rely, and in which he discussed the nature of costs to be awarded *after a hearing* by a tribunal. The power given to the Canadian Radio-Television Commission to award costs is not materially different than the power of the Joint Board. Section 73 of the National Transportation Act, R.S.C. 1970, c. N-17 reads:

> 73. The costs of and incidental to any proceeding before the Commission, except as herein otherwise provided, are in the discretion of the Commission, and may be fixed in any case at a sum certain, or may be taxed.

54 At p. 125 Urie J. says:

> An award of costs, whether in a judicial proceeding or before a regulatory or other tribunal and apart from some statute or rule or regulation providing for the contrary, is in the discretion of the Court or tribunal. Under the National Transportation Act R.S.C. 1970, c. N-17 ("the Act") s. 73 provides the authority for the Canadian Radio-Television Commission ("the Commission") to exercise its discretion to grant costs in any proceeding before it.

55 And further on at p. 125:

> As has been said on other occasions, the proceedings before the Commission in a rate fixing hearing are not adversarial in nature: there is no lis inter partes. The purpose of a hearing in such a proceeding is to obtain meaningful reaction from concerned and interested parties affected by the rate fixing, whether adversely or positively.

56 And further, at p. 126:

> Such contributions to a better understanding of the issues should, as I see it, be encouraged and rewarded. If this is so, obviously such encouragement cannot be based solely on indemnification for actual costs incurred. It is at this point that the Commission's discretion as to who is deserving of an award of costs, as to the elements to be considered and the principles to be applied in the award, is exercised in any of the ways contemplated by s. 73.
>
> There are authorities for this view of the applicable principle. I will cite only two. Each puts the proposition succinctly and in a manner which I adopt. The first is a decision of the Alberta Court of Appeal arising from an award of costs by the Public Utilities Board in a rate hearing in Re Green, Michaels & Assoc. Ltd. and Public Utilities Bd., [1979] 2 W.W.R. 481, 13 A.R. 574, 94 D.L.R. (3d) 641 (C.A.) , in which Clement J.A. at pp. 655-56 [D.L.R.] put the matter in this way:
>
> > In the factum of the appellants a number of cases were noted dealing with the discretion exercisable by Courts in the matter of costs of litigation, as well as statements propounded in texts on the subject. I do not find them sufficiently appropriate to warrant discussion. Such costs are influenced by Rules of Court, which in some cases provide block tariffs, and in any event are directed to lis inter partes. We are here concerned with the costs of public hearings on a matter of public interest. There is no underlying similarity between the two procedures, or their purposes, to enable the principles underlying costs in litigation between parties to be necessarily applied to public hearings on public concerns. In the latter case the whole of the circumstances are to be taken into account, not merely the position of the litigant who has incurred expense in the vindication of a right.

57 At p. 128, he quotes from the Commission's reasons:

> In the Commission's view, the application of the principle of indemnification upon which Bell relies would not be appropriate in regulatory proceedings before it. In the Commission's opinion the proper purpose of such awards is the encouragement of informed public participation in Commission proceedings. It would inhibit public interest groups from developing and maintaining expertise in regulatory matters if, in order to be entitled to costs, they had to retain and instruct legal counsel in the manner appropriate to proceedings before the courts in civil matters. On the other hand, no useful purpose would be served by requiring public interest groups artificially to arrange their affairs, by means, for instance, of forgivable debts or bonus accounts, in order to avoid a restrictive interpretation of the term 'costs'.

58 He agreed with the Commission's view that "costs" need not be merely compensatory. He then considered a prior decision of the Court rendered by Pratte J. in Re Bell Canada, [1982] 2 F.C. 681, 63 C.P.R. (2d) 44, 132 D.L.R. (3d) 641, 41 N.R. 221 (Fed. C.A.) , and distinguished it. Urie J. continues at pp. 129-130:

> The essence of the decision, as I see it, is found in the last two sentences in the following paragraph found on p. 647 [D.L.R.]:
>
> > In my view, the word "costs" in s. 73 of the National Transportation Act must, as argued by the appellant, be given its normal legal meaning, according to which the costs of a proceeding are the costs incurred by the parties or participants in that proceeding and do not include the expenses of the tribunal before which the proceedings are brought. See: Halsbury's Laws of England 3rd ed., vol. II, p. 293; Ballantine's Law Dictionary, p. 227; Black's Law Dictionary, p. 312; Jowitt's Dictionary of English Law, vol. 1, p. 507; Wharton's Law Lexicon, 13th ed., p. 230. I do not see any reason to give it a wider meaning. I am confirmed in this opinion by the fact that much of the language used in s. 73 is normally used in association with Court costs. I have in mind the phrase "costs of or incidental to any proceeding" (which is found in s. 50 of the English Supreme Court of Judicature (Consolidation) Act, 1925 (U.K.), c. 49), the reference to the possibility that costs be fixed at a sum certain or taxed and that the Commission prescribe a "scale" (in the French text: "tarif") of the costs. *If another interpretation were to prevail, the Commission would have the right to force the utility companies which the law obliges to appear before it to defray part of its expenses. This, in my opinion, would be contrary to the general policy of the National Transportation Act following which the expenses of the Commission are to be paid out of public funds rather than by the utility companies that are subject to its jurisdiction* .
>
> [the underlining is mine.]
>
> While what was said in the earlier part of the quoted passage appears to be totally at odds with my finding that the word 'costs' as used in s. 73 should be given a broader meaning than that ascribed to it in the Courts, taken in context with the last two sentences which clearly relate solely to the narrow issue before the Court in that case, there really is not a conflict between the two findings. I think it is clear that the issue in this case was not contemplated at all by the Court in the earlier case. I am fortified in this view by the following passage from p. 646 [D.L.R.] which is also contained in a quotation in Ryan J.'s reasons:
>
> > Moreover, even in clearly non-adversarial proceedings like applications for the approval of rates, *there may be cases where, like in ordinary litigation, it appears just to oblige a participant* in those proceedings to compensate the other participants for the expenses that they have incurred by reason of their participation in those proceedings.
>
> (the underlining is mine.)
>
> Pratte J. in that passage has likened the powers of the Commission to that of a Court in its ability to indemnify a participant in a hearing before it for expenses to which such participant may have been put by so participating. That does not mean, as I read the passage in the context of the whole of his reason, that the Commission is precluded from awarding 'costs' in

the broad sense of that word, to a participant whose contribution has, in the opinion of the Commission, been of value to it in assessing the merits of the application even if such participant had made no actual expenditures or only nominal ones.

59 Ryan J. for the majority held to a different view. While recognizing that proceedings before a tribunal may differ from those before a Court, he held that the word "costs" must be given its normal and ordinary legal meaning. He quoted, with approval from the reasons of Pratte J. in the prior Bell Canada rate case, supra, at pp. 138-139:

I will first consider the sense in which the word 'costs' is used in s. 73 of the Act. This Court had occasion to consider its meaning in Re Bell Canada (1982), 41 N.R. 221, 63 C.P.R. (2d) 44, 132 D.L.R. (3d) 641 (Fed. C.A.) . Leave to appeal to Supreme Court of Canada refused 63 C.P.R. (2d) 44n, 43 N.R. 269n (S.C.C.) . In that case, the Commission had ordered Bell Canada and B.C. Tel. to pay costs in respect of studies to be prepared for the Commission by consultants for use in a public hearing in connection with an application by Bell Canada and B.C. Tel. for rate increases. The appellant's basic submission was that for purposes of s. 73 '... the costs of a proceeding do not include the expenses incurred by the tribunal in order to hear and determine that proceeding'. The issue was obviously quite different from the issue in this case, and the passages I am about to quote must, of course, be read with this difference in mind.

In the course of his reasons, Mr. Justice Pratte, speaking for the Court, said at p. 647 [D.L.R.]:

> In my view, the word "costs" in s. 73 of the National Transportation Act must, as argued by the appellant, be given its normal legal meaning, according to which the costs of a proceeding are the costs incurred by the parties or participants in that proceeding and do not include the expenses of the tribunal before which the proceedings are brought ... I do not see any reason to give it a wider meaning.

Earlier in his reasons, Mr. Justice Pratte had noted, as had been submitted in that case and was submitted in this, that an application for a rate increase differs from ordinary litigation. He said at p. 646 [D.L.R.]:

> ... proceedings before the Commission are different from ordinary litigation. When a telephone company asks the Commission to approve a rate increase which is opposed by interveners, there is, strictly speaking, no lis between the applicant and the interveners. However, rates applications are not the only proceedings that may be brought before the Commission. Other proceedings, for example complaints against companies which are subject to the Commission's jurisdiction, resemble ordinary litigation. Moreover, even in clearly non-adversarial proceedings like applications for the approval of rates, there may be cases where, like in ordinary litigation, it appears just to oblige a participant in those proceedings to compensate the other participants for the expenses that they have incurred by reason of their participation in those proceedings.

60 Ryan J. then states, at p. 139:

This passage recognizes that in a rate proceeding it may well be appropriate to require a participant '... to compensate the other participants for the expenses that they have incurred by reason of their participation in those proceedings'. Again, in the quotation taken from p. 647 [D.L.R.], when speaking of 'costs' as carrying 'its normal legal meaning', Mr. Justice Pratte refers to '... its normal meaning, according to which the costs of a proceeding are the costs incurred by the parties or participants in that proceeding ...' It does not, as I see it, follow that in assessing costs in a rate proceeding, the Commission is bound to follow precisely the same rules as would a Taxing Master assessing costs in litigation in the Courts. Allowances would have to be made for differences in the purposes of the two quite different processes and in the practices and procedures followed in each. I am of opinion, however, that the term 'costs', as used in s. 73, does not carry with it, as an essential aspect, the element of compensation or indemnification for expenses incurred in a proceeding. The Commission would thus have been in error if, in its reasons for dismissing the appeal to it, it meant to reject the proposition that indemnification is an essential purpose in an award of costs under s. 73 of the Act.

61 None of the authorities relied upon by the respondents deal with the fundamental complaint of the applicants, namely, that what the Board has done is to grant intervenor funding in advance of a hearing. Those authorities recognize that the nature of the proceedings before a tribunal *may* , (not necessarily) differ from the proceedings before a Court and that where a board or

tribunal properly exercises its discretion re costs, its decision to do so will not be interfered with. In all of these cases, the major issues were whether the award in each case was within the discretionary power to award costs *after a hearing* . The weight of these authorities, however, leads to the conclusion that the word "costs", as used in a statute such as we are here considering, should be given its normal legal meaning with such modifications necessary by reason of the nature of the hearing.

Conclusion

62 Having considered the matter carefully, I am of the opinion that the Joint Board had no jurisdiction to make the impugned orders, as its discretion to award costs does not extend that far. I accept and adopt the reasoning of Huband J.A. in the Manitoba Seniors Case as correctly setting out the principle to be applied to the jurisdiction of the Board under s. 7 of the Consolidated Hearings Act. I further am of the view that the Joint Boards in the Victoria Hospital case and the Ontario Hydro case, in the quotations previously set out, correctly interpreted the authority of a Joint Board to award costs under the enabling statute.

63 The Board in the application before us clearly attempted to fund intervention in advance of a hearing and before the Board has had an opportunity to determine the value of the contributions to be made by the intervenor to the issue before it. While the Board has a broad discretion in its power to award costs, I am satisfied that this Board has not awarded "costs" here, but rather, has attempted to compel the applicant to provide intervenor funding, something which the Board has no jurisdiction to do.

64 It is for the Legislature, in clear lanaguage, to so empower a board or tribunal, should it be found desirable as a matter of public policy.

65 As, in my view, the Board here did not act within its jurisdiction, the orders below must be quashed. It is unnecessary to consider the question of appropriate guidelines, as this was premised on the finding that the Board had acted within its jurisdiction.

66 The application is allowed and the orders below are quashed. There is to be no order as to costs.

67 I wish to express my appreciation to all counsel who have participated in this application, for the full and capable argument given by each. I have not felt it necessary to refer to each of the great many cases brought to our attention, but rather to those which I felt to be necessary for the disposition of the application, but they have all, nonetheless, been considered.

Application granted.

Footnotes

* An application has been filed for leave to appeal to the Court of Appeal.

TAB 5

Ontario Energy Board Modernization Review Panel

FINAL REPORT | OCTOBER 2018

Introduction: The Evolving Role of the Ontario Energy Board

The Ontario Energy Board (OEB) is the independent economic regulator of Ontario's energy sector; its core purpose is to regulate Ontario's energy utilities in the public interest. The OEB is empowered by statute to (among other things) set rates for regulated entities, license market participants, review/approve consolidations, and grant leave-to-construct applications. The OEB undertakes its role primarily through quasi-judicial processes, reviewing utility applications through formal hearings and issuing legally binding orders.

Over the past 20 years, in addition to receiving jurisdiction over the electricity sector, the OEB has experienced significant changes in both its mandate and its required operations. These include:

- Balancing regulatory independence with responding to an increasing number of government directives;
- Taking on increased consumer protection responsibilities; and
- Delivering assistance programs such as the Ontario Electricity Support Program.

This mandate expansion was accompanied by extensive institutional changes:

- In 2003, the OEB became a self-financing government agency with a corporate governance structure led by the Chair/CEO and the Management Committee.
- The OEB's operating expenses have grown, from $24.5M in 2004-05 to $43.8M in 2017-18.

- The OEB's approach to adjudication has changed: the OEB now makes greater use of part-time Board Members and has increased the range of matters that are delegated to staff for decision-making.[1]

It is within this context of change that the OEB Modernization Review Panel (the Panel) was commissioned. The Minister of Energy, Northern Development and Mines tasked the Panel 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.[2] This Report outlines the process the Panel used to undertake its review, and its recommendations for opportunities to enhance regulatory excellence in the OEB's governance and operations.

1 Fiscal Year 2008-09: 315 Decisions issued – 117 by Board Members, 198 by delegated staff.
Fiscal Year 2017-18: 323 Decisions issued – 61 by Board Members, 262 by delegated staff.
Information provided by OEB September 2018

2 Appendix A: Terms of Reference; the Panel defines "regulatory community" as those who participate in OEB processes, including regulated utilities, intervenors, and others who have an interest in the work of the OEB.

Engagement Process

The Panel's review of the OEB included extensive consultation and engagement with Ontario's energy sector, as well as research and consideration of material relevant to the subject of regulatory excellence.[3] There were three main phases to the review:

Phase One

Beginning in January 2018, meetings were held with various stakeholders, regulatory experts and the Auditor General's Office to help shape the review. They contributed their insights as to the challenges facing energy regulation in Ontario. Seven key themes emerged during these initial discussions, and the Panel subsequently prepared and distributed discussion notes[4] on these themes to facilitate engagement.

The Panel also considered research that would support its work, reviewing academic thinking, cross jurisdictional comparisons and generally accepted best practices.

Phase Two

During March and April 2018, over 45 organizations and individuals met with the Panel in Toronto, London, Ottawa, Sudbury, and Thunder Bay. The Panel also invited stakeholders to provide written submissions; 60 were received. The participants in the consultations included:

- Entities regulated by the OEB
- Industry associations
- Consumer advocate groups

3 Appendix B: Selected Works Consulted

4 Appendix C: Panel Discussion Notes

- Regulatory lawyers
- Innovation proponents / technology developers
- Academics
- Provincial and municipal organizations
- The OEB

The Panel also received submissions from and met with representatives from Indigenous communities.

The Panel was in the process of reviewing all this input and other related materials when it was asked to pause its work in June 2018.

Phase Three

When the Panel was re-constituted in late August 2018, its first task was to prepare and submit a report summarizing the stakeholder input received in Phase 2. This "What We Heard" report was submitted to the Minister of Energy, Northern Development and Mines on September 25, 2018.[5]

In parallel, the Panel continued its review of information and research related to regulatory best practices, as identified in academic literature and through review of regulators in other jurisdictions. The Panel also met with OEB Members and OEB senior officials to review financial and operational reports.

Over September and October, the Panel completed its deliberations, developed its recommendations and prepared this Final Report.

5 Appendix D: "What We Heard" Report

The Challenges Ahead

In the process of completing its review, the Panel increasingly appreciated the importance of the OEB's work. Prudent regulation of the energy sector is not merely about setting fair rates or authorizing capital investments. It is about supporting a growing economy and helping Ontarians maintain a high quality of life. In furthering the adequacy, reliability, and quality of energy service, the work of the OEB supports Ontario's economic, social, and environmental development.

Given these realities, the role of the OEB will be even more critical over the next decade. New disruptive technologies are poised to impact and redefine the marketplace which the OEB regulates. For example:

- Energy storage facilities such as batteries and other distributed energy resources will increasingly become affordable and accessible;
- Many Ontarians will move towards electric cars; and
- Industrial and commercial customers will seek to generate more of their own electricity, thereby relying less on (and being less willing to contribute to the cost of) the electricity grid.[6]

These and many other changes have the potential to significantly affect traditional methods of generating, delivering, and consuming energy. The resulting new business models, changing consumer expectations, and increased interconnection between the energy system and the broader economy will require the OEB to adapt its policies, governance and practices to continue to serve the public interest.

6 "Revolution Now: The Future Arrives for Five Clean Energy Technologies – 2016 Update", U.S. Department of Energy, https://www.energy.gov/eere/downloads/revolutionnow-2016-update,
"6 Trends Driving Vehicle Electrification in 2018", Greentechmedia, https://www.greentechmedia.com/articles/read/how-vehicle-electrification-will-evolve-in-2018#gs.VKAfepk

The Panel believes that it is vital for Ontario's well-being that the OEB not only manage this transition, but that it manages this transition extraordinarily well. To perform at this level, the OEB will need to rely on a significant amount of public trust—an essential ingredient for institutions that have delegated authority from government. Public trust in the context of a regulator requires that all interested parties—the regulatory community, the public and public representatives—have confidence that the regulator will develop policies and issue decisions that are fair, well-reasoned, and responsive to their concerns.

To have and sustain public trust in this day and age is more challenging than it used to be. Institutions that pursue the public interest are subject to a broad range of commentary and criticisms from diverse stakeholders. Regulatory institutions are not immune from this trend, and the OEB will be tested in the years ahead to achieve the highest standard of excellence.

Regulatory Excellence

Through discussions with regulatory experts and through consulting regulatory best practices developed by organizations such as the Organization for Economic Co-operation and Development (OECD) and the World Bank,[7] the Panel identified five key characteristics that regulators should embody:

- **Independence:** The regulator should be recognized as making fair and impartial decisions, free of undue influence from government or others, and focused on its core economic regulation mandate.
- **Accountability:** While being independent in its decision-making, the regulator's governance should reflect that it is accountable for the advancement of the public interest.
- **Certainty:** Regulatory processes should be as predictable as possible. Regulated entities should understand what is expected of them and regulatory proceedings should follow a dependable schedule.
- **Effectiveness:** The regulator should be clear about the outcomes it is aiming to achieve. This includes having a clear rationale for how regulatory policies and processes deliver on statutory objectives. It should be transparent with how success is measured by tracking outcomes over time.
- **Efficiency:** The regulator should strive to find process improvements in all its functions to increase productivity and value for money.

Taking into account the challenges the OEB will face going forward, the OEB should reflect these characteristics in its governance and operations. Doing so will enable

7 See Appendix B: Selected Works Consulted

the OEB to respond to these challenges effectively and be viewed as a top-performing regulator. The Panel has therefore developed its recommendations to have the OEB embody these characteristics, drawing upon the input received from stakeholders, review of best practices in other jurisdictions, various analyses and reports, and our internal deliberations.

Recommendations

The following recommendations are to be taken as a whole, rather than considered individually, and are intended to reinforce the OEB's core function as an economic regulator. Taken together, these recommendations identify opportunities to improve confidence in Ontario's regulatory system and point towards opportunities to strengthen public trust.

The Panel's recommendations to support regulatory excellence are:

1. The Panel recommends the establishment of a new governance framework which would include a Board of Directors with a non-executive Chair (the Board), a President, and a Chief Commissioner responsible for adjudication. The Panel further recommends that the Ontario Energy Board be renamed the Ontario Energy Regulator (OER).

2. The Panel recommends that the Board ask the President and the Chief Commissioner to develop, within six months of their appointment, a plan to enhance the independence, the certainty and the efficiency of the adjudication process.

3. The Panel recommends that the Chair of the Board and the President inform the Legislative Assembly's Standing Committee on Government Agencies of the OER's plans, priorities and performance. The first appearance should be scheduled one year after the appointment of the Board and every three years after that. The Panel also recommends that section 128.1 of the Ontario Energy Board Act, 1998 requiring the Minister to commission a report on the agency's effectiveness every five years and have it tabled in the Legislature, be implemented.

4. The Panel recommends that the Board ask the President and Chief

Commissioner, with the input of stakeholders and other interested parties, to develop new key performance indicators (KPIs) that focus on matters such as decision cycle time, stakeholder satisfaction, and organizational excellence.

5. The Panel recommends that the Board ask the President and Chief Commissioner to develop and maintain a prioritized list and schedule of emerging policy issues to address. When addressing this list, the OER should make use of consultation approaches that promote transparency and inclusivity in the development of policies, including generic proceedings. The Panel further recommends that within the first year of the appointment of the Board, the issue of regulatory treatment of innovation be addressed in a generic proceeding.

6. The Panel recommends that the Board ask the President to undertake, within three months of appointment, a financial review of the operations of the OER with a view towards ensuring best practices are implemented and that expenditures are appropriate for delivering priorities.

7. The Panel recommends that the Annual Report be enhanced to include additional financial, operational and performance information.

8. The Panel recommends that the Board ask the President to develop for the Board's consideration and review a human capital plan. This plan would ensure that the staff skillset reflects the evolving needs of the regulator and is capable of responding to the challenges facing the regulation of the energy sector.

The Panel is confident that these recommendations, when implemented, would enhance independence, accountability, certainty, efficiency, and effectiveness in the OER's governance and operations.

Analysis and Comments

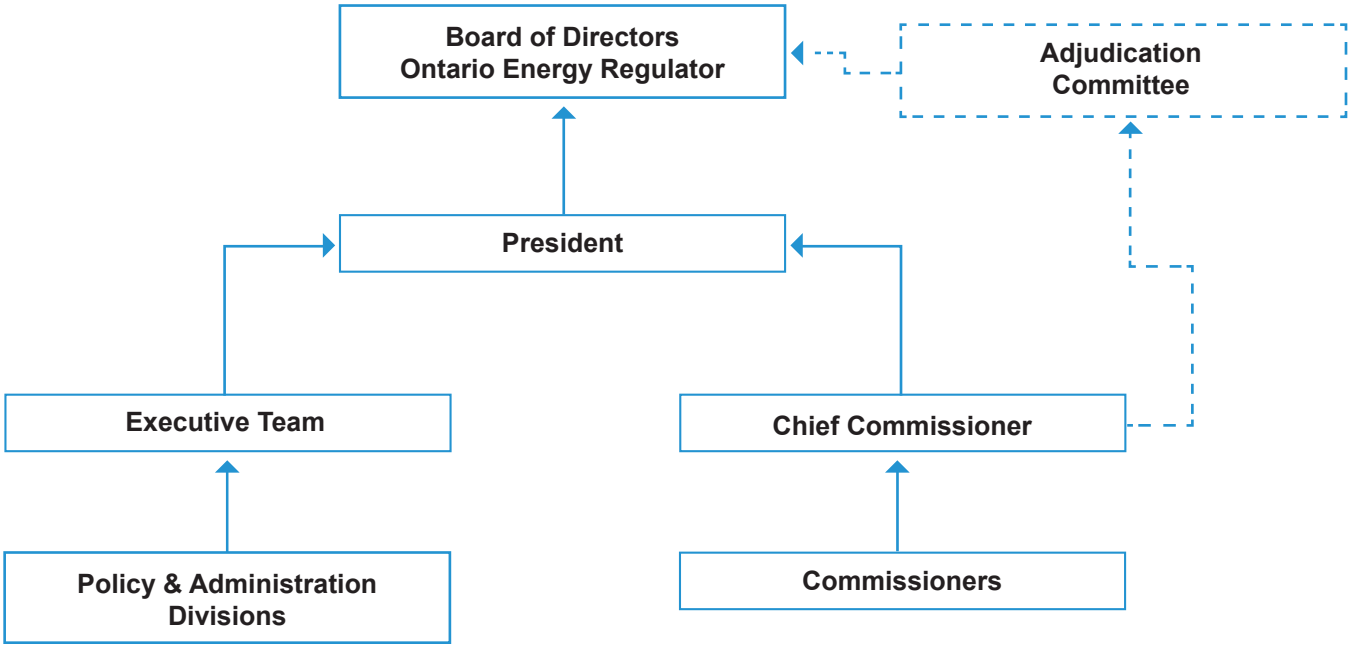
The analysis and comments below are intended to support the effective implementation of our recommendations and help achieve their intended outcomes.

Independence and Accountability (Recommendations #1, #3)

The new governance structure is the central component of the Panel's recommendations. The Panel heard that the sector sees the current governance structure as an impediment to independent decision-making and accountability. Reforming the governance structure is a solid first step toward improving trust and confidence in the regulatory system.

The Panel believes that changing the OEB's name to Ontario Energy Regulator emphasizes the breadth and depth of organizational change being proposed. The name "Regulator" reinforces that prudent regulation is the core purpose of the institution.

The governance structure of the new OER would clarify lines of accountability and strengthen independence as follows:



The **Board of Directors** would be composed of seven to nine Directors appointed by government. The Panel suggests the government first appoint the Chair of the Board, then other Directors of the Board with input from the Chair. In making appointments, the Panel suggests that the government develop and make public a competency matrix to ensure that the overall skillset of Board members equips the Board to administer its role effectively. The competency matrix should reflect a diversity of skills and experience, including:

- Extensive expertise in energy, regulatory, environmental, and public policy (including consumer issues);
- Corporate governance experience, including strategies for delivering on a public mandate;
- Financial and performance management; and
- Knowledge of Indigenous energy policy considerations and the diverse regional economies within Ontario.

The Board would focus on three critical roles in the leadership of the organization:

i. Performing the usual governance responsibilities of a Board, including overseeing the development and implementation of OER strategy;

ii. Serving as the primary interface with the Minister and the government; and

iii. Ensuring the independence and effectiveness of the adjudication process.

The Panel suggests the **President** be appointed by the government on the advice of the Board, following a search process conducted under the auspices of the Board. The President would be accountable to the Board for the efficient and effective management of all OER functions.

The OER's quasi-judicial role would be entrusted to **Hearing Commissioners**, led by a **Chief Commissioner**. Commissioners would adjudicate hearings and issue the OER's legally binding decisions. Commissioners would be assigned to cases by the Chief Commissioner. The Commissioners would be accountable to the Chief Commissioner for the efficient administration of their case load.

The Panel suggests the Chief Commissioner be selected and appointed by the Board, with the advice of the President. Given the importance of the adjudication role, the Panel suggests that every three months the Chief Commissioner report to an **Adjudication Committee** of the Board on adjudication activities, future case load, and resource requirements. Lastly, the Panel suggests that the appointment of all other Commissioners be done by the Board of Directors based on the recommendation of the Chief Commissioner.

The OER is accountable to the government. The Panel believes that given the scope of the OER, a periodic sharing of information with the Legislature about its plans and activities would be beneficial. Moreover, the undertaking of effectiveness reviews, as required by the current legislation, would also enhance transparency.

With the new governance framework in place, the OER would be well-positioned to make operational improvements that enhance regulatory certainty, efficiency, and effectiveness.

Certainty (Recommendations #2, #5)

Excellent regulators are able to process case work on a dependable timeline and can clearly communicate with the regulatory community about requirements, status, and milestones. Participants need more certainty as to what they can expect from regulatory processes. Providing this certainty is a significant component of building public trust.

It is for this reason that the Panel is recommending that the new OER develop a plan to make improvements in the adjudication process. The Panel suggests that such a plan should include:

i. A recommendation on the optimal number of Commissioners, including the ratio of full-time to part-time;

ii. A recommendation on an appropriate competency matrix for the appointment of Commissioners;

iii. Robust guidelines to assist Commissioners in administering effective hearings;

iv. A three-year forecast of case management workload and resource requirements;

v. Modernizing the intervenor participation guidelines; and

vi. Recommendations for any legislative amendments that would help the OER strike the right balance between more formal proceedings and delegated decision-making.

The development of this plan would benefit from appropriate stakeholder engagement.

Stakeholder engagement is also important when it comes to setting rules and policies that incent or require certain behavior in the energy sector. The OER cannot expect to succeed in its role if it does not have a clear sense of the challenges facing the sector, and developing this clear sense requires two-way communication with the regulatory community so that community concerns are understood. To address this, the Panel is recommending that the OER consult on and maintain a clear list of priority issues that may require a policy response, and to develop transparent and inclusive consultation processes to address them. This prioritized list, and an associated timetable, would then be reflected in the OER's strategic vision documents and business plans.

The Panel clearly heard that regulated entities are looking for more guidance from the OEB on matters related to the regulatory treatment of investment in innovation. While the OEB committed to providing this in its Strategic Blueprint, the Panel believes that the importance of this issue to the future of the energy sector requires that it receive priority attention and a generic proceeding. Taking such an inclusive approach will help the new OER enhance public trust.

Effectiveness (Recommendations #4, #8)

To demonstrate effectiveness, detailed and transparent performance measurement is critical. Excellent regulators set performance targets pertaining to their core work, and are open with the regulatory community as to how well those targets are measured and met; they also seek out opportunities for improvement.

After reviewing examples set by regulators in other jurisdictions—the Alberta Utilities Commission (AUC),[8] the British Columbia Utilities Commission (BCUC),[9] and the Office of Gas and Electricity Markets (Ofgem)[10] in the UK – the Panel recommends that the OER should develop, in consultation with the regulatory community, new KPIs. These should include:

- **Decision Cycle Time:** The OER should revamp the metrics it uses to track the adjudicative process to determine if hearings are hitting milestones and if decisions are issued in an appropriate timeframe. This will require consultation to determine an acceptable timeline for various hearings. Ofgem includes significant detail and transparency on how it performs on various types of proceedings. AUC offers a strong example of how to set decision cycle metrics for various types of cases that challenge the regulator to meet high performance expectations: 100 per cent target for decisions within 90 days of the closing of the record; proceedings have a range of target days depending on process type.

- **Stakeholder Satisfaction:** The OER should do more to track and report on how stakeholders perceive the regulator's performance. This includes reporting on whether or not stakeholders believe the OER is addressing the important policy issues of the day, how effective it is at delivering its responsibilities, and if it consults

8 AUC, 2017. http://www.auc.ab.ca/Shared Documents/2018-2019to2020-2021AUCBusinessPlan.pdf

9 BCUC Business Plan 2016, 2017. http://www.bcuc.com/Documents/ServicePlans/2017/DOC_49165_BCUC-Business-Plan-2017-2020.pdf

10 OFGEM, 2017. https://www.ofgem.gov.uk/system/files/docs/2018/06/ofgem_annual_report_2018_web_0.pdf

well. This will help OER management determine if long-term objectives are being achieved.

- **Organizational Excellence:** The OER should report on its internal operations to showcase its commitment to being an excellent regulator. The report would include information about financial efficiency measures as well as employee engagement. Both AUC and BCUC seek to surpass their respective provincial government's employee engagement score. Ofgem also tracks how quickly it responds to concerns of "whistle-blowers" identifying potential problems in the sector.

The OER should provide enough detail and transparency to ensure KPIs are useful for identifying opportunities to continuously improve. The OER should make use of best practices such as SMART (specific, measurable, achievable, relevant, and time-bound). KPIs should be reviewed periodically so they create stretch goals for the organization and promote accountability.

Effectively delivering on performance targets will also require that the OER retain a highly skilled workforce that can respond to the complex challenges the regulator will face. If the OER is unable to properly assess an innovative investment or business model proposed by a utility, Ontario consumers may not get best value for money. Accordingly, the Panel is recommending the development of a human capital plan. The OER must constantly be aware of the skillset it has on hand, what it might need in the future, and where there may be gaps to address.

Efficiency (Recommendations #6, #7)

Finally, like all public bodies, the OER is responsible for the prudent use of the funds available to it. Transparent and appropriate use of resources is especially important for self-financing agencies like the OER, which has the power to levy costs on the utilities it regulates that are then passed on to consumers. Excellent regulators also continuously seek to find efficiencies in their use of resources; the goal of any regulator should be to

deliver its work at the lowest cost possible to the ratepayer.

As such, the Panel is recommending that the OER conduct a review of the organization's finances to identify areas where efficiency improvements can be made. If information is available, benchmarking costs against other regulators should be undertaken. The Panel expects that this review will identify sources of savings that can offset any costs associated with the implementation of the new governance framework, identifying areas where the outcome of activities cannot justify the expense. Such potential savings could be in activities such as program delivery, which is not a core OEB purpose, or consumer outreach activities, which may be duplicating the work of other energy sector organizations. Once a new financial baseline is set, the OER should expand the transparency of its financial reporting in the Annual Report to make clear to the public what the major cost drivers of the OER's work are and what is being done to bring costs down year-over-year. This level of public reporting will help create the accountability necessary to pursue efficiency improvements.

Conclusion

The Panel believes that the OEB is staffed by committed public servants who deliver a demanding and complex workload to protect consumers and keep the energy sector functioning. The continuing success of Ontario's energy sector depends on the regulator delivering its responsibilities at an increasingly high level of performance. The recommendations contained in this report reflect real and tangible opportunities to better promote the independence, accountability, certainty, efficiency, and effectiveness of Ontario's energy regulatory system—now, and into the future.

The Panel expresses its sincere appreciation to all the individuals and organizations who took the time to contribute to this review. The Panel also wishes to express its gratitude to the excellent team at the Ontario Ministry of Energy, Northern Development and Mines for their support and dedication during this engagement. The stewardship and contributions of Mike Smith, Elaine Wong, and many others were invaluable to the Panel in completing its work.

Appendix A: Terms of Reference

Purpose and Mandate

The Minister of Energy, Northern Development and Mines is seeking the advice of an independent panel through their review of the Ontario energy regulator in order to strengthen trust and transparency in the energy sector.

Ontario energy stakeholders have repeatedly expressed concerns about Ontario's energy regulatory system. Informed by a wide spectrum of stakeholders and research, the Minister seeks the advice of an independent panel regarding immediate opportunities to enhance stakeholder confidence in the Ontario Energy Board (OEB). Strengthening the governance and operational framework of the OEB is intended to improve its decision-making, increase efficiency and promote best value for consumers.

The review is expected to benefit Ontario businesses and consumers, as well as support the government priorities to reinforce accountability and trust in government agencies.

Deliverables and Scope

The Ministry of Energy, Northern Development and Mines is establishing the Ontario Energy Board Modernization Review Panel (Panel) to provide recommendations on how the OEB's governance and operations can deliver better outcomes for consumers. The Panel is a re-constitution of the Panel that operated between December 2017 and June 2018, with a narrower scope that focuses on governance and operations of the OEB. The work of the Panel is expected to identify immediate opportunities to restore trust and transparency in the energy sector and promote efficiency and improved effectiveness.

The Panel will operate for the lesser of four (4) months or until their report is complete and within that time-frame will deliver:

1. a report summarizing the stakeholder input received during the prior Panel period, and
2. a formal public report with recommendations on the items described below.

The final report of the Panel will provide the Minister with the Panel's advice and recommendations on

the following areas:

- The OEB's internal governance structure, including opportunities to enhance oversight, transparency and accountability.
- Options for utilizing the OEB's policy expertise while protecting the independence of adjudicative processes.
- The OEB's internal operations, including opportunities to better align activities with outcomes that produce enhanced value for the sector.

This work will align with the government broader interests in finding efficiencies and exploring innovative ways to deliver sustainable programs and services.

Composition and membership

Reflecting their extensive experience in the energy sector, the Panel is composed of three members, as appointed by the Minister of Energy:

- Chair Richard Dicerni
- Member Cara Clairman
- Member Bruce Campbell

Appointments are effective for 4 months ending no later than December 31, 2018, and may be extended if necessary. Panel members will receive remuneration as may be provided for by Order-in-Council.

Operating and Ethical Principles

Members of the Panel will be expected to adhere to the operating and ethical principles as outlined in Ontario's Agencies and Appointments Directive:

- Not use or attempt to use his or her appointment to benefit himself or any person or entity;

- Not participate in or attempt to influence decision-making as an appointee if he or she could benefit from the decision;
- Not accept a gift that could influence, or that could be seen to influence, the appointee in carrying out the duties of the appointment;
- Not use or disclose any confidential information, either during or after the appointment, obtained as a result of his or her appointment for any purpose unrelated to the duties of the appointment, except if required to do so by law or authorized to do so by the Minister; and
- Not use government premises, equipment or supplies for purposes unrelated to his or her appointment; and
- Comply with such additional requirements, if any, established by the Panel itself, and/or the Minister.

For the purposes of the above “confidential information” means information that is not available to the public.

Governance, Organization, and Operation

Chair: The Chair shall preside at each meeting of the Panel. The Panel Chair is responsible for keeping the Minister up-to-date on the Panel’s progress.

Meetings: Meetings will be scheduled as the Chair deems necessary for the Panel to accomplish its duties and purposes.

Role of the Ministry of Energy, Northern Development and Mines: The Ministry will provide secretariat functions, including staff to help with coordination and other activities.

The Ministry of Energy, Northern Development and Mines will exercise due diligence in limiting total Panel costs.

Process of consideration: The report of the Panel is expected to reflect a consensus. In the event

that consensus among the Panel cannot be reached, the Chair will have the final determination of any matter.

Remuneration and Reimbursement of expenses: Panel will be remunerated at a per diem rate as approved in the remuneration Order-in-Council. The maximum remuneration for the Panel Chair is $26,028. The maximum remuneration for additional Panel members is $19,521. Panel members are expected to note the freeze on discretionary spending. Panel members will be reimbursed for all reasonable expenses actually incurred by them in carrying out their duties as outlined herein in accordance with all relevant Management Board of Cabinet directives including the Travel, Meal and Hospitality Expenses Directive. Total costs of the Panel are not to exceed $100,000.

Accountability Mechanisms

The Panel will operate in accordance with the conditions outlined in the Terms-of-Reference and all applicable Ontario directives, including: the Agency Establishment and Accountability Directive, the Government Appointees Directive, and the Travel, Meal and Hospitality Expenses Directive.

Effective Date

These Terms of Reference are effective as of the date the Minister signs. They can be changed at any time by the Minister.

Original signed by

Hon. Greg Rickford Date: 28th August, 2018

Minister of Energy, Northern Development and Mines

Appendix B: Selected Works Consulted

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Appendix C: Discussion Notes

Introduction

In December 2017, the Minister of Energy announced the creation of the Ontario Energy Board Modernization Review Panel ("Panel"). The launch of the Panel follows the release of the Long-Term Energy Plan 2017: Delivering Fairness and Choice. The Panel will explore how the mandate, role, and structure of the OEB[11] could be modernized to assist it in responding to a rapidly changing energy sector. The Panel will be guided by its Terms of Reference, which sets out the purpose and mandate for the review.

The purpose of these discussion notes is to set a context for the Panel's investigation into the questions described in the Terms of Reference. The Panel will seek input to examine and identify best practices, and to learn lessons from other jurisdictions that may have undertaken regulatory modernization and reforms.

The Panel is interested in learning about best practices for regulators, and in particular about qualities that promote regulatory excellence. Dr. Cary Coglianese, Director of the Penn Program on Regulation at the University of Pennsylvania has suggested[12] that the traits of an excellent regulator could be described by such adjectives as:

strong, well-funded, adequately staffed, credible, honest, and legitimate

and the actions of an excellent regulator could be described by adjectives such as:

vigilant, serious, reasonable, and evidence-based.

The Organisation for Economic Co-operation and Development (OECD) has also developed recommendations and guidelines on regulatory policy. The OECD has been working over the past few decades to "support OECD countries' governments to improve the institutional arrangements, processes and practices within regulators, support regulators' efforts to build a high level of

11 The Ontario Energy Board is Ontario's independent energy regulator, responsible for establishing energy rates and prices that are reasonable, setting rules for energy companies operating in Ontario, and making the energy system easier to navigate and understand for consumers.

12 Coglianese, Cary (2017). The Challenge of Regulatory Excellence. In Cary Coglianese (Ed.) Achieving Regulatory Excellence (pp.1-19). Washington D.C.: Brookings Institution Press.

professional competence, and attract, develop and retain the best people to manage regulatory systems."[13]

The OECD has outlined 7 principles for the governance of regulators,[14] which when taken together are a means of evaluating whether a regulator can be considered best-in-class:

- Role clarity;
- Preventing undue influence and maintaining trust;
- Decision making and governing body structure for independent regulators;
- Accountability and transparency;
- Engagement;
- Funding; and,
- Performance evaluation.

Others have made similar observations. Dr. Mark A. Jamison, Director of the Public Utility Research Center at the University of Florida's Warrington College of Business has suggested:

> *The regulator's authority to make decisions is affected by the regulator's independence, which simply means that the regulatory agency operates under laws rather than decrees; manages its own budget, subject to legal limits imposed by law; and makes decisions that are reviewable only by an independent judiciary and not by ministries, parliament, or the government…The regulator can affect its degree of independence by choices it makes regarding transparency, credibility, and legitimacy.*[15]

13 OECD (2014), The Governance of Regulators, OECD Best Practice Principles for Regulatory Policy, p.22. OECD Publishing, Paris, http://dx.doi.org/10.1787/9789264209015-en.

14 Ibid., p.16.

15 Jamison, Mark A. (2009). Towards New Regulatory Regimes in Globalized Infrastructure. In Auger, J.-F., et al. (Ed.) Internationalization of Infrastructures (pp.257-273). Delft, Netherlands: Delft University of Technology. http://warrington.ufl.edu/centers/purc/purcdocs/papers/0911_Jamison_Towards_New_Regulatory.pdf

In their 1999 study on assessing the regulatory performance in infrastructure industries, Stern and Holder[16] discuss similar criteria, such as:

- Clarity of Roles and Objectives
- Autonomy
- Participation
- Accountability
- Transparency
- Predictability

In another study on regulatory effectiveness published by the World Bank, additional criteria to the above such as “coherence” and “capacity” were also suggested.[17]

Following these principles, the panel has developed 7 themes for consideration that reflect what has been suggested by academics, NGOs, and others studying regulatory effectiveness and governance as important characteristics of a regulator. These themes are:

- **Mandate and Activities:** Does the scope of the OEB’s mandate and activities need to be adjusted (increased, decreased, or otherwise optimized) in order to support the modernization of Ontario’s energy sector? If so, in what way?
- **Disruption and Innovation:** How can the regulator ensure its policies and practices are best positioned to encourage innovation in Ontario’s energy sector?
- **Governance Framework:** What is the appropriate governance framework for a modern energy

16 Stern, J. and Stuart Holder (1999) Regulatory Governance: Criteria for Assessing the Performance of Regulatory Systems. Utilities Policy, 8(1) pp. 33-50.

17 Stern, J. and J. Cubbin (2005). Regulatory Effectiveness: The Impact of Regulation and Regulatory Governance Arrangements on Electricity Industry Outcomes. World Bank Policy Research Working Paper 3536. http://documents.worldbank.org/curated/en/535991468763757645/pdf/wps3536.pdf. “Coherence” and “Capacity” criteria are taken from Roger Noll (2000). Telecommunications Reform in Developing Countries. In Anne O. Krueger (Ed.) Economic Policy Reform: The Second Stage. University of Chicago. Also see Stern, Jon (2004). Regulatory Governance and its relationship to Infrastructure Industry Outcomes in Developing Economies. New Directions in regulation Seminar. Kennedy School of Government, Harvard University. https://sites.hks.harvard.edu/hepg/Papers/stern.reg.governance.develop.econs.May04.pdf.

regulator?

- **Stakeholder Relationship:** What are the effective mechanisms to provide stakeholders with appropriate opportunities to participate in OEB decision-making?
- **Relationship to Government:** Considering the diversity of Ontario's energy sector, how can the OEB best fulfill its adjudicative responsibilities and obligations within an accountability framework set by the legislature?
- **Regulatory Excellence and Benchmarking:** What are fair and meaningful performance metrics for measuring regulatory excellence, both in terms of efficiency of process and effectiveness of outcomes?
- **Resourcing:** What is the appropriate level of financial and human resources that will best equip the OEB to deliver on its mandate, and what is the appropriate source of its funding?

These themes are very briefly expanded upon below to help facilitate discussion, input and ideas from stakeholders interested in contributing to the future of the OEB. The Panel intends to explore what is considered best practice in each of these themes. The themes are not to be interpreted as standalone or isolated from one another, nor are they intended to limit discussion. The themes should be thought of as interconnected and interrelated and are separated here only to facilitate input.

The Panel looks forward to a vibrant discussion.

Discussion Theme: OEB Mandate and Activities

The Panel seeks to explore issues related to the appropriate mandate and role of the regulator. The OEB's role and mandate, including the tools with which to carry out that mandate, are established through statutes. It is the responsibility of government to establish a legislative framework that sets a clear and appropriate mandate for the OEB to effectively regulate the energy sector, both today and in the future.

The OEB's historical core function is economic regulation, including consumer price protection.

The OEB is authorized to set rates for regulated entities, license market participants, review/ approve consolidations, grant leave to construct applications, and approve IESO charges. The OEB undertakes this role through quasi-judicial processes, reviewing utility applications within formal hearings and issuing legally-binding orders.

Additional responsibilities include authority over the wholesale electricity market rules, (including oversight by the Market Surveillance Panel), conduct of market participants, and program administration (e.g. the Ontario Electricity Support Program).

Ofgem[18] (Office of Gas and Electricity Markets) is an independent regulator in the UK, responsible for regulating Gas and Electricity. Ofgem's approach to regulation is administrative (decisions determined and issued by regulator staff), rather than quasi-judicial.

The Alberta Utilities Commission (AUC)[19] is an independent, quasi-judicial agency responsible for regulating the rates of investor-owned (and some municipal) gas, electric and water utilities. The AUC does not set any of the rates or terms and conditions of service for competitive retailers.[20] The Utilities Consumer Advocate[21] (UCA) holds mandate for consumer education and advocacy.

The Public Utilities Board of Manitoba (PUB)[22] "is an independent, quasi-judicial administrative tribunal that has broad oversight and supervisory powers over public utilities and designated monopolies." The mandate of the PUB includes oversight over natural gas/propane safety, funeral homes, and auto-insurance in addition to electricity and gas.

Question: Does the scope of the OEB's mandate and activities need to be adjusted (increased, decreased, or otherwise optimized) in order to support the modernization of Ontario's energy sector? If so, in what way?

18 https://www.ofgem.gov.uk/about-us/who-we-are

19 http://www.auc.ab.ca/Pages/Default.aspx

20 http://www.auc.ab.ca/about-the-auc/who-we-regulate/Pages/default.aspx

21 https://ucahelps.alberta.ca/what-we-do.aspx

22 http://www.pubmanitoba.ca/v1/about-pub/index.html

Discussion Theme: Disruption and Innovation

The panel seeks to explore how the OEB can position itself to respond to the significant changes underway in Ontario's energy sector. Non-traditional technologies such as energy storage are becoming cost-effective; customer demands, expectations and participation trends are evolving; and new business models are emerging.

The Ontario Energy Board (OEB) articulated its direction on smart grid and innovation through the 2012 Renewed Regulatory Framework for Electricity and the 2013 Supplemental Report on the Smart Grid. Innovation and smart grid activities are now required as part of utility Distribution System Plans. Presented at rate filings, these plans articulate the capital investment strategies that utilities propose to use over a five year period. On June 27, 2013, the Board created the Smart Grid Advisory Committee, which issued a paper on barriers to energy storage in 2014, and a questionnaire on cybersecurity in 2015. In December 2017, the OEB released its Strategic Blueprint that sets out a roadmap of how the regulator will equip itself to address sector transformation in the next five years.

The 2017 Long-Term Energy Plan (LTEP) commits the OEB to provide utilities with the right environment to invest in innovative solutions that make their systems more efficient, reliable and cost-effective, and provide more customer choice. In response, OEB's LTEP Implementation Plan describes a number of initiatives to promote a more innovative energy sector, including establishing an Advisory Committee on Innovation.[23]

Regulatory reviews are underway in other jurisdictions; fundamental questions are being asked as to what constitutes "value" in an energy system, and what the public interest looks like in an increasingly distributed energy future.

For example, the New York Public Commission is developing new methodologies to value and compensate distributed energy resources, which takes into account energy price, reduction of costs

23 This includes activities such as the OEB forming an Advisory Committee on Innovation. See Implementation Plan. Ontario Energy Board. 2018. Ontario Energy Board's Implementation Plan. pp. 10-16, 36-38.

for consumers, and the value of deferred capital.[24] Regulators in California are exploring models like locational net benefits to facilitate the transition to a distributed energy future.[25] In Great Britain, Ofgem established the RIIO framework, which "encourages[s] a more flexible and forward looking approach."[26] Ofgem's framework does not differentiate between capital and operational expenditures in determining utility rate-of-return, which avoids debate over expenditure types[27] and removes any incentive to overspend on capital assets.

Question: How can the regulator ensure its policies and practices are best positioned to encourage innovation in Ontario's energy sector?

Discussion Theme: Governance Framework

The Panel seeks to explore the components of an appropriate governance framework for a modern energy regulator. The Ontario Energy Board (OEB) is an independent regulator with its basic governance structure set out in the Ontario Energy Board Act, 1998. The governance structure includes the dual position of Chair/Chief Executive Officer (CEO), two Vice Chairs, other Board Members (full-time and part-time), a Chief Operating Officer (COO), and a Board Secretary. The Management Committee, consisting of the Chair/CEO and two Vice Chairs, serves as a quasi-Board of Directors. It is responsible for the overall performance of the OEB including budgeting, allocation of resources, and making by-laws governing the operation of the Board.

As legislation designates that the Chair also has the duties of the CEO, the oversight of all activities (both adjudicative and operational) are directed through the same office. In the past decade, the mandate and role of the OEB have expanded considerably, increasing operational workload. In recent years, Board membership has seen a trend away from full-time Members with greater utilization of part-time Members. Currently the Chair/CEO is supported by a COO/General Counsel.

24 See State of New York. Public Service Commission. 2017. Order on Net Metering Transition, Phase One of Value of Distributed Energy Resources, and Related Matters.

25 See California. Public Utilities Commission. 2016. California's Distributed Energy Resources Action Plan: Aligning Vision and Action. pp. 1-14.

26 Ofgem. 2010. RIIO - A New Way to Regulate Energy Networks. p. 14.

27 Ofgem. 2010. Guide to the RIIO-ED1 electricity distribution price control. p. 14.

Other models also exist in other jurisdictions. The California Public Utilities Commission (CPUC)[28] is governed by Commissioners led by the President. The Executive Director responsible for executive functions reports to the President. The Chief Administrative Law Judges Division maintains an independent forum for processing formal filings and conducting hearings.

The Alberta Energy Regulator[29] governance model has a governing board of directors for corporate oversight while the Chief Hearing Commissioner is responsible for independent adjudication.

The National Energy Board has a joint Chair/CEO arrangement. However, the NEB is undergoing a fundamental reform as a result of an Expert Panel Review,[30] moving away from the joint Chair/CEO arrangement towards separate positions heading the board of directors and hearing commissioners. The Canadian Government recently introduced Bill C-69 which would, if passed, repeal the National Energy Board Act and enact, among other statutes, the Canadian Energy Regulator Act. Under the proposed Bill, the Canadian Energy Regulator would have a separate Chair and CEO, both of which are separate from the Commission (the suite of adjudicators).[31]

Question: What is the appropriate governance framework for a modern energy regulator?

Discussion Theme: Stakeholder Relationship

The Panel seeks to explore the nature of participation of stakeholders in the OEB's decision-making and how it relates to what is considered best practice for a regulator. As many of the OEB's regulated entities are natural monopolies, ensuring the OEB hears from those who pay rates or are affected by investment decisions is critical to the integrity of the process. Effective stakeholdering must also consider opportunities to attract stakeholders that have a range of interests (consumers, power producers and utilities, non-governmental organizations, etc.) that can contribute to efficient decision making and policy development. Stakeholder participation is vital to the effectiveness and legitimacy

28 http://www.cpuc.ca.gov/history/

29 https://www.aer.ca/about-aer/governance

30 https://www.nrcan.gc.ca/19667

31 http://www.parl.ca/DocumentViewer/en/42-1/bill/C-69/first-reading

of the regulator. The OEB must also considered how to engage with First Nations and Métis communities.

Stakeholders provide input to the OEB through avenues such as formal adjudicative hearings and through non-adjudicative engagement processes such as consultations and working groups. Some stakeholders may qualify for cost awards for participation in adjudicative proceedings and consultations (intervenor funding). The OEB relies on standing and ad hoc committees to provide advice and recommendations to the OEB.[32] The OEB has also convened the new "Advisory Council on Innovation" to support its work on the LTEP Implementation Plan.

Some jurisdictions have limited or no funding available to intervenors. However, they may have a publicly funded consumer advocate that represents customers who may not have the resources to fund participation on their own. Examples include Nova Scotia and Alberta.[33]

The National Energy Board (NEB) provides an envelope of funds under the Participant Funding Program (PFP) that all intervenors may apply for to receive funds for participating in proceedings and hearings. Funding is limited and is not intended to cover all costs. Currently the maximum funding allowed for individuals is $12K and for an eligible group $80K.[34] The federal government has recently introduced legislation to reform the NEB and require the new regulator to establish participant finding.[35]

Ofgem (UK) has specific process guidelines for consultations. For major issues of wide interest, Ofgem allows 12 weeks consultation as the maximum timeline. By statute, Ofgem must publish an impact assessment if it is going to propose an important change related to the functions under the Gas and Electricity Act.[36]

32 https://www.oeb.ca/about-us/who-we-are/stakeholder-and-consumer-groups

33 https://nsuarb.novascotia.ca/sites/default/files/ca.pdf ; https://ucahelps.alberta.ca/what-we-do.aspx

34 https://www.neb-one.gc.ca/prtcptn/hrng/pplngprtcpt-eng.html

35 http://www.parl.ca/DocumentViewer/en/42-1/bill/C-69/first-reading

36 https://www.ofgem.gov.uk/consultations/consultations-policy

Question: What are the effective mechanisms to provide stakeholders with appropriate opportunities to participate in OEB decision-making?

Discussion Theme: Relationship with Government

The Panel seeks to explore how the OEB can best fulfill its adjudicative responsibilities and obligations within the accountability framework set by the legislature. As Stern and Holder have noted, both autonomy and accountability are fundamental characteristics of a best-in-class regulator.[37]

Currently there are five main touch points between the government and the OEB as required by the *Ontario Energy Board Act*, 1998:

- Board appointments: The government is responsible for appointing board members to the OEB, including designating the Chair and Vice Chairs.
- Memorandum of Understanding (MOU): The OEB and the Ministry of Energy must enter into a MOU every 3 years. The MOU sets out expectations for the operational, administrative, communication, and reporting arrangements between the OEB and the Ministry.[38]
- Business Plan: The Minister of Energy is responsible for approving the OEB's annual business plan and budget.
- Directives: The government is authorized to send directives to the OEB concerning general policy objectives to be pursued by the Board, on specific issues and licence condition requirements, and to develop a Long Term Energy Plan (LTEP) Implementation Plan.
- Questions & Advice: The Minister is authorized to require the OEB to examine and report on questions respecting energy.

In British Columbia, the government has broad authority to direct the British Columbia Utilities

37 Stern, J. and Stuart Holder (1999) Regulatory Governance: Criteria for Assessing the Performance of Regulatory Systems. Utilities Policy, 8(1) pp. 33-50.

38 https://www.oeb.ca/oeb/_Documents/About the OEB/Memorandum_of_Understanding_OEB_Ministry.pdf

Commission (BCUC) with respect to the exercise of its powers and the performance of its duties, limited only in that the government cannot rescind an order or decision of the Commission.[39]

In Nova Scotia there is no government direction-making authority over the Nova Scotia Utility and Review Board (NSUARB).[40] The appointment of its board members is also distinct in that members are appointed in a manner similar to Provincial Court judges.[41]

In the United Kingdom, the Secretary of State can issue guidance to the Gas and Electricity Markets Authority (GEMA) (the governing body of Ofgem) about contributing towards the attainment of social or environmental policies set out in the guidance. Before issuing the guidance, the government must consult with GEMA and licence holders and lay the guidance before each House of Parliament for 40 days.[42]

Question: Considering the diversity of Ontario's energy sector, how can the OEB best fulfill its adjudicative responsibilities and obligations within an accountability framework set by the legislature?

Discussion Theme: Regulatory Excellence and Benchmarking

The Panel seeks to explore best practices for performance measurement that both benchmark regulatory activities and appropriately evaluate regulatory outcomes. Proper performance measurement is critical to promoting regulatory excellence.

The OEB currently measures its performance against performance indicators that support four primary objectives defined in the OEB Business Plan that are subject to an independent audit.

In 2011 (electricity) and 2014 (natural gas), the office of the Auditor General of Ontario conducted a value for money audit of the OEB. The recommendations of the audits focussed on better Operational Efficiency, Cost Effectiveness, and Consumer Protection.

39 Utilities Commission Act, RSBC 1996, Ch. 473, s.3

40 Utility and Review Board Act, 1992, c.11, s.1 and confirmed by telephone.

41 https://nsuarb.novascotia.ca/about/appointment-info

42 Electricity Act, 1989, c. 29, s. 3B https://www.legislation.gov.uk/ukpga/1989/29/section/3B

While the AG reported that "substantial progress"[43] has been made, many of the issues identified continue to be of concern to some stakeholders.[44] Expressed concerns include lack of transparency; increasing regulatory burden; concern with timeliness; lack of cost-benefit analysis;[45] and lack of "an outcome based approach"[46] when it comes to setting regulation.

The Annual Report[47] of Ofgem includes a section that includes Key Performance Indicators (KPIs) and evaluates performance of Ofgem against these KPIs. These KPIs are specific, quantitative (e.g., license grant within 70 days) and measurable.

Performance metrics used by Alberta Energy Regulator appear values-based (e.g., Albertans benefit from a stable, reliable electricity system that protects consumers, attracts investment and has improved environmental performance)[48] as compared to transaction or activity based (e.g., number of rate applications reviewed).

The Australian Energy Regulator (AER) takes a quantitative approach to reporting outcomes in its Annual Report,[49] outlining the key deliverables as well as the target for the fiscal year.

Question: What are fair and meaningful performance metrics for measuring regulatory excellence, both in terms of efficiency of process and effectiveness of outcomes?

Discussion Theme: Resourcing

The Panel seeks to explore the appropriate financial and human resources required for the regulator to deliver on its mandate. This includes considering best practices in areas such as required staff skills, methods for determining resource levels, and accountability frameworks to ensure the regulator is pursuing best value in setting its budgetary requirements.

43 Follow up to the 2011 Value for Money Audit of the Ontario Energy Board, Auditor General of Ontario, 2013

44 Ministry of Energy LTEP Stakeholder Consultations, 2017

45 Report on Energy Governance in Ontario, George Vegh, 2017

46 Ministry of Energy LTEP Stakeholder Consultations, 2017

47 Ofgem, Annual Report 2016-2017, https://www.ofgem.gov.uk/system/files/docs/2017/06/annual_report_and_accounts_2016-17_0.pdf

48 Alberta Energy, "Business Plan 2017-20 Energy", http://finance.alberta.ca/publications/budget/budget2017/energy.pdf

49 Australian Energy Regulator Annual Report 2016-2017, https://www.aer.gov.au/system/files/AER Annual Report 2016-17.pdf

The OEB allocates its general operating costs to regulated entities in accordance with a cost assessment model that the OEB determines. Periodically, the OEB conducts reviews and amendments of its cost assessment model to maintain alignment to changing OEB policy, strategic objectives and mandate. The OEB also has discretion to levy costs on regulated entities in relation to specific proceedings or consultations. Revenues from administrative penalties are restricted to support activities relating to consumer education, outreach and other activities in the public interest and cannot be used for other activities.

OEB is financially accountable through reporting its audited financial statements in its annual report. Internal resourcing decisions to support the OEB's mandate are largely the responsibility of the Management Committee (OEB Chair and Vice Chairs serving as the OEB's head governing body), subject to the Minister of Energy's approval through annual business plans. The revenue received by the OEB does not form part of the government's Consolidated Revenue Fund.

The Management Committee has the ability to determine its internal organizational structure as well as human resources requirements (roles, required expertise, and remuneration policies of staff).

Canadian energy regulators are typically self-funded where costs are passed on to regulated entities, and ultimately rate-payers (for example, Alberta, BC, Ontario and Quebec).[50] Elsewhere, regulators, such as the California Public Utilities Commission and the Australian Energy Regulator[51] are taxpayer-funded. These organizations receive their annual allocations through standard government budgeting processes.

Question: What is the appropriate level of financial and human resources that will best equip the OEB to deliver on its mandate, and what is the appropriate source of its funding?

50 Alberta: http://www.auc.ab.ca/regulatory_documents/Pages/Administration.aspx; BC: http://www.bcuc.com/Documents/AnnualReports/2017/DOC_48965_BCUC_AR20152016_FINAL.pdf p.22, Quebec: http://www.regie-energie.qc.ca/en/regie/composition.html

51 https://www.aer.gov.au/system/files/AER Annual Report 2016-17.pdf

Appendix D: What We Heard

September 25, 2018

Dear Minister,

We are pleased to provide this report on “What We Heard” as requested in your August 30th letter. This report presents key points from submissions by energy sector stakeholders regarding the modernization of the Ontario Energy Board (OEB).

Our consultation and engagement activities were organized in two main phases.

Beginning in January 2018, various stakeholders and regulatory experts, and the Auditor General’s Office helped orient the review, contributing their views as to the challenges facing energy regulation in Ontario. Seven key themes emerged as a result of these initial consultations.

In the second phase of our consultations, the Panel prepared and distributed discussion notes on these themes to facilitate engagement. During March and April 2018, over 45 organizations and individuals met with the Panel in Toronto, London, Ottawa, Sudbury and Thunder Bay. We also invited these and other stakeholders to provide written submissions; we received 60 from stakeholders across the sector.

The participants in our consultations included:

Entities regulated by the OEB

- Industry associations
- Consumer advocate groups
- Regulatory lawyers
- Innovation / technology developers
- Academics
- Government agencies

We also met with representatives from Indigenous communities and leaders from municipalities.

Our consultations elicited a range of views and perspectives on the characteristics of an excellent regulator. Here are the key points:

1. **Mandate:** Most stakeholders stated that the OEB's mandate should be focussed on its core functions of economic regulation and consumer protection. A few submissions advocated an expanded mandate for the OEB. A few other submissions argued for removing some responsibilities from the OEB's mandate, such as program administration and rate regulating telecommunications pole attachments.

2. **Disruption and Innovation:** Most stakeholders observed that new technologies and innovative business models are realities in Ontario's electricity sector. Several went so far as to say that embracing innovation is fundamental to the survival of local distribution companies. Several also felt the current regulatory framework acted as a barrier to fully reaping the benefits of cost effective innovation. Overall, stakeholders wanted greater clarity and certainty in the regulatory treatment of investments in innovation and technology.

3. **Governance Framework:** Stakeholders from across the sector expressed support for enhancing the OEB governance structure, both to promote greater accountability, and to support the autonomy of the adjudicative processes. Most suggested that a board of directors could be established to provide strategic direction, oversee performance and make senior appointments.

4. **Stakeholder Relationship and Process:** Most stakeholders stressed the importance of clear, open and transparent stakeholder processes in regulatory applications and policy consultation. Most stakeholders found that the OEB processes were challenging due to lengthy and uncertain timelines associated with some OEB decisions. A few stakeholders suggested that the OEB would benefit from a review of the effectiveness of its current outreach activities.

5. **Relationship to Government:** Stakeholders felt that the OEB needs to be appropriately

independent from government. Several stakeholders noted that prescriptive directives to the OEB may compromise its independence. A few commented on the importance of the unique skill sets the OEB contributes towards government policy development and welcomed this contribution.

6. **Regulatory Excellence and Benchmarking:** Most stakeholders noted that the OEB would benefit from developing a more robust performance measurement plan with benchmarking, more meaningful Key Performance Indicators (KPI), efficient processes, and enhanced regular public reporting.

7. **Resourcing:** Stakeholders noted that the OEB should have an appropriate level of resources and expertise to enable it to deliver its mandate. There was consensus that funding the OEB from the rate base should be maintained. Several stakeholders proposed greater oversight and transparency in the way OEB develops its financial and human resource requirements, and for the cost assessments allocated to regulated entities.

We are now turning our attention to our second report, targeting delivery to you by the end of October.

Finally, we would like to express our thanks to each of the participants for their input, and to the OEB Chair and staff for their engagement with the Panel. We have been impressed by the strong level of interest and engagement in the work of the Panel and the thoughtfulness of both the oral and written input.

Sincerely,

The OEB Modernization Review Panel

Original signed by	*Original signed by*	*Original signed by*
Richard Dicerni	Cara Clairman	Bruce Campbell
Chair	Panelist	Panelist

Mandate and Activities

Synopsis

Most stakeholders stated that the OEB's mandate should be focussed on its core functions of economic regulation and consumer protection. A few submissions advocated an expanded mandate for the OEB. A few other submissions argued for removing some responsibilities from the OEB's mandate, such as program administration and rate regulating telecommunications pole attachments.

Core Mandate

Most stakeholders that commented on this theme maintained that the OEB's mandate should focus on its core functions of economic regulation and consumer protection.

> *"…the Government of Ontario ("Government") [should] amend the statutory mandate of the Ontario Energy Board (OEB) to focus on its core function as an economic regulator."*

One submission suggested that the OEB's statutory objectives need to balance the interests of consumers and regulated utilities noting that the OEB's consumer mandate has moved beyond consumer protection to consumer advocacy. This emphasis on consumer advocacy may strain OEB resources, noted another stakeholder.

Expanded Mandate

Currently, the OEB only regulates and has oversight of portions of the electricity bill. A few stakeholders felt the OEB should have jurisdiction over the whole bill in order to strengthen consumer confidence.

> *"…it is in the best interests of the public and the sector as a whole for the OEB's mandate to be expanded to all aspects of the electricity bill."*

A few stakeholders believed OEB oversight of the IESO should be expanded. One stakeholder

suggested legislative changes to strengthen the role of the OEB's Market Surveillance Panel (MSP), which monitors and reports on the functioning of the IESO-administered markets.

A few stakeholders argued that the OEB's mandate should be expanded to include an independent and public review of supply-side options, including electricity conservation and the procurement of renewable energy. Another stakeholder said that any procurement contracts charged to consumers through the Global Adjustment should first undergo a public interest review by the OEB.

A few stakeholders suggested that the mandate should be expanded to include innovation and technology development; others noted that the OEB already has the tools it needs to enable innovation.

There were also a few submissions that encouraged the OEB to take on an expanded role in fulfilling the Crown's duty to consult when projects have the potential to adversely impact Aboriginal or Treaty rights.

Reduced Mandate

A few stakeholders submitted that the OEB should not be administering programs, such as the Ontario Electricity Support Program (OESP).

> *"Any social programs that may be required to assist families struggling to pay their monthly energy bills should be implemented and overseen by social service agencies, which maintain the resources and expertise to manage these programs… the fees paid by ratepayers in their energy bills are being used for social service functions – thereby intermingling cost-based rates and social services."*

A few others argued that the OEB should not set charges to attach telecom wirelines to the poles of local distribution companies.

Disruption and Innovation

Synopsis

Most stakeholders observed that new technologies and innovative business models are realities in Ontario's electricity sector. Several went so far as to say that embracing innovation is fundamental to the survival of local distribution companies. Several also felt the current regulatory framework acted as a barrier to fully reaping the benefits of cost effective innovation. Overall, stakeholders wanted greater clarity and certainty in the regulatory treatment of investments in innovation and technology.

Several stakeholders noted that there were barriers to innovation in Ontario's regulatory regime. The nature of these barriers varied among submissions; a few called for legislative changes to make innovation an explicit objective of the OEB. A few argued for more clarity and consistency in rate hearing decisions.

> *"Ontario must establish the right regulatory and market conditions that are conducive to innovation and technological change if it is to provide consumers with the most value possible… For innovation to occur, the energy landscape needs a clear, predictable, efficient and transparent regulatory system."*

Several stakeholders said current rate-making practices are a barrier to innovation. They observed that LDCs typically make investments that add to the utility's rate-base, as that provides an assured rate of return on their investment. They believe that this discourages innovative solutions that are less capital intensive but do not have the same assured rate of return.

> *"Adjust the over-riding incentive to increase rate-base. There must be different mechanisms in place for utilities to earn profits based on reliability, service levels and most importantly, given the uncertainty, for creating optionality and flexibility in the evolution of the distribution grid."*

Several stakeholders supported using the rate-base to support innovation and innovative technologies. A smaller number cautioned against rate-basing of innovation and new technologies; they believe the private sector and individuals may be better positioned to take on risk and promote

innovation.

A few stakeholders acknowledged that the OEB has taken steps to address regulatory barriers to innovation by establishing an Advisory Committee on Innovation in early 2018.

Governance Framework

Synopsis

Stakeholders from across the sector expressed support for enhancing the OEB governance structure, both to promote greater accountability, and to support the autonomy of the adjudicative processes. Most suggested that a board of directors could be established to provide strategic direction, oversee performance and make senior appointments.

Board of Directors

Most stakeholders who commented on this theme suggested the OEB should have a board of directors that would perform traditional corporate governance functions.

> *"Improving the governance structure begins by holding the OEB accountable to a Board of Directors, including independent Directors who act in the interest of the [OEB's] stated mandate."*

Stakeholders, in describing the roles for the new board, suggested:

- setting the strategic direction of OEB;
- implementing the legislated mandate and providing guidance on implementation of government policy;
- overseeing budget, finances, human resources;
- making senior appointments
- supervising overall performance and delivery of Key Performance Indicators (KPI);
- determining general priorities, including subjects for generic hearings on important and emerging regulatory policy issues; and

- providing appropriate resources for the OEB's adjudicative functions

These stakeholders suggested that a new board of directors could reinforce the autonomy of the adjudicative function and provide corporate oversight to instill greater confidence across the community of regulated entities and stakeholders.

There was strong support for using a competency matrix when making appointments to the board of directors in order to ensure directors have the skills and expertise required to perform its functions.

Adjudication

Most stakeholders who commented on this theme emphasized the critical importance of maintaining clear independence of the OEB adjudicative function from other operations of the OEB.

There was also strong support for more full-time adjudicators. Stakeholders believed this would increase the OEB's efficiency and expertise, improving both hearing quality and timelines.

> *"Full-time panelists maintain familiarity with industry trends and issues and will have more availability to dedicate to adjudication and policy-setting. It is further anticipated that scheduling coordination across multiple panelists is more efficient when panelists have full-time availability."*

Stakeholder Relationship and Process

Synopsis

Most stakeholders stressed the importance of clear, open and transparent stakeholder processes in regulatory applications and policy consultation. Most stakeholders found that the OEB processes were challenging due to lengthy and uncertain timelines associated with some OEB decisions. A few stakeholders suggested that the OEB would benefit from a review of the effectiveness of its current outreach activities.

Hearings

Most stakeholders emphasized the importance of clear, open, and transparent application and intervention processes. Concerns were also expressed about long timelines and uncertainty regarding when decisions would be rendered. They also emphasized that decision-making should be independent, fact-based, and guided by good economic principles.

A few stakeholders noted that meaningful and value-added stakeholder participation by intervenors in the adjudicative process should be maintained. However, others felt that the current intervenor process could be made more efficient.

A few stakeholders were concerned that a recent OEB initiative looking at a “proportionate review” of rate applications could give rise to excluding stakeholder interests from OEB processes.

There were a few specific proposals made for a separate Consumer or Public Interest Advocate, a Low Income Advisory Group, or a Rural and Northern Local Advisory Committee.

> *“The sector needs a true consumer voice capable of engaging in meaningful dialogue with other stakeholders to collaborate on constructive solution to the industry’s challenges. The OEB cannot properly perform the function of consumer advocate when it must safeguard the higher public interest which requires balancing competing interests as appropriate.”*

Policy Consultation

Several stakeholders noted that OEB industry stakeholder and consumer advisory groups that operate behind “closed doors and by invite only” reduced the credibility of the processes and outcomes. Others noted that they would like to better understand how their input and advice would be heard and considered by the OEB.

> *“Policy development at the OEB should be supported by open and transparent engagement with stakeholders. Such consultation processes build trust and knowledge.”*

Several stakeholders observed that generic hearings are an effective way to inform stakeholders of policy development in the energy sector. They suggested generic hearings should be a regular event, with stakeholders providing input as to what issues should have the highest priority.

One stakeholder indicated that there should be more consultation in OEB decision making when adjudicating on matters related to service issues in Indigenous communities.

Public Outreach

A few stakeholders questioned the effectiveness of OEB consumer outreach activities, noting that they duplicate what local distribution companies are already doing.

> *“While laudable (community outreach by the OEB) these outreach activities have created confusion and survey/engagement fatigue amongst customers who are also in contact with their LDCs and others.”*

Relationship to Government

Synopsis

Stakeholders felt that the OEB needs to be appropriately independent from government. Several stakeholders noted that prescriptive directives to the OEB may compromise its independence. A few commented on the importance of the unique skill sets the OEB contributes towards government policy development and welcomed this contribution.

Appropriate Independence

Several stakeholders said that the independence of the OEB had been weakened by prescriptive directives from the government. They felt that it was appropriate for the government to set the broad direction of energy policy, but that the OEB should have discretion on how to implement the direction.

Several stakeholders also noted that the use of directives to the OEB needed to be more transparent, suggesting that the government should consult on proposed directives. Others thought the OEB should conduct cost-benefit studies on any proposed directive and make the studies public.

> *"The government's authority to issue directives should be reviewed and rationalized into fewer, well-defined directive authorities. Those directive authorities which remain should be exercised judiciously, and in a manner [that] does not compromise the continued independence of the OEB and its determinations from short term political influence."*

A few stakeholders suggested that the OEB's independence could be strengthened by making it accountable to the legislature. This would allow any government direction to the regulator to be debated in an open and transparent forum.

A few stakeholders noted that the OEB's independence would be strengthened by enhancing the degree of transparency of communications between the government and the OEB.

One stakeholder suggested the current Memorandum of Understanding between the Minister of

Energy and the OEB should be limited to administrative and financial matters, to strengthen the OEB's independence.

Policy Development

Several stakeholders proposed that the OEB independently review government policy direction prior to their adoption. The OEB would analyze and publicly report on potential impacts, including costs. A few other stakeholders suggested that the OEB convene and facilitate discussions among industry, government and stakeholders to inform government policy.

A few stakeholders suggested that, given the OEB's focus on the broader public interest, it should be contributing to the development of government policy.

> *"…the Board cannot be reduced simply to a "policy implementer" – regulating in the policy realm demands much more than that. And the Board's perspective should be taken into account in the setting of policy. Not to say that the OEB has decision rights on policy setting, but as subject matter expert in the area of regulation, it should be consulted and heard."*

A few stakeholders suggested that the OEB should have oversight of the Ministry's Long Term Energy Plan.

A few stakeholders noted the important and useful contribution OEB staff make towards the government's policy development.

Regulatory Excellence and Benchmarking

Synopsis

Most stakeholders noted that the OEB would benefit from developing a more robust performance measurement plan with benchmarking, more meaningful key performance indicators (KPI), efficient processes, and enhanced regular public reporting.

Performance Benchmarking

Several stakeholders commented that the OEB should benchmark its performance against other regulators. Stakeholders further suggested that the benchmarking should cover measures for efficiency, cost and innovation.

> *"Just as the sector it regulates does, the Board should benchmark its performance against other regulatory agencies in North America. Trust and transparency are depicted as the most important feature of the Board's role, and this can only be strengthened through benchmarking and the measurement of specific performance measures against which to hold the Board accountable."*

One stakeholder pointed out that the scorecards provided in the OEB's Annual Report state only whether tasks have been performed and do not track or measure outcomes or provide meaningful measures of performance.

Another stakeholder maintained that tracking specific measures such as "Days until Decision" would make the OEB's regulatory processes more transparent.

Key Performance Indicators

Most stakeholders who commented on this theme said that, in line with industry best practices, the OEB should be required to develop meaningful, outcome-based KPIs to assess its performance, and that the OEB should consult with stakeholders when developing its KPIs. A few stakeholders

suggested that the KPIs could include measures such as “Days until Decision”, “Cycle time”, “Customer Outreach” and Stakeholder Experience”.

> *“An example of an area where KPI’s should be required is with respect to the processing of applications. There is currently no certainty as to when a decision will be issued relative to the filing of an application…This creates uncertainty for both utilities and ratepayers.”*

Several stakeholders also noted that the results of the OEB’s annual performance scorecard should be audited or reviewed by the Auditor General. They further noted that OEB management should be held accountable for KPI achievement.

Efficient Processes

Most stakeholders who commented on this theme believe that the OEBs processes can be more timely and efficient.

> *“… research the collective regulatory burden of the sector, set targets to reduce it and require the OEB to streamline its regulatory instruments (guidance documents and regulatory codes) to ensure clarity, consistency and relevance ...”*

Several stakeholders would like to see the regulator modify its annual requirements for reporting on expenditures and resources. One stakeholder said the OEB should phase out quarterly reporting, reduce duplicate regulatory filings, and develop a “short form” Cost of Service process.

Public Reporting

Several stakeholders noted that the OEB should itself adhere to the same standards it sets for regulated entities. To support transparency, the OEB should publicly release scorecards of how it is performing against established benchmarks.

> *“…[the] scorecard should be developed in consultation with government and industry stakeholders. As is the case with the Distributor Scorecard, it should be clear, concise and made available to the public.”*

Other suggestions brought forward by individual stakeholders included an annual review of the regulatory burden of the sector, the OEB conducting regular satisfaction surveys of stakeholders in the electricity and natural gas sectors, and tabling of the OEB's business plan in the legislature every year.

Resourcing

Synopsis

Stakeholders noted that the OEB should have an appropriate level of resources and expertise to enable it to deliver its mandate. There was consensus that funding the OEB from the rate base should be maintained. Several stakeholders proposed greater oversight and transparency in the way OEB develops its financial and human resource requirements, and for the cost assessments allocated to regulated entities.

Appropriate Resourcing

Most stakeholders who commented on this theme supported appropriate and reliable resourcing that allows the OEB to deliver on its mandate. A few suggested additional resources would support timely OEB decisions.

> *"The OEB is an important regulatory tribunal and critical in maintaining a viable Ontario energy sector, while ensuring the interests of energy consumers are sufficiently protected. The OEB should continue to be resourced in a way that allows it to undertake the role effectively."*

There was strong support of the current OEB cost recovery model from the rate base.

> *"The current practice, under which all of the costs of the OEB are paid by the regulated entities continues to be the right approach. This result is that the customers, through their rates, pay the regulatory costs of the utilities, the customer groups and the regulator itself. This is appropriate as the customers are the primary beneficiaries of regulations."*

However, a few stakeholders felt that some tax-based funding could be used to support undertakings outside the OEB's economic regulation mandate.

Greater Oversight and Transparency of Funding

A few stakeholders would like to see more transparency in the way OEB develops its priorities and

resource needs.

> *"The former practice of public consultation on the OEB Business Plan should be reinstated. Utilities, customer groups, and other stakeholders are a significant resource, with lots of expertise and a broad range of perspectives. The OEB would benefit from more input from the sector, both during the development of the Business Plan, and when a draft is ready for review."*

A few stakeholders advocated that funding received from cost assessments allocated to regulated entities should be subject to review and not be determined solely at OEB's discretion.

Panel Members

Richard Dicerni

Mr. Dicerni began his public service career in 1969 when he joined the federal government. Throughout the 1970s and 1980s, he held a number of executive positions in the federal public service including Deputy Secretary to the Cabinet and Senior Assistant Deputy Minister, Health and Welfare. He joined the Ontario Government in 1992 as Deputy Minister of Environment and Energy and was appointed Deputy Minister, Education and Training in 1995.

Mr. Dicerni served as acting President of Ontario Power Generation between 2003 and 2005.

He rejoined the Canadian Government in 2006, serving as Deputy Minister of Industry until 2012. He was named Deputy Minister of the Alberta Executive Council and Head of the Alberta Public Service in October 2014 and served until April 2016.

Richard Dicerni was appointed to the Order of Canada in December 2017.

Cara Clairman

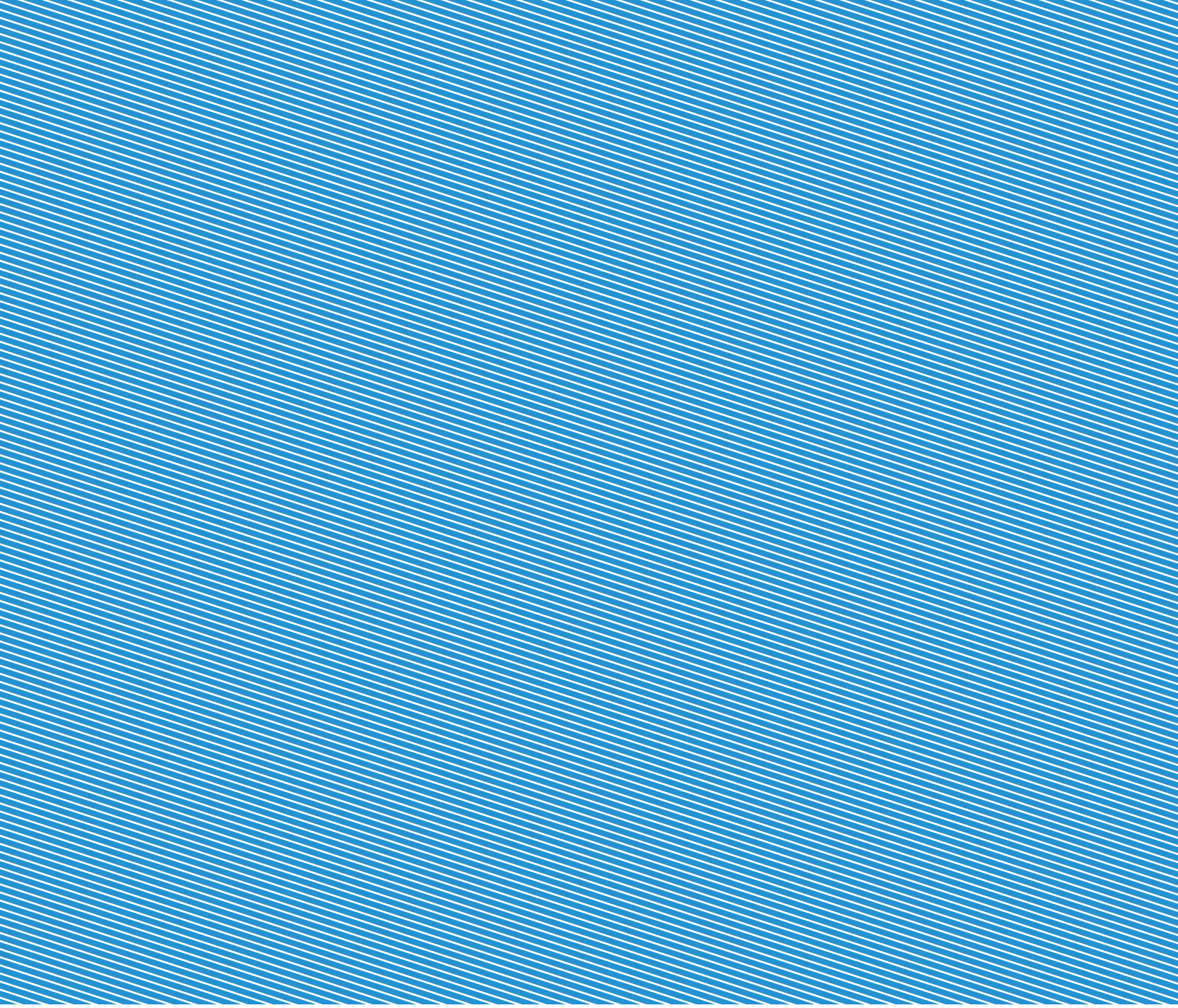
Cara Clairman is founder, President, and Chief Executive Officer of Plug'n Drive, a non-profit that is accelerating the deployment of electric vehicles (EVs) to maximize their environmental and economic benefits. Plug'n Drive is recognized as a leader in the EV business.

Ms. Clairman has more than 20 years of experience working in the environmental and sustainability fields, including 12 years working at Ontario Power Generation (OPG), first as OPG's environmental lawyer and then as its Vice President of Sustainable Development. In this role, she was responsible for overseeing OPG's environmental performance and the development and implementation of OPG's sustainable development policies and programs.

Bruce Campbell

Bruce Campbell was President and Chief Executive Officer of Ontario's Independent Electricity System Operator (IESO) from May 2013 to June 2017. Mr. Campbell was instrumental in integrating Ontario's investment in distributed energy resources into the province's electricity system. Under his direction, the IESO introduced innovative technologies such as storage and actively pursued more competitive, cost-effective solutions to meet future power needs.

Mr. Campbell also served on the Member Representative Committee of the North American Electric Reliability Corporation (NERC) and on the Council of Independent System Operators and Regional Transmission Organizations which supports the delivery of sustainable and reliable electric power to millions of consumers across the continent.



Ontario Energy Board Modernization Review Panel

TAB 6

2021

FINANCIAL REVIEW
MANAGEMENT RESPONSE

ONTARIO ENERGY BOARD

Context

Financial accountability is an essential characteristic of all public facing organizations. The Ontario Energy Board (OEB) is funded by those it regulates and as such, it must be both accountable and transparent as it drives a mandate of organizational modernization. To that end the OEB commissioned a financial review with broad parameters and full exposure to all aspects of financial and operational management within the OEB.

A full financial review was conducted in late 2020 as a basis for establishing the 2021/22 operating budget and providing a three-year roadmap for activities which will sharpen the financial focus and deliver better value for money for those regulated by the OEB.

Observations and Management Response

The Final Report included 21 Observations that addressed: Financial efficiency at the OEB; Efficiency measures benefitting the Sector; and Investments. The following provides Management responses to those Observations.

1. Stakeholder the budget

OBSERVATIONS	OEB RESPONSE
"Stakeholder" the Budget on an Annual basis, then finalize through the Board and send to the Ministry. This is done by other organizations in Canada in the sector.	Accepted Management will develop a plan for stakeholdering the annual budget and reviewing the Cost Assessment Model in the context of the 2022 to 2025 Business Plan. Management will commence implementation of this recommendation in the summer of 2021.

2. Separate output from outcome metrics and report on results on a more frequent basis

OBSERVATIONS	OEB RESPONSE
The OEB is reviewing, with an objective to improve, its Performance Management Framework in which it captures its metrics and reports on those metrics. There are opportunities in this review to separate output from outcome metrics and to report on results on a more frequent basis.	Accepted As part of its work to become a top quartile regulator, Management is considering how to further separate outputs and inputs and is examining the establishment of Key Performance Indicators (KPIs) based on best practices in comparable jurisdictions. This work will be informed by the research conducted as part of the Top Quartile Regulator project and by information gleaned from the recent Ipsos survey. As an immediate first step, the OEB has established a pilot program which helps applicants and intervenors track the timing as an application is processed. The results of this pilot project will be assessed throughout 2021/22 and efforts will be scaled as appropriate through the end of 2023/24.

3. Annual “Forward Work Programme”

OBSERVATIONS	OEB RESPONSE
Consider introducing an approach that is used by the Office of Gas and Electricity Markets (OFGEM) in the UK, which publishes an annual “Forward Work Programme”. OEB could adapt this to include financial reporting and the modernization efforts it plans to implement in that year under the principles of Independence, Accountability, Certainty, Effectiveness and Efficiency as identified by The Panel.	Accepted Strategic and business planning are meaningfully integrated with financial reporting and all modernization efforts at the OEB. As part of our commitment to transparency and stakeholder engagement we will publish details on budget assumptions, policy and initiatives. The OEB will host an annual "Policy Day" with stakeholders that will inform future strategy and business plans.

4. Public Affairs Division's spending

OBSERVATIONS	OEB RESPONSE
The Public Affairs Division's current spending seems more oriented to external, brand building activities. This does not seem to align with the internal cultural change and regulatory transformation that should be the focus. So, approx $600K could be repurposed and/or reduced. Some investment in the internet and intranet sites and communications of modernization plans and results should be considered.	Accepted 2021/22 budget has been reduced to address this recommendation. Management will adjust the organization of the Public Affairs Division to effectively support cultural change, modernization and digital optimization. Then, Public Affairs will develop a Communications "Playbook" to set out a communications strategy that among other things, tells the stories of OEB modernization, supports change management and includes a digital roadmap that ensures OEB digital channels are leveraged effectively, modernized and continuously improved.

5. Use of consultants

OBSERVATIONS	OEB RESPONSE
Undertake a detailed review of the use of consultants, in the areas of expert opinions generated for the OEB, external legal services and in back office and policy functions, to ensure that they provide true value add and contribute to capacity building.	Accepted Management will examine and rationalize the use of consultants. The 2021/22 Operating budget (i.e. Section 26) for consulting services has been reduced by 9% in anticipation of savings. To ensure Executive oversight and the proper prioritization of consulting engagements, a CEO consulting reserve fund will be established, and CEO approval will be required to utilize this reserve.

6. Roster of legal HR resources

OBSERVATIONS	OEB RESPONSE
Should consider examining the long-term contract for HR legal advice ($1.7M) should be examined to reduce costs, especially given the OEB is in the off cycle of negotiations for a Collective Bargaining Agreement; given there are 10-12 grievances only per year; etc. Consider the episodic use of a roster of legal HR resources for advice on any departures.	Accepted Management will initiate a competitive process in 2022 to procure employment legal services to compliment increased HR legal capability internally to fulfill our legal requirements in the most cost-effective manner. Utilizing a roster of legal resources would be less cost effective in that each firm would need to familiarize themselves with the OEB, resulting in additional billable hours overall. Consideration will be given to augmenting internal HR Legal resources so that more work is done “in-house” and reliance on external vendors is reduced over the next three years.

7. Consider space reductions and lease reductions

OBSERVATIONS	OEB RESPONSE
It is recognized that a long-term lease has just been recently renewed for OEB’s office accommodations, in early 2020 pre-pandemic. However, given the swift move to work from home arrangements due to COVID-19 distancing requirements; the move to virtual hearings; the fact that the space standards are in excess of Ontario Public Service’s standards; and, among other things, the increased application of digitization, the OEB should look at space reductions and lease reductions in order to decrease its spending on this expense at the expiry of the current lease.	Accepted Management will create a lease plan by the end of 2022/23 that reduces space and decreases spending at the expiry of the current lease at the end of December 2024. This plan will be completed with the assistance of Infrastructure Ontario and will consider lease directives from the Ministry. This plan will be presented to the CEO and the Board of Directors in early 2023 for approval and implemented to ensure that significant expense reductions will be realized beginning January 1, 2025.

8. Operating reserve

OBSERVATIONS	OEB RESPONSE
Carrying an operating reserve to fund working capital and for unforeseen in-year costs and/or requirements which the OEB may be asked to take on is a prudent financial management approach. However, over the last 5 years there has been underspending of the OEB's budget on an annual basis. There are several good reasons for this underspending (e.g. transitional year where various expenses were not realized). Even with these valid reasons the current operating reserve seems to be quite high (approximately $8M). The OEB has plans to reduce this reserve over the next 3 years ($500K/year). However, the OEB should consider a deeper reduction over the next 2-3 years to have the reserve settle at $3M. A reduction of $1M to $2M in each of the next 3 years would allow for the implementation of any required changes to financial processes and would help to ensure that the financial impact of the reduction to $3M is smoothed over time. This combined with a conservative underspending of say $1M in any given year seems to be achievable and a good signal of self-prudence to regulated entities and ratepayers.	Conditionally accepted Management will review and amend the current Operating Reserve policy to establish principles that govern the use of and potential reduction in the Operating Reserve. The revised policy will be presented to the CEO and the Board of Directors by June 2021 for review and approval. The Cost Assessment Model will be informed by the revised Operating Reserve policy.

9. Optimized organizational structure

OBSERVATIONS	OEB RESPONSE
Encourage the examination of structural organizational elements of the OEB to determine if they are optimized.	Accepted The destination operating model will be shaped in response to the OEB Financial Review, Ipsos survey results and stakeholder feedback. The OEB will be focused on ensuring that it has the resources needed to deliver on modernizing the OEB. The destination operating model will be presented to the Board of Directors in early 2021. The OEB will focus on defining “core business activities” in the context of its legislated mandate. The OEB will pursue with the Ministry of Energy, Northern Development and Mines the potential transfer of the administration of the OESP Program which is not a core function of the OEB.

10. Comprehensive review of all procedures, processes, rules, codes and requirements

OBSERVATIONS	OEB RESPONSE
Over the 3-year modernization journey, conduct a comprehensive review of all procedures, processes, rules, codes and requirements, with a 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).	Accepted Management will undertake a review and rationalization process of OEB procedures, processes, rules, codes, and requirements. This work will be a multi-year undertaking that will be completed under several initiatives including the Chief Commissioner’s plan and the Top Quartile Regulator and Filing Requirements projects.

11. Assess assertive case management models

OBSERVATIONS	OEB RESPONSE
Assess assertive case management models for their applicability in adjudicative hearings for the OEB, for example: • more effectively managing Issues Lists generated during rate application reviews; • be more deliberate about managing In Scope requirements; • assess cross examinations based on their relevance to directly informing an adjudicative decision; • consider a more strict definition of who is impacted by a project; • track duplicative requests and cluster together for efficiency, if possible.	Accepted Management is undertaking a number of initiatives to improve the efficiency of its processes for adjudicative hearings while respecting the requirement for procedural fairness. Management will: • review the timing and approach to Issues Lists • provide greater definition on what constitutes a "substantial interest" for intervention in OEB proceedings • address the findings of the Top Quartile Regulator project.

12. Environmental assessment processes

OBSERVATIONS	OEB RESPONSE
Assess legislative requirements for the OEB's role in ensuring Environmental Assessment processes have been followed in capital applications. If this is not legislatively required, then a harmonization opportunity with the relevant Ministry should be explored and communicated as a revised process to regulated entities.	Accepted Management agrees that the streamlining or integration of project approval processes can provide efficiencies for project proponents but notes that (a) agency overlap or duplication in responsibilities regarding environmental assessment matters is limited; and (b) leave to construct proceedings are appropriately scoped and managed to address attempts to have the OEB engage in areas that fall within the mandate of another agency. Management will engage the Ministry of Energy, Northern Development and Mines to ascertain the Ministry's interest in, and perspectives on, harmonization opportunities in relation to environmental assessment matters in leave to construct proceedings.

13. Engagement with applicants outside of application

OBSERVATIONS	OEB RESPONSE
At times there may be a reluctance to engage with an applicant in advance of an Application as it would be seen to prejudice the adjudicative decision. However, there needs to be the "space" to have these types of dialogue, without prejudice to any future decision.	Accepted Management will incorporate participation of Commissioners in the Applicant Orientation Session by July 2021. Management will create a new forum for dialogue by fiscal 2021-22. Management will continue the practice of engaging with large utilities before filing when required and will provide this opportunity for smaller utilities.

14. Innovation Sandbox

OBSERVATIONS	OEB RESPONSE
The Innovation Sandbox present an opportunity to more effectively explore regulatory innovation and transformation. While it is a nascent concept, it also would benefit from being elevated in its prominence in the organization and properly resourced to be able to have genuine dialogue and as a means to drive innovation. A meaningful mandate should be applied for the next 2 years which would need to demonstrate innovations that increase value to the sector and ratepayers.	Accepted The OEB will raise the profile of the Sandbox within the organization and across the sector to increase understanding of its purpose in the context of the OEB's broader work to facilitate innovation. Management will give consideration to the organizational placement of the Sandbox as it works to define the areas of focus, roles and benefits of sectoral and interjurisdictional partnerships.

15. Top Quartile Regulator project

OBSERVATIONS	OEB RESPONSE
The OEB has already begun an initiative to respond to the Panel's recommendation of being a top quartile regulator, entitled: The Top Quartile Regulator Project. This is a positive sign and it should be able to demonstrate that the OEB is in or has arrived into the top quartile among global regulators by "ranking" itself against best practices; publicly report the findings; update transparently its journey to being in the top quartile; and, zealously implement the changes and continuous improvement necessary to reach that goal. This assessment and its results should also be a guide for internal transformation for the OEB.	Accepted The Top Quartile Regulator project began in October 2020 and has made significant progress. The project will identify best practices in other jurisdictions, compare these to our current practices and put plans in place to close the gaps. This project will inform the OEB's Strategic Plan. This Plan will be refreshed each year to ensure continuous improvement and identify the appropriate targets for each year. A Phase 1 summary of the Top Quartile Regulator project will be shared with the sector by the end of March 2021.

16. Benchmarking all key administrative functions and costs

OBSERVATIONS	OEB RESPONSE
In addition, the OEB should consider benchmarking all key administrative functions and costs against other regulators; set public targets to achieve future cost savings and commit to a set of improvements to be delivered over the next 2-3 years.	Accepted Management will develop a plan to benchmark specific administrative functions within the OEB during fiscal 2021-22. This work will be a multi-year undertaking that will target specific administrative functions for improvements each year. Based on the benchmarking results, proposals will be presented to the CEO to realize any savings and achieve best practices identified through benchmarking. Targets will be established and the OEB will implement tracking on the achievement of those targets.

17. Clarity of delegated decisions

OBSERVATIONS	OEB RESPONSE
Increase the clarity of when delegated decisions are triggered to improve the sector's understanding of their use. In addition, consider increasing the use of delegated decisions especially for applications that are less than inflation, e.g. quarterly rate adjustments (pending a review of the legislative implications of doing so).	Accepted The OEB has delegated authority to senior staff to make determinations for numerous types of applications under specific conditions and restrictions. Management will assess whether changes to the conditions and restrictions may result in further matters being delegated to OEB staff. Approximately 80% of decisions issued by the OEB each year are currently decided by delegated authority. Management agrees that it is appropriate to make public what matters have been delegated to OEB staff. Once the OEB has completed its review of current delegations, a list of what has been delegated will be posted on the OEB's website in a clear and easily accessible way by the end of 2021.

18. Re-apply filed information in subsequent hearings

OBSERVATIONS	OEB RESPONSE
Consider what filing information could be re-applied in a subsequent hearing (e.g. cost of capital), with the objective of examining and reducing the total cost of rate filings.	Accepted Management will assess the potential for further reductions in filing requirements through reliance on the Reporting and Record Keeping Requirements (RRR) in terms of non-incentive rate applications. Utilities file information through the Reporting and Record Keeping Requirements that could be assessed for use in rate filings. The OEB has created an instrument for the mechanistic incentive rate-setting applications that relies on the utility's RRR filings and allows each utility to automatically download historical information (such as consumption and demand by class). This has reduced utilities' efforts in preparing these annual rate applications.

19. Filing requirements of LDCs by size

OBSERVATIONS	OEB RESPONSE
Given that approximately one half of all LDCs are small (by OEB's definition), consider whether they still need to file a capital plan every 5 years. Perhaps this timeframe could be extended thereby decreasing filing costs.	Accepted Management will review the filing requirements including the content and timing of the filing of updated distribution system plans as part of its proportional review initiative for small utilities who have under 20,000 customers. The results of this review will be made public by spring 2021.

20. Employee training

OBSERVATIONS	OEB RESPONSE
Consider increasing the amount allocated for training for employees. The types of training that could be considered would be in leadership skills, emerging technologies and change management. This should build on the HR talent management plan of the OEB.	Accepted The training budget for fiscal year 2021-22 has been increased to support focused training and professional development for a defined cohort of employees. The Chief Commissioner will prepare a training plan for new and current Commissioners and investments will be made, as appropriate, in training and development which supports key operational outcomes. Key elements of the HR People Plan will focus on delivering business success through people by assessing talent requirements and developing effective solutions to enhance performance. The OEB has established a Key Performance Indicator (KPI) to regularly track and measure employee training/skills development programs and costs.

21. Blockchain

OBSERVATIONS	OEB RESPONSE
Research and assess the future application of blockchain solutions perhaps for authenticating data and addressing the likely impact on the industry as energy technologies continue to evolve and rapidly get more “local” (e.g. microgrids). Or, to be able to better assess the impacts of crypto currencies; the Internet of Things (IoT) devices and their impact on the grid; impacts on time of use; role of aggregators; future development of smarter energy grids; etc.	Accepted The OEB is pursuing research on the use of blockchain in regulatory settings and will present findings to the Board of Directors in Q1 of 2021. These efforts will support further consideration of the uses and potential of blockchain's application to the OEB's regulatory processes and approaches. Applications of blockchain to the broader Ontario energy sector will also be considered.

Conclusion

The external Financial Review has provided a “roadmap” for the OEB to follow over the next three years. All 21 observations have been accepted by Management and will be acted upon in a systematic, rigorous and thoughtful manner as the OEB demonstrates its accountability to the energy sector and the people of Ontario in an open and transparent manner.

TAB 7

Report of the AUC Procedures and Processes Review Committee

August 14, 2020

C. Kemm Yates, Q.C., Committee Chair
David J. Mullan
Rowland J. Harrison, Q.C.

AUC Procedures and Processes Review Committee

August 14, 2020

Ms. Carolyn Dahl Rees, Chair
Alberta Utilities Commission
1400, 600 Third Avenue S.W.
Calgary, Alberta T2P 0G5

Dear Ms. Dahl Rees:

AUC Bulletin 2020-17, issued on May 8, 2020, appointed us as an "independent expert committee to assist in improving efficiency of rates proceedings." Our Terms of Reference required the Committee to report to you on how the Commission's processes can be made more efficient within the requirements of procedural fairness, and how the new approaches should be implemented.

The Committee has concluded that significant improvements in the efficiency and effectiveness of rates proceedings can be implemented through assertive case management within the Commission's existing legal framework, without requiring legislative change. We make 30 recommendations for reforms that, in our view, may be implemented by the Commission with optimal respect for the requirements of procedural fairness and with minimal legal risk.

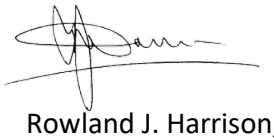
We are pleased to submit the *Report of the AUC Procedures and Processes Review Committee* for your consideration.

The Committee members are available to review the *Report* with you at your convenience.

Yours truly,

C. Kemm Yates, Q.C.
Committee Chair

David J. Mullan
Member



Rowland J. Harrison, Q.C.
Member

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Executive Summary

On May 8, 2020, the Alberta Utilities Commission ("AUC" or "Commission") announced that it had appointed an independent AUC Procedures and Processes Review Committee ("Committee") to "review the Commission's rate application adjudicative processes and procedures and make recommendations…on how process and procedure steps can be made more efficient or eliminated altogether."[1] The appointment of the Committee was one of several ongoing initiatives by the Commission in response to the enactment in June 2019 of the Alberta *Red Tape Reduction Act*.[2]

The Terms of Reference ("TOR") for the Committee[3] required it "to propose how the Commission's processes can be made more efficient within the requirements of the principles of procedural fairness, and how the new approaches should be implemented." The TOR stated that the Commission was particularly interested in the Committee's advice on 11 specific issues, but that the Committee was not restricted to only those issues.

The Committee was directed to consult with Commission members, Commission staff and participants in Commission rate-setting proceedings "as deemed necessary by the Committee."

An examination of the AUC's procedures and processes must be informed by a clear understanding of the Commission's role and responsibilities as prescribed by its constating statutes. The Committee therefore undertook a detailed analysis of the legal framework—both substantive and procedural—within which the Commission functions currently, with particular emphasis on legislative provisions that directly or indirectly establish the procedural framework for the AUC's utility rate regulation mandate.[4]

The Committee conducted consultations through written submissions as well as telephone and virtual meetings.

The Committee has concluded that the process and procedure issues that have been identified through the TOR and the consultation process are primarily the result of an overly conservative approach to regulatory process. In particular, it appeared to the Committee that the Commission has, in process and procedural matters, tended to be unduly receptive and responsive to the desires, expectations and schedules of parties to its proceedings. The Commission is a quasi-judicial, inquisitorial body mandated to make specified determinations as prescribed under applicable statutes. In the discharge of its mandate, it is the needs of the Commission that should prevail, rather than those of the participating parties. The

[1] Bulletin 2020-17: AUC creates independent expert committee to assist in improving efficiency of rates proceedings (May 8, 2020).
[2] SA 2019, c R-8.2.
[3] Appendix II to this Report of the AUC Procedures and Processes Review Committee ("Appendix II").
[4] See Appendix III: Legal Framework and Risk Assessment ("Appendix III"), sections 1 through 3.

Commission's processes and procedures should be designed and applied accordingly, while respecting the requirements of procedural fairness.

Under its enabling legislation, the AUC is the master of its procedure and processes. The Commission has the power to implement an assertive approach to its process, focused on the regulator's information requirements and on procedural efficiency. Specifically, the Committee recommends:

> **THAT** the Alberta Utilities Commission apply an overarching, assertive case management approach to the development and implementation of the Commission's procedures and processes and the implementation of the Committee's specific recommendations.

The Committee has concluded that the consistent application of this approach to the 11 specific issues listed in the TOR (particularly "Scoping of issues" and "Scheduling"), as well as the additional issues identified by the Committee, would address most if not all of the identified concerns.

The essential conclusion of the Committee is that the AUC can and should exercise its existing powers to improve its regulatory efficiency and expedition through assertive case management.

The TOR specifically required the Committee to include in its Report "a discussion of associated risks, in particular legal risks…" of implementation of any recommendations that it may make. Based on its comprehensive analysis of the applicable statutory framework and Canadian jurisprudence,[5] it is the Committee's considered opinion that active and responsible case management can and should be undertaken by the Commission without fear that judicial review through appeal will result in constraints or delays in the fulfillment of its statutory mandate. An attentive, balanced, and reasoned approach to the exercise of the Commission's discretionary powers over procedural matters should almost invariably secure vindication on appeal. Further, the phrase "legal risk" disguises the fact that a "successful" legal challenge in this context would provide guidance to the Commission for the future. The legal risk is, in a word, minimal.

Finally, the Committee was to consider recommendations for legislative change that would improve the efficiency of the Commission's processes and procedures. The Committee has concluded that it is within the current authority of the Commission to implement both the general approach of assertive case management and the Committee's specific recommendations. Accordingly, the Report does not include any recommendations for legislative change. It does include a recommendation that the Commission review its *Rules of Practice* with a view to supporting implementation of the recommendations of the Committee.

[5] See Appendix III, Section 4, Legal Risk Assessment.

1. Introduction

1.1. Appointment of the Committee

On May 8, 2020, the Alberta Utilities Commission, Alberta's independent utilities regulator, issued Bulletin 2020-17 announcing that it had appointed an independent AUC Procedures and Processes Review Committee to "review the Commission's rate application adjudicative processes and procedures and make recommendations…on how process and procedure steps can be made more efficient or eliminated altogether."[6] The Terms of Reference for the Committee are appended to Bulletin 2020-17 in Appendix I of this Report and are exhibited separately as Appendix II.

The genesis of the appointment of the Committee can be traced to the June 2019 enactment of the Alberta *Red Tape Reduction Act* ("*RTR Act*")[7], "with the objective of reducing regulatory burden to enhance economic growth, innovation, competitiveness and investment in Alberta business."[8] In response to this enactment, on July 17, 2020 the Commission announced that it would consult broadly with stakeholders "to explore ways to further reduce regulatory burden."[9] The Commission invited interested stakeholders to submit written comments on initiatives to reduce regulatory burden and announced that it would host a roundtable on October 4, 2019 to discuss comments received. Roundtables on the Commission's draft 2019-2022 Strategic Plan[10] followed on October 28 and 29.

In its 2019-2022 Strategic Plan, formally tabled in December 2019, the Commission adopted "efficiency and limiting regulatory burden" as one of four themes under which it proposed to reposition itself to meet the current challenges that it faces.

On February 5, 2020, the Commission's regulatory efficiency working group submitted its "Improving Regulation Report" to the government, committing the AUC to a number of initiatives, including: "Simplifying Processes and Rules".

The Commission's announcement of the appointment of the Committee followed with the release of Bulletin 2020-17 on May 8, 2020.

1.2. Terms of Reference

The Committee's Terms of Reference state that the Commission "is committed to reforming its processes and procedures and will look to the Committee's findings and recommendations to

[6] *Supra*, note 1.
[7] SA 2019, c R-8.2.
[8] Commission Announcement July 17, 2019: Regulatory burden stakeholder consultation ("Roundtable Announcement).
[9] *Ibid*.
[10] 2019-2022 Strategic Plan.

inform its approach."[11] The Committee "is to propose how the Commission's processes can be made more efficient within the requirements of the principles of procedural fairness…".

The TOR identified 11 issues on which the Committee's advice is sought, but did not restrict the mandate to only those issues. The Committee is required to include in its advice on any recommended reforms "a discussion of associated risks, in particular legal risks…".

The Committee was instructed to consult "with Commission members, Commission staff, and counsel and participants in Commission rate-setting proceedings…" as it deemed necessary. The Committee was given full discretion to determine its processes.

2. Committee Process

2.1. Documentation Review

In accordance with the TOR, the Commission provided the Committee with relevant background documentation. This included submissions received by the Commission in its "Regulatory burden stakeholder consultation" announced on July 17, 2019[12] and other submissions made directly to the office of the Associate Minister of Red Tape Reduction. The Committee also reviewed the transcript of the October 4, 2019 roundtable held by the Commission, the results of that roundtable as reported in Commission Bulletin 2019-18,[13] and summaries of the Commission's October 28 and 29 strategic plan roundtables.

2.2. Consultations

2.2.1. Alberta Utilities Commission

Members of the Commission were invited to engage in direct consultations with the Committee, either in writing or by virtual meeting or conference call. The Committee received one written submission and conducted one interview by conference call in response to this invitation.

The Committee consulted with the former and current Chairs of the Commission, via conference call.

The Committee conducted several conference call meetings with senior staff of the Commission.

[11] Appendix II.
[12] Roundtable Announcement.
[13] AUC Bulletin 2019-18: Regulatory burden reduction, AUC roundtable report and next steps (October 18, 2019).

2.2.2. Stakeholders

The Commission's Bulletin 2020-17 announcing the appointment of the Committee included an invitation from the Committee to interested stakeholders to provide comments.[14] All comments received in response to this invitation were posted to the Commission's Engage portal.[15]

On May 29, the Committee announced that stakeholders who had made submissions could submit comments on the submissions of other stakeholders.[16] Submissions received in response to this announcement were also posted to the Commission's Engage portal.

On July 14, the Committee advised stakeholders that it had been requested by the Commission to offer a further opportunity to stakeholders to consult directly with the Committee. In response to this invitation, the Committee held further virtual consultations with several individual stakeholders, on the basis of the Chatham House Rule. No additional documentation was presented to the Committee during these consultations.

The Committee carefully reviewed and considered all written and oral submissions.

2.3. The Committee Report

The deliberations of the Committee and, ultimately, the recommendations that are contained in this Report have been informed by our review of the relevant documentation and our consultations with stakeholders, Commission Chairs, and Commission members and staff.

3. Context

3.1. Assumptions

"Regulatory lag" and "regulatory burden" are universally invoked as criticisms of regulatory institutions and processes. The Committee is not aware of any regulated entity having ever argued that regulation should take longer and cost more; it is not controverted that regulation takes time and imposes costs.

The real question is whether regulation is taking longer and costing more than necessary to meet its public purpose goals. Is it "efficient", not in the sense of taking little time at minimal cost, but in the broader sense of accomplishing the goals of regulation in a reasonable timeframe, at reasonable cost, which cost is outweighed by the benefits that regulation delivers, and that respects the principles of procedural fairness?

[14] *Supra*, note 1.
[15] Engage consultation page: Rate application adjudicative processes and procedures.
[16] 2020-05-29 Invitation for Reply Comments.

The question for the Committee, however, is narrower:

> [H]ow the Commission's processes can be made **more efficient** within the requirements of the principles of procedural fairness…[emphasis added][17]

Accordingly, the Committee has proceeded from the simple assumption that there is always room for improvement.

3.2. Areas of Concern

The documentation and submissions reviewed by the Committee identified several elements of the Commission's recent processes and procedures of particular concern. In these areas, the Committee has identified potential improvements in efficiency, without compromising principles of procedural fairness.

Most of the concerns raised directly with the Committee come within the 11 specific issues listed in the Committee's Terms of Reference and will be discussed separately in Section 5 of this Report. Other concerns that were raised with the Committee are also discussed there.

Before turning to specific issues, however, the Committee reports that it has identified a pervasive theme permeating many of the submissions – a theme implying that, in managing its procedures and processes in specific proceedings, the AUC is more reactive than proactive. For example, several submissions expressed concern about what was referred to as "scope creep", describing a tendency for the issues raised by particular applications to expand throughout the course of a proceeding. The solution, it was submitted to us, is for the Commission to be more assertive in defining issues and resisting the tendency to countenance continuous expansion of those issues. Similarly, it was suggested that concerns with respect to scheduling and multiple rounds of interrogatories (often leading to associated motions and, in turn, delays) could be addressed by greater decisiveness on the part of the Commission.

A recurring phrase to describe the Commission in this context was "risk averse", referring to a tendency on the part of the Commission to default to further process and to defer to the proposition "the more information the better" in the discharge of its mandate and in an effort to avoid judicial review through appeal on procedural fairness grounds.

Further discussion of this issue requires a clear understanding of the role of the Commission in fulfilling its mandate and meeting its responsibilities. The Committee sets out its understanding in Section 4 of this Report.

[17] *Supra*, note 3.

3.3. AUC Ongoing Initiatives to Improve Regulatory Efficiency

The AUC reports that it has consistently sought efficiency and cost accountability in delivering its work.[18] This approach has been impacted by the passage, in 2019, by the Alberta government of the *RTR Act*, with the objective of reducing regulatory burden to enhance economic growth, innovation, competitiveness and investment in Alberta businesses.

One of the responses of the AUC to the *RTR Act* has been to initiate broad consultation with stakeholders to explore ways to further reduce regulatory burden. The Commission's areas of focus for the consultations include its rules of practice, procedural steps that may have become outdated or unnecessary, and opportunities to streamline and improve regulation and adjudication processes.[19]

The appointment of the Committee is the most recent initiative of the Commission in its drive to enhance efficiency and encourage expedition in an effort to reduce regulatory burden and regulatory lag. The Committee recognizes that it is part of a much larger and ongoing process. It also understands that the Commission has already implemented a number of changes to bring more efficiency to its processes.

Some of the measures already implemented are referred to or itemized in Bulletin 2020-17 announcing the creation of the Committee:

- inviting written comments from stakeholders on initiatives to reduce regulatory burden, then hosting three stakeholder roundtables to discuss those comments in the fall of 2019;
- holding more technical meetings aimed at reducing the number of information requests;
- directing parties to narrow issues and negotiate outcomes where possible; and
- conducting focused, shorter hearings, some with immediate decisions.

Other steps taken by the Commission include:

- publishing its strategic plan (December 2019), which focuses on what has been done and plans to further remove unnecessary regulatory burden;
- the AUC's regulatory efficiency working group provided the Alberta government with its Improving Regulation Report, which sets out what the Commission intends to do to improve AUC regulation, and reports its progress against those objectives (February 2020);
- establishing the Regulatory Burden Reduction Task Force;
- Project Green Light; and
- the first AUC Annual Report Card ("Report Card").[20]

[18] Roundtable Announcement.
[19] *Ibid*.
[20] The various recent steps taken by the AUC to effect reduction of regulatory burden are described in more detail in the AUC Report Card, released June 19, 2020.

These initiatives of the Commission have met with generally favourable reviews from stakeholders that provided comments to the Committee.

The Commission has also acted with initiative in dealing with two sources of delay that were identified by stakeholders—confidentiality motions and the use of aids to cross-examination ("ATCs").

As discussed in Section 5.6 of this Report, the AUC revised Rule 001, its *Rules of Practice* to facilitate the exchange of confidential information and enhanced its eFiling system to further reduce delay (February 2020).

As discussed in Section 5.9, the Commission established guidelines for utilization of ATCs which are intended to expedite cross-examination using such aids.

One source of delay and possible regulatory lag was characterized as the Commission's longstanding culture of caution and conservatism. One criticism that the Committee heard was that the Commission appeared to have a policy that more process was better process. The appearance was that the Commission was risk averse—wanting to avoid appeals on grounds of procedural fairness. It was described as pursuing a comprehensive record to show stakeholders and the public that the process was a fair one, and that it was appropriately discharging its mandate. This could include requiring further information from utilities that have filed deficient applications (rather than rejecting the application for deficiencies), permitting multiple rounds of information requests, allowing extensive cross-examination, and not constraining any opportunity to be heard.

The AUC has already taken steps to seek a better balance between conservatism of approach and efficiency of regulation, including:

- reviewing its record requirements, assessing at what point the costs and delays of seeking out all potentially relevant information exceed any likely gains to be achieved by further inquiry, and
- reorganizing its legal resources. Earlier this year, the AUC lawyers were assigned to the Commission's various divisions, including the Rates Division, with the objective of implementing a more business-oriented, less legalistic approach to regulation.

It should also be noted that the Commission has had an ongoing focus on improving its processes, expediting regulation, and minimizing regulatory burden. As long ago as 2010, the AUC established performance standards for processing rate-related applications.[21] Bulletin 2010-16 established performance standards for record development, from application filing to the close of the record. It also reiterated the Commission's previous commitment to issuing disposition documents (acknowledgement letters or decision reports) for all rate-related

[21] Bulletin 2010-16: Performance Standards for Processing Rate-Related Applications (April 26, 2010).

applications within 90 days of the close of the record, and stated the AUC's intention to meet the 90-day performance standard 100 per cent of the time.

In AUC Bulletin 2015-09[22] the Commission updated its performance standards for processing rate-related applications. The performance standards are intended to provide consistent and predictable timelines and performance measures for a full cycle application process, from the time an application is filed with the AUC until a decision is issued. There are six process types, ranging from one requiring No Notice and resulting in a disposition document within 5-10 days, to the Full Process (including an oral hearing, argument and reply argument) with a disposition document within 233-295 days. The practice and the intention of the Commission is to meet the performance standard for the record development phase 80 per cent of the time.[23]

The practice of the Commission is to analyze each application upon receipt for the purpose of determining and employing the appropriate process that will enable the discharge of the AUC's statutory mandate with the minimum regulatory burden. We understand that this has led to fewer oral hearings and improved compliance with performance standards.

The Report Card indicates that, in Rates proceedings, the Commission met its record development performance measure 64% of the time on a "binary" basis[24], but 94% of the time when adjusted for consideration of factors beyond the Commission's control.[25] It met its disposition document performance measure 94 per cent of the time, on both binary and adjusted bases.[26]

However, a number of proceedings in recent years took far longer than the Full Process performance standard. Those proceedings were the focus of the criticisms and suggestions that were communicated to the Committee by the stakeholders and Commission staff and members. They were also the focus of a September 2019 AUC internal Rate Proceeding Lag Analysis ("Lag Analysis"), which was conducted to identify the causes for delay in 12 rates proceedings registered from January 1, 2015 through December 31, 2018 that took inordinate times to complete. The Lag Analysis concluded that most rates proceedings met or beat AUC targets. For the 12 proceedings that did not, the Lag Analysis identified the length of delays by type of request (motion, extension, application update, information request round, negotiated settlements, other), by utility and by initiator. The results of the Lag Analysis enabled a focus on areas of concern, and informed the Terms of Reference for the Committee.

[22] Bulletin 2015-09: Performance standards for processing rate-related applications, (March 26, 2015). This was preceded by Bulletin 2010-16, *ibid.,* which outlined performance standards for processing gas and electric rate-related applications.
[23] *ibid.*
[24] In this context, "binary" meaning whether the relevant performance measure was met or not.
[25] Report Card, Appendix E-Performance Measures, Rates, 3.b, page 39. "64 per cent-Binary (56 of 87); 94 per cent-Adjusted when factors beyond AUC's control were considered (76 of 81).
[26] Report Card, Appendix E-Performance Measures, 3.c, page 39—84 of 88 in each case.

In the Committee's view, the Lag Analysis reveals that many of the delays experienced in the 12 "outlier" rates proceedings can be attributed to actions of the participants (e.g. utility requests for adjournments to permit the preparation and filing of updated applications, motions by many parties for extensions of time for various reasons, including to file responses to information requests ("IRs"), motions by interveners for orders directing further and better responses to IRs, requests by interveners for additional rounds of IRs, time for negotiation of potential settlements), but that the delays could have been reduced through more assertive case management by the Commission members hearing the cases. [27]

4. Role of the AUC

4.1. The Nature of the Commission's Specific Responsibilities

Any examination of "the processes and procedures of the [Alberta Utilities] Commission for rate-setting cases with the objective of making them more efficient and productive"[28] must begin with a clear understanding of the Commission's role and responsibilities as prescribed by its constating statutes.

For present purposes, that role revolves, firstly, around the Commission's responsibilities under the *Public Utilities Act* ("*PU Act*")[29] to "**fix** just and reasonable" rates, including, *inter alia*, to "**fix** proper and adequate rates and methods of depreciation…", to "**fix** just and reasonable standards…"[30], to "**determine** a rate base", and to "**fix** a fair return on that rate base."[31] These responsibilities are vested exclusively in the Commission. While the Commission must give notice to and hear interested parties before making these determinations, it is not the primary role of the Commission to adjudicate competing claims as to what constitute "just and reasonable rates" , except to the extent that it might find it necessary do so in the course of arriving at the Commission's own conclusions.

Similarly, under section 121(2) of the *Electric Utilities Act* ("*EU Act*"),[32] when considering whether to approve a tariff application, "the Commission **must ensure** that [*inter alia*] (a) the

[27] Individual proceedings before the Commission are usually assigned to one or more Commission members, referred to in section 13 of the *Alberta Utilities Commission Act*, SA 2007, c A-37.2 (*"AUC Act*") as "a division of the Commission…". References to the "Commission" throughout this Report include such a division of the Commission designated under section 13. The Committee notes that what is, strictly speaking, "a division of the Commission" under section 13 is widely referred to, within and outside the Commission, as a "Panel", with the presiding member of the Panel being identified as "Panel Chair". Where the individual members of the Commission are being referred to, as distinct from the Commission as a corporation under section 2(1) of the *AUC Act*, they are described either as "Commission members" or "members of the Commission."
[28] TOR, Appendix II.
[29] RSA 2000, c P-45.
[30] *PU Act*, s. 89 [emphasis added].
[31] *PU Act*, s. 90. [emphasis added].
[32] SA 2003, c E-5.1.

tariff [which comprises rates[33] and terms and conditions[34]] is just and reasonable [and] (b) the tariff is not unduly preferential, arbitrarily or unjustly discriminatory… [emphasis added]" This imposes an affirmative obligation on the Commission that clearly goes beyond merely choosing between competing positions put forward by interested parties.

In addition to these explicit assignments of specific responsibilities to the Commission, it was submitted to the Committee that the Commission has "a broad public interest mandate".[35] While it is often said of regulatory tribunals that they have a public interest mandate, the Committee notes that, under the *AUC Act*, the only Commission powers that are expressly couched in terms of the public interest are the provisions respecting joint hearings and facilities approvals.[36] Neither the *PU Act* nor the *EU Act* refers to the public interest in allocating general rate-making or tariff approval authority to the Commission. However, we note that Commission members are required, "in exercising powers and in discharging functions and duties", to act in the public interest.[37] In any event, even assuming that the Commission has a broad public interest mandate in the context of its rate-setting and tariff approval responsibilities, the responsibility for determining the public interest would rest squarely with the Commission, not with the parties to its proceedings.[38]

The Commission's responsibilities obligate it to reach its own conclusions on certain matters, and not merely to adjudicate between the parties before it in any particular proceeding. It follows that an important purpose of "the processes and procedures of the Commission" is to enable the Commission to fulfill its statutory mandate.

The Commission's processes and procedures also play a critical role in meeting the Commission's obligations with respect to procedural fairness and certain statutory procedural requirements. Procedural fairness, however, is not an end in itself but, rather, is to be considered in the context of the statutory framework within which it arises. Here, procedural fairness arises within the overall requirement that the Commission itself must "fix" just and reasonable rates and "ensure" that a tariff is just and reasonable. In that respect, the Commission's processes and procedures establish the means by which a record is compiled that meets the Commission's needs in fulfilling its statutory responsibilities.

A central question for the Commission in establishing and applying its processes and procedures is, therefore, whether its own information requirements will be satisfied, while at the same time the procedural rights of parties are respected. This overarching principle informs

[33] *EU Act*, s. 1(a)(zz)(i). The term "rates" is defined in s. 1(1)(pp) as "prices, rates, tolls and charges."
[34] *EU Act*, s. 1(a)(zz)(ii).
[35] Submission of the Consumers' Coalition of Alberta (May 22, 2020).
[36] *AUC Act*, sections 16 and 17 respectively.
[37] *AUC Act*, section 6(1)(a).
[38] A concept that was explicitly acknowledged in some submissions to the Committee, e.g. submission of AltaLink (May 22, 2020).

an understanding of the statutory burden of proof that rests on applicants[39] and their procedural right to make their case as they choose.

The Commission should, therefore, be expected to be an active participant in managing the processes and procedures that enable it to make its mandated determinations. The Commission would not properly meet its responsibilities were it to adopt a merely passive role, largely leaving it to other parties to define issues and determine the Commission's information needs for it.

In the Committee's view, many if not all of the issues around the Commission's processes and procedures could be addressed by the Commission adopting a more direct, assertive management approach that reflects the role of those processes and procedures in developing the record the Commission needs in order to meet its statutory obligations.[40] The Commission's processes and procedures should be designed and applied through the lens of the Commission's own needs and responsibilities, while respecting the procedural rights of parties.

It is implicit in this proposition that the challenge is to strike the appropriate balance between these two potentially competing dynamics. Many factors come into play in meeting that challenge. Without pretense to comprehensiveness, the Committee offers the following observations that in its view are particularly pertinent in the present context.

First, the Commission is an "expert" tribunal, the members of which are presumably to be appointed having regard to the relevance of their individual backgrounds to the Commission's mandate. Further, the Commission is supported by a professional staff with relevant expertise. It is to be expected that this institutional expertise would play a role in the Commission's approach to fulfilling its mandate. At the same time, applicants have the onus of establishing their case and the procedural fairness right to make their case as they choose. So too do other parties have the right to choose how to present their cases. In meeting their onus, applicants may well bring deeper knowledge and wider expertise in specific cases, as may other parties. At the end of the day, however, it is for the Commission to make its mandated determinations for itself. As an expert tribunal, the Commission (taking into account the parties' evidence and submissions) is expected to know what it needs to know and should actively manage its processes and procedures accordingly.

Second, it is for the Commission to determine, as an expert tribunal, whether it has sufficient information for the purposes of making its determinations. Applicants and other parties are the sources of information in individual proceedings and are entitled to submit relevant information. However, in the context of the Commission's specific responsibilities, more information is not necessarily better.

[39] *PU Act*, s 103(3); *EU Act* s 121(4).
[40] As suggested to the Committee by one stakeholder: "The Commission has to own the process."

Third, and analogously to the foregoing proposition with respect to information, more process does not necessarily lead to better outcomes. As is discussed further in Section 6.1 of the Report,[41] proportionality must enter into the assessment of procedural requirements. As noted in Section 3.2 of this Report, it was suggested to the Committee in this context that the Commission has tended to be "risk averse", leading to more process and delays. In our view, the appropriateness of processes and procedural requirements must be evaluated in the broad context of the Commission's core responsibility, which is to fulfill its statutory mandate to make certain specific determinations.

Fourth, as is implicitly acknowledged in our Terms of Reference, the Commission, as a public agency, has a responsibility to ensure that its processes and procedures are "efficient and productive".[42] At the same time, it must be recognized that measures intended to improve efficiency and productivity can undermine the requirements of procedural fairness (and, indeed, the needs of the Commission itself to develop a comprehensive record).

In formulating its recommendations, the Committee has been mindful of the need to respect the requirements of procedural fairness and to avoid efficiency and productivity measures that could impinge on those requirements or on the ability of the Commission to satisfy its responsibility to make fully-informed determinations. The Committee believes that the more active, assertive management role for the Commission that is proposed overall and in several of the Committee's recommendations strikes the appropriate balance. As discussed further in Section 6, the Committee has concluded that the legal risks of implementing its recommendations are minimal.

5. The Issues

5.1. Introduction

The Terms of Reference for the Committee state that the AUC is particularly interested in the Committee's advice on 11 specific issues but that the Committee is not restricted to only those issues.[43] This Section of our Report discusses each of the 11 identified issues, as well as other issues that arose in the course of the Committee's review.

As discussed in Section 4, the Committee has concluded that the efficiency and productivity of the AUC's processes and procedures would be improved if the Commission were to adopt an assertive case management approach that is more reflective of the Commission's own needs and responsibilities, while respecting the principles of procedural fairness. This Section discusses the application of this general approach to specific issues. As discussed in more detail

[41] And in greater detail in Appendix III: Legal Framework and Risk Assessment.
[42] Terms of Reference. See also Section 2.2 of the Commission's *Rules of Practice* providing that the rules must be liberally construed "to ensure the fair, expeditious and efficient determination on its merits of every proceeding."
[43] Appendix II.

in Section 6, the Committee's overall conclusions are that the legal risks of implementing its recommendations are minimal.

The Committee emphasizes, however, that, while the following discussion considers each of the specific issues individually, the effectiveness of the recommended approach would depend in no small measure on its **general** application, reflecting the fact that several of the specific issues are interconnected. For example, were the Commission to adopt a more assertive approach to scoping (Issue #1 in the Committee's Terms of Reference) at an early point in its process, that step could be nullified by a subsequent lax approach to motions (Issue #7) that resulted in expansion of the scope. Similarly, establishing a schedule (Issue #2) would be of little effect were the Commission to take a lenient approach to motions to subsequently amend or extend that schedule. The approach of assertive case management that is proposed by the Committee should, therefore, be applied generally by the Commission, not just to each of the specific issues in isolation from each other.

The assertive management approach is conceptually similar to the practice of "case management" in Canada's civil[44] and criminal courts.[45] As applied in the courts, case management is a formalized tool for managing the steps in litigation or trials, including the potential appointment of a case management judge for, *inter alia*, the following reasons:

> (b) to promote and ensure the fair and efficient conduct and resolution of the action;
> (c) to keep the parties on schedule…[46]

The case management judge need not be the trial judge.

The AUC itself has, within its existing authority, the direct ability to apply "case management" techniques, without the need to resort to any additional appointment to assist in this regard.[47] Therefore, in the Committee's view, a formalized case management process need not be implemented for the Commission. The Committee emphasizes, however, that several of its specific recommendations should be viewed by the Commission, and applied, as elements of a broad case management approach to its proceedings. There should also be an expectation that frontline responsibility for active case management should rest with the Commission members designated to hear any specific matter and the Panel Chair.

[44] See, e.g. *Alberta Rules of Court*, Part 4: Managing Litigation.
[45] *Criminal Code*, RSC 1985, c C-46, Part VIII.1.
[46] *Alberta Rules of Court*, Rule 4.13.
[47] See further the discussion of the Commission's powers in Appendix III, Legal Framework and Risk Assessment.

5.1.1. Recommendations: Assertive Case Management

Recommendation #1[48]
The Committee recommends that the AUC apply an overarching, assertive case management approach to the development and implementation of the Commission's procedures and processes and to the implementation of the Committee's specific recommendations.

Recommendation #2
In the context of specific proceedings before the Commission, it should be recognized that responsibility for implementing assertive case management, particularly with respect to Scoping and Scheduling, rests with the Commission members assigned to process the relevant application, led by the Panel Chair and assisted as appropriate by Commission staff.

5.2. Legal Principles Informing the Committee's Recommendations[49]

The primary sources of the Commission's rate-setting authority are found in the umbrella *AUC Act*, and the three statutes that cover the gamut of the Commission's rate-setting responsibilities – the *EU Act*, the *Gas Utilities Act* ("*GU Act*") ,[50] and the *PU Act*. While each of these four statutes contains provisions that deal with procedural matters or process, the critical provision is section 76(1)(e) of the *AUC Act*. It underscores the Commission's role as by and large the "master of its own procedure"[51] by conferring on the Commission the power to make "rules of practice governing the Commission's procedure and hearings." This authority has been exercised primarily through Rule 001, the Commission's *Rules of Practice*. Procedural requirements are also to be found in other Rules, as well as more informal policies and the precedents established in Commission decision-making.

Where primary legislation is silent or incomplete as to the procedural content of an obligation to afford a hearing to affected persons, the common law of procedural fairness also becomes relevant, to the extent that it will make good the omission of the legislature. In the context of a regulatory agency's procedural rule-making powers, this means that the common law serves as a standard against which the exercise of that rule-making power will be measured. Where the rules themselves confer discretion on the agency as to aspects of the application of procedural rules, the common law also provides a basis for assessment of rulings made in individual proceedings.

However, the principles of procedural fairness do not impose a single, invariable standard; they vary in intensity with context. This means that, for a utilities regulator such as the Commission,

[48] The recommendations in this Report are numbered consecutively and are consolidated in Appendix IV.
[49] For a more extensive discussion of this issue and applicable citations and sources, see Appendix III, Legal Framework and Risk Assessment.
[50] RSA 2000, c G-5.
[51] "[E]very administrative body is the master of its own procedure and need not assume the trappings of a court": *Knight v. Indian Head School District No. 19*, [1990] 1 SCR 653, at para. 49 (*per* L'Heureux-Dubé J).

the requirements of procedural fairness will be different (and often less onerous) than the rules that apply, for example, in matters of professional discipline. It is also the case that, while courts will frequently review procedural fairness challenges on a correctness standard, there will nonetheless be considerable deference or respect paid to an agency's procedural rules or rulings. This is especially so where the agency is operating in a highly specialized, policy infused setting, and where the legislature has indicated its confidence in the judgment of the regulator by conferring wide-ranging discretion to make rules and issue rulings. The duty of procedural fairness is, therefore, not a licence for a court to engage in micro-managing the procedural rules and rulings of a specialized regulator such as the Commission. Rather, the duty calls upon a reviewing court to ask whether, in all the circumstances, the decision-maker deprived the affected party of a genuine opportunity to know and respond to the issues at stake in the matter before the Commission.

It is against that background that the Committee has assessed the procedures of the Commission and developed its recommendations for change. The Committee's assessments have also been informed by a recognition that the common law itself and the Commission's *Rules of Practice*, Sections 2.2 and 2.3, treat the demands of procedural fairness not in absolute terms but rather as part of a balancing exercise in which the procedural claims of affected parties have to be evaluated in relation to the "expeditious and efficient" discharge of a decision-maker's statutory mandate. This consideration has special application in the context of broad, public interest decision-making such as rate-setting for public utilities. It also finds more general support in the Supreme Court's endorsement of a principle of proportionality in the procedures governing civil litigation, a concept that has as much, if not more resonance in the Commission's policy-centered, rate-setting mandate. To take just one example, it is reflected in the authority of the Commission to deploy its costs powers to create incentives for focused and efficient participation in rates hearings.

In summary, we have located the exercise of our mandate within the relevant primary legislation, the Commission's own procedural rules, and the overlay of common law procedural fairness. However, in this context, the overall message of all three sources is that the Commission, in general, has considerable room for maneuver in its adoption of procedures and the making of procedural choices. The Committee returns to this theme later in the Report in our consideration of Legal Risk.[52]

5.3. Scoping of Issues

There was widespread support in the submissions to the Committee for the Commission to issue a List of Issues – "scoping" – early in the process established for each individual proceeding. Several submissions commented on the central role that this step should play in

[52] Section 6, *infra.*

focusing proceedings, described in one submission as "a foundational issue"[53] and in another as "[t]he critical first step…".[54]

The Committee agrees that early scoping by the Commission of the issues to be addressed in each proceeding should be formalized. In the Committee's view, the role of scoping in shaping both the substantive focus and the process framework of individual proceedings is central.

It is important to restate in this context our conclusion that it is the core role of the Commission to make its statutorily assigned determinations and not to merely adjudicate between the competing views of parties.[55] It is ultimately the responsibility of the Commission to settle the issues that are raised by each individual application before it. The Commission's early identification of those issues should be the focus of the subsequent steps in the process, serving to avoid the introduction of peripheral or extraneous considerations.

At the same time, procedural fairness (including particularly the rights of parties to make their case as they choose) requires that applicants and other interested parties should have an opportunity to make their submissions on what issues are raised by each particular application. Furthermore, the Commission itself would likely benefit from hearing submissions on the appropriateness of the Commission's proposed List of Issues.

The Committee recommends therefore that the Commission issue a formal Directions on Procedure document for each proceeding that includes a preliminary List of Issues. The Directions on Procedure should, as a step in the Schedule discussed in the next Section, include a fixed date for written comments to be filed on the preliminary List of Issues. The Commission would thereafter issue a final List of Issues that should generally be adhered to.

The Committee's recommendations on scoping assume a rigorous assessment of the completeness of each application, measured against the Commission's minimum filing requirements, **before** even a preliminary List of Issues is compiled.

The List of Issues should guide the Commission's subsequent approach to questions of relevance, particularly in the context of Interrogatories (Issue #5 in the Committee's Terms of Reference)[56] and Cross-examination (Issue #6)[57]. At the same time, the Commission would retain the discretion to revise the List of Issues where, as a proceeding evolved, it became clear that it was appropriate to do so[58], while strenuously resisting incrementalism, or "scope creep".

[53] Submission of ATCO (May 22, 2020).
[54] Submission of AltaLink (May 22, 2020).
[55] See Section 4 (Role of the AUC).
[56] Discussed in Section 5.7 below.
[57] Discussed in Section 5.8 below.
[58] The need to retain flexibility was emphasized in the submission to the Committee from the Utilities Consumers Advocate in particular (May 22, 2020). See also the submission of the Consumers' Coalition of Alberta (May 22, 2020).

The overarching consideration should be the Commission's own determination, informed by parties' submissions, of the issues that it must address in meeting its statutory responsibilities.

5.3.1. Recommendations: Scoping

Recommendation #3
The Committee recommends that the Commission issue Directions on Procedure for each application that include a preliminary List of Issues, and that a date for filing written comments on the List of Issues be fixed in the Schedule for that proceeding. Thereafter, there should be an onus on the parties to persuade the Commission that there are exigent circumstances that make it appropriate to vary the List of Issues, based on the record to date in the particular proceeding.

Recommendation #4
The Committee recommends that the Commission apply the List of Issues as the framework for assessing the relevance of subsequent steps in each proceeding, such as interrogatories and motions to amend or expand the List of Issues.

5.4. Scheduling

Several submissions proposed that the Commission should establish, at the outset, a schedule for each proceeding and generally adhere to that schedule. The Committee agrees. A fixed schedule, specific to each proceeding before the Commission, would benefit all parties, including the Commission itself.

The Committee recommends therefore that, as a key element of the Directions on Procedure for each proceeding (discussed in the preceding Section 5.3), the Commission issue a Schedule, fixing dates, in the case of a proposed full oral hearing, for:

- the filing of the applicant's evidence
- interrogatories from the Commission to the applicant
- responses to Commission interrogatories
- interrogatories to the applicant from other parties
- responses by the applicant
- written motions with respect to interrogatories
- written responses by the applicant to motions
- written replies by motions applicants
- decision by the Commission on the motions
- evidence by interveners to be filed
- interrogatories to interveners
- responses by interveners to interrogatories
- written motions with respect to interrogatories to interveners
- written responses to motions

- written replies
- decision by the Commission on the motions
- reply evidence of the applicant
- hearing date

Appropriate modifications would be made for less than full oral hearing proceedings. Adjustments to the Schedule in the Directions on Procedure should be permitted only where the Commission is persuaded that delay is warranted to ensure that a record will be developed that meets the Commission's needs or where a party's procedural fairness rights would otherwise be infringed.

The Committee's recommended approach to both Scheduling and Scoping emphasizes the foundational role that these two issues should play in improving the efficiency of the Commission's process and procedures. It would, therefore, be essential that, from the outset, responsibility for settling Scheduling and Scoping for each specific application rest with the Commission members assigned to process the application, led by the Panel Chair, assisted as appropriate by Commission staff.

5.4.1. Recommendation: Scheduling

Recommendation #5
The Committee recommends that the Commission formalize the issuance of Directions on Procedure, including a schedule that establishes dates for each step of the proceeding.

5.5. Time Limits

Time Limits were not identified as one of the eleven specific issues included in the Committee's Terms of Reference. The potential introduction of fixed time limits is, however, related to the issue of Scheduling (Issue #2 in the Committee's Terms of Reference) and it is convenient to discuss the subject at this point in our Report.

Neither the *AUC Act* nor the Commission's *Rules of Practice* create any time limits for decision-making in rate-setting matters.[59] Section 2.2 of Rule 001 specifies that the Rules must be

> … liberally construed in the public interest to ensure the fair, **expeditious** and efficient determination on its merits of every proceeding [emphasis added].

[59] Rule 016, *Review of Commission Decisions*, Section 3(3), imposes a sixty day limitation period on the filing of applications for review of a Commission decision, though subject to Commission modification. Otherwise, Rule 016, Section 7 subjects Commission's review and variance hearings on which leave has been granted to the Commission's *Rules of Practice*. Where appropriate, our recommendations on such process matters as scoping and scheduling as well as time limits should be read as also applying to such proceedings.

Section 2.3 then confers on the Commission the authority during a proceeding to "issue any directions that it considers necessary" to achieve those same ends. Beyond that, Rule 001 is silent with respect to time limits, though Section 32.1 contemplates process meetings in which time limits can be established for the various stages in the processing of specific applications. The Commission has, however, currently by Bulletin 2015-09, established "Performance standards for processing rate-related applications." Those performance standards vary depending on the nature of the matters before the Commission. In the case of applications or other proceedings subject to a Full Written Process, the full cycle is fixed at 214 to 262 days and, for Full Process, it is 233 to 295 days. Included within the full cycle are performance standards for record development that the Commission aims to achieve 80% of the time. The Commission has also established a 90-day standard from the closure of the record for the issuance of disposition documents which it should meet 100% of the time. The Commission's inaugural Report Card reports that this target was in fact met 96% of the time.[60]

In the submissions that we received, at least one of the utilities was generally content with these as performance standards, though there was concern expressed that an 80% target was insufficiently rigorous. However, these and other utilities were critical of the Commission's failure to meet these performance standards in several recent proceedings. Aside from the process costs of so-called regulatory lag, the utilities were also concerned about the extent to which delays in the completion of some hearings resulted in what was effectively retroactive rate-setting. This led some to argue for the imposition of time limits, though without any clear sense of whether that should be done by way of primary legislation, Cabinet regulation, or the Commission's *Rules of Practice*.

There is no doubt that there were serious failures to meet the 2015 performance standards in 12 of the rate proceedings between January 1, 2015 and December 31, 2018. However, the Committee is not persuaded that this less than stellar record is a sufficient basis on which to establish more rigid time limits for rate-setting matters, especially since the Commission's September 2019 Lag Analysis shows an acute awareness of the problem, and a resolve to more diligently monitor the progress of applications.

The Committee observes that time limits provisions figure prominently in the *Canadian Energy Regulator Act* ("*CER Act*").[61] Under that Act, the general pattern is that the Lead Commissioner establishes time limits for the disposition of various applications, with time running from the date at which the application is complete.

However, subject to exceptions, the Lead Commissioner is constrained by a legislated outer limit. Thus, for example, in the case of pipeline applications that result in a report to the Minister, the outer limit is 450 days,[62] while in some other situations, such as applications

[60] Report Card, Appendix E, at page 39.
[61] Enacted by SC 2019, c 28, section 10.
[62] Section 182(4).

respecting aspects of off-shore power lines and renewable energy projects, the maximum deadline is 300 days.[63]

The Committee is also conscious of the fact that the Legislative Assembly of Alberta has recently enacted legislation conferring on Cabinet authority to make regulations establishing time limits for the full panoply of the Alberta Energy Regulator's authority and processes,[64] including situations where the Regulator otherwise has power to make rules creating time limits for decision-making.

Notwithstanding the arguments of the regulated utilities and the apparent attractiveness to some legislatures of time limits, the Committee is not persuaded that they are a panacea for regulatory lag or necessarily lead to more "expeditious" decision-making.[65]

The Committee notes that the enactment of a time limits regime is often complex and is usually qualified by discretionary authority to extend such limits. For example, section 183(6) of the *CER Act* grants the Minister unfettered authority to grant "one or more extensions of the time limit specified under section (4)", without specifying any grounds for granting such extensions. Thus, in the Committee's view, the certainty that it is argued would be provided by a time limits regime may prove to be illusory.[66] It is also telling that, while the *CER Act* establishes time limits for facilities applications, it does not do so for the CER's rate-setting jurisdiction.[67]

Furthermore, in the Committee's view, it is within the ability of the Commission itself to implement measures that would provide all parties with confidence in the timeliness of its proceedings. It is interesting to note in this context that the recent amendment of the *RED Act*[68] dealing with time limits merely empowers the Cabinet to make regulations establishing such limits, thus implicitly recognizing that the Alberta Energy Regulator itself has the authority to address the matter with the tools at its disposal.

Given the range of applications coming before the Commission (as reflected in the variations provided for in the current performance standards), it is the Committee's recommendation that a more flexible option to legislated time limits is preferable.

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[63] Section 298(5).

[64] *Responsible Energy Development Act, 2020*, SA 2020, c 16 ("*RED Act*"), section 5, amending section 60 of the *Responsible Energy Development Act*, SA 2012, c R-17.3. The Act received Royal Assent and came into effect on June 26, 2020.

[65] There is evidence that many of the examples provided by the utilities in criticism of the Commission's timeliness record and in justification of legislated time limits were outliers in the sense that the time to final decision was influenced heavily by the novelty or exceptional nature of the proceedings and other exogenous circumstances. We sense that on a going forward basis, such distortions to the statistics on the time taken to reach a decision will be less common, particularly given the Commission's determination to become more expeditious in its processes.

[66] In addition to the Minister's discretion to grant extensions, section 216 the *CER Act* empowers the Regulator to make regulations prescribing the circumstances in which periods may be excluded from the calculation of the time limit, often referred to as "off ramps".

[67] *CER Act*, sections 225-238.

[68] *Supra*, note 64.

Under this alternative, and consistent with the Committee's recommendations on scheduling,[69] the Commission would preserve (though keep under review) its current performance standards for processing rate-related applications, with those standards being the presumptive starting point for the scoping and scheduling process under an enhanced case management system. Using the current performance standards as a starting point, but responsive to its needs and the needs of the applicant and other parties, the Commission would then produce the detailed schedule recommended in Section 5.4 for all procedural steps in the application process.

The need for flexibility and ready adaptation in performance standards suggests to us that it would be better to continue their status as a policy document rather than incorporating them into Rule 001. And, we certainly would not favour giving them the force of law by either Cabinet regulation or legislative amendment.

As also recommended, the Commission should make it abundantly clear that, except in extreme circumstances, participants would be held to the established Schedule.

With strict policing of that Schedule by the Commission, the timely disposition of applications would in our view become much more achievable. It would also avoid the complexities of the *CER Act* time limit regime with all its qualifications and exceptions. Indeed, the time taken dealing with issues of interpretation and application to the facts of particular proceedings may themselves give rise to another cause of regulatory lag.

The Committee notes that, if mandatory time limits were imposed in a Schedule for each proceeding, setting specific dates within the framework of mandated time limits would be an important tool in ensuring compliance.

5.5.1. Recommendations: Time Limits

Recommendation #6
The Committee is not recommending that there be legislative change to implement time limits. However, the Committee recommends that the Commission retain its current performance standards for record development (e.g. 143-205 days for Full Process; 80% of the time) and disposition documents (90 days from close of the record; 100% of the time), and strictly adhere to them.

Recommendation #7
The Commission's commitment in Section 2.2 of Rule 001 to the "expeditious and efficient determination on the merits of every proceeding" is more appropriately achieved through a rigorous scoping of issues and scheduling of proceedings as recommended in Sections 5.3 and 5.4 of this Report than by the imposition of statutory time limits.

[69] Section 5.4 above.

5.6. Confidentiality

From the submissions and our consultations, it appears that confidentiality, as a process efficiency issue, is essentially past tense. The Commission has dealt with the issue such that, going forward, it will be a matter of improving efficiency through assertive case management in the application of now-established standards to fewer confidentiality motions.

The Committee was informed that the use of confidential filings increased, particularly related to the "Big Build" of electricity infrastructure and the competitive bid process relating to contractors in that context. Regulatory burden was increased through segmented information requests, motions, hearings and arguments, as well as physical issues, particularly the lack of an e-filing process for confidential information.

The Committee appreciates the concept of the open court principle that encourages rate-setting processes that instill public confidence through being open and transparent. We also appreciate the need for confidentiality in specific circumstances, as reflected in the legislative empowerment of the AUC in Section 28 of Rule 001. The acceptance by the regulator of confidential information should be minimized, and limited to situations where the Commission has concluded, in accordance with Section 28.7, that granting the motion for confidential treatment:

a) is necessary to prevent a serious risk to an important public interest, including a commercial interest, because reasonable, alternative measures will not prevent that risk; and
b) the benefits of granting the request outweigh its harmful effects, including the effects on the public interest in open and accessible proceedings.

Our consultations revealed a general view that the steps already taken by the Commission have been effective in reducing the regulatory burden of confidentiality. The amendments to Section 28 of Rule 001 (effective February 8, 2020) and the AUC eFiling System enhancement (released on the same date)[70] are seen as significantly improving the process and reducing the regulatory burden.

The Committee sees merit in the suggestion that requests for confidentiality that have clear precedent could be granted without further process[71], or subject to objection.[72] However, the Commission should be suspicious of routine assertions of confidentiality, especially where there is no obvious threat to competitive advantage should the documents be released.

[70] Bulletin 2020-05: Amendments to AUC Rule 001 to facilitate exchange of confidential information (February 9, 2020).
[71] Submission of AESO (May 22, 2020).
[72] Submission of AltaGas (May 22, 2020).

Ultimately, however, it is the Commission that needs to be more vigorous in its case management to the confidentiality issue.

5.6.1. Recommendation: Confidentiality

Recommendation #8
The Commission should build on its proactive resolution of the confidentiality issue and aggressively apply case management to enhance the efficiency of its processes in this respect.

5.7. Hearings

For rate-related applications, the Commission has established six different process classifications: No Notice, Notice Only, Basic Written Process, Minimal Written Process, Full Written Process, and Full Process. Each application is assigned to one of those categories.[73] The vast majority of those assignments are automatic and non-controversial. It is, however, in the context of applications subject to a Full Written Process or a Full Process that issues have arisen with respect to the conduct of proceedings, either orally or in writing. It was on this aspect of the process that those making submissions focused.

In general, submissions were supportive of the Commission's greater use of written processes. Some even argued that the Commission should go further with suggestions that presumptively all hearings would be written unless a case could be made for phases of the hearing to be oral. Reference was made to the high costs of oral processes.

Other correspondents were more muted in their support of written processes. The principal criticism was directed at one aspect of written processes: the use of information requests as a surrogate for oral testimony tested by cross examination. It was urged that this resulted in inefficiencies and process delays. Some also argued against the use of written (as opposed to oral) argument either generally or at least when there had been an oral hearing. The Committee deals with those two concerns in Sections 5.8 and 5.11 of the Report.

Section 9(4) of the *AUC Act* provides that, subject to considerations of procedural adequacy, the Commission has authority to order that representations be made in writing, not orally. More generally, Section 35.1 of the *Rules of Practice* allows the Commission to conduct both written and oral hearings. However, Section 35.1 does not elaborate on the standards or criteria on which that choice should be made.

Recently, as noted earlier, the Commission has increasingly turned to written hearings. Moreover, during the COVID-19 pandemic, the Commission has confined itself to hearings entirely in writing.

[73] On occasion, the initial assignment of an application as between a Full Written Process and a Full Process may be revisited.

The choice to proceed in whole or in part by way of writing is obviously a matter for the Commission's discretion, and the Committee is of the view that there will often be significant advantages, in terms of expedition and cost, to proceeding in that manner. Deadlines for written processes are generally easier to impose and enforce than in oral hearings. Oral hearings will frequently involve the attendance of all participants and their lawyers at an obvious cost to the Commission, the regulated utility, or utilities, and interested parties. Moreover, in the case of utilities, much of those costs will ultimately be passed on to their customers in rates. Hearings in writing can also be a more efficient and effective way of proceeding when highly detailed, technical issues are critical to the issues raised by an application. Certainly, there are situations where oral hearings may be necessary to ensure procedural fairness, such as where issues of credibility of witnesses are in play or parties opposing the application lack the capacity or resources to participate effectively in writing.

On balance, the Committee's view is that functional considerations indicate that the Commission should have a policy or presumption that applications be heard entirely in writing, subject to any participant's entitlement to make the case for all or parts of the process to take place orally. When in issue, any requests for a full or partial oral hearing should be an integral part of the case management process and generally be resolved[74] at the scoping and scheduling stage.

5.7.1. Recommendations: Hearings

Recommendation #9
There should be a strong presumption that all Commission rate-setting hearings be conducted in writing, subject to the applicant or a party demonstrating to the satisfaction of the Commission, or the Commission determining in view of its own needs, that a hearing or part thereof be oral.

Recommendation #10
Issues as to whether a hearing should be written, oral, or partly oral and partly written should be determined in the context of the recommended scoping of issues (Recommendation #3) and scheduling (Recommendation #5), within an assertive case management process.

5.8. Interrogatories

The interrogatories issue is inextricably linked to the Scoping issue, discussed in Section 5.3. Interrogatories, referred to as information requests ("IRs") in the AUC *Rules of Practice,* were identified by many of those consulted by the Committee as a source of extensive delay and consequent regulatory lag. Specific criticisms were levelled at multiple rounds of information requests, so-called "fishing expeditions", and lack of any materiality or proportionality filters.

[74] Section 35.2 provides the Commission "at any time during the written hearing" may choose to "hold an oral hearing." The Committee accepts that such a provision is necessary even if rarely exercised, particularly when there has been a full scoping and scheduling process.

On the other side, it is argued that interrogatories are necessary to reduce the "information asymmetry" between the utility and the interveners, and to act as a necessary discipline on monopolies that have an incentive to be less than forthcoming in their applications to facilitate increases in their revenues. This appears to the Committee to be another area where the Commission can improve efficiency and expedition by moving in the direction of more active and assertive case management.

Conflicting views were expressed on the suggestion that the Commission present its IRs to the utilities before those of interested parties. One view is that this process would increase efficiency by causing the interveners to focus on matters of concern to the regulator. The other view is that, in practice, the approach did not limit duplication but instead inspired more detailed requests from interveners on the same topics, resulting in a delayed process.

Concerns were also expressed about the experience with motions relating to IR responses (see Motions, Section 5.10). One such concern was the time taken by the AUC members hearing the cases to rule on motions to compel further and better responses to IRs, and the length of some AUC decisions on such motions.

The AUC already has in place rules that define the IR process. It is worth reviewing Section 24 of Rule 001 which establishes the parameters for information requests:

> **24 Information requests**
>
> **24.1** A party may make an information request to another party in accordance with a direction of the Commission, to
>
> a) clarify any documentary evidence filed by the other party;
> b) simplify the issues;
> c) permit a full and satisfactory understanding of the matters to be considered; or
> d) expedite the proceeding.

The operative words are important—"clarify", "simplify", "permit…understanding", and "expedite". Some of those consulted by the Committee are concerned that the IR process is being used, at least in certain instances, to obfuscate, complicate, confuse and delay.

It is also noteworthy that Section 25.1 requires "a full and adequate response to each question" in a request for information, and Section 26.1 requires a full justification where a party is not able or not willing to prepare a response.

The Commission also has in place comprehensive guidelines for motions relating to IRs. In 2008, the Commission stated:

> The Commission also notes that although the Impugned IR Responses are a small fraction of the total number of IRs directed at [ATCO Gas ("AG")], significant time

> savings could have been achieved if the information directed to be filed by this Ruling had been filed with the initial information request responses.
>
> Further, the Commission considers that future motions requesting direction from the Commission with respect to allegedly deficient information request responses should clearly include as part of the ground on which the motion is made.
>
> - the reasons why the information request response does not comply with the provisions of Rule 001, Section 30(1)(b) or 31(1);
> - the materiality of the requested information, in the context of either the principle involved or the approximate impact to the applied for revenue requirement (or to the subject matter of the application);
> - the purpose for which the requested information is required;
> - the prejudice to the intervener if the requested information is not provided; and
> - how the requested information will assist the Commission in evaluating the application.
>
> This information should be provided with respect of each such allegedly deficient information request response. This information will assist all parties in understanding the rationale for the Motion, promote more complete response and reply submissions and assist the Commission in evaluating the merits of the motion.
> …
> The Commission has also considered the materiality and potential impacts to parties of either providing or not providing the requested information. In particular, the Commission was concerned with balancing the level of detail requested in some of the IRs, the effort required to produce the material requested, potential prejudice to AG if the information is produced over its objections and the potential benefit to interveners and the Commission of receiving it.[75]

The Committee considers that the relevant provisions of Rule 001, and the guidance provided in the ATCO Gas 2008 IR Ruling, clearly establish the parameters within which the Commission can and should exercise assertive case management to prevent regulatory delay from arising during the IR process.

The Committee recognizes that the need for interrogatories is driven by the nature, extent, and quality of disclosure of relevant information by the utility in its application. An application that is less than forthcoming with relevant facts or is evasive or long on obfuscation should properly be subjected to a vigorous IR process.

The need for more than one round of information requests can depend on whether the Commission Panel has decided that the proceeding should be conducted entirely in writing (Full Written Process), or should involve an oral element including cross-examination (Full Process).[76]

[75] ATCO Gas (AG) 2008-2009 General Rate Application, Application No. 1553052, Proceeding ID.11, Commission Ruling on UCA and Calgary Motions, March 7, 2008 (ATCO Gas 2008 IR Ruling).
[76] Bulletin 2015-09, *supra*, note 22.

In the former case, more than one round of IRs could be justified in the interests of developing an appropriate record. In the latter, questions that remain after the responses to IRs have been provided can be pursued through cross-examination.

The Committee also notes that the Commission has the power to modify the IR process in mid-hearing. For example, in a written hearing where the Commission is faced with requests for multiple rounds of IRs, it could determine that the most expeditious way to deal with the disclosure of information would be to schedule cross-examination on the existing IR responses, rather than permitting further rounds of IRs.

In the Committee's view, rigorous application of assertive case management, particularly with respect to scoping and scheduling, would be effective in limiting the use of interrogatories to matters that are properly before the Commission in individual proceedings. A number of measures specific to the interrogatory process should be implemented within that overall approach, together with a more assertive application of the principles outlined by the Commission in the ATCO Gas 2008 IR Ruling.

5.8.1. Recommendations: Interrogatories

Recommendation #11
The Committee recommends that the Commission:

1. Strictly limit interrogatories to matters within the List of Issues as settled by the Commission for each specific proceeding (Recommendation #3).

2. Include in the schedule for each proceeding (Recommendation #5) fixed dates for filing interrogatories, responses to interrogatories, motions to compel further and better responses, and the issuance of Commission rulings on such motions.

3. Adopt the practice of other regulators of processing motions relating to interrogatories in writing, using a Word document template.

4. Not permit interrogatories to parties that are not adverse in interest to the requesting party.
5. Hold technical meetings, including AUC staff or Commission members, to discuss potential interrogatories questions (particularly on technical issues), including relevance, materiality, and proportionality, to reduce the number and expanse of interrogatories.

6. Enforce the interrogatory parameters established in the ATCO Gas 2008 IR Ruling. Each interrogatory must contain justification of the value of the requested information to the Commission Panel in considering the particular application, including:

a. Implementing a materiality filter: what is the amount in question on the issue, and what will it cost to deal with it?

b. Applying a proportionality test: is the effort involved in the preparation of a "full and adequate response" to the interrogatory, and in dealing with the response in evidence, justified by the probative value of the information that is requested?

7. In written hearings, permit additional rounds of IRs only where determined to be absolutely necessary, and consider permitting oral cross-examination on IR responses where it appears to be more expeditious than additional rounds of IRs.

8. In oral hearings, establish a presumption that there will be only one round of Interrogatories, with follow up questions as necessary in cross-examination.

9. Penalize abuse or inefficient use of the interrogatory process through reduction of costs allowed to utilities and eligible interveners.

5.9. Cross-examination

The Committee received input on the cross-examination issue from many parties. Several expressed concern about the time and expense of oral hearings (including cross-examination). Some suggested limiting oral hearings, and thereby cross-examination. Others suggested time limits for cross-examination. Specific concerns were voiced about the use of aids to cross-examination, and about the Commission permitting witnesses to provide opinion evidence without having been qualified as experts, thereby compelling that time be taken to cross-examine such witnesses.

Two observations need be made at the outset.

First, the Commission is the master of its own procedure,[77] meaning that it possesses the power to decide whether to provide for cross-examination in a particular proceeding, or not.

Second, the law on cross-examination is well settled. There is no absolute right to cross-examination. The content of the duty of fairness varies according to context and circumstances, meaning that the duty of fairness does not always require the right of cross-examination. It should only be permitted when it is determined by the regulator to be necessary to provide the parties with a meaningful opportunity to present their case fully and fairly.

The current state of the law was well-expressed and applied in the litigation relating to the expansion of the Trans Mountain pipeline ("TMX"). There, the National Energy Board ("NEB") established a process that did not provide for oral cross-examination. It upheld its process

[77] Section 20, *AUC Act*. See also section 76(1)(e) re authority to set rules of practice.

decision in dismissing two motions[78] as well as a request for reconsideration.[79] The NEB decision granting conditional approval to the TMX was appealed to the Federal Court of Appeal ("FCA") on various grounds, one of which was the denial of cross-examination. The FCA allowed the appeal on two grounds but dismissed the ground relating to denial of cross-examination, saying that, in the context of the proceeding (which included multiple parties, the ability to test evidence through information requests, the opportunity to file evidence, and legislative timelines for adjudication), the duty of fairness was not breached by the NEB decisions not to allow oral cross-examination. The Court found that the procedure established by the NEB did allow the parties a meaningful opportunity to present their cases fully and fairly.[80] Certain parties sought leave to appeal to the Supreme Court of Canada against the grounds of appeal that were dismissed, including cross-examination, but were unsuccessful.

The Committee understands that the current practice of the Commission is, upon receipt of an application, to consider the level of process that is required to discharge its mandate.[81] The policy is to establish a process that minimizes the regulatory burden—utilize the minimum process necessary to fulfil the AUC's mandate in respect of the application. Only the Full Process involves cross-examination.[82]

Generally speaking, cross-examination is permitted when the regulator considers credibility to be in issue. Often this would relate to technical areas, such as cost of capital, which involve the evidence of expert witnesses.

The Committee understands that oral hearings are increasingly rare in AUC practice, and that the Commission takes the position that, in virtually all cases, written proceedings meet the requirements of procedural fairness by providing all parties with a meaningful opportunity to present their case fully and fairly.

The Committee sees no need to recommend changes to the Commission's practice for process determination.

Several written submissions and oral consultations included concerns about so-called "non-expert expert" evidence causing regulatory burden and resulting in wasted time and expense. Essentially, the concern is that parties present witnesses to provide opinion evidence in areas where they are not, in fact, expert, with the result that the evidence is of little or no value to the Commission in discharging its mandate.

[78] National Energy Board letter decision re Notices of motion from Ms. Robyn Allan and Ms. Elizabeth May to include cross-examination of witnesses, Ruling No. 14, May 7, 2014.
[79] National Energy Board letter decision re Requests to establish new deadline for additional information requests to Trans Mountain for intervenors receiving late participant funding decisions, Ruling No. 51, January 30, 2015.
[80] *Tsleil-Waututh Nation v. Canada (Attorney General),* 2018 FCA 153, [2019] 2. F.C.R. No. 3, at paras. 241-258.
[81] See discussion in Section 3.3 (AUC Ongoing Initiatives to Improve Regulatory Efficiency).
[82] Bulletin 2015-09, Table 2: Record development process steps by process type.

Bulletin 2016-07: Practice advisory and procedural change—expert witness qualifications no longer required[83] recognized that the Commission allows witnesses who are not expert to provide opinion evidence. This practice is endemic to the regulatory process, and differentiates it from civil and criminal litigation. It also means, however, that the litigation standard of admissibility of opinion (as opposed to factual) evidence only from witnesses who have been qualified as experts is not workable in the regulatory context. Regulators must therefore find other ways to constrain the cluttering of the record with evidence that is of little or no use and contributes to regulatory burden and lag.

Bulletin 2016-07 changed AUC procedure such that it no longer requires that witnesses be qualified as experts in rates and other hearings. It states:

> All relevant evidence, including opinion evidence, will be assessed in accordance with the weight accorded the evidence by the Commission after considering the submissions of the parties.

Bulletin 2016-07 appears to implement a trend that the Committee understands to be current in litigation—to focus the evidentiary process on weight rather than admissibility. The problem with this trend is that it is antithetical to enhancing efficiency and expedition of the regulatory adjudicative process.

Another problem is that much time would be wasted even if the Commission reverted to the previous process of qualifying experts. The practice was that the determination of expertise was done at the time the witness appeared for cross-examination. Prior to that, much time would have already been expended by the Commission and parties reviewing the proffered evidence, and any IRs and responses that related to such evidence.

The Commission needs to find a different method to constrain "non-expert experts". It could reinstitute a requirement that witnesses be qualified before they be allowed to present evidence that is accepted as expert opinion evidence (as opposed to non-expert opinion evidence), and deal with the qualification requirement as soon as the evidence is filed. Expert opinion will, by definition, be accorded greater weight than other opinion evidence.

It should also be possible to discourage "non-expert expert" evidence through a more vigorous application of the AUC's costs jurisdiction. Elsewhere, the Committee recommends that the Commission's costs powers be aggressively exercised to discourage behaviour that is unhelpful to the Commission in discharging its mandate, including its policy of reducing regulatory burden by increasing the efficiency of its procedures and processes.

If, at the end of the day, the Commission members hearing the case find the evidence to be of little or no use, they could penalize the party that adduced that evidence, in costs. The costs of subpar intervener "experts" could be disallowed as intervener costs to be recovered from

[83] March 24, 2016.

utilities. The costs of subpar utility witnesses could be directed to be excluded from recovery by the utility from its customers, effectively making them payable by utility shareholders.

The Committee recognizes that the Commission's costs power cannot be used as a tool to influence the behaviour of interveners that are ineligible for cost recovery. However, the submissions to the Committee on this issue were focused on the regular interveners in rate-setting proceedings—the Consumers' Coalition of Alberta ("CCA") and the Office of the Utilities Consumer Advocate ("UCA")—and did not identify other interveners as contributors to the problem.

It was suggested that a process that limited interrogatories to one round, with follow up cross-examination would be a step in the right procedural direction.[84] In the Committee's view, this has some merit. Clearly, cross-examination can play an important role in the development of the appropriate record for a proceeding, but it must be tempered by assertive case management not only in the hearing room but in the process leading to the hearing.

Several parties suggested that Commission counsel should examine witnesses before parties conduct their cross-examinations. Some suggested AUC counsel should also be afforded the opportunity to examine further after the cross-examinations of other parties are concluded. These suggestions make some sense to the Committee, provided that the procedure is combined with assertive case management by the presiding Commission member or members. The Commission needs to control the cross-examination of parties that follow the AUC counsel examination so as to constrain repetition and focus the process on the information that the Commission has determined that it requires, rather than the adversity of interest of the parties.

Several parties expressed frustration with the time that appears to be wasted on aids to cross-examination. The records of oral hearings are replete with legal fencing over the admissibility and appropriateness of the use of ATCs. This, however, appears to the Committee to be another situation where appropriate action has already been taken by the Commission in establishing the parameters and criteria, and it is time to enforce the rules.

Section 39 of Rule 001—Aids to question witnesses—requires provision of ATCs no less than 24 hours before the witness is to be questioned, and requires highlighting of the passages in the document that are to be the subject of the questioning. It also prohibits filing of aids until the Commission so directs,[85] which allows the Commission to enforce the established rule that only those parts of an aid that have been discussed with the witness may become part of the evidentiary record, thereby avoiding extraneous material cluttering the record. Further, the Commission dealt specifically with the use of ATCs in its decision on the 2018 Generic Cost of Capital (GCOC) proceeding, stating:

[84] See section 5.8 Interrogatories.
[85] Rule 001, Section 39.3.

> A valid aid to cross-examination must be relevant to the matters in question and must be put to the witness in a fair manner. While a document may be relevant, the party or counsel who seeks to use the aid to cross-examination must also demonstrate the probative nature of the document by tying it to the direct evidence or testimony of the witness(es). Fairness involves sufficient time to review the document as well as allowing the witness to address questions on it in the context of testing the witness's evidence. The document's connection to the evidence and its intended use should be made clear.[86]

In the same decision, the Commission indicated that it would consider if changes to its existing process regarding the use of ATCs could address its concerns, and that it might consider amendments to Rule 001 or directions to parties to follow a revised process.[87] The Committee does not believe such steps to be necessary. Section 39 of Rule 001, assertively applied in accordance with the guidance provided by the Commission in the GCOC Decision, should enhance expedition and efficiency of the process.

5.9.1. Recommendations: Cross-Examination

Recommendation #12
The Committee recommends that the Commission maintain and increase its focus on reduction of regulatory burden in determining whether to allow cross-examination.

Recommendation #13
The Commission should provide for cross-examination only where, in its considered view, it would be necessary or worthwhile in the circumstances of the case. An opportunity for cross-examination should only be provided when the Commission determines that it is necessary for it to discharge its mandate. It should limit cross-examination to specific evidence. Most importantly, however, the Commission should engage in assertive case management in the hearing room (see Recommendation #22). Cross-examination should be limited to areas and issues that the Commission considers to be necessary to inform its judgment on the application before it.

Recommendation #14
Aids to cross-examination should be strictly controlled in accordance with the Commission's *Rules of Practice* and stated policies.

Recommendation #15
Non-expert opinion evidence should be discouraged through reduction of costs allowed to utilities and eligible interveners.

[86] Decision 22570-D01-2018 Generic Cost of Capital, pages 171-172.
[87] *Id.,* at page 172.

5.10. Motions

Concerns were expressed with respect to the number of motions, the materiality thereof, and the time taken by the Commission to render decisions on motions. There were suggestions of implementing controls on the level, amount, and timing of motions. Most of the concern focused on motions to compel further and better responses to information requests.

Some of those who made submissions or were interviewed noted recent improvement in the time taken by the AUC to rule on motions, and in the use of pre-emptive motions for IRs that are out-of-scope or that fail a proportionality test—requiring more effort than is justified by the probative value of the information to be generated. Further, it was noted that increased use of technical meetings has had the positive impact of enhancing understanding and reducing the number of information requests.

Rule 001 provides for motions in a very general way, requiring only the grounds on which the motion is made.[88]

The Committee is of the view that the Commission could further enhance efficiency in dealing with motions by including dates for motions, responses, replies *and* decisions in the hearing schedule that is issued at the outset of the proceeding, and sticking to the schedule (see Section 5.4). Motions would be conducted entirely in writing.

We were informed that the Commission has already experimented with this approach, which is used by other regulators, including the Canada Energy Regulator ("CER"). In the case of the CER, the motions are conducted through the vehicle of a Word document template which is populated with the motion, the responses, and the reply on the dates specified in the hearing order. The CER does not set dates for decisions on the motion, but in our view it would be an improvement for the AUC to do so.

The CER has also established parameters for consideration of motions in respect of IRs. It applies three criteria—relevance, significance, reasonableness (no undue burden). Confidentiality/commercial sensitivity is also considered, if raised. These criteria are similar to those established by the Commission in the ATCO Gas 2008 IR Ruling, discussed in Section 5.8.

It was suggested that the AUC should disallow any motion in one proceeding that is virtually identical to a motion in an earlier proceeding that had been ruled on by the Commission hearing the earlier case. The Committee does not find this suggestion to be persuasive. The doctrine of *stare decisis* does not apply to regulation. The Commission is not bound by its previous decisions. Further, strict adherence to past decisions could confine the regulator's exercise of its statutory discretion and constrain its ability to adapt to new situations.

[88] Section 27.3(b)(ii).

Administrative tribunals do, however, properly strive to achieve continuity, consistency and a degree of predictability. It would follow from this that the Commission could introduce a presumption that rulings in earlier motions that deal with similar issues will apply unless the party bringing the new motion can provide justification for a different ruling. The party bringing the motion would bear the burden of persuading the Commission that the earlier ruling should not apply.

The Committee is not persuaded that it would be productive to introduce limits on the number of motions, or the subject matter. There should, however, be requirements of materiality and proportionality, measured against the List of Issues, that are strictly enforced as part of assertive case management.

5.10.1. Recommendations: Motions

Recommendation #16
The Commission should establish a schedule for written motions in the Directions on Procedure (Recommendation #5), including dates by which the decisions on the motions are to be issued.

Recommendation #17
The Commission should enforce the ATCO Gas 2008 IR Ruling and implement materiality and proportionality standards for requested information. Parties requesting information, and bringing motions for further and better responses to such requests, bear the onus of persuading the Commission that the information requested is not only relevant but material, and that the time required to generate the response does not exceed the probative value of the information requested.

Recommendation #18
The Commission should implement a rebuttable presumption of *stare decisis* in respect of previous rulings on similar motions.

5.11. Argument

The Committee received varying views on argument. There was both criticism and praise for the current Commission practice of simultaneous written argument and reply. Oral argument in the litigation format was advocated by some and opposed by others.

The AUC deals specifically with argument in its *Rules of Practice*:

> **47. Argument**
>
> 47.1 Argument must be in the form directed by the Commission.
>
> 47.2 No argument may be received by the Commission unless it is based on the evidence before the Commission.

It is clear that the Commission has a free jurisdictional hand to choose the nature and extent of argument that, in its view, will best inform the exercise of its regulatory mandate. The spectrum ranges from no argument at all through written to oral to hybrid formats. We understand that the Commission has exercised its discretion to utilize various forms of argument in differing cases and circumstances.

In significant rates proceedings, it has become common practice for the Commission to direct simultaneous written argument and reply. This is a two-step process. On a date prescribed by the Commission —usually 2-3 weeks after the close of evidence—all parties (applicants and interveners) file simultaneous written argument. On a second prescribed date—2-3 weeks later—all parties file reply arguments.

The simultaneous written argument practice plays to mixed reviews. It facilitates the most comprehensive analysis of the record by providing parties with ample opportunity to deal with any and all issues, unconstrained by limits on volume of submissions. While we were not informed of the genesis of the practice—unique in the experience of the Committee—it is plausible that its adoption was seen by a Commission predecessor as the most comprehensive way to inform the discharge of the regulator's mandate. Certainly, this form of argument is the most consistent with the "pursuit of the perfect record" approach. It permits parties to deal in detail with the many complex issues that populate significant rates proceedings. It also enables interveners to deal with differing interests as amongst them. However, it does so at enormous cost, both in terms of the multiple hours spent by lawyers and consultants and employees in developing the detailed arguments, and in terms of the time—many weeks—added to the proceeding.

The simultaneous written argument approach deprives applicants of their traditional right of ultimate reply. This may be viewed as a good thing if one accepts the "asymmetry of information" theory. However, it comes with a risk of further extension of the proceedings through motions to allow sur-reply or other response to assertions made in reply filings.

A different form of written argument is also time consuming. It involves three steps. The applicant is given time to prepare and file its argument. The interveners are given time to file their arguments in response—the premise being that it is only fair for the interveners to know the applicant's argument before being required to prepare their own. The applicant is then given time—usually less—to prepare and file its reply argument.
Argument may also be oral, or a combination of written and oral.

With oral argument, the tradition in the Courts is that the applicant first presents argument, the respondent responds, and the applicant has the right to final reply. This form is the general rule for many regulatory tribunals as well. The ethical standard is that the applicant, in its initial argument, is required to speak to all the positions of the interveners that, from the evidence, it can anticipate will be taken by those interveners in their arguments. It is improper to save any matters—particularly any of substance—for reply argument when the interveners have no

opportunity to respond. This is sometimes referred to colloquially as the "no sandbagging rule".

A common practice of the NEB (now the CER) has been to allow a brief period after the close of the record before hearing oral argument, and to then hear that argument in the top down/bottom up mode. In our experience, this has the effect of expediting the process by time-constraining the preparation of the arguments, forcing hearing participants to focus on the issues of greatest importance, and significantly reducing the costs of argument.

The top down/bottom up oral argument format involves the applicant presenting its argument first, then going down the list of interveners (in whatever order) to deliver their arguments in chief, then (sometimes with a short break), coming back up the list in reverse order to deliver reply arguments, with the applicant last to reply. This format, frequently used by the NEB/CER, provides all parties with the opportunity to respond to all others and in practice has been generally viewed as fair. It does require the regulator to exercise discipline in enforcing the ethical standard of the "no sandbagging rule".

Another advantage of oral argument is that the format enables Commission members to ask questions of counsel, and to limit argument to matters that they consider to be necessary to inform their judgment on the issues. This is another opportunity for the Commission to exercise control over the process in the name of efficiency and expedition.

Time limits for oral argument are a well-established practice in the judicial system, and could be used to advantage by the regulator.

It is also possible to use a hybrid of written and oral argument, an option that has been used by regulators in proceedings that do not involve an oral evidentiary hearing. A recent example of this format involved coincident filing of written arguments, followed by top down/bottom up oral argument.[89] Expedition can be enhanced through the use of time limits for the oral presentations, or imposition of hearing room discipline by the Commission ("We will not allow you to read your filed argument. We have read it. What we want is for you to speak to us about what you think is most important, respond to the other parties' arguments, and answer our questions.")

Some regulators have found it efficient to stipulate topics for argument. The Committee sees this option as entirely consistent with a more assertive approach to case management with a focus on the information that the Commission determines is necessary to enable it to fulfil its mandate in the particular case.

In our view, argument is another area where the processes and procedures of the Commission can be improved through active case management. The Commission members hearing a rates

[89] See National Energy Board Proceeding MH-053-2018 Coastal GasLink Pipeline Ltd.: Jurisdiction over the Coastal GasLink Project, oral argument May 2-3, 2019.

proceeding have wide latitude to choose the form and timing for argument that they consider will meet the needs of the Commission for that particular case. The Commission may choose that argument be oral, written, or a hybrid, and it can and should establish an expeditious argument schedule.

5.11.1. Recommendations: Argument

Recommendation #19
The Committee recommends that the Commission adopt a presumption for efficient and expeditious oral argument to be delivered within 3 business days of the close of the hearing record, using the top down/bottom up format. This presumption should be varied only in exceptional circumstances with appropriate justification.

Recommendation #20
The Committee recommends that the Commission adopt an assertive approach to management of oral argument including utilization of time limits, stipulation of topics on which it will hear argument, or other measures as it deems necessary or advisable in pursuit of the goal of improving efficiency and expedition.

5.12. Adequacy of the Record

As discussed in Section 4 of the Report (Role of the AUC), a central question for the Commission in establishing and applying its processes and procedures is whether the Commission's own information requirements will be satisfied, while at the same time the procedural rights of parties are respected. The Committee also observed that the Commission is an expert tribunal, supported by a professional staff.

It is, therefore, up to the Commission to determine the adequacy of the record before it in specific proceedings. While the Commission should respect the expertise of parties and the rights of parties to present their cases as they choose, it should do so guided by the Commission's own needs[90] and resist attempts by parties to expand the record beyond the Commission's central role, namely, to inform the Commission's deliberations on the determinations it is mandated to make. In particular, just as the Commission should resist "scope creep", so too it should resist suggestions that more information is necessarily better.

[90] It was suggested in one submission to the Committee that "[s]cope creep, voluminous submissions, and continuing disputes between litigants regarding the relevance or sufficiency of evidence are all related to a lately developed vagueness regarding exactly what information the Commission requires to make its decisions" (Submission of FortisAlberta (June 5, 2020)).

5.12.1. Recommendation: Adequacy of Record

Recommendation #21
The Committee recommends that the Commission assess the adequacy of the record in each proceeding by reference to the List of Issues (Recommendation #3) and that it resist attempts to persuade it that more information is necessarily better.

5.13. Panel Assertiveness in the Hearing Room

One possible reading of this aspect of our mandate was that the Committee should reflect upon how aggressive a Commission Panel and its individual members could be in controlling hearing room behaviour and the conduct of a party's presentation of its evidence and arguments. When would the actions of the Panel or one or more of its members transcend acceptable assertiveness and become reviewable by reason of a reasonable apprehension of bias? While the answer to that question is heavily fact sensitive, the general principles are not controversial.

The Committee therefore determined that behind the terms in which the issue was couched was a more fundamental question bearing on the very nature of the Commission's regulatory role. To what extent is the rate-setting process one in which the Commission may legitimately be interventionist or controlling in orchestrating the proceedings? Would it be appropriate for the Commission to interpret its mandate as being more inquisitorial as opposed to a sphinxlike refereeing of an adversarial, adjudicative process? Seen in that light, "assertiveness" is more properly understood, not as "aggressive", but as "active" or "proactive."

Earlier in our Report, the Committee proposed that, despite the fact that its processes are commonly triggered by the filing of an application, the Commission is primarily responsible for determining what it requires in any particular situation to fulfill its statutory mandate. Moreover, central to meeting that obligation are the procedures that the Commission determines are best suited in any specific situation, subject, of course, to statutory and common law procedural fairness constraints.

When viewed from that perspective, the Commission has every right to be both assertive and proactive in setting the procedures to be followed in responding to applications or when acting on its own motion. Indeed, it is not really a stretch to regard such activism as a matter of obligation and not just choice. It is therefore in line with this conception of the nature of the Commission's role that the Committee is making many of its recommendations respecting the Commission's processes. More generally, it has also prompted the Committee's umbrella recommendation that the Commission move in the direction of more active case management**.** In the Committee's view, such an evolution will assist greatly in the fulfilment of the expectations set out in Section 2 of Rule 001 of a process that is "fair, expeditious and efficient."

5.13.1. Recommendation: Panel Assertiveness

Recommendation #22
The Committee recommends, consistent with the focus of this Report on assertive case management, that the Commission endorse assertiveness not only in the hearing room but generally throughout the process as a virtue that should inform all rate-setting and rate-related proceedings.

5.14. Decisions

Few of those making submissions to or interviewed by the Committee faulted the Commission's decision-writing methodology. If there was a problem, it was said to be the extent to which Commission panels felt obliged to deal with all arguments that were raised in the hearing process. However, those making that point saw this not so much as a problem of decision-writing competence as the result of earlier process flaws and, in particular, a failure to focus on what was truly or reasonably relevant to the determination of the particular application. Many argued that greater structuring and, more generally, rigor from the outset would eliminate that problem and lead to shorter, clearer, and more concise decisions. These are matters that the Committee has addressed in our discussion of other issues and do not require further elaboration here.

A small number of stakeholders did, however, draw our attention to what they considered to be a design flaw in the usual template for Commission reasons. The AESO submission captured it well, faulting the Commission for "typically" including within its decisions free-standing or disembodied extensive recitations of the evidence and submissions or arguments made by the parties.[91] In the words of another correspondent, there is a practice of "rote recitation of parties' positions on substantive issues."[92]

The Committee has not engaged in an empirical review of the Commission's recent decisions to evaluate the extent of this practice. However, it certainly was a format that the Commission followed in two earlier decisions that we examined for other purposes: the 2010 Commission ruling in *Re Lavesta Area Group,*[93] and, much more recently, the 2017 Commission *Ruling on jurisdiction to determine the Notices of Questions of Constitutional Law*.[94] In the earlier of these decisions, the panel devoted 39 paragraphs to straight recitation or summary of the positions of the parties. We also found further support for the accuracy of this characterization of the Commission's reason writing template as recently as a June 29, 2020 Commission decision on an ATCO Gas and Pipelines Ltd. application for review and variance of a decision.[95] Twenty-four

[91] Submission of AESO (May 22, 2020).
[92] Submission of FortisAlberta (May 22, 2020).
[93] 2010 LNAUC 507.
[94] 2017 LNAUC 4 (*sub nom. Re Alberta PowerLine General Partner Ltd.*).
[95] Decision 25380-D01-2020, *ATCO Gas and Pipelines Ltd.*, *Decision on Preliminary Question, Application for Review of Decision 24333-D01-2019, 2017 Capital Trucker True-Up Compliance Filing to Decision 23789-D01-2019* (June 29, 2020).

paragraphs were a detailed, non-analytical description of the parties' submissions, while only seven paragraphs were devoted to a consideration of the substantive grounds on which the application was based.

Attention to the arguments of the parties is an indispensable part of the duty to give reasons. However, in the context of judicial decision-making, the clearly preferred approach is now one that is issues driven. In other words, the arguments of the parties and detailing of the evidence are to be found not in separate sections of the reasons but are integrated into the elaboration of each issue that is at stake in the proceedings. Moreover, it is instructive that, in separate power point presentations prepared for the 2019 Canadian Association of Members of Public Utility Tribunals ("CAMPUT") energy regulation course, both Justice Michael Penny of the Ontario Superior Court and Justice David Brown of the Ontario Court of Appeal, both previous members of the Ontario Energy Bar, urged this approach.

One of the primary objectives of a reasons requirement is to ensure that the parties know and understand the reasons for the decision and its various components. That legitimate expectation is in general met much more readily by reason writing that is issues driven. Moreover, such an approach brings with it two additional benefits – it generally leads to shorter decisions,[96] and the clarity that attends such an integrated approach is also more likely to attract a deferential or respectful approach on the part of any reviewing court.

The Committee therefore recommends that the Commission adopt a reasons writing template that is committed to an issues driven approach, rather than a fact/chronology approach. While we recognize that shorter, issue-focused reasons do not necessarily mean more prompt decisions, in many instances, they should produce decisions that deal directly with relevant issues and diminish the extent of the Commission's exposure to applications for review and variance and applications for permission to appeal to the Court of Appeal.

5.14.1. Recommendations: Decisions

Recommendation #23
The Commission should adopt a template for decision-writing that is issue-driven.

Recommendation #24
The Commission should provide appropriate training to its members and staff on issue-driven decision-writing.

5.15. AUC Member Training

In the Committee's view, the effectiveness of applying an assertive case management approach to the Commission's proceedings would very much depend on the members of the Commission

[96] Though admittedly ones that may take longer to write.

having a shared understanding of the function of the Commission and of their role in conducting individual proceedings.

As discussed in Section 4, the Commission's statutory responsibilities require the Commission to make certain determinations for itself, and not simply to adjudicate between competing claims. The Commission's function is inquisitorial, rather than adjudicative; hence the frequent description of tribunals like the Commission as "quasi-judicial". It is imperative that Commission members have a common understanding of the nature of that function, and how it differs from the judicial function of the conventional courts.

The Committee has observed that the Commission is an expert tribunal, the members of which are presumably to be appointed having regard to the relevance of their individual backgrounds to the Commission's mandate.[97] However, the criterion of having a background relevant to the Commission's mandate in order to qualify for appointment to the Commission will likely result in many, if not most, appointees not having experience in managing a quasi-judicial proceeding, even where an appointee has a background as a legal professional.

Furthermore, the Committee's overall recommendation that the Commission adopt an assertive case management approach would require the skillful balancing of measures that focus proceedings on the Commission's needs, while respecting the requirements of procedural fairness. In other words, individual Commission members need more than just their expertise in specialized areas.

In the Committee's view, these considerations suggest that Commission members (and the Commission's overall processes) would benefit from training on the elements of the quasi-judicial process,[98] particularly with respect to balancing procedural requirements with the need to conduct an effective and efficient process intended to enable the Commission to fulfil its mandated responsibilities.

It was suggested to the Committee that the presiding member in a Commission proceeding should have litigation experience. This may not be feasible having regard to scheduling demands on members' availability. However, in the Committee's view, it would be desirable that the presiding member for a full written or oral hearing proceeding include a member with a legal background. It might, therefore, be appropriate to suggest to the Alberta government that it consider appointing sufficient members of the Commission with appropriate legal backgrounds to support this practice.

[97] See Section 4.1 above.

[98] Superior Court judges in Canada must have wide experience in legal matters in order to qualify for appointment to the Bench. The Committee notes, however, that newly-appointed judges must still undergo formal training during the first year of their appointment, organized by the Canadian Judicial Council, and are required to participate in continuing education programs thereafter: https://cjc-ccm.ca/en/what-we-do/professional-development.

The Committee notes that the Council of Canadian Administrative Tribunals provides various professional development courses, including courses in adjudication for members and refresher courses "for more experienced members."[99] The offerings include a course on "Decision Writing." It is also noted that the purposes of CAMPUT include improving "the education and training of commissioners and staff of public utility tribunals"[100] and that the organization offers various training courses.

5.15.1. Recommendation: Member Training

Recommendation #25
The Committee recommends that members of the AUC be provided with training on the nature of the Commission's role as a quasi-judicial tribunal and on the principles of procedural fairness and the elements of conducting a quasi-judicial process, particularly with respect to balancing procedural requirements with the need to conduct an effective and efficient process intended to enable the Commission to fulfil its mandated responsibilities. "Refresher" training programs for members should also be available periodically. Such training should include reference to Appendix III: Legal Framework and Risk Assessment, particularly as it relates to the minimal legal risks of assertive case management.

5.16. *Consolidated-Bathurst* Plenary Meetings

Thirty years ago, in *IWA v. Consolidated-Bathurst Packaging Ltd.*,[101] the Supreme Court of Canada endorsed the practice of agencies and tribunals that sit in panels or divisions of holding plenary meetings of the membership of the agency or tribunal to discuss an issue or issues that had arisen in proceedings before a specific panel. Deployed properly, such plenary meetings could, among other things, provide an incentive for achieving consistency on issues that were likely to recur before individual hearing panels. As recently as 2019 in *Canada (Minister of Citizenship and Immigration v. Vavilov*, a recent leading decision of the Supreme Court of Canada, which is discussed in Section 6 and Appendix III, the Supreme Court continued to endorse such meetings as:

> … an effective tool to "foster coherence" and "avoid … conflicting results".[102]

We were told that within the Commission the idea of such processes had been floated and perhaps tried once but had not so far taken hold. The reason for this apparent lack of enthusiasm was not explained.

[99] http://www.ccat-ctac.org/en/professional-development. The Committee notes, however, that the range of responsibilities of Canadian administrative tribunals is vast - customized training tailored to the responsibilities of economic regulation tribunals such as the AUC would be desirable.
[100] http://www.camput.org/about-camput/.
[101] [1990] 1 SCR 282.
[102] 2019 SCC 65, at para. 130, citing *Consolidated-Bathurst*.

In a regulatory domain where there are likely to be issues arising before hearing panels that are of significance for the rate-setting operations of the Commission as a whole, the Committee noted that this potentially invaluable consultation facility was not being promoted. Given the range of backgrounds from which members of the Commission are appointed and the varying lengths of their service on the Commission, there is much to be said for encouraging the exchanges of views and perspectives that such processes facilitate.

Certainly, the Commission's hearing panels are not bound by the determinations made by other panels; there is no formal doctrine of precedent applicable to administrative agencies and tribunals. However, even though the Supreme Court in *Vavilov* was not prepared to endorse inconsistency as a free standing ground of judicial review, nonetheless, the majority took pains to emphasize that a persistent lack of consensus on commonly arising issues could raise concerns on the score of arbitrary decision-making. Therefore, in the Committee's view, a Commission policy promoting such plenary sessions could be an effective way of "strengthening institutional best practices."[103] Provided the constraints recognized in the case law are respected and, in particular, that such meetings "do not operate to fetter decision-making",[104] such meetings will pass legal muster.

5.16.1. Recommendation: Plenary Meetings

Recommendation #26
The Commission should formally recognize the benefits of plenary meetings to discuss generic issues that arise in proceedings before individual Panels, within the terms of the guidance on such meetings provided by the Supreme Court of Canada in the *Consolidated-Bathurst* and *Vavilov* decisions.

5.17. Intervention

Consumer and, more generally, interested party participation in rate regulation proceedings has long been a feature of hearings conducted by the Commission and its predecessors. Presently, the most frequent interveners in these matters are the statutorily recognized and government funded UCA, established in 2003, and the CCA, that has operated since 1978. As part of its statutory mandate, the UCA

> … represents the interests of Alberta residential, farm and small business consumers of electricity and natural gas before proceedings of the Alberta Utilities Commission and other bodies whose decisions affect the interests of those consumers.

[103] *Ibid.*
[104] *Ibid.*

On its website, the CCA defines its primary role both originally and today as

> … to intervene in [Commission] hearings related to the regulated portions of household utility bills.

It further describes the CCA as

> … an independent, non-profit, volunteer-based organization.

In many rate matters, the UCA and the CCA are currently the only interveners. The absence of other interveners is apparently explained in large measure by the provisions of Sections 3 and 4 of Rule 022: *Rules on Costs in Utilities Rate Proceedings*.[105]. One of the conditions of cost eligibility in Section 3 is that an intervener

> … does not have the means to raise sufficient financial resources to enable the intervener to present its interest adequately in the hearing or other proceeding.

Section 4 then excludes from access to intervener funding, "[u]nless the Commission orders otherwise", a range of "types or classes of interveners" including municipalities and associations thereof, and "business, commercial, institutional, or industrial entities" and associations thereof. The CCA, not coming within the exclusions of either Section 3 or Section 4, is a regular participant and applicant for costs in rate-setting and rate-related matters.

Some of the submissions to the Committee were critical of the participation of each of the regular interveners in rate matters. Generally, the utilities that raised this issue expressed concerns about the duplicative nature of intervener evidence and submissions, their excessive resort to IRs and engagement in "fishing expeditions", and the quality of the evidence provided by, what have been described to the Committee as the interveners' "non-expert experts".

Concerns were also expressed about the breadth of interventions, and a failure on the part of the interveners to confine themselves to matters that were appropriately before the Commission in the specific proceeding. It was further alleged that the interveners tended to concentrate, mainly through the IR and cross-examination processes and the use of "non-expert experts", on matters of little real moment in terms of their ultimate impact on rates.

This led to various suggestions including one arguing for the prevention of CCA intervention in matters where consumer interests were being represented by the UCA, and another urging, more generally, stricter policing for duplicative interventions particularly where the UCA was a party. A third called for greater accountability principally through increased justificatory requirements for intervener status, and a more restrictive costs regime based in part on the percentage of customers represented by the intervener.

Given the complexity of many rate regulation proceedings, varying consumer positions on issues integral to applications, and the diminution in size of the intervener community, room

[105] Made in part under section 21(2) of the *AUC Act*.

should continue to exist for expression of those differing visions of the consumer interest, and, indeed, additional perspectives on that interest.

Certainly, duplication can be a problem for the efficient and expeditious processing of applications, as can excessive use of the IR process and cross-examination, focus on issues that proportionally are of little or no moment, and the tendering of opinion evidence that is immaterial or unreliable. However, it is also clear that it is not only interveners that have been at fault in the protraction of rate-setting and rate-related matters. This is evidenced by utility resistance to and resulting dueling by motions over information requests, including those revolving around issues of confidentiality.

What is, however, apparent to the Committee is that these are problems that should be managed by more assertive case management. At the front end, preemptive action in the form of more rigorous attention to scoping is one obvious way of reining in any inappropriate expansion of an application, so-called "scope creep". Unnecessary duplication could also be nipped in the bud in the context of the interveners' Statements of Intent to Participate, and, more particularly, as now appears to be happening, through technical or issues meetings.

As discussed earlier in the Report, the Commission has also developed new approaches and mechanisms for dealing with one of the biggest sticking points and contributors to delay between regulated utilities and interveners: the determination of claims to confidential treatment of information.

It is otherwise clear that the Commission is aware of the problems identified by the utilities and its own staff and is doing something about it. This is evident in the following 2017 admonition:

> In the Commission's view many of the parties who filed statements of intent to participate in this proceedings raise similar issues. The Commission encourages parties with standing to band together to form a group, because the participation of groups contributes to the efficiency of a hearing and allows interveners to share the work of preparing and presenting an intervention. It should also be noted that costs awards to local interveners are affected by efficiencies that are gained, or which should have been gained by a co-operative approach among interveners and intervener groups.[106]

One can also add that another way of improving the efficiency of hearings would be an allocation of responsibilities among those intervening.

In more recent decisions and in the context of applications for review or variance, the Commission has also been more forthcoming in denying at least a significant part of intervener cost claims based on the Commission's assessment of the quality of interventions. Has the intervener contributed meaningfully to the matters in issue?[107] Were there qualitative defects in the intervener's evidence? Was there unnecessary duplication of effort in the work for which

[106] *Alberta PowerLine General Partner Ltd. (Re)*, *supra*, note 94, at para. 118.
[107] *Consumers' Coalition of Alberta*, Decision 23833-D01-2018 (2018).

the intervener was claiming costs?[108] Was the cost of the services for which costs are being claimed proportionate to the value of that evidence to the matters in issue?[109] These considerations as well as others are listed in Section 11 of Rule 022. It also goes without saying that it is not just eligible interveners who are and should be subject to the discipline of costs reduction but also applicants. They too as "participants" are subject to Section 11.

By virtue of Section 3.3 of Rule 022, applicants are eligible to claim costs. This raised the question for the Committee of whether, as another measure of discipline, the possibility exists that the Commission has authority to not only deny or reduce the costs incurred by both utilities and interveners but also order the payment of what in effect are party and party costs. However, there are strong indications[110] that the Alberta Court of Appeal would regard Rule 022 as a complete code for the award of costs in rate-setting proceedings. In other words, the Rule amounts to a legitimate structuring of the Commission's discretion with respect to costs found in sections 11 and 21(1) of the *AUC Act* leaving no room for those sections to operate as free-standing bases for costs awards outside of Rule 022. Moreover, there are serious doubts as to whether Rule 022, properly interpreted, could stretch to utilities making costs claims against interveners. This possibility is not in any way suggested by Section 12(1) of Rule 022. In providing for the costs liability of utilities to interveners and omitting any mention of the costs liability of interveners to utilities, the Commission has in effect spoken on this issue. Of course, the Commission could amend Rule 022 to allow for this possibility, but the Committee is not recommending that.

In summary, the Committee has concluded that, through the Commission's own recent initiatives, and a more rigorous approach to front end case management and Commission vigilance throughout the hearing of an application, much of the current tension between some of the regulated utilities and the two regular interveners could be eliminated or at least reduced to a state of healthy contestation. As well, Section 11 of Rule 022 provides ample room for costs denial and reduction when either applicants or eligible interveners engage in any of the relevant species of participatory "misconduct" identified in Section 11.

As with other aspects of the Commission's discretionary powers, there would be little legal risk involved in the deployment of case management and the use of costs powers as a means of channeling the participation of both applicants and interveners (and the UCA and CCA in particular) in order to avoid duplicative and generally unnecessary effort, as well as to enhance

[108] *The Consumers' Coalition of Alberta*, 25245-D01-2020 (2020).
[109] See, in transmission line proceeding, *ENMAX Power Corporation*, 25364-D01-2020 (2020).
[110] See the judgment of Fraser CJA in *ATCO Gas and Pipelines Ltd. v Alberta Utilities Commission*, 2014 ABCA 397, 588 AR 134, at paras. 82-83 and 98-99, in which she classifies Rule 022 as a complete code on costs for rate and rate related matters. Given that there is no explicit warrant for the award of party and party or equivalent costs to be found in Rule 022, that would seem to speak strongly against the reading of such an authority into the Rule. It must however be noted that it is unclear whether these aspects of Chief Justice's judgment garnered the support of either the other majority judge or the dissenting judge. (The Fraser judgment has been cited recently by the Commission in a Review and Variance application: *Calgary (City) (Re)*, 2019 LNAUC 265, at paras. 44-45.)

the quality of the regulatory process. The Court of Appeal's appreciation of the scope of this discretionary power is abundantly clear in the 2014 judgment of the Alberta Court of Appeal in *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*:

> The Commission is a specialized body with a high level of expertise in a wide range of issues … Of particular relevance to this appeal is the Commission's expertise in determining the amount and appropriateness of legal costs for applicants and interveners in the many kinds of proceeding before it.[111]

5.17.1. Recommendations: Interventions

Recommendation #27
The Committee recommends that the Commission should, through its case management powers, more assertively hold all parties to the scoped issues and guard against repetitious evidence and submissions.

Recommendation #28
The Committee recommends that the Commission should, in appropriate cases, continue to recognize and apply the extensive discretionary authority that it possesses under Section 11 of Rule 022, *Rules on Costs in Utility Rate Proceedings*, to deny or reduce the cost claims of both utilities and eligible interveners.

5.18. Costs

The *AUC Act* confers broad costs powers on the Commission. Section 11 provides that the Commission has the same authority with respect to costs as does a judge of the Court of Queen's Bench. Section 21(1) is more specific in providing that the Commission can order

> … by whom and to whom its costs and any other costs of or incidental to a hearing or other proceeding … are to be paid.

Section 21(2) then authorizes the Commission to make rules "respecting the payment of costs to interveners".[112] More general rule-making authority with respect to costs is also implicit in section 76(1)(e), and its provision for rules of practice "governing the Commission's procedure and hearings."

The Commission has exercised its rulemaking powers with respect to costs in Rule 022,[113] which, as discussed in Section 5.17, creates a costs regime under which both eligible

[111] *Id.*, at para. 17.
[112] This provision does not however apply to "local interveners" as defined in section 22(1) and provided for by way of a separate rulemaking authority in section 22(2). In effect, this means that the rulemaking power in section 21(2) does not apply to transmission proceedings, but it does not affect rate-setting and rate-related proceedings.
[113] *Supra*, note 105.

interveners and applicants[114] can claim costs under a Scale of costs attached to the Rule as Appendix A. As far as interveners are concerned, eligibility is restricted to those with "a substantial interest" who do not

> … have the means to raise sufficient financial resources to enable the intervener to present its interest adequately in the hearing and other proceeding.

Under Section 12 (Liability for costs) of Rule 022, in proceedings where a utility is an applicant, any costs awarded to an intervener are to be paid by the utility.[115] In generic proceedings, the Commission may pay the costs of any eligible participant (including utilities), or order that responsibility for payment of any costs "be shared by one or more utilities."[116]

However, Section 12 is silent as to liability for any costs awarded to an applicant utility in a rate-setting proceeding. That omission is puzzling but, as supported by the Commission's practice, the solution is to be found in Section 13.4. It provides that the Commission may state in any cost order that a named applicant is entitled to "record the costs in its hearing costs reserve account." The overall effect of this is that the utility becomes entitled to include these costs in its revenue requirements and to pass them on to its customers through its rates. By implication, it supports the contention that Rule 022 does not allow a utility to recover its costs from an intervener.

Section 9.2 is also critical in understanding the reach of Rule 022. It provides that participants in utility rate proceedings may "only claim costs in accordance with the scale of costs." This suggests that Rule 022 has occupied the field and constitutes a complete code for the awarding of costs in utility rate proceedings. Apparent confirmation is provided by the 2014 judgment of Fraser CJA in *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*,[117] noted in Section 5.17. In the context of two generic hearings, she rejected the argument of ATCO that the Commission had not only the authority but also the obligation to award it full legal and other regulatory costs for its participation in those proceedings on the basis that they had been prudently incurred. In other words, ATCO was asserting that its entitlement to costs was not constrained by the Scale of costs in Appendix A to Rule 022. However, Fraser CJA held that, In adopting Rule 022, the Commission had lawfully structured its discretionary powers over the award of costs found in sections 11, 21, and 76(1)(e) of the *AUC Act*. ATCO's claim for costs was limited by the categories and amounts provided for in Appendix A, subject (as provided for in the introduction to the Scale of costs) to upward adjustment only where the claimant

> … can advance persuasive argument that the scale is inadequate given the complexity of the case.

[114] Section 3.3.
[115] Section 12.1(a).
[116] Section 12.1(b).
[117] *Supra*, note 110.

After careful consideration, the Committee is not recommending any change in the carefully calibrated costs regime for utility rate proceedings elaborated in Rule 022. As noted in Section 5.17, this included rejection of any amendment of Rule 022 (or the *AUC Act*) that would expose interveners to the possibility of an order that they pay the legal and other regulatory costs of applicants.

However, the Committee does not reject, and in fact endorses the role of costs as a discipline on "behaviour" for those participating in rate-setting or rate-related proceedings. The overarching theme of this Report has been the importance of more assertive case management. In the Committee's opinion, such an approach should have the impact of eliminating or reducing many of the practices that have characterized the participation of both utilities and interveners in rate-setting and rate-related proceedings that have contributed to regulatory lag. To the extent that this may not necessarily eliminate all such obstacles to the efficient and expeditious processing of applications and Commission-generated proceedings, there should be consequences for subpar participation.

At present, those consequences are provided for in Section 11 of Rule 022, the terms of which deserve elaboration. To qualify for an award of costs, the costs must be "reasonable and directly and necessarily related to the hearing or other proceeding."[118] Another threshold requirement that speaks directly to participatory performance is that

> … the eligible participant acted responsibly in the hearing or other proceeding and contributed to a better understanding of the issues before the Commission.[119]

Section 11.2 then goes on to list a series of considerations or factors that the Commission may take into account in deciding whether to penalize a participant with a reduction in the quantum of costs to which the participant would otherwise be entitled under the Scale of costs. Those factors include many of the "sins" that are detailed and discussed in the preceding sections of this Report. The first is illustrative:

> Asked questions on cross-examination that were unduly repetitive of questions previously asked by another participant and answered by the relevant witness.

In terms of the Committee's mandate, Section 11.2(h) is particularly salient:

> Engaged in conduct that unnecessarily lengthened the duration of the hearing or other proceeding or resulted in unnecessary costs to the applicant or other participants.

As discussed in Section 5.17, there is evidence that the Commission is increasingly willing to rely on Section 11.2 in evaluating and, where appropriate, reducing the costs claims of all eligible participants. Especially for some interveners but also more generally, significant participatory misconduct reductions in the costs awarded should be both a salutary experience and an

[118] Section 11.1 (a).
[119] Section 11.1 (b).

incentive to more focused and measured participation in the future. The Committee urges on the Commission that it continue along this path and diligently subject all costs claims to the code of conduct for participatory engagement that is the core of section 11.

5.18.1. Recommendation: Costs

Recommendation #29
The Committee recommends that the Commission rigorously apply to costs claims in rate-setting and rate-related proceedings the considerations governing eligibility and quantum of recovery set out in Section 11 of Rule 022, *Rules on Costs in Utility Rate Proceedings*.

6. Legal Risks

6.1. Introduction

The Terms of Reference require that the Committee's report include "a discussion of associated risks, in particular legal risks, arising from moving from traditional procedures and methods to more innovative and flexible approaches."[120] This part of our mandate requires an analysis of the legislative context—both substantive and procedural—within which the Commission functions currently, with particular emphasis on legislative provisions that directly or indirectly establish the procedural framework for the AUC's utility rate regulation. It then requires consideration of the relevant common law influences as embodied in court-imposed rules of procedural fairness and common-law developed regulatory principles. Ultimately, it requires an assessment of the legal risks of implementation of our recommendations for reform, including consideration of the standards of review that we would expect the Alberta Court of Appeal to apply to any challenges to the substantive and procedural rules and rulings made by the Commission in the context of utility rate regulation.

Appendix III: Legal Framework and Risk Assessment presents our detailed analysis and discussion of legal risks. It informs our considered opinion that implementation of our recommendations for reform is subject to little risk of successful judicial review, and our conclusion that the Commission should feel free to implement assertive efficiency-driven procedural innovations, without fear of judicial intervention that is anything other than constructive.

This Section 6 of our Report—Legal Risks—is essentially a summary of the principles and analysis set out in detail in Appendix III.

[120] Appendix II.

6.2. General

One way of characterizing the Committee's mandate is that it involves reviewing the rate-setting processes of the Commission with a view to making recommendations for change that will ensure an appropriate and legally defensible balance between what are sometimes, but not always, the competing demands of expedition and efficiency, on the one hand, and procedural fairness, on the other. However, it must also be recognized that, at common law, the rules of procedural fairness are both situation specific and content variable. This means that the requirements of procedural fairness vary in intensity and have themselves evolved contextually and with regard to, among other values, the realities of what is feasible as a matter of good administrative practice. In civil litigation, in a way that has obvious resonance in administrative decision-making, this is reflected in the Supreme Court of Canada's espousal of the concept of proportionality.[121] Under this approach, the rules of civil procedure and the extent of procedural entitlements involve a balancing exercise in which the gains in efficacy of decision-making likely to be achieved by procedures are measured against the litigation and other costs of those procedures – in other words, a crude form of cost benefit analysis.

In recommending changes to the Commission's rate-setting processes, the Committee has been mindful of both the principles just identified and the legal framework within which the Commission functions. A central feature of that statutory framework is that the Commission is not primarily an adjudicative body. Rather, it is nearer to the inquisitorial end of the administrative decision-making spectrum. This is reflected in a legislative scheme under which it is the Commission's needs that are paramount in the fulfilment of its core mandate and the setting of just and reasonable rates. Its core function is not so much the refereeing or adjudication of a contest between contending participants as a process by which the Commission determines the appropriate level of rates by reference to its own standards and needs as the designated regulator and as defined by the governing legislation. Among the statutory indicators of this is the authority conferred on the Commission by section 8(2) of the *AUC Act* to act on its own initiative or motion. The most notable examples of the use of this power are the Commission's scheduling of generic hearings.

Among the features of that legal framework are the relative lack of procedural detail contained in the Commission's home or governing statutes and the extent to which, either directly or by necessary implication, matters of procedure are left to the on the ground judgment of the Commission. This finds its strongest manifestation in the extensive discretion that the *AUC Act* bestows on the Commission to make procedural rules. This discretion has been most notably exercised in the Commission's Rule 001, *Rules of Practice*. These *Rules of Practice* undoubtedly have been formulated with a close eye on the Commission's sense of what the common law rules of procedural fairness demand within the realities of this specific statutory decision-making process. The same is true of the way in which the Committee has developed its recommendations for change.

[121] *Hryniak v. Maudlin*, 2014 SCC 7, [2014] 1 SCR 87.

The Committee has been attentive throughout to legal risk. To what extent are the changes that we are recommending legally consistent with the overall legal framework within which the Commission operates in its rate-setting jurisdiction? In this regard, we have paid particular attention not only to the governing statutes but also the overlay of common law procedural fairness when those statutes are not explicit and the role of the courts is to determine whether to fill the void left by the legislature.

Of course, where a recommendation runs up against the explicit or necessarily implicit provisions of a statute, the only way of putting that recommendation into effect is by way of legislative amendment or repeal. In fact, we are not making any such recommendations for legislative change by the Legislative Assembly of Alberta.

Similarly, if a recommendation were contrary to Rule 001, its implementation would involve the Commission in rewriting the relevant provisions of those rules. If the Committee believes that that is required or where prudence indicates that, in any event, the recommendation be embodied in a new Rule or set of Rules, we should say so. Moreover, when considering possible changes to Rule 001, the Committee was conscious of the reality that a reviewing court might measure the validity of any such changes against the common law rules of procedural fairness, rules that implicitly act as a limitation on the procedural rule-making powers of the Commission.

The Committee has reviewed all our recommendations for change in the light of these general principles, as well as our perception of the current requirements of both the statutory and engrafted common law. Our overall conclusions are that the legal risks of implementing the Committee's recommendations are minimal. The common law of procedural fairness is sufficiently flexible to accommodate our recommendations. None of them requires changes to the primary legislation or, for that matter, the Commission's *Rules of Practice*, though we do recommend that the Commission review Rule 001 in light of our recommendations. Given the comprehensiveness of Rule 001, there may be an argument for furthering that objective by the incorporation of some at least of the recommendations in the form of rules.

Certainly, both rules and rulings resulting from the implementation of any of our recommendations have some exposure to the possibility of judicial review through appeals on leave to the Alberta Court of Appeal. Since the judgment of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*,[122] it remains likely that any challenge on procedural fairness grounds to a Commission rule or ruling will be categorized as a "question of law" for the purposes of the threshold for an application for leave to appeal, and, if leave is granted, reviewed on a correctness standard.[123] However, while the Supreme Court in *Vavilov* may have reaffirmed the proposition that questions of procedural fairness are to be reviewed by reference to a correctness rather than a reasonableness standard, the Supreme Court also made it clear that, in assessing the intensity of the procedural fairness demands on

[122] *Supra*, note 102.
[123] *Id.*, at para. 23.

particular decision-makers, reviewing courts must have regard to the procedural choices made by a regulatory body on which the legislature has bestowed discretionary authority to set its rules of practice and procedure.[124] In other words, any exercise in judicial review of the content of procedural rules will have a significant element of deference or respect for the choices made by the front-line regulatory agency. This approach is captured well in the following extract from the pre-*Vavilov* judgment of Evans JA in the Federal Court of Appeal in *Re Sound v. Fitness Industry Council of Canada*:

> In short, whether an agency's procedural arrangements, general or specific, comply with a duty of fairness is for a reviewing court to decide on a correctness standard, but in making that determination it must be respectful of the agency's choices. It is thus appropriate for a reviewing court to give weight to the manner in which an agency has sought to balance maximum participation on the one hand, and efficient and effective decision-making on the other. In recognition of the agency's expertise, a degree of deference to an administrator's procedural choice may be particularly important when the procedural model of the agency under review differs significantly from the judicial model with which courts are most familiar.[125]

Moreover, it is highly likely that any such respect or deference will be reinforced if the relevant rule change has been preceded by consultation with affected constituencies and justified by reference to considerations of proportionality.

As for individualized exercises of discretion under changed rules or simply based on the Committee's recommendations, *Vavilov* emphasizes that the quality of a decision-maker's reasons is critical in the conduct of judicial review. Given that, the Alberta Court of Appeal is likely to support any well-reasoned procedural ruling either on the basis of correctness or perhaps even as not raising a question of law or jurisdiction under the appeal provisions in the *AUC Act*.

The Committee also believes that the Commission should not retreat from what it believes to be appropriate procedural changes and innovations by adopting a risk averse posture. The worst that can happen is that the Court of Appeal will "correct" the Commission and, in so doing, provide guidance on the future exercise of its mandate.

In summary, it is the Committee's considered opinion that active and responsible case management can and should be undertaken by the Commission without fear that judicial review through appeal will result in constraints on the fulfillment of its statutory mandate. An attentive, balanced, and reasoned approach to the exercises of the Commission's discretionary powers over procedural matters should almost invariably secure vindication in the Court of Appeal (and, similarly, in the context of review and variance proceedings).

[124] *Id.*, at para. 77.
[125] 2014 FCA 48, [2015] 2 FCR 170, at para. 42.

6.3. Specific

As a general matter, the Commission's existing authority under both relevant legislative provisions and its rule-making powers provides a legal basis for many of the procedural steps and aids covered by the list of issues that forms the core of the Committee's mandate. For example, there is no legal impediment to the Commission establishing a formal regime for the scoping and scheduling (including the setting of time limits) of applications designated for a full written process or an oral hearing. The Commission's discretionary powers on matters of procedure are sufficiently broad to enable the introduction and modification of these species of channeling aids.

This does not mean, however, that such regimes are without exposure to legal risk. The rules or policies may have elements that amount to a denial of procedural fairness. In individual interpretations and applications of the rules and policies, the Commission might violate the rules of procedural fairness. Particularly in the context of scoping, the Commission could face claims that it has misinterpreted the terms of its substantive mandate by excluding considerations that should have been included or including matters that should have been excluded.

Even with more assertive and efficiency driven case management, it is unlikely that there will be many situations where this risk would be significant. In fact, conversely, case management aimed at eliminating unnecessary delay and insufficiently focused processes can be an overall enhancer of fairness, as opposed to a contraction in the procedural fairness entitlements of participants. At the very least, the deployment of such techniques should be viewed as a relevant factor in determining the intensity of the Commission's procedural fairness obligations.

With respect to the content of the rules and policies that the Committee is recommending on scoping, scheduling and time limits, there is built-in flexibility and, more generally, the recommendations have been forged with an eye to the demands of procedural fairness. They also contemplate engagement with both applicants and other affected parties and over scoping and what represents an appropriate and fair schedule for the progress of the particular application. Moreover, in relation to both the content and application of the rules and policies, the Court of Appeal, in the context of both applications for leave to appeal and the appeal itself, is likely to be deferential to the procedural choices of the Commission, having regard to the extent of its discretionary powers and the policy laden nature of its rate-setting roles.

To the extent that the Commission in scoping and scheduling is involved in a process that is largely fact-based, it is also predictable that most proceedings in the Court of Appeal will be dismissed at the leave to appeal stage as not raising a question of law or jurisdiction. Rather, they will likely be classified as impermissible attempts to seek review of a mixed question of law and fact from which there is no readily extricable pure question of law. Only in situations that

involve a transcendent issue of procedural fairness is it likely that the application for leave to appeal will be successful.[126]

The same is also true of challenges to the substance of any scoping exercise. The setting of limits to the ambit of a hearing seldom depends exclusively on the determination of a question of law or statutory interpretation. Rather, scoping involves a discretionary exercise of Commission authority which is generally fact specific and not involving a pure question of law.[127] Of course, should there be a pure question of law on which leave is granted, the standard of review in the Court of Appeal will, after *Vavilov*, be that of correctness. However, the Committee does not envisage that many applications for leave to appeal will come within that category.

Much the same analysis also applies to most of the other issues that are part of the Committee's mandate and form the range of what the law governing the content of procedural fairness obligations may require depending on context – Sections 5.6 (Confidentiality) to 5.12 (Adequacy of the Record). Certainly, some of the Committee's recommendations will involve changes to the Commission's operational policies and practices. Most of those (as in the case of Section 5.8 Interrogatories) propose a tightening up of the processes of the Commission. Others will require a restructuring of existing practices which, while preserving the Commission's discretionary powers, create default positions with respect to certain processes (Section 5.7 Hearings; Section 5.11 Argument). Furthermore, most of the Committee's recommendations have been developed as part of the Committee's more general concern that there be more active and systematic case management particularly for full written and full hearings.

Doubtless, questions will be raised as to whether some or even all these recommendations for tighter and more expeditious processes unduly compromise the procedural fairness rights of some or all participants.

First, there is no common law guarantee that, once adopted, procedural rules are cemented forever as the content or detail of procedural fairness requirements for a particular decision-maker. Changes to procedural rules and practices, including those that remove or limit existing entitlements, and resulting from reflective experience, are obviously within the discretionary procedural powers of a regulator such as the Commission.

Secondly, even some of the most common procedural features of administrative decision-making are not applicable across the entire range of statutory authorities. For example, oral hearings and cross-examination are not universal requirements of procedural fairness. Provided the Commission's processes recognize exceptional circumstances in which such rights should be accorded, rules that presumptively eliminate such rights should in general be legally secure. Thus, for example, the elimination of oral processes except where issues of credibility arise or where those affected cannot effectively function in writing should be safe from judicial review.

[126] See e.g. *Milner Power Inc. v. Alberta (Utilities Commission)*, 2019 ABCA 127, at paras. 49-59.
[127] See e.g. *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2104 FCA 245, [2015] 4 FCR 75.

Similarly, the elimination of traditional cross-examination and its replacement by a structured process of information requests would survive.

Thirdly, It is highly unlikely that the Court of Appeal would apply the doctrine of legitimate expectations to set aside a rule or ruling that diminishes or modifies the procedures attendant on a decision-making process. Provided there have been no representations to participants of adherence either generally or in the particular matter to existing processes, there will be little, if any room for the invocation of that doctrine. Moreover, in the instance of rule changes, any argument for legitimate expectations becomes even weaker if the rule changes are developed in the context of a consultative process engaging stake holders and are prospective in their operation, in the sense of not applying to proceedings that have already been commenced.

In summary, it is the Committee's conviction, particularly given the nature of rate-setting processes and the Commission's broad discretion in devising its own processes, that the recommendations will pass legal muster both as written and in implementation.

7. Legislative Change

By the Terms of Reference, the AUC instructed the Committee to consider "any recommendation for legislative change that will improve the efficiency of the Commission's process and procedures." The Committee has concluded that its overarching recommendation that the Commission adopt an assertive case management approach, as well as its specific recommendations, could be implemented within the existing authority of the Commission. Accordingly, the Committee is not making any recommendation for legislative change.

The Committee considered a recommendation that time limits be imposed on the Commission's processes by legislation but, as discussed in Section 5.5, concluded that "expeditious and efficient determination on the merits of every proceeding"[128] would be more appropriately achieved through rigorous scoping and scheduling of proceedings, as recommended in Sections 5.3 and 5.4.

8. Conclusion

The Committee has concluded that the existing AUC legislative framework is fit for the purpose of implementing efficient and effective regulation, provided that the Commission embraces assertive case management that is focused on the information needs of the Commission to discharge its mandate, always respecting the requirements of procedural fairness.

The recommendations of the Committee are set out in the various analytical sections of this Report, and are consolidated in Appendix IV: Recommendations of the AUC Procedures and Processes Review Committee.

[128] Rule 001, Section 2.2.

The Committee has concluded that it is within the existing authority of the Commission to apply an overarching, assertive case management approach to the development and implementation of the Commission's procedures and processes and the implementation of the Committee's specific recommendations. The Committee has not identified any legislative changes that would be necessary before the Commission could implement the Recommendations in this Report. It may be, however, that the effectiveness of some of the Recommendations would be enhanced if they were formally incorporated into the Commission's *Rules of Practice*.

8.1. Rules Review

8.1.1. Recommendation: Rules Review

Recommendation #30
The Committee recommends that the Commission review Rule 001: *Rules of Practice* with a view to supporting implementation of the Committee's recommendations, as the Commission may deem appropriate.

Appendix I - Bulletin 2020-17: AUC creates independent, expert committee to assist in improving efficiency of rates proceedings (May 8, 2020)

Bulletin 2020-17 and Attachments

Appendix II – Terms of Reference of AUC Committee on Procedures and Processes


Terms of Reference

Appendix III – Legal Framework and Risk Assessment

Legal Framework &
Risk Assessment

Appendix IV – Recommendations of the AUC Procedures and Processes Review Committee


Recommendations

Appendix I
Bulletin 2020-17: AUC creates independent, expert committee to assist in improving efficiency of rates proceedings (May 8, 2020)

AUC
Alberta Utilities Commission

Bulletin 2020-17

May 8, 2020

AUC creates independent, expert committee to assist in improving efficiency of rates proceedings

This bulletin summarizes the Commission's plans to continue its important discussions with stakeholders about reducing regulatory burden and lag, and provides an update on initiatives underway or planned to pursue further improvements.

These efforts were the subject of three stakeholder roundtables last fall and two related bulletins issued by the Commission, Bulletin 2019-18 and Bulletin 2020-02.

Following the first roundtable on October 4, 2019, the Commission immediately initiated a number of measures intended to bring more efficiency into our adjudicative process primarily in connection with rate and facility applications. These included:

- More technical meetings aimed at reducing the number of information requests.
- Directing parties to narrow issues and negotiate outcomes where possible.
- Conducting focused, shorter hearings, some with immediate decisions.

Not all of the initiatives have as yet met their goals, but Commission members and staff are genuinely committed to introducing more innovation to improve the timelines in our decision-making process.

In November 2019 the AUC published its strategic plan in which it committed to publish an annual report card setting out, among other things, what has been done and plans to further remove unnecessary regulatory burden. As part of that report card, the AUC intended to ask the companies the AUC regulates and other stakeholders for their views on whether the AUC's burden reduction efforts are succeeding. The AUC proposed to solicit those views through an industry impact assessment.

Towards this goal, the AUC published Bulletin 2020-02 on January 17, 2020. For reasons explained in that bulletin, the industry impact assessment was to focus on the AUC's non-adjudicative regulatory functions. However, the overwhelming response from participants centred on the AUC's adjudicative process related to rate applications.

Stakeholders encouraged the AUC to focus its burden reduction efforts in this area because rates proceedings take too long and the associated regulatory lag is having an unfavourable impact on the utilities sector. Because of the COVID-19 pandemic, we are delaying the formal industry impact assessment for one year, although we will continue with our own internal assessment of process efficiencies.

However, given the views that were expressed in response to Bulletin 2020-02, the Commission has decided to focus its attention on improving the effectiveness and timeliness of the processes and procedures used in rates proceedings in our ongoing discussions. Other process efficiency initiatives (such as the reduction of agency overlap, a "trusted traveller" approach for certain applications, fixed hearing dates and more) will proceed unabated for AUC facility applications, but will not be part of the AUC's next planned roundtable. We will report on our progress and activities in relation to those efficiency efforts in our annual report card.

The AUC is also introducing a change to the composition of our next roundtable, partly because of the COVID-19 pandemic and partly because a smaller group is more likely to make progress in advancing adjudicative efficiencies. The AUC will establish a technical advisory working group of five or six people comprised of representatives from the regulated utilities and intervener groups. The working group and the Commission will identify issues and propose solutions and report back to a wider audience and senior representatives of stakeholders. Once the technical advisory working group is in place, we will propose an agenda and schedule a time to meet. However, given the pandemic's demands on everyone's resources, we will schedule the next roundtable when a degree of normalcy returns to the workplace.

To assist the AUC, the Commission has established an independent AUC Procedures and Processes Review Committee. The committee members have deep regulatory experience and includes C. Kemm Yates, QC, noted regulatory counsel; David J. Mullan, Queen's University professor emeritus in administrative law; and Rowland J. Harrison, QC, a former long-serving member of the National Energy Board (now the Canada Energy Regulator).

The committee will review the Commission's rate application adjudicative processes and procedures and make recommendations to AUC Chair Mark Kolesar on how process and procedure steps can be made more efficient, or eliminated altogether. An invitation from the committee to submit comments is appended to this bulletin.

Stakeholders can use the AUC's Engage consultation tool to provide written submissions directly to the committee. Engage can be accessed from the AUC website on the ribbon in the top-centre of the page. Those responding should focus specifically on the 11 issues identified in the committee's terms of reference while at the same time feeling free to raise other matters bearing upon the committee's mandate.

The committee's recommendations will inform discussion with the technical working group referenced above in identifying improvements that can be implemented to reduce regulatory burden and streamline the process for rates proceedings. The Commission looks forward to your continued interest and participation in the improvement of utility regulation in Alberta.

Douglas A. Larder, QC
General Counsel

Committee on the Procedures and Processes of the Alberta Utilities Commission

Invitation to interested stakeholders to provide comments

As announced in AUC Bulletin 2020-17, dated May 8, 2020, we have been established as an ad hoc committee "to look into the processes and procedures of the Commission for rate-setting cases with the objective of making them more efficient and productive." Our terms of reference are found below.

As part of its work, the committee looks forward to consulting with stakeholders.

The current COVID-19 pandemic imposes obvious constraints in this regard. We are, therefore, initiating our consultations by inviting written submissions.

The committee has already reviewed or will be reviewing relevant material provided by the Commission. This includes the written submissions that were received by the Commission in its regulatory burden stakeholder consultation announced on July 17, 2019, the transcript of the October 4, 2019 roundtable held by the Commission, the results of that roundtable as reported in Bulletin 2019-18, and summaries of the October 28 and 29 AUC Strategic Plan roundtables, as well as the filed responses to Bulletin 2020-02. We have also reviewed certain submissions made directly to the office of the Associate Minister of Red Tape Reduction.

Stakeholders are invited to make written submissions directly to the committee through AUC Engage. Those responding should focus specifically on the 11 issues identified in the committee's terms of reference while at the same time feeling free to raise other matters bearing upon the Committee's mandate.

Written submissions, along with contact details, should be filed through AUC Engage by May 22. The committee may also conduct telephone or video consultations as it considers appropriate.

C. Kemm Yates, QC
Committee Chair

David J. Mullan

Rowland J. Harrison, QC

Committee on the Procedures and Processes of the Alberta Utilities Commission

Preamble

The Alberta Utilities Commission has established an ad hoc committee to look into the processes and procedures of the Commission for rate-setting cases with the objective of making them more efficient and productive. The need to examine the Commission's processes and procedures has been a general discussion point for some time and has most recently received attention as a result of the Alberta government's policy initiative to reduce red tape for Alberta's businesses.

The Commission is committed to reforming its processes and procedures and will look to the committee's findings and recommendations to inform its approach.

Terms of reference

The committee shall be composed of Kemm Yates, QC, David Mullan and Rowland Harrison, QC. Kemm Yates shall chair the committee. Without limitation, the committee is asked to review the various steps of the decision making processes used by the Commission in its rate-setting function.

The committee is to propose how the Commission's processes can be made more efficient within the requirements of the principles of procedural fairness, and how the new approaches should be implemented.

The committee will work with Commission staff as necessary to complete its work. The Commission will provide any information and material required by the committee including a description of the process steps typically followed by the Commission upon the filing of a rate application; submissions made by industry and customer groups at roundtables on regulatory burden conducted by the Commission in October 2019; submissions made directly to government by the utilities industry in 2019 and 2020; bulletins related to the roundtables issued by the Commission and copies of Improving Regulation Reports filed by the Commission with the provincial government.

The Commission is particularly interested in advice on the following issues but the committee is not restricted to only these issues:

1. Scoping of issues
2. Scheduling
3. Confidentiality
4. Hearings — written or oral
5. Interrogatories
6. Cross-examination — whether to allow and if so when
7. Motions
8. Argument — written, oral, timing, order
9. Adequacy of the record

10. Panel assertiveness in the hearing room
11. Content and length of decisions

Committee members will consult with Commission members, Commission staff, and counsel and participants in Commission rate-setting proceedings, as deemed necessary by the committee.

The advice on recommended reforms should include a discussion of associated risks, in particular legal risks, arising from moving from traditional procedures and methods to more innovative and flexible approaches as well as any recommendation for legislative change that will improve the efficiency of the Commission's process and procedures.

The committee has full discretion to determine its processes, and will use its best efforts to provide a written report to the chairman by June 15, 2020.

Appendix II
Terms of Reference of AUC Committee on Procedures and Processes

Committee on the Procedures and Processes of the Alberta Utilities Commission

Preamble

The Alberta Utilities Commission has established an ad hoc committee to look into the processes and procedures of the Commission for rate-setting cases with the objective of making them more efficient and productive. The need to examine the Commission's processes and procedures has been a general discussion point for some time and has most recently received attention as a result of the Alberta Government's policy initiative to reduce red tape for Alberta's businesses.

The Commission is committed to reforming its processes and procedures and will look to the Committee's findings and recommendations to inform its approach.

Terms of Reference

The Committee shall be composed of C. Kemm Yates, Q.C., David Mullan and Rowland J. Harrison, Q.C. Kemm Yates shall chair the Committee. Without limitation, the Committee is asked to review the various steps of the decision making processes used by the Commission in its rate-setting function.

The Committee is to propose how the Commission's processes can be made more efficient within the requirements of the principles of procedural fairness, and how the new approaches should be implemented.

The Committee will work with Commission Staff as necessary to complete its work. As soon as possible after the striking of the Committee, the Commission will provide any information and material required by the Committee including a description of the process steps typically followed by the Commission upon the filing of a rate application; submissions made by industry and customer groups at round tables on regulatory burden conducted by the Commission in October, 2019; submissions made directly to government by the utilities industry in 2019 and 2020; bulletins related to the roundtables issued by the Commission; and copies of Improving Regulation Reports filed by the Commission with the provincial government.

The Commission is particularly interested in advice on the following issues but the Committee is not restricted to only these issues:

1. Scoping of issues
2. Scheduling
3. Confidentiality
4. Hearings—written or oral
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6. Cross-examination—whether to allow and if so when
7. Motions
8. Argument—written, oral, timing, order
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10. Panel assertiveness in the hearing room
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Committee members will consult with Commission members, Commission staff, and counsel and participants in Commission rate-setting proceedings, as deemed necessary by the Committee.

The advice on recommended reforms should include a discussion of associated risks, in particular legal risks, arising from moving from traditional procedures and methods to more innovative and flexible approaches as well as any recommendation for legislative change that will improve the efficiency of the Commission's process and procedures.

The Committee has full discretion to determine its processes, and will use its best efforts to provide a written report to the Chairman by June 15, 2020.

Appendix III
Legal Framework and Risk Assessment

Contents

1. Introduction and Summary

1.1. The Committee's Mandate and Summary Conclusions

The mandate of the Committee is essentially threefold:

1. review the current processes and procedures of the Commission in rates proceedings;
2. make recommendations on how the Commission's processes can be made more efficient within the requirements of the principles of procedural fairness; and
3. provide an assessment of the legal risks arising from implementation of any of our recommendations.

Each of the tripartite elements of our mandate must be informed by the reality of the legal framework within which the AUC operates. That legal framework establishes the parameters within which we have undertaken the task of evaluating what is feasible both practically and legally in the crafting of recommendations that we believe will lead to greater efficiency and expedition in the AUC's carrying out of its rate-setting and rate-related mandates. Equally, the assessments provided in Appendix III are critical to the development of a greater awareness by the Commission of the opportunities that the legal framework affords for the carrying out of its own mandate in a way that balances the often competing considerations that are urged upon it by those with strong interests in the substance of the Commission's rate regulation role. In other words, we also define our task as one of enabling the Commission to proceed confidently in the continuing development of a regime that will pass legal muster while at the same time lead to more efficient and expeditious fulfillment of its rate regulation responsibilities.

In this section of our Report (presented as Appendix III), we set out in detail the primary legislative context—both substantive and procedural—within which the Commission functions currently, with particular emphasis on legislative provisions that directly or indirectly establish the procedural framework for the AUC's utility rate regulation mandate. We detail and discuss relevant common law influences as embodied in court-imposed rules of procedural fairness and common-law developed regulatory principles. We then assess the legal risks of implementation of our recommendations for reform. In that specific context, we consider the standards of review that we would expect the Alberta Court of Appeal to apply to any challenges to the substantive and procedural rules and rulings made by the Commission in the context of utility rate regulation, with emphasis on the evaluation of procedural challenges. Within that standard of review framework, we examine the extent to which the common law rules of procedural fairness (and regulatory principles) are likely to have traction. We conclude with an assessment of the legal risk involved in the implementation of specific recommendations for procedural change.

In summary, having given extensive consideration to the applicable legislative and common law, our considered opinion is that implementation of the recommendations that we make—primarily the application of assertive case management within the enabling context of the

existing legislative and common law regime—is subject to little risk of successful judicial review. The Commission should feel free to implement assertive efficiency-driven procedural innovations, without fear of judicial intervention that is anything other than constructive.

Section 6 of our Report—Legal Risks—is essentially a summary of the principles and analysis set out in detail in this Appendix III.

1.2. The Mandate in Greater Detail

As already described, a core component of our mandate from the Commission was to consider how the Commission's processes could be made more efficient while still meeting its obligations to adhere to the principles of procedural fairness. To that end, we were asked to evaluate eleven specific aspects of the Commission's processes as well as any other issues that we saw as potentially providing room for greater efficiencies. The mandate then elaborated on our responsibilities with respect to the legal aspects of any recommendations for change. In our Report, we were to

> … include a discussion of associated risks, in particular legal risks, arising from moving from traditional procedures and methods to more innovative and flexible approaches as well as any recommendations for legislative change that will improve the efficiency of the of the Commission's process and procedures.

Section 6 of our Report to the Commission—entitled Legal Risks—first sets out a summary overview of the legal risks associated with the kinds of changes that the Committee is recommending as well as a brief discussion of the potential for legal challenge to our specific recommendations.[1] The basis for that section of our Report is to be found in this Appendix.

Appendix III commences with a detailed outline of the legal foundations for the Commission's rate setting roles and the procedures currently supporting the exercise of those functions – the relevant primary legislation, potentially applicable constitutional and *quasi*-constitutional imperatives, the Commission's extensive body of procedural rules bearing on its rate making function, the common law of procedural fairness, and generally accepted regulatory principles which might also be described as a form of common law.[2]

We then examine in greater detail the potential limitations on the Commission's processes and recommendations for change imposed by the relevant constitutional and *quasi*-constitutional norms.[3] There follows an examination of the standard of review that the Alberta Court of Appeal is likely to apply in assessing the substantive, and, more importantly for current purposes, procedural rules and rulings of the Commission in the exercise of its rate-setting

[1] Section 6: Legal Risks, 6.1 Introduction.
[2] Appendix III, Legal Framework and Risk Assessment, Section 2: Relevant Legal Norms.
[3] Appendix III, Section 3: Impact of Legal Norms, Section 3.1 Constitutional and *Quasi*-Constitutional Limitations.

functions. This section concludes with an evaluation of the general demands that the principles of procedural fairness are likely to impose on the Commission in this context.[4]

Appendix III then concludes with a consideration of the extent of the legal risk to any of our specific recommendations on each of the eleven issues that we were asked to address as well as additional issues that our experience and consultations identified as relevant to our mandate. As already noted, our conclusion was that the chances of successful legal challenge to either rules or rulings resulting from Commission acceptance of our recommendations would be negligible.

2. Relevant Legal Norms

2.1. Primary Legislation[5]

2.1.1. *Alberta Utilities Commission Act*[6]

The starting point for this analysis is the *Alberta Utilities Commission Act* ("*AUC Act*"). Section 8 of that Act specifies the powers of the Commission. They are expansive. Subsection 2 provides that the Commission

> … in the exercise of its powers and the performance of its duties and functions under this Act or any other enactment, may act on its own initiative or motion and do all things that are necessary for or incidental to the exercise of its powers and the performance of its duties and functions.

Subsection 3 then goes on to confer discretionary power on the Lieutenant Governor in Council ("Cabinet") to expand the "powers, duties and functions" of the Commission beyond those already provided for in the *AUC Act* or any other enactment. The role of the Cabinet is further fortified in subsection 4 to include the making of orders requiring the Commission to fulfill "any function or duty specified in the order" including

> … inquiring into, hearing and determining any matter or thing in respect of any matter within the jurisdiction of the Commission under this Act or any other enactment.

Particularly relevant to the Commission's rate-setting (and, more generally, hearing) functions is subsection 5 conferring on the Commission authority to

> (a) hear and determine all questions of law and fact;
> (b) make an order granting the relief applied for;

[4] Appendix III, Subsection 3.2 Standard of Review.
[5] In addition to the Utilities legislation outlined below, there is the *Rural Utilities Act*, RSA 2000, c R-21. It recognizes and provides for the establishment and running of Rural Utilities Associations, cooperative enterprises that provide utilities for groups of residents of rural Alberta. They function largely on a contractual basis. However, in interacting with other utilities they do become amenable to the rate-setting jurisdiction of the Commission. As illustrated by *FortisAlberta Inc. v. Alberta (Utilities Commission)*, 2020 ABCA 271, this interface can create some complex jurisdictional issues.
[6] SA 2007, c A-37.2 (as amended).

(c) make interim orders;
(d) where it appears to the Commission to be just and proper, grant partial, further or other relief in addition to, or in substitution for, that applied for as fully and in all respects as if the application or matter had been for that partial, further or other relief.

Directly relevant, indeed critical to the work of the Committee is section 9. Subsection (1) provides that the Commission need not give notice or hold a hearing prior to making "any order or decision", unless expressly provided otherwise "by this Act or any other enactment to the contrary, and subject to this section..." [7] However, subsection (1) is qualified significantly by subsection (2). Where the Commission is of the view that a

> …. decision or order on an application may directly and adversely affect the rights of a person, the Commission shall
>
> (a) give notice in accordance with Commission rules,
> (b) give the person a reasonable opportunity of learning the facts bearing on the application as presented to the Commission by the applicant and other parties to the application, and
> (c) hold a hearing.

Nonetheless, by virtue of subsection (3), a hearing is not required where no one requests one in response to the filing of an application. Moreover, while "hearing" is not defined in the *AUC Act* (or any of Alberta's other utility rate-setting statutes), subsection (4) provides that any entitlement to make representations arising out of subsection (2) does not include the right to make oral representations, or to be represented by counsel, provided the Commission "affords … an adequate opportunity to make representations in writing."

Thereafter, section 10 confers on the Commission authority to review any decision or order under rules promulgated for that purpose. These rules can address the criteria the Commission will apply in determining whether to conduct a review, who is eligible to apply for a review, the information that must accompany any request for a review, and the time within which any application for a review can be made.

Section 11 then entrusts the Commission with "all the powers, rights, privileges and immunities that are vested in" Court of Queen's Bench judges with respect to a range of procedural matters extending from the compelled attendance and examination of witnesses to the payment of costs, and, more generally,

> … all other matters necessary or proper for the due exercise of its jurisdiction or otherwise for carrying any of its powers into effect…

[7] The *AUC Act* does not define "enactment". However, by virtue of section 28(1)(m) of the *Interpretation Act*, RSA 2000, c I-8, when an Act refers to an "enactment", it covers both an Act and a regulation.

Part 1 then ends with a typical contempt provision under which the Commission may apply to a judge of the Court of Queen's Bench for a committal order. This is triggered where someone

> … commits or does an act, matter or thing that would, if done in or in respect of the Court of Queen's Bench, constitute a contempt of the Court…[8]

Thereafter, in Part 2, the Act contains detailed provisions respecting the conduct of hearings, including the authority of the Chair to designate which and how many members will sit on a particular application with authority to act in the name of the Commission. After provisions respecting evidential privilege and witnesses, section 20 makes it clear that:

> The Commission is not bound in the conduct of its hearings by the rules of law concerning evidence that are applicable in judicial proceedings.

It is also significant that, in providing for awards of costs, section 21(2) anticipates rules "respecting the payment of costs to an intervener" in rate-setting proceedings.

Part 4 of the Act deals with appeals from decisions or orders of the Commission. Section 29 provides for an appeal to the Court of Appeal on "a question of jurisdiction or on a question of law" but only if permission is granted by a judge of the Court of Appeal. There then follows a privative clause[9], which at least on its face seems calculated to confine any challenge to decisions or orders of the Commission to appeals on leave under section 29. This is one of the strongest exclusions of common law judicial review found in Canadian legislation. It makes "every action, order, ruling or decision" of the Commission and those acting on behalf of the Commission "final", meaning that any such matter

> … shall not be questioned or reviewed in any court by application for judicial review or otherwise, and no order shall be made or process entered or proceedings taken in any court, by way of injunction, declaratory judgment, prohibition, quo warranto or otherwise, to question, review, prohibit, or restrain the Commission or the Chair or any of the Commission's proceedings.

The *AUC Act* also contemplates further elaboration of the processes to be followed by the Commission in responding to applications and otherwise exercising its powers. Under section 75, the Cabinet is given broad regulation making powers, which include, not only defining "any word or expression used but not defined in the Act", but also regulating how the Commission's powers, duties and functions "are to be exercised." Section 76 then confers extensive rule-making powers on the Commission. Among them are the powers to make "rules of practice governing the Commission's procedure and hearings"[10] and establishing the "requirements that must be met by an applicant to satisfy the Commission under section 9(3)(b) that a hearing is

[8] Section 12.
[9] Section 30.
[10] Section 76(1)(e).

not necessary."[11] The Commission does not have to hold a hearing before making any such rules,[12] and the making of these rules is not subject to the *Regulations Act*.[13]

By reference to section 76, the Commission has adopted an extensive set of procedural rules, the latest version of which is to be found in Rule 001: *Rules of Practice*, as approved by the Commission on February 3, 2020.[14]

2.1.2. *Electric Utilities Act*[15]

While the *AUC Act* is an umbrella statute setting out the Commission's overall mandate and procedural obligations at a general level, the Commission's specific jurisdiction or authority with respect to utility rate regulation is found in the *Electric Utilities Act* ("*EU Act*"), the *Gas Utilities Act* ("*GU Act*"), and the *Public Utilities Act*, ("*PU Act*"), the first dealing with most but not all electric utilities, the second with gas utilities, and the last with all other utility rate-setting by the Commission.

More specifically, sections 121(2)(a) and (b) of the *EU Act* establish the core of the Commission's role in rate or tariff setting for most of the electricity sector. Under (a), the Commission "must ensure" that a "tariff is just and reasonable", while under (b), the Commission is required to ensure that

> … the tariff is not unduly preferential, arbitrarily or unjustly discriminatory or inconsistent with or in contravention of this or any other enactment or law.

The term "tariff" is defined as a document that sets out "rates"[16] and "terms and conditions",[17] with rates being defined as "prices, rates, tolls and charges."[18]

In other words, it is the stuff of standard North American utility regulation principles.

The *EU Act* also contains provisions bearing upon the procedures that apply to most electricity rate regulation proceedings.

Section 118(2) confers on the Commission authority to make rules respecting information that must be filed with the Commission (including the persons responsible for filing). Included within the information that may be required to be filed are forecasts, and

[11] Section 76(1)(f).
[12] Section 76(4).
[13] Section 76(5).
[14] The main objective of the February amendments was to "facilitate a major enhancement to the Commission eFiling System supporting the exchange of confidential documents among Commission-authorized proceeding participants": AUC Bulletin 2020-05: Amendments to AUC Rule 001 to facilitate exchange of confidential documents (February 10, 2020).
[15] SA 2003, c E-5.1.
[16] *Id.*, section 1(1)(zz)(i).
[17] *Id.*, section 1(1)(zz)(ii).
[18] *Id.*, section 1(1)(pp).

> separate information in relation to transmission, distribution, exchange, purchase or sale of electric energy when one or more of those functions is undertaken by the same person.

Under section 121(1), the Commission's tariff approval jurisdiction is made contingent on "giving notice to interested parties." However, the term "interested parties" is not defined. Section 121(4) goes on to provide that the burden of proof for showing whether a "tariff is just and reasonable" falls "on the person seeking approval."

Of particular significance in terms of controlling regulatory lag, Division 3 of Part 9 ("Regulation by the Commission") provides for the "Negotiated Settlement of an Issue." As part of this regime, section 132(1) provides that the Commission "**must** [emphasis added] recognize or establish rules, practices and procedures that facilitate

> (a) the negotiated settlement of matters arising under this Act or the regulations, and
>
> (b) the resolution of complaints or disputes regarding matters arising under this Act or the regulations.

(To the extent that any such rules, practices and procedures affect the Independent System Operator ("ISO"), the Commission owes a duty of prior consultation with the ISO: section 132(2).)

There then follow provisions in section 133 respecting the appointment of mediators as well as the capacity of the Commission to make rules respecting process (notice, disclosure, and participatory rights, including the extent to which non-parties may participate).

Any settlements coming out of this process require the approval of the Commission (section 134), and that section and others that follow (sections 135-137) set out the process by which the Commission determines whether or not to accept the settlement.

2.1.3. *Gas Utilities Act*[19]

The structure of the *GU Act* is similar to that of the *EU Act*, with the Commission's regulatory role defined in terms of fixing "just and reasonable rates, tolls or charges" for the supply of natural gas.[20] This is an authority that the Commission may exercise "on its own initiative or on the application of a person having an interest" and generally[21] requires the Commission "giving

[19] RSA 2000, c G-5.

[20] See sections 6(1)(a), 36 and 37.

[21] Under section 6(1), the Cabinet may order the Commission to fix and determine "just and reasonable" prices for certain categories of gas. On making such an order, the Cabinet may also direct that the Commission proceed without giving notice and without holding a hearing (section 6(3)(a)). However, in such a situation, the Commission, after making an order, must "within a reasonable time" of new prices coming into effect provide notice to "any interested party" and hold a hearing for the purpose of "reviewing its order and, if necessary, amending or replacing it." (section 6(4)).

notice to and hearing the parties interested."[22] At any such hearing, the burden of proof rests with the owner of the gas utility seeking to establish the justness and reasonableness of any proposed "increases, changes or alterations".[23] Section 36 also requires that where that burden has been met, the Commission is to proceed by way of an "order in writing".

Sections 28.51 to 28.8 of the Act are virtually identical to the provisions respecting negotiated settlements in the *EU Act* described above. The final three sections[24] of the Act then incorporate various aspects of the *PU Act* into the *GU Act*, and specify that, in the case of conflict between any such incorporated provisions in the *PU Act* and the *AUC Act*, the *AUC Act* is to prevail.

2.1.4. *Public Utilities Act*[25]

Unlike the *EU Act*, the *PU Act* contains few provisions that either directly or indirectly bear upon the procedures to be followed by the Commission in exercising jurisdiction under that Act. However, section 85, which confers on the Commission "general supervision over all public utilities, and the owners of them" and applies to electric utilities as well as water and gas,[26] obviously contemplates the Commission having extensive information gathering powers

> … as to the manner in which owners of public utilities comply with the law, or as to any other matter or thing within the jurisdiction of the Commission.[27]

The Act then follows the typical pattern of a rate regulation statute by clothing the Commission with authority to make orders that "fix just and reasonable … rates."[28] This is an authority that the Commission may exercise of its own initiative or "on the application of a person having an interest". However, it is predicated on the Commission "giving notice to and hearing the parties affected." Thereafter, from section 89(b) through section 95, the Act sets out the bases on which rates are to be set, including the considerations relevant to the determination of a rate base, which is to form the basis for the Commission's determination of what is "a fair return on the rate base." However, by virtue of section 116(1), none of sections 89 to 95 applies to electric utilities as defined in the *EU Act*.

[22] Section 36.
[23] Section 44(3).
[24] Sections 59-61.
[25] RSA 2000, c P-45.
[26] Section 85(1).
[27] Section 85(2).
[28] Section 89(a).

2.1.5. *Government Organization Act* [29]

Schedule 13.1 of the *Government Organization Act* establishes the Office of the Utilities Consumer Advocate ("UCA"). That office operates within the department of the "responsible Minister" and with such staff as authorized by the Minister.[30] Among the responsibilities of the UCA under section 3 is that of

> … represent[ing] the interests of Alberta residential, farm and small business consumers of electricity and natural gas before proceedings of the Alberta Utilities Commission and other bodies whose decisions may affect the interests of those consumers.

Necessarily implicit in the imposition of this responsibility is standing as of right in the Commission's rate-setting proceedings. Moreover, in support of its various responsibilities and capacities, the UCA is given extensive information gathering capacities (including information about electricity and natural gas distributors, providers and retailers which is in the possession of the Commission).[31]

It is also noteworthy that, under section 6(d), the Cabinet may make regulations

> … adding to, clarifying, limiting or restricting any of the responsibilities of the Office of the [UCA] or regulating how they are to be carried out ….

2.1.6. *Administrative Procedures and Jurisdiction Act*[32]

Part 1 of this Act specifies a limited range of procedural obligations for those exercising statutory powers and designated by regulation as subject to the provisions of that Part of the Act.[33] At one time, the Commission and its predecessor were subject to Part 1 but that is no longer the case.[34] However, with reference to Part 2 of the Act, Jurisdiction to Determine Questions of Constitutional Law, the Commission has been given authority to determine "all questions of constitutional law."[35]

For these purposes, the Act defines a "question of constitutional law" as

> (i) any challenge, by virtue of the Constitution of Canada or the *Alberta Bill of Rights* to the applicability of or validity of an enactment of the Legislature of Alberta, or

[29] RSA 2000, c G-10, Schedule 13.1.
[30] Section 2.
[31] Section 4(1).
[32] RSA 2000, c A-3.
[33] Section 2.
[34] *Authorities Designation Regulation*, Alta Reg 64/2003 (as amended), section 1. The list of four agencies to which the Act applies in whole does not include the Commission nor for that matter the Alberta Energy Regulator. However, the Commission was subject in whole to the Act between January 15, 2008 and September 23, 2013 by reference to the now repealed section 1(f).
[35] *Designation of Constitutional Decision Makers Regulation*, Alta Reg 69/2006, section 2, and Schedule 1.

(ii) a determination of any right under the Constitution of Canada or the *Alberta Bill of Rights*.

The Act does not define "Constitution of Canada" but it presumably includes not only the various *Constitution Acts* and the *Canadian Charter of Rights and Freedoms* but also constitutional norms found in the underlying principles of the Canadian Constitution, as recognized by the *Quebec Secession Reference*,[36] and the rights and interests of Indigenous peoples as enshrined in section 35 of the *Constitution Act, 1982* and under common law, as reflected in the duty to consult and, where appropriate, accommodate.

2.2. Constitutional and *Quasi*-Constitutional Requirements

2.2.1. *Alberta Bill of Rights*[37]

The *Alberta Bill of Rights* contains two substantive provisions. The first, section 1, is a recognition and declaration of the right on a non-discriminatory basis[38] to a range of human rights and fundamental freedoms. Among those rights, the most likely to be engaged in utility rate regulation are

(a) the right of the individual to liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law

and

(b) the right of the individual to equality before the law and the protection of the law.

Section 2 then goes on to detail how the *Alberta Bill of Rights* may be invoked in regulatory as well as judicial proceedings. It acts as a directive as to both the construction and application of statutes:

> Every law of Alberta shall, unless it is expressly declared by an Act of the Legislature that it operates notwithstanding the *Alberta Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared.[39]

Legislation containing such provisions, especially when linked to the protection of human rights and freedoms, is often characterized as *quasi*-constitutional and, as such, as having a status

[36] [1998] 2 SCR 217.
[37] RSA 2000, c A-14.
[38] The specifically recognized proscribed grounds of discrimination are "race, national origin, colour, religion, sexual orientation, sex, gender identity or gender expression." However, section 3(1) goes on to affirm that nothing in the Act should be construed as abrogating or abridging any other non-enumerated "human right or fundamental freedom … that may have existed in Alberta at the commencement of this Act."
[39] Another such statute is the *Alberta Personal Property Bill of Rights*, RSA 2000, c. A-31. Section 4 of that Act is to the same effect as section 2. However, it is highly unlikely that the protection that it affords for personal property rights would have any purchase in the Commission's rate-setting proceedings.

superior to that of ordinary primary legislation.[40] Moreover, as outlined already, by virtue of Part 2 of the *Administrative Procedures and Jurisdiction Act*, challenges and determinations involving the *Alberta Bill of Rights* are included within the definition of "question of constitutional law." However, whether its impact extends beyond the construction and application of ordinary legislation and justifies findings of invalidity of statutes that explicitly or by necessary implication cannot be construed in a manner that does not violate the rights and freedoms enumerated in section 1 is a more controversial question.

2.2.2. *Canadian Charter of Rights and Freedoms*

Here too, the provisions most likely[41] to be invoked in the context of utility rate regulation are the equivalents of sections 1(a) and (b) of the *Alberta Bill of Rights*: section 7 and the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice, and section 15, the *Charter*'s equality provision. However, these guarantees clearly go further than directing courts as to the construction and non-application of legislation implicating the guaranteed rights and freedoms; they also provide a basis for the striking down of non-compliant legislation.

2.2.3. *Indigenous Peoples – The Duty to Consult and Accommodate*

It is also possible that the Commission's rate-setting role might on occasion have an impact on the rights and claims of Indigenous peoples, thereby triggering the constitutional obligation to consult and, where appropriate, accommodate. In that context, issues may arise as to whether the normal processes of the Commission as provided for in primary legislation, regulations, and Commission-developed processes and procedures are adequate to the task that the duty to consult imposes, or whether special or supplementary processes are constitutionally necessary.[42]

2.3. Subordinate Legislation and Rules of Practice and Procedure

2.3.1. *Rule 001 - Rules of Practice*

As already noted, the Commission has exercised its authority to make *Rules of Practice* and those Rules have been amended as recently as February of this year.[43]

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[40] See e.g. *Lavallee v. Alberta Securities Commission*, 2009 ABQB 17, 3 Alta. LR (5th) 232, at para. 166.
[41] Though note *ForestEthics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245, [2015] 4 FCR 75, and *Ernst v. Alberta Energy Regulator*, 2017 SCC 1, [2017] 1 SCR 3, where section 2(b)'s protection of "freedom of expression" was pleaded in the context of claims asserting a denial of procedural fairness.
[42] At present, in the context of project applications, the Commission is working on an Indigenous consultation framework. See Commission Bulletin 2020-22: External engagement on the draft AUC Indigenous consultation framework (May 28, 2020), with a link provided to that draft Framework.
[43] In contrast, the Alberta Energy Regulator *Rules of Practice*, AR 99/2013, while similar or even identical in most respects to the Commission's *Rules of Practice*, were made by way of regulation under the *Responsible Energy Development Act*, SA 2012, c R-17.3.

Section 2 of the Commission's *Rules of Practice* deals with the "Application and interpretation" of the Rules and provides as follows:

> 2.2 These rules must be liberally construed in the public interest to ensure the fair, expeditious and efficient determination on its merits of every proceeding.
>
> 2.3 The Commission may, at any time before making a decision on a proceeding, issue any directions it considers necessary for the fair, expeditious and efficient determination of an issue.
>
> 2.4 The Commission may dispense with, vary or supplement all or any part of these rules if it is satisfied that the circumstances of any proceeding require it.
>
> 2.5 The Commission may set time limits for doing anything provided for in these rules and may extend or abridge a time limit set out in these rules or by the Commission, on any terms that it considers reasonable, before or after the expiration of the time limit.
>
> 2.6 No proceeding is invalid by reason of a defect or other irregularity in form.

The *Rules of Practice* then go on to create a detailed, though not comprehensive set of procedures for the conduct of proceedings before the Commission, including the exercise of its rate-setting jurisdiction. They contain provisions dealing with many of the issues referred to in the Committee's Terms of Reference: Notice of Hearing ("Scheduling") (Section 14); Documents, evidence, filing and service ("Adequacy of the Record") (Part 3, Sections 16 to 23); Information Requests (or "Interrogatories") (Sections 24 to 26.1); Motions (Section 27); Confidential Filings (or "Confidentiality") (Section 28); Written and oral hearings ("Hearings – written or oral") (Section 35); Cross-examination ("Cross-examination – whether to allow and if so when") (Section 42.3); and Argument ("Written, oral, timing, order") (Section 47.1). Not surprisingly, there is nothing in the *Rules of Practice* about panel control over hearings or the content and length of decisions.

The *Rules* are also noticeably silent on deadlines, in effect leaving timing matters to the discretion of the Commission. Section 32.1 does however confer an explicit discretion on the Commission, either on its own initiative or at the request of a party, to direct the holding of a "process meeting." Among the purposes of a process meeting are, not only recommending "the process, procedures and schedule" for the proceeding (Section 32.1(b)), setting of "the date, time and place for an oral hearing", and the allotment of time for the presentation of evidence and argument (Section 32.1(c)), but also a form of substantive scoping (Section 32.1(a)):

> … to determine the issues in question and the position of the parties, including matters relating to costs.

More generally, Section 32.1(d) provides that the Commission may

> … decide any other matter that may aid in the simplification or the fair, expeditious and efficient disposition of the proceeding.

The narrowing or clarification of issues is also one of the objectives of Technical Meetings, which are provided for in Section 33.1. Finally, Section 34.1 incorporates Rule 018: *Rules on Negotiated Settlements*, mandated by section 132(1) ("must") of the *EU Act* and section 28.51(1) of the *GU Act* ("shall").

2.3.2. *Rule 018 - Rules on Negotiated Settlements*

Rule 018 providing for negotiated settlement proceedings is specifically directed to "rates and tariffs" proceedings (Section 1). Initiation of the process is confined to applicants and requires the consent of the Commission (Section 4). The Rule contemplates the involvement of Commission staff in the process (Section 5(1)), including providing advice to the Commission "as to the fairness of the process" (Section 5(2)). Thereafter, without the express written consent of all the parties to the process, involved staff cannot take any further part in the Commission's proceedings "arising from or relating to any issue in the negotiated settlement proceeding" (Section 5(1)).

If agreement is reached on one or more of the issues dealt with in a negotiated settlement proceeding, there must be an application to the Commission for approval, with the process for seeking approval set out in Section 6. Sections 7 and 8 then specify the obligations of the Commission in determining whether to approve the settlement agreement, a process that involves among other things consideration of any dissenting views. Finally, Section 9 subjects the award of costs incurred in the negotiated settlement process to the provisions of the Commission's *Rules on Intervener Costs*,[44] subject to the admonition that such costs are "generally the responsibility of the applicant utility, to be recovered through customer rates" (Section 9(1)).

2.3.3. *Rule 022 - Rules on Costs in Utility Rate Proceedings*[45]

Rule 022 was promulgated primarily under authority conferred on the Commission by section 21 of the *AUC Act*. Subsection 1 empowers the Commission to

> … order by whom and to whom its costs and any other costs of or incidental to any hearing or other proceeding are to be paid.

[44] It is not clear whether this is Rule 009: *Rules on Local Intervener Costs* or Rule 022: *Rules on Costs in Utility Rates Proceedings*.
[45] The Commission's costs regime for facilities applications is found in Rule 009: *Rules on Local Intervener Costs*.

Subsection 2 then goes on to provide that the Commission

> … may make rules respecting the payment of costs to an intervener other than a local intervener referred to in section 22.

Acting pursuant to this subsection and presumably (as explained below) its authority under section 76(1)(e) of the *AUC Act* to make "rules of practice governing [its] procedure and hearings", the Commission adopted costs rules with respect to

> … hearings or proceedings for rate applications of utilities under the jurisdiction of the Commission or related to rate applications.

Intervener eligibility to apply for costs is spelled out in Section 3.1 of Rule 022:

> The Commission may award costs to an intervener who has, or represents a group of utility customers that have, a substantial interest in the subject matter of a hearing or other proceeding and who does not have the means to raise sufficient financial resources to enable the intervener to present its interest adequately in the hearing or other proceeding.

There then follows a list of exclusions (though subject to Commission override) (Section 4). However, prior to that, Section 3.3 also provides that an "applicant" is eligible to claim costs. To the extent that the Commission's rule-making power under Section 21(2) is confined to providing for the payment of costs to an intervener other than a local intervener, the authority for Section 3 must be found in section 76(1)(e) of the *AUC Act*.

Section 5 creates a specific costs regime for Review Applications that applies to all "participants" – applicants and eligible interveners.

Rule 022 then set outs the process for making and processing costs claims and, most importantly, in Section 11, the criteria to be applied in deciding on costs.

Section 11.1 establishes a threshold for access to an award of costs for both eligible interveners and applicants. The Commission must be of the opinion that the costs claimed by an eligible participant are "reasonable and directly and necessarily related to the hearing or other proceeding." As well, the Commission must be of the opinion that the eligible participant has

> … acted responsibly … and contributed to a better understanding of the issues before the Commission.

Section 11.2 follows with a list of nine criteria that the Commission may consider in determining the quantum of costs. They include things such as the presentation of irrelevant evidence and lack of cooperation with other parties with a view to reducing "duplication of evidence and questions."

In Section 12, Rule 022 allocates liability for costs. Unless the Commission otherwise determines,

> (a) in a hearing or other proceeding that relates to an application of a utility, the utility shall pay the costs awarded to an eligible intervener, and
> (b) in a hearing or other proceeding that relates to policies or concerns respecting utilities, the Commission may pay the costs awarded to an eligible intervener or require that payment of the costs award be shared by one or more utilities.

Critically, for applications for costs by applicant utilities, Section 13.4 provides the Commission with discretionary power to state in a cost order

> … whether an applicant named in the order is authorized to record costs in its hearing costs reserve account.

Section 9.2 also provides that eligible participants "may only claim costs in accordance with the scale of costs" found in Appendix 1 of Rule 022. That Scale of costs establishes categories and rates that will be applied unless an eligible participant

> … can advance persuasive argument that the scale is inadequate given the complexity of the case.

In Section 12, Rule 022 allocates liability for costs. Unless the Commission otherwise determines

> (c) in a hearing or other proceeding that relates to an application of a utility, the utility shall pay the costs awarded to an eligible intervener, and
> (d) in a hearing or other proceeding that relates to policies or concerns respecting utilities, the Commission may pay the costs awarded to an eligible intervener or require that payment of the costs award be shared by one or more utilities.

2.3.4. *Rule 016 - Review of Commission Decisions*

Rule 016, issued under section 10 of the *AUC Act*, spells out the details of the Commission's authority to review and vary its decisions, including decisions in utility rate-setting proceedings.

Section 2 provides that the Commission may review a decision on its own motion at any time. Otherwise, the process is triggered by an application by someone who is "directly and adversely affected" by a decision.[46] If an applicant cannot meet the standing threshold, the leave of the Commission must first be obtained.[47] There is a sixty day time limit on the making of applications but the Commission can vary or dispense with that.[48]

[46] Section 3(1).
[47] Section 3(2).
[48] Section 3(3).

Section 4(d) sets out a **non-exhaustive** list of grounds on which an application for review and variance can be made:

i. The Commission made an error of fact, law or jurisdiction.
ii. Previously unavailable facts material to the decision, which existed prior to the issuance of the decision in the original proceeding but were not previously placed in evidence or identified in the proceeding and could not have been discovered at the time by the review applicant by exercising reasonable diligence.
iii. Changed circumstances material to the decision, which occurred since its issuance.[49]

There then follow further grounds specific to facilities applications.

Under Section 6(1), the Commission generally deals with review and variance applications in two stages. However, Section 8 allows the Commission on giving notice to combine the two stages if, in its opinion, it is "reasonable and practical to do so".[50]

At the first stage, the Commission in effect decides whether there is enough merit in the application to allow it to proceed to a full review at which the Commission will decide whether the original decision "should be confirmed, rescinded or varied."[51] Section 6(2) provides that, at the first stage, the Commission may proceed with or without a hearing.

In determining whether the threshold for moving to the second stage has been met, the criterion is that of materiality i.e. the likelihood that the Commission would be persuaded to "materially vary or rescind the decision."[52] In the case of alleged error of "fact, law or jurisdiction", it is expressed in terms of whether the error is "either apparent on the face of the decision or otherwise exists on a balance of probabilities..."[53] With respect to the two other relevant subsections, the assessment of materiality is predicated on the "existence" of the circumstances outlined in those subsections.[54]

[49] For a recent Commission panel decision setting out the Commission's jurisprudence and current position on how to apply these grounds, see *Re ATCO Gas and Pipelines Ltd*, Decision 25380-D01-2020 (June 29, 2020), at paras. 10-20. In short, it is a power to be exercised sparingly given the principles of finality, it is not an opportunity to reargue the matter, or to raise grounds and arguments that could have been raised at the original hearing but which the applicant for review and variance chose not to, and, in the case of fact-based grounds, the review panel should be very deferential and, generally, only review or vary where there was an "obvious or palpable error." The last consideration results from the Commission's explicit incorporation of the "palpable and overriding error" standard adopted by the Supreme Court of Canada in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235, as the standard of appellate review for issues of fact and mixed fact and law in appeals in civil litigation. As the Commission points out obliquely, at para. 16, this is now the standard of review for questions of fact and mixed fact and law for administrative decisions that reach the courts (as in the case of the Commission) by way of appeal, as opposed to judicial review: *Canada (Minister of Citizenship) v. Vavilov*, 2019 SCC 65, at para. 37.
[50] Section 8.
[51] Section 6(1).
[52] Section 6(3)(b).
[53] Section 6(3)(a).
[54] Section 6(3)(b)(i)-(2).

Where the Commission proceeds to the second stage, it must issue a notice of hearing and proceed in accordance with the Commission's general rules under Rule 001 for the conduct of hearings.[55]

Nowhere is it provided whether an application for review and variance under Rule 016 is a precondition to an application for leave to appeal to the Court of Appeal under section 29 of the *AUC Act*. In *Calgary (City) v. ATCO Gas and Pipelines Ltd.*,[56] Costigan JA held that an application for review and variance was a precondition to an appeal to the Court of Appeal on an issue that could have been raised on an application for review and variance. However, while a subsequent panel of the Court of Appeal has acknowledged this issue and its procedural implications, the Court was by no means definitive as to the need to exhaust internal channels of relief. Far from resolving the question authoritatively, it simply indicated that the issue is one that should be dealt with in the circumstances of the particular case.[57]

2.4. Common Law Procedural Fairness

For centuries, the common law has played an important supplementary role in the evolution of the principles of procedural fairness. Where the relevant legislation is silent as to whether a hearing is required, the courts, subject to meeting a threshold, have often imposed a general duty of procedural fairness on administrative decision-makers. The question then becomes what processes are required in the specific situation to fulfill that duty.

That is also the task of the courts where the statute specifies that a hearing is required but is either mute as to what procedures are involved, or possibly incomplete as to the various components of a procedurally fair hearing.

The latter is the situation under the *AUC Act* and other legislation relevant to the Commission's rate-setting role. In this context, the common law of procedural fairness provides criteria on which the courts determine whether there is room for supplementation of the procedural protections contained in the relevant legislation, and, if so, the actual content of any additional process.

There is also a presumption that, in general, the legislature, in conferring regulation and rule-making powers, does not intend to permit the Cabinet or the administrative decision-maker to adopt procedural rules that are contrary to the requirements of procedural fairness. In that context, it therefore becomes necessary to scrutinize procedural rules for consistency with what procedural fairness requires. Therefore, in its Report, this Committee must be concerned with whether the existing *Rules of Practice* and other relevant *Rules* meet those standards, and,

[55] Section 7.
[56] 2007 ABCA 133, 404 AR 317.
[57] See *Calgary (City) v. Alberta (Energy and Utilities Board)*, 2010 ABCA 94, 477 AR 56, at paras. 26-31. For a more detailed consideration of this issue in the context of the Ontario Energy Board, see the judgments of the Ontario Divisional Court in *Planet Energy (Ontario) Corp. v. Ontario Energy Board*, 2020 ONSC 598, at paras. 14-34, and *Enbridge Gas Inc. v. Ontario Energy Board*, 2020 ONSC 3616, at paras. 25-33.

more particularly, whether any recommendations for change in procedural rules would pass muster.

2.5. Regulatory Principles

Lurking in the undergrowth of much of public utility regulation are its historical origins and various commonly accepted norms as, for example, the common law developed principle of non-discriminatory access to public utilities exercising monopoly power, which ultimately became embedded in the so-called regulatory compact. Over time, these underlying principles played little direct role in the evolution of procedural rights in regulatory proceedings. However, general conceptions of regulatory power having to be exercised in the "public interest" have had some bite in the domain of procedural rights or entitlements.

Nonetheless, even where the relevant legislation specifically directs the regulator to have regard to the public interest, the Supreme Court of Canada in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, the *Stores Block* decision,[58] made it clear that this was not a licence for the Board to introduce into its decision-making general or at large concepts of the public interest; the extent of what came within the reach of a power to make orders in the public interest[59] had to be grounded in the particular statutory context in which this authority was located. Moreover, it is significant that there is no equivalent "public interest" provision in the *AUC Act*, or in the other relevant rate-setting statutes, the *PU Act*, the *EEU Act*, or the *GU Act*.[60]

The only specific references in the *AUC Act* to the public interest as a concept that is relevant to the authority of the Commission are to be found in provisions respecting joint hearings with another regulatory body,[61] the Commission's facility approval jurisdiction,[62] and as an element in the "duty of care" obligations that section 6(1) imposes on members of the Commission.

Aside from those three *AUC Act* provisions, the public interest is a specific criterion for Commission decision-making in only limited situations under the *PU Act*, the *GU Act*, or the *EU*

[58] 2006 SCC 4, [2006] 1 SCR 140, at paras. 40-46.
[59] *Alberta Energy & Utilities Board Act*, RSA 2000, c A-17, section 15(3)(d). More specifically, the subsection provided the Alberta Energy & Utilities Board with an ancillary power

> … to make any order or impose any additional conditions that the Board considers necessary in the public interest.

[60] For rejection of an argument that the omission of "public interest" as a relevant consideration meant that the regulator had no authority to assess the adequacy of the Crown's Indigenous peoples consultation efforts, see *Nova Scotia (Attorney General) v. Nova Scotia (Utility and Review Board)*, 2019 NSCA 66, 436 DLR (4th) 624, at paras. 105-16. However, it is difficult to interpret that part of the judgment of the Nova Scotia Court of Appeal as endorsing the existence of an at large, untethered public interest jurisdiction for the Nova Scotia Utility and Review Board.
[61] Section 16.
[62] Section 17(1).

Act, with the prime examples found in the Commission's authority over the ISO under the *EU Act*.[63] Even the jurisdiction of the UCA is not expressed in terms of the public interest at large.[64]

Nonetheless, in two recent applications for leave to appeal, O'Ferrall JA has invoked general public interest considerations. The first of these applications for leave involved the interpretation of the scope of the Commission's necessary and incidental powers under section 8(2) of the *AUC Act*.[65] The second raised issues of procedural fairness and the discretionary rejection of an application for costs.[66] Writing in the former, O'Ferrall JA asserted:

> The Commission's first and foremost mandate is to make decisions which are in the public interest. It must make policy choices it considers necessary to achieve the objectives of utility regulation.
>
> …
>
> And so when the Commission makes a decision on remedies which it says will achieve what it considers to be public interest objectives, courts should be hesitant to interfere.

Questions are raised as to whether such broad characterizations of the Commission's "public interest" mandate are justified given the majority judgment of Bastarache J in *Stores Block* and the subsequent omission from the *AUC Act* of the "public interest" criterion that was under consideration in that case. In any event, in terms of the mandate of this Committee and its focus on the processes and procedures of the Commission, it should be noted that, while O'Ferrall JA asserted that the content of the Commission's procedural fairness obligations "may

[63] See e.g. sections 20.2(4) and 25(1)(b)(iii). For an application of the latter with respect to a complaint about an ISO tariff, see *ENMAX Energy Corp. v. Alberta (Utilities Commission)*, 2019 ABCA 222. In that context, on an application for leave to appeal, O'Ferrall JA asserted at para. 67:

> The Commission is a specialized expert tribunal steeped in almost a century of utility rate regulation and its views on what will or will not promote fair, efficient and open competition must be accorded great deference and can be made without direct evidence.

Under the *PU Act*, the public interest or interests is a relevant criterion in the Commission's authorization of the joint use of equipment (section 96), and the approval of municipal franchises (section 106(2)). Under the *EU Act*, in addition to the Commission's authority over the ISO, the public interest is also explicitly relevant to the Commission's approval of rights to distribute electricity granted by municipalities (section 139). Finally, under the *GU Act*, the public interest or interests is specifically relevant to incentive-based rate making under section 45, and the approval under section 49 of municipal granting of privileges or franchises to owners of gas utilities.

[64] *Government Organization Act,* Schedule 13.1, *supra*, note 29, section 3.

[65] *Capital Power Corp. v. Alberta (Utilities Commission)*, 2018 ABCA 437, at paras. 52-53. Section 8(2) provides:

> The Commission in the exercise of its powers and the performance of its duties and functions under this Act or any other enactment, may act on its own initiative or motion and do all things that are necessary for or incidental to the exercise of its powers and the performance of its duties and functions.

[66] *Milner Power Inc. v. Alberta (Utilities Commission)*, 2019 ABCA 127, at para. 57.

be impacted by public interest considerations of those before [it]"[67], nonetheless, in ultimately rejecting the assertion of procedural unfairness, he stated:

> The process followed by the Commission in addressing the interest issue was essentially a discretionary choice made within the context of the Commission's statutory scheme following the receipt of input from those affected.[68]

As was the case previously with the review of the Commission's exercise of its supplementary powers under section 8(2), O'Ferrall JA accepted the need for deference to or respect for the Commission's procedural choices even where that choice was, in his judgment, imbued with public interest considerations.

3. Impact of Legal Norms

3.1. Constitutional and *Quasi*-Constitutional Limitations

As noted already, it is possible that recommended procedural reforms may run afoul of a range of constitutional or *quasi*-constitutional rights, freedoms, and entitlements. They are now addressed in greater detail.

3.1.1. *Alberta Bill of Rights*

In contrast to section 7 of the *Canadian Charter of Rights and Freedoms*, section 1(a) of the *Alberta Bill of Rights* establishes the right to "due process of law", not only where "liberty" or "security of the person" is threatened, but also "enjoyment of property". In this regard, it parallels section 1 of the *Canadian Bill of Rights* applicable federally.

However, there is very little Alberta case law involving a challenge to regulatory action based on the due process protection from deprivations of the "enjoyment of property." A notable exception is the judgment of Wittmann ACJQB in *Lavallee v. Alberta (Securities Commission)*.[69] In the context of a challenge to provisions in the *Securities Act*,[70] Wittmann ACJQB held that enforcement proceedings possibly leading to administrative penalties of up to $1,000,000 for each infraction engaged the "enjoyment of property" protection. He continued that, in such proceedings, a statutory direction that all relevant evidence had to be admitted could result in a denial of "due process of law". However, he then described due process as involving "at least a certain level of procedural fairness."[71]

On appeal to the Alberta Court of Appeal,[72] the Court did not find it necessary to deal with this ground of challenge to the application of the legislation. It interpreted the statute as not

[67] *Ibid.*
[68] *Id.*, at para. 58.
[69] *Supra*, note 40.
[70] RSA 2000, c S-4.
[71] *Id.*, at para. 199.
[72] 2010 ABCA 48, application for leave to appeal to the Supreme Court of Canada refused: [2009] SCCA No. 172.

amounting to a without exception requirement that all relevant evidence be admitted. However, assuming that Wittmann ACJQB's judgment is authoritative on this point, two points should be made about its relevance to the procedure of the Commission in rate regulation proceedings.

First, it is somewhat of a stretch to regard the setting of utility rates as involving a deprivation of the "enjoyment of property",[73] and there does not appear to be any authority to that effect under either section 1(a) of the *Alberta Bill of Rights* or, its federal equivalent, section 1(a) of the *Canadian Bill of Rights*.

Secondly, Wittmann ACJQB's concept of what due process required was not universal, rigid adherence to "all the guarantees offered in a criminal setting."[74] Rather,[75] in administrative settings, the content of due process was situation specific and determined by reference to the five procedural fairness intensity criteria set out by L'Heureux-Dubé J in *Baker v. Canada (Minister of Citizenship and Immigration)*.[76] In other words, provided that the procedures followed by the decision-maker met the standards that the common law required, there was no basis for a challenge. Only where an agency's primary[77] legislation explicitly or by necessary implication overrode the common law would there be any need for invocation of the *Alberta Bill of Rights* "due process of law" protection.

3.1.2. *Canadian Charter of Rights and Freedoms*

Canadian courts have consistently held that "security of the person" whether under section 1(a) of the *Alberta Bill of Rights*, section 7 of the *Canadian Charter of Rights and Freedoms*, or, in the federal domain, section 1(a) of the *Canadian Bill of Rights*, does not include "purely economic rights."[78] Moreover, the Supreme Court has been reluctant to hold that section 7 is a source of positive rights.[79] As a consequence, it is very difficult to conceive of situations where utility rate-setting would amount to a potential deprivation of "security of the person" so as to engage either the right to "due process of law" under section 1(a) of the *Alberta Bill of Rights* or the "principles of fundamental justice" under section 7 of the *Canadian Charter of Rights and*

[73] Certainly, Wittman ACJQB, *supra*, note 40, at para. 178, defined "enjoyment of property" in terms of "enjoyment of land and money." However, it is another thing to see a regulatory agency setting "just and reasonable" rates for service provided as depriving those paying for that service of the enjoyment of property except perhaps in the instance of rates that are truly confiscatory in their impact.
[74] *Id.*, at para. 199.
[75] *Id.*, at para. 200.
[76] [1999] 2 SCR 817, at paras. 21-22.
[77] Relevant provisions in subordinate legislation and agency rules of procedure can generally be attacked as invalid by reference to common law principles without reliance on constitutional or *quasi*-constitutional due process protections.
[78] See e.g. *Lavallee* (QB), *supra*, note 40, at para. 115, and *Lavallee* (CA), *supra*, note 72, at para. 27, applied by the then Alberta Energy Resources Conservation Board in *Re Sarg Oils Ltd.*, 2011 LNAERCB 32, at paras. 120-21.
[79] See *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 SCR 429, cited by Wittmann ACJQB in *Lavallee* (QB), *ibid.*

Freedoms. The only possibility may rest in situations where the level of rates levied on individuals may have the effect of "preclud[ing them] from meeting their essential needs."[80]

Section 15, the equality or non-discrimination section of the *Canadian Charter of Rights and Freedoms*, is not seen commonly as a source of procedural (as opposed to substantive) protections for the victims of discrimination. Moreover, to the extent that the economic impact of utility rate-setting may have a disparate impact on the poor in society, in *Boulter v. Nova Scotia Power Inc.*,[81] the Nova Scotia Court of Appeal held that "poverty" was not an analogous ground of discrimination to those listed specifically in section 15(1) and therefore could not be brought within the scope of that provision.

3.1.3. *Indigenous Peoples – The Duty to Consult and Accommodate*

Since the 2017 Supreme Court of Canada judgments in *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*,[82] and *Chippewas of the Thames First Nations v. Enbridge Pipelines Inc.*[83] cases involving the then National Energy Board, it is now clear that an otherwise independent regulatory agency responding to an application under its empowering statute is acting on behalf of the Crown so as to be engaging in Crown conduct when it responds to the application:

> [O]nce it is accepted that a regulatory agency exists to exercise executive power as authorized by legislatures, any distinction between its action and Crown action quickly falls away. In this context, the NEB is the vehicle through which the Crown acts.[84]

As a consequence, one of the preconditions to the existence of a duty to consult and, where appropriate, accommodate Indigenous peoples is met simply by virtue of the legislative choice of a regulatory agency as the instrument for the fulfilment of a statutory mandate. The filing of an application gives rise to "contemplated Crown conduct." The critical question then becomes whether that "contemplated Crown conduct" has the potential to affect adversely Indigenous

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[80] *Ibid*.
[81] 2009 NSCA 17, 275 NSR (2d) 294, application for leave to appeal to the Supreme Court of Canada refused: [2010] SCCA No. 119.
[82] 2017 SCC 40, [2017] 1 SCR 1069.
[83] 2017 SCC 41, [2017] 1 SCR 1099. See also in relation to the Nova Scotia Utilities and Review Board: *Nova Scotia (Attorney General) v. Nova Scotia (Utility and Review Board)*, *supra*, note 60.
[84] *Id.*, at para. 29. This in effect rejects any statements to the contrary by the Commission panel in *Fort McMurray West 500-kV Transmission Project, Ruling on jurisdiction to determine the Notices of Questions of Constitutional Law*, AUC Proceeding 21030 (February 10, 2017), *sub nom. Re Alberta PowerLine General Partner Ltd. (Re)*, 2017 LNAUC 4, at paras. 103-119 ("*Alberta PowerLine*"), in holding that the Commission did not have jurisdiction to consider the adequacy of Crown consultation when the Crown was not before it as a party in the relevant proceedings. It also puts paid to the argument accepted in *Alberta PowerLine* that the Commission's designation under the *Designation of Constitutional Decision Makers Regulation*, *supra*, note 35, as an authority with jurisdiction to consider all questions of constitutional law does not include the assessment of the adequacy of consultation and accommodation where Indigenous rights and claims are in play or, for that matter, the Commission's own authority to engage in consultation and accommodation. The Commission (and the Alberta Government) accept that the ruling does implicate it in consultation and assessment of consultation responsibilities: see the first paragraph of Bulletin 2020-22, *supra*, note 42.

rights and claims. In terms of the Committee's mandate, are there circumstances in which a rate or tariff application or other proceeding could have an impact on Indigenous rights and claims such as to give rise to a duty to consult and, where appropriate, accommodate Indigenous rights and interests?

While it is easy to see how Indigenous rights and claims will be affected by the Commission's exercise of its transmission siting jurisdiction (as in *Alberta PowerLine*[85]), it is far less obvious that there will be situations where rate or tariff proceedings could have an adverse impact on Indigenous rights and claims.[86] However, if that threshold is crossed, it is now clear that the Commission should respond to any challenges by assessing the adequacy of consultations carried out by proponents and also conducting its own consultations as the vehicle through which the Crown is acting. Thus, in *Alberta PowerLine*,[87] the Commission acknowledged its obligation as part of its general jurisdiction to respond to claims of adverse impact on rights and interests asserted by Indigenous parties or interveners. For these purposes, it may be advisable to establish specific procedural rules.[88]

3.2. Standard of Review

3.2.1. *Substantive Issues*

As already discussed, the *AUC Act* contains a very strong privative clause but provides for appeals (on permission being granted) to the Alberta Court of Appeal on a question of law or jurisdiction. With the Supreme Court's exiling of the concept of jurisdiction in *Canada (Minister of Citizenship and Immigration) v. Vavilov*,[89] it is probable that this ground of appeal has in effect been repealed by judicial fiat. However, there are possibly arguments that where specific statutory regimes make provision for review or appeal on that ground, the holding in *Vavilov* does not apply. As for questions of law, they are the subject of one of the most significant changes wrought by *Vavilov*. Previously the default standard of review for questions of law and in particular tribunal or agency interpretation of their home or frequently encountered statutes was the deferential standard of reasonableness, even where access to the court was by way of

[85] *Ibid.*
[86] This is not to say however that there will not be Indigenous issues arising out of the Commission's rate-setting jurisdiction. Very recently, the Manitoba Court of Appeal considered and rejected a Public Utilities Board directive which required a utility to create a First Nations On-Reserve Residential customer class for which there would be a zero per cent increase: *Manitoba (Hydro-Electric Board) v. Manitoba (Public Utilities Board)*, 2020 MBCA 80. (For forthcoming commentary in the *Energy Regulation Quarterly* see Patrick Duffy, "*Manitoba Hydro v. Manitoba Public Utilities Board*: Reduced Rates for Indigenous Peoples Overruled.")
[87] *Id.*, at para. 118.
[88] Even though it is directed towards project applications, it may well be that the final version of the Commission's Draft Indigenous consultation framework (see Bulletin 2020-22, *supra*, note 42) will provide a partial template for such a policy in the domain of rate-setting.
[89] *Supra*, note 49, at paras. 65-68.

statutory appeal as opposed to judicial review.[90] Now, with *Vavilov*, that has changed.[91] Unless the legislature has provided otherwise, correctness will henceforth be the standard of review for pure questions of law under the appeal provision in the *AUC Act.*

How aggressive the Alberta Court of Appeal will be in categorizing questions as ones of law subject to the appeal provision remains to be seen. Will it, for example, include questions of procedural fairness? How will it be applied to the Commission's exercise of its considerable discretionary powers with respect to both substance and procedure? What about situations where it is problematic to extricate a pure question of law from a mixed question of law and fact, not on its face subject to the appeal provision? For example, to revert to a matter raised previously, how far, if at all will the Alberta Court of Appeal go in treating scoping issues as essentially questions of law subject to correctness review?

3.2.2. *Procedural Fairness*

On any assessment of legal risk with respect to the Commission's rules and rulings on procedural issues, an obvious consideration is whether the reviewing court will deploy a standard of correctness or reasonableness.[92]

At a general level, this has been a controversial issue, that controversy having been stoked in considerable measure by the judgment of LeBel J for the Supreme Court in *Mission Institution v. Khela*.[93] There, he asserted initially that the standard of review on issues of procedural fairness was that of correctness[94] but he then went on to state, in the context of a challenge by an offender to a penitentiary transfer decision, that there was an entitlement to a measure of deference to a denial of relevant information on the basis of a statutory provision that its release would jeopardize the "security" of the prison.[95]

Seizing on the latter statement, some (but by no means all) Courts of Appeal held that a reasonableness standard applied to at least some issues of procedural fairness, particularly in situations where the entitlement asserted depended on an evaluation of relevant facts or where there was an express statutory discretion with respect to the procedural claim that was

[90] *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 SCR 293.
[91] *Supra*, note 49, at paras. 36-52.
[92] Or, whether standard of review selection has any purchase in cases involving allegations of denial of procedural fairness: see e.g. *Milner Power Inc. v. Alberta (Utilities Commission)*, *supra*, note 66, at para. 14. See also *Blair v. Alberta (Utilities Commission)*, 2018 ABCA 438, at para. 15, citing an argument relying on *Baker v. Canada (Minister of Citizenship and Immigration)*, *supra*, note 76, to the effect

> … that issues of procedural fairness are not subject to a standard of review; the question is not whether the tribunal's decision was correct or reasonable but rather whether the procedure chosen was fair, given all the circumstances.

[93] 2014 SCC 24, [2014] 1 SCR 502.
[94] *Id.*, at para. 79.
[95] *Id.*, at para. 89.

in contention. Two judgments of Stratas JA for the Federal Court of Appeal provide illustrations. In *ForestEthics Advocacy Association v. National Energy Board*,[96] he applied the deferential standard of reasonableness in rejecting a challenge to a denial of participatory status at a NEB hearing by reference to a statutory provision setting out a discretionary test for standing or access to participatory rights. Subsequently, in *Bergeron v. Canada (Attorney General)*,[97] he applied the reasonableness standard with reference to an argument that the Canadian Human Rights Commission had denied the applicant procedural fairness by failing to conduct an adequate investigation of the applicant's discrimination complaint.[98]

Since the Supreme Court's judgment in *Vavilov*, however, commentators have argued that the majority put paid to any possibility of arguing that there was room for deference on issues of procedural fairness.[99] Support for that position was found in the following statement by the majority:

> When a court reviews the merits of an administrative decision (i.e., judicial review of an [sic] administrative decisions **other than a review related to a breach of natural justice and/or the duty of procedural fairness**) the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness [emphasis added].[100]

It has been said that the only inference to be drawn from this statement is that the standard of review to be applied to procedural rules and rulings is that of correctness or, put another way, standard of review analysis has no purchase in the domain of procedural issues.

Nonetheless, another possible reading is that review for procedural fairness is constitutionally protected and that legislatures cannot override that protection, but leaving for another day the question of whether deference has any role to play in such a constitutionally protected domain.[101] It might also be argued that the Court was not willing to accept a presumption of reasonableness review in the domain of procedural issues, and that the onus rested on the

[96] *Supra*, note 41. See the Commentary by C. Kemm Yates, Q.C. and Sarah Nykolaishen, "National Energy Board Procedural Reform – Round 2 Goes to the Regulator" (2015), 3(4) *Energy Regulation Quarterly* 37.
[97] 2015 FCA 160, at paras. 67-72.
[98] Subsequently, in delivering the judgment of a majority of the Federal Court of Appeal in *Vavilov*, 2017 FCA 132, [2018] 3 FCR 75, at paras. 11-14, he referred to *Bergeron* as an example of appropriate application of a deferential reasonableness review of a procedural fairness issue.
[99] See e.g. Paul Daly, "Unresolved Issues after *Vavilov* III: Procedural Fairness", Administrative Law Matters Blog, May 7, 2020.
[100] *Supra*, note 49, at para. 23.
[101] Some support for this may be found earlier in the judgment, *id.*, at para. 13, where the majority seem to conceive the core role of the courts on judicial review as that of safeguarding "the legality, rationality and **fairness** of the administrative process [emphasis added]."

party seeking the application of reasonableness as opposed to correctness review to the determination of a procedural unfairness claim.

What is also clear is that the majority in *Vavilov* was not dismissing entirely deference as relevant to the determination of procedural fairness issues. In reaffirming[102] *Baker v. Canada (Minister of Citizenship and Immigration)*[103] to the effect that procedural fairness was "eminently variable", inherently flexible, and context-specific, the majority cited the five *Baker* procedural fairness intensity criteria. The fifth of those factors was and is "the choices of procedure made by the administrative decision-maker itself" or, as explained in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*,[104] also cited in *Vavilov*[105]: "the nature of the deference accorded to the body."[106] McLachlin CJ, delivering the judgment of the majority, elaborated further on the fifth criterion:

> The fifth factor – the nature of the deference due to 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 decide whether the decision in question falls within this realm.[107]

Seemingly necessarily implicit in this is the very clear sense that, in certain situations, the decision-maker's choice of procedures, as either rules or rulings, is entitled to deference or respect as a factor relevant in the assessment of whether the procedures followed have met the necessary degree of intensity. In another pre-*Vavilov* judgment, *Re Sound v. Fitness Industry Council of Canada*,[108] Evans JA captures it well when he states:

> In short, whether an agency's procedural arrangements, general or specific, comply with a duty of fairness is for a reviewing court to decide on a correctness standard, but in making that determination it must be respectful of the agency's choices. It is thus appropriate for a reviewing court to give weight to the manner in which an agency has sought to balance maximum participation on the one hand, and efficient and effective decision making on the other. In recognition of the agency's expertise, a degree of deference to an administrator's procedural choice may be particularly important when the procedural model of the agency under review differs significantly from the judicial model with which courts are most familiar.

However, the resolution of this issue is further muddied by reason of the fact that judicial scrutiny of decision-making by the Commission will almost invariably take place in the context of section 29 of the *AUC Act*, and its creation of access to the courts by way of appeal on a

[102] *Id.*, para. 77.
[103] *Supra*, note 76, at paras. 21-23.
[104] 2004 SCC 48, [2004] 2 SCR 650.
[105] *Supra*, note 49, at para. 77.
[106] *Supra*, note 104, at para. 5.
[107] *Id.*, at para. 11.
[108] 2014 FCA 48, [2015] 2 FCR 170, at para. 42.

question of law or jurisdiction to the Alberta Court of Appeal, permission to appeal having been granted by a judge of the Court of Appeal. In the aftermath of *Vavilov*, absent provisions to the contrary, the standard of review for questions of law and perforce jurisdiction will be that of correctness and, at first blush, that might appear to cover issues of procedural fairness, the reach of procedural fairness obligations being seen as questions of law.

Nonetheless, to the extent that the determination of the intensity of procedural fairness obligations will depend on the five *Baker* factors, that question of law has built into it consideration for the procedural choices of regulatory agencies or, in other words, elements of deference. It is also possible that the Court of Appeal may treat certain procedural fairness issues as inextricably intertwined with the particular facts out of which the challenge has arisen and therefore excluded from the appellate jurisdiction of the Court.[109] Finally, it also remains to be seen whether the Court will build a deference component into the determination of procedural fairness issues when they arise out of the exercise of an explicit discretionary power such as the determination of whether someone will be recognized as entitled to participate by way of intervention.

3.2.3. *The Requirements of Procedural Fairness*

There can be no doubting that the Commission is subject to a duty to act in a procedurally fair manner or, putting it another way, that some at least of its functions attract a duty of procedural fairness. Without more, rate-setting in a public utility context might be seen as a broad policy-making function not attracting a duty of procedural fairness. However, the legislative framework set out above (including the *AUC Act*) makes it clear that the Commission is obliged to hold hearings with at least some traditional adjudicative characteristics where a decision or order may directly affect the rights of a person when there is a request for a hearing in response to the filing of an application. Section 76 of the Act conferring authority on the Commission to make "rules of practice governing the Commission's procedure and hearings" also speaks to the application of the rules of procedural fairness. Moreover, the existence and extent of that obligation (and, in particular, the duty to engage with the affected consumers) is underscored by the notice provisions for tariff approval proceedings found in section 121(1) of the *EU Act*, the explicit mandating of a hearing in both section 36 of the *GU Act* and section 89 of the *PU Act*, and the legislative creation of the Office of the UCA with standing as of right to represent the listed interests in "proceedings" of the Commission. Consequently, the significant threshold issue with respect to the Commission's procedural obligations is not whether procedural fairness obligations attach generally to the decision-making functions of the Commission but rather the intensity of those obligations.

As just noted, in discussing the nature and extent of the duty to provide reasons for decisions, the majority of the Court in *Vavilov* reaffirms[110] the five non-exhaustive criteria spelled out in

[109] See *Blair v. Alberta (Utilities Commission), supra,* note 92
[110] *Supra*, note 49, at para. 77.

Baker v. Canada (Minister of Citizenship and Immigration)[111] for determining the extent or intensity of a decision-maker's procedural fairness obligations:

> Those factors include: (1) the nature of the decision being made and the process followed in making it: (2) the nature of the statutory scheme; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the decision-maker itself.[112]

In terms of those factors, the first points to a high level of procedural fairness the nearer the decision-making process is to traditional adversarial judicial decision-making. As already noted, rate-setting is not in its very nature a decision-making process that necessarily is adjudicative or judicial. It is very much a policy making function involving consideration of open-textured statutory objectives (such as "just and reasonable" and "unjustly discriminatory").

However, given the legislative setting in which the Commission functions and the contemplation of hearings involving both applicants and interveners, the second factor or criterion is more indicative of a significant level of procedural fairness than the first standing alone. This is further reinforced by the finality of the Commission's decision-making in such matters subject only to a constrained access by way of appeal to the Alberta Court of Appeal. Nevertheless, section 9(2) to the effect that there is no guarantee of a right to make oral submissions or to representation by counsel, and section 20 absolving the Commission from adherence to the rules of evidence applicable in "judicial" proceedings, are obvious indicators of legislative intention that Commission hearings may be less formal than the traditional adjudicative or adversarial model. More generally, provisions such as section 121(2) of the *EU Act*, which provides that the Commission "must ensure" that tariffs adhere to certain standards speak to a role that is not purely adjudicative. Rather, the Commission is obliged to take a proactive, near inquisitorial role in the discharge of its rate-setting mandate.

As for the third factor, achievement of an appropriate return on investment is of critical importance to those entities regulated by the Commission, and not having to bear excessive costs for utility service is a significant concern for both household consumers and also business and institutional interests.

Strictly speaking, it is hard to envisage much room for the Canadian version of the doctrine of legitimate expectations having purchase in this context unless changes to procedural practices take place in the context of a particular application without advance notice and provision of an opportunity to contest to those participating. To the extent that, in this exercise, the Committee is consulting with stakeholders and there will presumably be further notice and comment opportunities before any such changes in the *Rules of Practice*, or existing practices, it is hard to envisage the frustrating of any legitimate expectations that the existing order will not

[111] *Supra*, note 76, at paras. 23-27.
[112] *Per* the majority in *Vavilov*, *supra*, note 49, at para. 77, summarizing *Baker*.

be changed without an opportunity to comment. In short, legitimate expectations is a neutral or irrelevant factor in the determination of the required level of procedural fairness intensity.

Finally, when it comes to the procedural choices made by an expert, mature regulator such as the Commission, it is salient that the Commission has authority to dispense with some of the trappings of truly judicial proceedings and possesses a broad discretion to make its own rules of practice and procedure. In terms of *Baker*, the exercise of these powers will normally be deserving of considerable "respect":

> [I]mportant weight must be given to the choice of procedures made by the agency itself and its institutional constraints.[113]

There is no question as to the economic seriousness of utility rate regulation. There is also no doubt that the legislature has chosen to have these issues generally dealt with at hearings to which those consumers affected by the quantum of approved tariffs and rates have access. However, it is also clear that the Alberta legislature has not adopted a regime that requires the full panoply of procedural requirements or options that characterize traditional adjudicative processes. Rather, much of the primary responsibility with respect to the creation of rules and the making of specific rulings has been left to the Commission. Despite the Supreme Court's general (though not necessarily consistent) position that issues of procedural rules and rulings attract correctness review, where the legislature has entrusted the crafting and application of procedural norms to the discretion of an administrative decision makers, there is an expectation that reviewing courts will, in the words of *Baker*, accord "respect" and give "important weight to the procedural choices made by such decision-makers."

There are also at least three further considerations that provide support for this position.

First, in the context of regulatory proceedings, there will sometimes be overlap between issues of substance and issues of procedure. A good example highly relevant in the context of rate regulation is the issue of scoping: What issues are relevant to the particular application? In that context, Stratas JA of the Federal Court of Appeal in *ForestEthics Advocacy Association v. National Energy Board*,[114] drew attention to the interconnectedness between procedure and substance[115] on the issues of status to participate in the National Energy Board's Line 9 Reversal hearings and the Board's scoping of the parameters of those hearings. He then went on to give the Board a considerable margin of appreciation with respect to both elements.[116]

Secondly, it should be recalled that, as long ago as 1973, the Judicial Committee of the Privy Council in an appeal from New Zealand, in *Furnell v. Whangarei High Schools Board*,[117] applied in effect a deferential standard of scrutiny to the alleged procedural deficiencies in a procedural

[113] *Supra*, note 76, at para. 27.
[114] *Supra*, note 41.
[115] *Id.*, at paras. 61-62.
[116] *Id.*, at paras. 68*ff.*
[117] [1973] AC 660 (PC(NZ)).

code governing the dismissal of teachers contained in regulations. In doing so, the Judicial Committee emphasised among other matters that the code was not only detailed but had emerged from the cauldron of negotiations between labour and management.[118] This judgment has been cited on a number of occasions by Canadian courts[119] including an endorsement of this very point by Rothstein J (as he then was) in *Armstrong v. Canada (Commissioner of the RCMP)*.[120]

Finally, but perhaps most importantly, the judgment of Karakatsanis J for the Supreme Court of Canada in *Hryniak v. Maudlin*[121] heralded a new era of proportionality in the assessment of the procedural requirements of civil litigation:

> [U]ndue process and protracted trials, with unnecessary expense and delay, can **prevent** the fair and just resolution of disputes [emphasis added].[122]

She then articulated the three pillars of a properly functioning "civil justice system".[123] It had to be accessible, and true accessibility required that the process be "proportionate, timely and affordable."[124] In this context, a result would not be fair and just if the

> … process is disproportionate to the nature of the dispute and the interest involved.[125]

Where procedural rules are discretionary, that discretion

> … includes an underlying principle of proportionality which means taking account of the appropriateness of the procedure, its cost and impact on the litigation, and its timelines given the nature and complexity of the litigation.[126]

While the context was the summary judgment jurisdiction of the Ontario Superior Court, it is obvious that these principles are transferrable to administrative decision-making,[127] and that a reviewing court would not readily interfere with procedural rules and rulings that were animated by such considerations. It is therefore noteworthy that there is reference to *Hryniak* and the proportionality principles in *Vavilov*, albeit in the minority judgment.[128] Thus, in terms of possibilities that are being considered by the Committee, Karakatsanis J's conception of

[118] *Id.*, at page 667.
[119] See e.g. the judgment on which the modern Canadian approach to procedural fairness was built: *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 SCR 311.
[120] [1994] 2 FC 356, at para. 43.
[121] 2014 SCC 7, [2014] 1 SCR 87.
[122] *Id.*, at para. 24.
[123] *Id.*, at para. 23.
[124] *Id.*, at para. 28.
[125] *Id.*, at para. 29.
[126] *Id.*, at para. 31, quoting from the judgment of the Newfoundland and Labrador Court of Appeal in *Szeto v. Dwyer*, 2010 NLCA 36, at para. 53.
[127] See Michelle A. Alton, "Rethinking Fairness in Tribunal Adjudication to Best Promote Access to Justice" (2019), 32 *Canadian Journal of Administrative Law & Practice* 151, writing in the context of tribunal adjudication.
[128] *Supra*, note 49, at para. 242.

active case management animated by proportionality concerns has resonance in the domain with which we are concerned: utility rate or rate-related proceedings.

4. Legal Risk Assessment

4.1. General Overview

While section 9(2)(c) of the *AUC Act* obliges the Commission to hold a hearing where its proceedings have the potential to "directly and adversely affect the rights of a person", as already described, the *AUC Act* and related statutes are sparse on what a hearing requires in any particular situation. To be sure, section 9(2)(b) imposes an obligation to provide "a reasonable opportunity of learning the facts bearing on the application" but leaves what precisely this involves to the discretion of the Commission. Section 9(4) then makes it clear that it is for the Commission to determine if an oral hearing or representation by counsel is necessary. Similarly, with respect to notice of any proceedings, section 9(2)(a) leaves the settling of the details of notice requirements to rules to be developed by the Commission. Section 20 provides the Commission with further discretion in stating that the Commission in its hearings is not bound by the rules of evidence "applicable to judicial proceedings."

This sense of the Commission as being the master of its own proceedings is also evident in the process to be followed in Commission review of its decisions. By virtue of section 10, that too is left to development in the Commission's rules of practice. In the *EU Act*, other procedural matters are left to be developed by the Commission acting in its rule-making capacity: the information that the Commission may require to be filed,[129] and, while the promulgation of such rules is mandatory, the procedures attendant on the Negotiated Settlement of an Issue.[130]

Moreover, as far as the Commission's rulemaking authority is concerned, section 76(1)(e) of the *AUC Act* is completely open-ended as to the content of any "rules of practice" issued by the Commission, save for section 75's conferral of overriding regulation-making powers on the Cabinet.[131]

What emerges from these and other elements in the relevant legislation is that the Commission has been entrusted with broad discretion as to the processes that it will follow generally and in utility rate regulation proceedings in particular. In short, there are few, if any indicators that its processes must follow those of typical adjudicative proceedings, a consideration underscored by the common law procedural fairness intensity analysis outlined above. Moreover, even assuming that the Court of Appeal would accept the contention that the standard of review to be applied to the Commission's procedural rules and rulings is that of correctness, that position is tempered by *Vavilov*'s explicit reaffirmation of *Baker* to the effect that, in assessing the intensity of a regulatory agency's procedural fairness obligations, considerable respect should

[129] Section 118(2).
[130] Sections 132-33. See also section 28.51(1) of the *GU Act*.
[131] Though see also section 8(4) of the *AUC Act*.

be accorded to the judgment of agencies that legislatively have a significant degree of discretion in the crafting of both procedural rules and rulings.

More generally, in terms of the Commission's fulfilment of its statutory mandate, the emergence of a principle of proportionality in process design is strongly indicative of a need for judicial respect for any judgments that the Commission may make in the balancing of procedural fairness arguments against the efficient discharge of its responsibilities in the broader public interest. Thus, for example, the Commission has recognized the legitimate demands of efficient process in Sections 2.2 and 2.3 of the *Rules of Practice*. The former calls for an interpretation of those Rules so as to further the cause of a "fair, expeditious and efficient determination on its merits of every proceeding." The latter then authorizes the Commission to issue directives during proceedings to promote the same ends.

4.2. Specific Issues – Mandate

4.2.1. *Scoping of Issues and Scheduling – Assertive Case Management*

One of the themes that underlies the Committee's specific subject matter mandate is that of case management. It is clearly discernible in the first two items in the list of procedural issues to be explored: scoping of issues and scheduling. Both speak to a consideration of the extent to which at the front end of any proceeding, there should be room for active shaping of the content and progress of the hearing of applications.

As described already, section 8(2) of the *AUC Act* confers broad powers on the Commission in support of the fulfilment of its statutory responsibilities including the power to "act on its own initiative or motion." On the procedural front, this conferral of discretionary authority is reinforced by section 76(1)(e) that provides the Commission with power to make "rules of practice governing the Commission's procedure and hearings." Also relevant are the provisions of both the *EU Act*[132] and the *GU Act*[133] that impose on the Commission an obligation to make "rules, practices and procedures" that will facilitate the negotiated settlement of issues arising out of applications. While not bearing directly on the initial structuring of the processes by which an application will be governed, they do illustrate one of the common features of effective case management, and provide warrant for the Commission to exercise its discretionary powers in such a way as to implement case management at various other stages of the determination of applications.

Section 2.3 of the Commission's *Rules of Practice*, adopted under section 76(1)(e) of the *AUC Act*, confers on the Commission authority to "issue any directions that it considers necessary for the fair, expeditious and efficient determination of an issue", while Section 2.5 confers broad discretionary authority over time limits. The specific provisions of the *Rules of Practice* then establish some ground rules for the filing of applications and notices of intention to participate

[132] Section 132(1).
[133] Section 28.51(1).

("SIPs"), but not in such a way as to preclude the Commission from otherwise structuring the reach of what it requires the parties to address so as to enable it to fulfil its statutory responsibilities. Nor do the relevant rules governing the scheduling of an application (with one irrelevant exception[134]) in any way limit the Commission's Section 2.5 authority over time limits.

As a result, it is abundantly clear that, unless constrained by constitutional imperatives, the common law of procedural fairness, or other statutory provisions, the Commission has broad discretionary powers to adopt case management processes aimed at the front end at defining what issues it considers as relevant to the discharge of its mandate ("scoping"), and setting time limits within which various stages in the process must take place.

In this respect, it is difficult to conceive of situations (aside perhaps from the duty to consult Indigenous peoples) where constitutional requirements would bear upon such structuring and timetabling initiatives. It is similarly unlikely that other statutory provisions (save perhaps the responsibilities of the UCA under Schedule 13.1 of the *Government Organization Act*) would limit in significant ways the ability of the Commission to engage in case management with particular reference to scoping and scheduling.

As for the common law, as seen in *Tsleil-Waututh Nation v. Canada (Attorney General)*,[135] and *ForestEthics Advocacy Association v. Canada (National Energy Board)*,[136] there is always the possibility that a scoping exercise could be challenged on substantive grounds. However, that does not undercut the Commission's engagement in such exercises. As for considerations of procedural fairness with scoping, and timetabling or scheduling, once again, there is the possibility of a challenge on the facts of a particular application. However, it is critical to keep in mind the extent to which the Court of Appeal will accord the Commission considerable room to maneuver in engaging in such exercises, a latitude that is dictated by the nature of the Commission's mandate and the discretionary terms in which its structuring of procedures is couched both in the *AUC Act* and in Rule 001.

Certainly, the Commission should engage with both the applicant and those filing a SIP. However, beyond listening to and taking account of their positions on both the scope of the "hearing" on the application and the timing of various stages of the process, the Commission has little reason to be wary of such exercises except in the extreme case where its position would constitute a clear denial of procedural fairness rights such as a refusal in obvious circumstances to extend a time limit.

[134] Unless otherwise directed, the Commission cannot in its notice of hearing set an oral hearing date fewer than ten days after the date of the notice of hearing: Section 14.2.
[135] 2018 FCA 153, [2019] 2 FCR No. 3, at paras. 393-450.
[136] *Supra*, note 41.

4.2.2. *Confidentiality*

Section 28(7) of the *Rules of Practice* provides the Commission with authority to grant a motion for the confidential treatment of information "on any terms it considers reasonable or necessary." The exercise of that authority depends on the Commission determining that granting the motion

> (a) is necessary to prevent a serious risk to an important public interest, including a commercial interest, because reasonable, alternative measures will not prevent the risk; and
> (b) the benefits of granting the request outweigh its harmful effects, including the effects on the public interest in open and accessible proceedings.

Section 28, amended on February 8, 2020, goes on the provide a detailed regime for the filing and determination of such motions.

Section 28(7) embodies the relevant common law procedural fairness principles on which issues of confidentiality are to be resolved in tribunal or agency proceedings.[137] During the consultation process, the Committee encountered only vague assertions that the Commission was too readily granting confidentiality motions on the basis that the relevant information was of a commercially sensitive nature. Obviously, if established in a particular proceeding, this would amount to a denial of procedural fairness though we would generally expect that a well-reasoned Commission justification of its position would attract considerable deference from the reviewing Court. That said, the Committee sees no reason for change to the considerations in Section 28(7) on which confidentiality motions must be determined.

Where the Committee did encounter concerns was with respect to the mechanics of resolving assertions of confidentiality. Commission panels were spending undue time on dealing with confidentiality motions often with respect to which there were ample precedents in the Commission's past rulings. It was also said that there were problems with the exchange of confidential documents among participants who had clearance, on providing an undertaking, to access material accepted by the Commission as confidential.

The latter problem seems to have been rectified for the most part by the February 8 amendments to Rule 001 and associated enhancements to the Commission's eFiling system.

As for the processing of confidentiality motions, there is room, without significant exposure to allegations of procedural unfairness, for case management processes that allow for pre-filing acceptance of confidentiality claims particularly for those categories of information for which precedents exist. The same could also hold for the automatic accepting of motions filed with an application or emerging from interrogatories with respect to information where confidentiality

[137] See Gordon Kaiser and Bob Heggie, "Developments in Public Utility Law" in Kaiser and Heggie (eds.), *Energy Law and Policy* (Carswell: Toronto, 2011), at pages 153-55.

protection is routinely denied or allowed. Implementation of this process might well require further adjustment to Section 28 of Rule 001.

4.2.3. *Hearings*

As already described, the *AUC Act* deals specifically with the issue of oral representations. Where the Commission is obliged to hold a hearing because its decision or order "may directly affect the rights of a person",[138] by virtue of section 9(4), this does not include the right to make oral representations as long as the Commission "affords … an adequate opportunity to make representations in writing."

This provision is by no means an exemplar of clarity. Does the making of representations simply involve the making of submissions and arguments based on the evidence, or does it extend to the presentation of evidence and cross examination on that evidence? Even where the provision is triggered, does it still leave the Commission with a discretion to nonetheless allow oral "representations"? On its face, it also seems to be limited in its application to those affected directly by an application and not to the applicant in the proceedings. Does this mean it allows for a lack of symmetry as between applicants and those affected directly by that application, with the former entitled to make oral representations and the latter not? Does it by necessary inference exhaust the Commission's capacity to proceed by written rather than oral processes, or do the Commission's section 76 (1)(e) powers to make "rules of practice governing [its] procedure and hearings" include the capacity to deal further with the issue of written as opposed to oral hearings?

While there are no immediately obvious answers to any of these questions, it would be surprising if a reviewing court did not afford the Commission a margin of appreciation in determining whether an opportunity to make written submissions was an adequate vehicle for making representations. This likelihood increases where the Commission has been responsive to any contrary arguments that, in the circumstances, an oral hearing was required. In other words, the subsection would seem to admit of an element of discretion or judgment on the part of the Commission. It is also unlikely that a reviewing court would hold that the subsection by necessary implication exhausted the Commission's rule-making capacities as to the use of written rather than oral processes. In fact, in crafting its *Rules of Practice*, the Commission has included a very general provision respecting oral and written hearings:

> 35.1 The Commission may conduct written hearings and oral hearings.

While this Section does not give any guidance as to the criteria on which a choice between written and oral hearings should be made, it is hard to conceive of a court striking such a provision down on the basis that it could be applied in such a manner as to violate the principles of procedural fairness.

[138] Section 9(2).

More generally, in a regulatory context somewhat removed from a truly adjudicative proceeding, it is highly likely that a reviewing court, confronted by a rule or ruling to the effect that proceedings be conducted in writing rather than orally, would apply the holding of the Supreme Court of Canada in *Baker*,[139] and rule that an oral hearing was not legally necessary. The only qualification would be that the rule or ruling should not be so absolute as to preclude access to an oral process, such as where it might be critical or essential to resolve issues of credibility,[140] or in situations of lack of participatory capacity with respect to written proceedings.

4.2.4. *Interrogatories*

Interrogatories or "Information requests" (as they are described in Section 24 of Rule 001), along with the Commission's Minimum Filing Requirements, are an integral part of the Commission's discovery or disclosure regime. Under Section 24.1, they may be used to

(a) clarify any documentary evidence filed by the other party;
(b) simplify the issues;
(c) permit a full and satisfactory understanding of the matters to be considered; or
(d) expedite the proceeding.

There is no doubt that the use of Information requests has been one of the major causes of delay in the processing of applications and, in many instances, "issue creep."

Certainly, adequate disclosure of or access to relevant information is one of the most important underpinnings of the duty of procedural fairness, and is an accepted component of utilities regulation proceedings.[141] Affected parties are entitled to access to the proofs and arguments being advanced against their position. However, it is not an absolute or unqualified right; the extent of the entitlement varies with context.[142]

In our Report, the Committee makes several recommendations for changes with a view to narrowing the opportunities for Interrogatories - rigorous substantive scoping of applications at an early stage of the application process, active case management throughout the process, stricter enforcement of the bases for information requests set out in section 24, removal of

[139] *Supra*, note 76, at paras. 33-34.
[140] See e.g. *Khan v. University of Ottawa* (1997), 34 OR (3d) 535 (CA). In its representations to the Committee, ATCO listed a number of considerations that might be relevant to the determination of whether to allow an oral hearing or part of a hearing: the contents of the Issues List, the scope of the proceeding, materiality, complexity of the topic (such as where highly academic evidence was being introduced), the need to develop the record through oral testimony, or the level of public concern.
[141] See Gordon Kaiser and Bob Heggie, "Developments in Public Utility Law", *supra*, note 137, at pages 155-63.
[142] *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 SCR 809, at para. 89, rejecting in a correctional setting, the application of the full disclosure regime applicable in criminal proceedings as established in *R. v. Stinchcombe*, [1991] 3 SCR 326.

multiple rounds of information requests, and, where appropriate, in-person, cross-examination as a surrogate.

Given the nature and complexity of rate-setting exercises, procedural design providing access to relevant information is itself a complex, situation sensitive exercise. In the face of a carefully considered Commission response to these recommendations and particularly having regard to the principles of proportionality, it is unlikely that the Alberta Court of Appeal would second-guess the Commission's adoption of a regime designed to avoid abuse, regulatory lag, and issue creep

4.2.5. *Cross-Examination*

Almost fifty years ago, in *Re County of Strathcona No. 20 and MacLab Enterprises*,[143] Johnson JA, of the Alberta Supreme Court, Appeal Division, held that an entitlement to cross-examine witnesses was not an immutable requirement of natural justice (now procedural fairness). Provided a party to administrative proceedings was "afforded an equally effective method of answering the case made against him, … the requirements of natural justice will be met."[144] This statement was made in the context of an adjudicative tribunal as opposed to a regulatory agency such as the Commission. However, in the latter context, where a regulatory body "is more concerned with community interests at large, and with technical policy aspects of a specialized subject matter", Estey J, in delivering the 1981 judgment of the Supreme Court of Canada in *Inisfil Township v Vespra Township*,[145] was clear that the requirements of natural justice (including any claim to a right to cross-examine) were even more flexible and context sensitive.

Much more recently, in an energy regulation setting, Dawson JA, delivering the judgment of the Federal Court of Appeal in *Tsleil-Waututh Nation v. Canada (Attorney General)*,[146] affirmed this principle. In so doing, she rejected an argument that, in the context of the National Energy Board consideration of the Trans Mountain Pipeline ("TMP") application, the Board had violated the principles of procedural fairness by denying participants a right to cross-examine TMP's witnesses orally or in-person. Given a range of considerations, the rules of procedural fairness were met by the Board's process of Information Requests. The Federal Court of Appeal accepted that, on the facts, this written process provided the relevant parties with an adequate opportunity to contest the evidence that contradicted their case.

As was the case with the National Energy Board in *Tsleil-Waututh Nation*, as already outlined, both the *AUC Act*,[147] and the Commission's *Rules of Practice*,[148] contemplate the Commission

[143] (1971) 20 DLR (3d) 200 (Alta SC, AD).
[144] *Id*., at pages 203-04.
[145] [1981] 2 SCR 145, at pages 167-68.
[146] *Supra*, note 135, at paras. 242-259.
[147] Section 9(4).
[148] Section 35.

proceeding orally, in writing, or by a combination of both. Certainly, Section 42.3 of the Rules provides as follows:

> A witness may be questioned by or on behalf of a party, a member of the Commission staff or the Commission.

However, this does not necessarily imply that all those presenting evidence must do so and be available for questioning in person. Rather, the provision's operation could be restricted to situations where testimony is given in person, an interpretation informed by the other subsections of Section 42 – Presenting Evidence. Alternatively, the term "questioned" could be read as "questioned either in person or by writing." Under either interpretation, the Commission has discretion as to the process it makes available to participants for contesting the evidence that contradicts their case.

Certainly, situations may arise, as also in the instance of the more general choice between oral and written hearings, where there is an issue of credibility that can be resolved only by testimony in person subject to testing by cross-examination. However, absent such considerations, as in *Tsleil-Waututh Nation*,[149] a reviewing court is very likely to be deferential to any Commission decision that the testing of evidence and submissions be in writing, and not in person by way of conventional cross-examination. This is especially so, where, as in *Tsleil-Waututh Nation*,[150] the regulator has provided reasons for its choice of process.

4.2.6. *Motions*

Whether as part of a regime of more active case management or under amendments to Section 38 of Rule 001,[151] greater structuring of the motions process with a view to more efficient processing of motions is a matter primarily for the Commission. The Court of Appeal would almost certainly not want to micro-manage the rules further refining the process for the making and determining of motions. Here too, considerations of proportionality would support the entitlement of the Commission to allow, for example, for summary determination of motions for which there are ample Commission precedents or that could otherwise be resolved without a full process of written submissions and counter submissions.

4.2.7. *Argument*

The same considerations that apply to a revised Motions regime hold for concluding arguments. There are simply no common law procedural fairness requirements with respect to the details of closing arguments. Moreover, Section 47 of Rule 001 is even more sparse than Section 38 respecting Motions:

[149] *Supra*, note 135, at para. 255.
[150] *Id.*, at para. 248, for the National Energy Board's ruling and the reasons for it.
[151] Puzzlingly, section 38 applies only to Motions made in an oral hearing.

47.1 Arguments must be in the form directed by the Commission.

47.2 No argument may be received by the Commission unless it is based on the evidence before the Commission.

It is open to the Commission to adopt whatever rules respecting argument that it considers appropriate, either in a more detailed Rule or in the application of the current discretion conferred by Section 47 on a case by case basis, ideally as part of the initial process of scheduling the progress of an application. Unless the Commission acts in such a way as to create inappropriate disparities as among the various parties to an application, judicial review on procedural fairness grounds would not be an option.

4.2.8. *Adequacy of the Record*

It is within the discretion of the Commission to determine whether it has sufficient information for its needs. In regulatory proceedings, the law of diminishing returns has considerable purchase. There comes a point where the cost of obtaining more information is more than the likely contributions of that information to a better decision. Ultimately, the pursuit of a perfect record is a snare and a delusion. The Commission and its Panels should take that admonition seriously secure in the confidence that unless it has failed to conduct any inquiry on a statutorily relevant criterion, its determination that the record is sufficiently complete will withstand judicial scrutiny.

4.2.9. *Panel Assertiveness in the Hearing Room*

Intemperate behaviour in the hearing room on the part of a decision-maker may give rise to a challenge based on a reasonable apprehension of bias. While Canadian examples are few,[152] decision-makers, whether sitting alone or as a member of a panel, are expected to refrain from conduct that reveals antagonism towards a party, a party's witnesses, or a party's cause. These authorities should not, however, be read as limiting the extent to which the hearing members of a tribunal or agency can comfortably impose control on the conduct of proceedings as, for example, through a rigorous case management regime. This is especially so where an agency such as the Commission has inquisitorial characteristics and a statutory mandate that emphasises the regulator's own needs.[153] In such a context, the principles respecting unbiassed decision-making do not require those members assigned to a proceeding to refrain from active intervention in the course of a hearing (and, for that matter, pre-hearing). Controlling the proceeding in such a way as to focus on what the Commission considers to be truly relevant to its mandated obligations and concerns is not just the prerogative of the panel members but

[152] However, see e.g. *Canadian College of Business and Computers Inc. v. Ontario (Private Career Colleges)*, 2010 ONCA 856, and *Golomb v. Ontario (College of Physician and Surgeons)* (1976) 12 OR (2d) 73, 68 DLR (3d) 25 (Div. Ct.).

[153] The leading authority on the "relaxed" standards of bias that apply to utilities and regulators remains *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623.

their implicit obligation. Colloquially speaking, the panel members are not expected to rise totally above the fray.

4.2.10. *Decisions*

Nowhere in the applicable primary legislation or the Commission's *Rules of Practice* is there any specific provision requiring the AUC to provide reasons for its decisions.[154] Moreover, *Vavilov* has reaffirmed that, by reference to the principles of procedural fairness, "reasons are not required for all administrative decisions."[155] However, intuitively, it seems unlikely that a court would absolve the Commission from a duty to give reasons either generally or in the context of utility rate-setting proceedings.

There are also two provisions that provide some independent or, at least, supplemental support for a duty to give reasons in such proceedings. Section 29(10) of the *AUC Act* requires the Commission, in response to an application for leave to appeal, to forward to the Alberta Court of Appeal "its findings and reasons for the decision or order." Further, Section 48 of the Commission's *Rules of Practice* makes provision for the correction of errors "in any of its rulings, orders, decisions or directions." Nevertheless, it may well be that these are too slim a basis on which to construct an argument for a necessarily implicit obligation to give reasons. In that case, it will be necessary to consider whether this setting is one of those instances where the common law principles of procedural fairness serve to supply the omission of the legislature and, in the case of the *Rules of Practice*, the Commission itself.

An appropriate starting point for this common law analysis is the majority judgment in *Vavilov*. It details some of the situations in which at common law "written reasons" will be required:

> … those in which the decision-making process gives the parties participatory rights, an adverse decision would have a significant impact on an individual or there is a right of appeal.[156]

The majority also reiterates the justifications commonly advanced for the imposition of a duty to give reasons:

> Reasons explain how and why a decision was made. They help to show affected parties that their arguments have been considered and demonstrate that the decision was

[154] Section 7 of the *Administrative Procedures and Jurisdiction Act*, RSA 2000, c A.3, obliges designated decision-makers to provide the findings of fact on which they based their decisions and reasons for their decisions. However, as already noted, *supra*, note 34, the Commission is not one of the four remaining designated decision-makers. See *Authorities Designation Regulation*, AR 64/2003 (as amended). It might be argued that section 36 of the *GU Act* requiring the Commission to make its various range of orders under that provision "in writing" amounts to an implicit requirement of reasons but that would be a stretch.
[155] *Supra*, note 49, at para. 77.
[156] *Ibid.*

> made in a fair and lawful manner. Reasons shield against arbitrariness as well as the perception of arbitrariness in the exercise of public power.[157]

Moreover, in terms of these rule of law considerations and the earlier recognition of the importance of reasons where there is a right of appeal to the courts (as under the *AUC Act*), "reasons facilitate meaningful judicial review".[158]

It therefore seems inescapable, if the question should ever arise, that the Alberta Court of Appeal would hold the Commission to its regular practice of providing reasons in its decisions and rulings in rate regulation proceedings. Even if there is no common law-imposed obligation to provide reasons for its decisions, there is now a further impetus for the provision of reasons. For the majority in *Vavilov*, and the minority certainly do not take issue with this:

> [R]easons are the means by which the decision maker communicates the rationale for its decision. A principled approach to reasonableness review is one that puts those reasons first.[159]

In other words, reasons provide the lens through which reasonableness review is conducted. When courts conduct reasonableness review, it is now not enough that the decision-maker has reached an outcome that is **justifiable**.

> Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies.[160]

In short, the reasons provided are the basis on which courts must now focus in conducting reasonableness review.

Of course, to the extent that rate regulation decisions reach the Alberta Court of Appeal by way of an appeal on law and jurisdiction following the granting of leave, the standard of review will be that of correctness for pure questions of law or questions of law that are readily extricable from findings of mixed fact and law.[161] That suggests the possibility that reviewing courts will engage in wider ranging evaluation of the decision than would be the case under

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[157] *Id.*, at para. 79.
[158] *Id.*, at para. 81.
[159] *Id.*, at para. 84.
[160] *Id.*, at para. 86.
[161] Given the strength of the privative clause in section 30 of the *AUC Act* and the confining of access to the Court of Appeal to questions of law and jurisdiction, there would appear to be no other way of seeking judicial review on issues of fact or questions of mixed law and fact from which a pure question of law is not readily extricable. However, Professor Nigel Bankes in "Statutory Appeal Rights in Relation to Administrative Decision-Maker Now Attract an Appellate Standard of Review: A Possible Legislative Response", January 20, 2020, online: http://ablawg.ca/wp-content/uploads/2020/01/Blog_NB_Vavilov.pdf, referencing both the majority (paras. 50-52) and minority (para. 252) judgments in *Vavilov*, posits situations where there can still be access to an application for judicial review even in the face of a statutory right of appeal thereby opening the possibility for fact and mixed law and fact-based review. Our sense is that such situations will be exceptionally rare especially given the palpable intention of section 30 to restrict access to judicial scrutiny to the statutory appeal route.

reasonableness review. If so, self-preservation would certainly counsel in favour of the Commission in its reasons taking the opportunity to provide the Court of Appeal with the clearest possible explanation of why it reached the various determinations on all questions of law that are the underpinnings of its overall conclusions in rate regulation proceedings.

More generally, *Vavilov* provides a road map for agencies on how to write reasons that will fulfill the objectives of that obligation. These lengthy portions of the judgment in *Vavilov* are very much a manual for good decision-writing. They should be compulsory reading for all administrative decision-makers. This includes the Commission given the criticism that some decisions are far too prolix and could be condensed without any sacrifice in terms of quality or the requirements of the common law. Of particular concern to some of those responding to our invitation for submissions is the detailed setting out of every argument made during a hearing and lengthy undigested recitations of the facts. The majority judgment in *Vavilov* shows full awareness of such an over-reaction to the existence of a duty to provide reasons:

> Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" … or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion". To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice.[162]

This should provide considerable reassurance for any agency or tribunal with an inclination to overreach in terms of what must be included in any set of reasons. What is to be guarded against is a

> … failure to meaningfully grapple with key issues or central arguments raised by the parties.[163]

4.3. Other Issues

4.3.1. *Time Limits*

The Commission's ability to set time limits for the completion of an application or various components of the application process would likely come within either or both of the Commission's "necessary" and "incidental" powers under section 8(2) of the *AUC Act*, or authority under section 76(1)(e) to make "rules of practice governing the Committee's procedure and hearings." The only potential source of legal challenge to Commission-imposed time limits would be in situations where the time limits were either too short generally or in a specific case as to amount to a denial of procedural fairness to the applicant or other

[162] *Supra*, note 49, at para. 128, the quotes being from the judgment of the Court in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, at paras. 25 and 16, respectively. See also the minority judgment in *Vavilov*, *id.*, at para. 301.
[163] *Ibid.*

participants. That means that any general Rule or schedule for a specific proceeding imposing time limits should include a sufficiently flexible dispensation power.

4.3.2. *Participatory Rights and Intervention*

The relevant legislation fails to elaborate in any detail as to who may be parties to or interveners in utility rate-setting or rate-related processes. The criterion in the *AUC Act* for participatory rights is whether the application "may directly and adversely affect the rights of a person."[164] In the *EU Act*,[165] it is "interested parties", while in the *GU Act*[166] and the *PU Act*, [167] it is "the parties interested". None of these three terms is defined. However, sections 21 and 22 of the *AUC Act*, conferring authority on the Commission to make rules[168] respecting intervener costs, clearly contemplate the granting of intervener participation in the Commission's proceedings. These provisions aside, the only specific recognition of a participatory right is in Schedule 13.1 to the *Government Organization Act*, and its conferral in section 3 of representative status on the UCA.

The Commission's *Rules of Practice* are somewhat more expressive but, even then, not necessarily self-applying. Among those coming within the definition of "party" for the purposes of Rule 001 is

> … a person, other than an applicant, with rights that may be directly and adversely affected by the Commission's decision on an application, who participates in a hearing.[169]

Section 1.1(k)(viii) also defines "party" to include "any other person whom the Commission determines to be a party."

Over the years, there has been much litigation in Alberta (and elsewhere) as to the meaning of these terms and their equivalents in other regulatory agency statutes. As long ago as 1971, the Alberta Supreme Court, Appellate Division in *Consumers Gas Co. v. Alberta (Public Utilities Board)*,[170] held that access to the then Board for "interested parties" should be generously interpreted and not restricted to those with a "proprietary or contractual interest."[171] In the

[164] Section 9(2).
[165] Section 121(1).
[166] Section 36.
[167] Section 89.
[168] Neither the *AUC Act* nor Rule 022: *Rules on Costs in Utility Rate Proceedings* establishes further criteria on which the Commission is to determine applications for intervener status. However, Section 3.1 of Rule 022, does adopt a **costs eligibility** threshold:

> … an intervener who has, or represents a group of utility customers that have, a substantial interest in the subject matter of a hearing or other proceeding and who does not have the means to raise sufficient financial resources to enable the intervener to present its interest adequately in the hearing or other proceedings.

[169] Section 1.1(k)(ii).
[170] (1971) 18 DLR (3d) 749.
[171] *Id.*, at page 760.

same decade, the Court also recognized the value of interventions to the fulfilment of the Board's mandate.[172] Nonetheless, litigation over the meaning and application of statutory standing or status provisions has persisted.

Earlier in this Appendix, on the standard of review for procedural fairness issues, there is an examination of one of the leading authorities on participatory claims in energy regulatory proceedings, the judgment of Stratas JA of the Federal Court of Appeal in *ForestEthics Advocacy Association v. National Energy Board*. There, he emphasized the need for a considerable[173] margin of appreciation for the then National Energy Board's interpretation and application of the statutory standards for participation in its proceedings as either an intervener or a commenter.[174]

However, this is not necessarily reflective of the approach of the Alberta courts to the interpretation of such provisions in regulatory statutes, though it is noteworthy that, at times, the Alberta Court of Appeal has drawn a distinction between the attribution of meaning to standing provisions (appealable as questions of law), and the application of the chosen standard to the facts (not subject to appeal as primarily questions of fact or mixed law and fact).[175]

To the extent that this bifurcation of the standing to participate issue will continue in the wake of *Vavilov*, it will presumably have the effect of subjecting the statutory interpretation aspects of standing or intervention decisions to appellate scrutiny on a correctness standard,[176] and rendering the application of the statutory provisions to the facts of the particular proceeding immune from judicial scrutiny as not coming within the scope of the appeal provision in the *AUC Act*.

As illustrated by *ForestEthics*, regulatory regimes respecting standing and intervener status might also differentiate in the level of permissible engagement. In that instance, the National Energy Board had established a process under which it allocated recognized participants into

[172] See *Green, Michaels & Associates Ltd. v. Edmonton (City)* (1979) 94 DLR (3d) 641 (Alta. CA), at para. 25.
[173] *Supra*, note 41.
[174] Stratas JA, however, declined to deal with the argument that the National Energy Board intervener status regime was unconstitutional for violation of section 2(b) of the *Charter* and its guarantee of "freedom of expression." The applicants were precluded from seeking judicial review on that ground as they had not put their constitutional challenge to the NEB: *id.*, at para. 42.
[175] For discussion, see David J. Mullan, "Regulators and the Courts: A Ten Year Perspective" (2014) 1 *Energy Regulation Quarterly* 13, at pages 15-19.
[176] See also *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 SCR 6. There, despite what the majority characterized as a broad discretion as to who could make a "complaint", the Canadian Transportation Commission had made an unreasonable decision in subjecting the complainant to a status test that could never be met and by the automatic application in a regulatory setting of the test for public interest standing in judicial review proceedings. It now remains to be seen whether in a post-*Vavilov* world, the Alberta Court of Appeal would classify any such "error" on the part of the Commission as one of law subject to appeal or how, within any such appeal, supposedly on a correctness standard, the Court of Appeal would factor in the "discretionary" nature of the Commission's authority.

one of two categories – those with full intervener status, and those restricted to filing a comment. In the context of the Commission's rate-setting authority, that would permit the Commission to differentiate between those whose rights may be directly and adversely affected, and other interveners as to the extent of their participation. What also seems clear (and is relevant to some of the criticisms coming from the regulated utilities) is that the Commission, as part of assertive case management, would be entitled to clamp down on repetitious representations from various interveners. In concrete terms, that would justify the Commission rejecting Consumers' Coalition of Alberta and other intervener evidence and submissions addressing matters canvassed by the statutorily sanctioned UCA. More generally, the Commission would be legally justified in reining in any attempt on the part of any party (applicant, party as of right, or intervener) to insinuate issues that are outside the bounds of any scoping exercise.[177]

4.3.3. *Costs*

4.3.3.1. Statutory Authority

Section 11 of the *AUC Act* confers on the Commission all the powers of a judge of the Court of Queen's Bench with respect to "the payment of costs." As well, section 21(1) expands on the Commission's authority to order costs:

> The Commission may order by whom and to whom its costs and any other costs of or incidental to any hearing or other proceeding of the Commission are to be paid.

Section 21(2) then authorizes the Commission to make rules respecting the payment of costs to an intervener other than a "local intervener" as defined in section 22. (Section 22 authorizes rules for intervener costs in facilities matters.)

4.3.3.2. Rule 022

In Rule 022, the Commission has established a costs regime for utility rate proceedings. Section 21(2) of the *AUC Act* is the primary statutory basis for this Rule. However, to the extent that Rule 022 provides in Section 3.3 that an "applicant can claim costs", that "participant" is defined to include "an applicant", and that the costs criteria in Section 11 apply not just to interveners but "eligible participants",[178] the Rule is not confined to intervener costs as seemingly required by the terms of section 21(2).[179] If so, Rule 022 must find justification, not

[177] Subject, of course, to exceptional circumstances in which the Commission determines that its own needs require an expansion in the scope of its consideration of an application.
[178] For example, Section 8 allowing for interim costs is expressed in terms of "an eligible intervener" while the general cost provision is expressed as applicable to "an eligible participant."
[179] This interpretation finds support in the name change to Rule 022 from *Rules on Intervener Costs in Utility Rate Matters* to *Rules on Costs in Utility Rate Proceedings*. It is also acknowledged by the Commission in Bulletin 2008-16: Draft Revised Rule 022, *Rules on Intervener Costs in Utility Rate Matters* (July 31, 2008), explaining proposed changes to Rule 022. At page 4, it is stated that section 3.3 stating that applicants are eligible to claim costs

just in section 21 but also in section 76(1)(e) and the Commission's ability to make rules governing its "procedure and hearings."[180]

4.3.3.3. Applicant Costs under Rule 022

The question of when under Rule 022, an applicant can claim costs and against whom must take into account Section 12, Liability for costs. It provides that, in an application by a utility, the utility is to pay the costs awarded to an eligible intervener. Where the hearing or proceeding is Commission initiated and is generic in character, the Commission may pay the costs of an eligible participant or direct that the costs awarded be shared by one or more utilities. There is no mention of liability for costs where a utility as applicant makes a claim for costs.

However, the answer to this question is apparently to be found in Section 13.4 of Rule 022 to the effect that the Commission "may state" in a cost order

> … whether an applicant named in the order is authorized to record the costs in its hearing costs reserve account.[181]

In other words, applicants may be allowed to recover any costs assessed in their favour through the rates that they charge their customers.

That seemingly leaves as an open question whether this represents the only vehicle through which applicants can recover their costs. More particularly, do Sections 12 and 13.4 of Rule 022, when read together, have that effect? Or, does the Commission still possess an overriding discretion, by virtue of sections 11 and 21(2) of the *AUC Act*, to respond to an applicant or even an intervener for costs outside the regime established by Rule 022? This question is returned to below.

4.3.3.4. Intervener Costs under Rule 022

As far as interveners are concerned, under section 3.1, general eligibility is contingent on the intervener being or representing a "group of utility customers" that have

> … a substantial interest in the subject matter of a hearing or other proceeding and does not have the means to raise sufficient financial resources to enable the intervener to present its interest adequately in the hearing or other proceeding.[182]

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reflected the Commission's position that it "will continue to allow the prudent costs of a utility to be recovered through rates."

[180] Rule 001, the Commission's *Rules of Practice*, does not contain any provision respecting costs.

[181] See also Section 5.2, dealing with costs on applications for review and variance under Rule 016: *Review of Commission Decisions*.

[182] The effect of this is to leave cost ineligible interveners completely out of the costs regime established by Rule 022.

4.3.3.5. Costs Criteria Applicable to Eligible Interveners and Utilities

Section 11.1, which applies to all eligible participants, conditions the award of costs on their being "in the opinion of the Commission … reasonable and directly and necessarily related to the hearing or other proceedings." As well, the eligible participant must in the opinion of the Commission have

> … acted reasonably in the hearing or other proceeding and contributed to a better understanding of the issues before the Commission.

Section 11.2 then goes on to list nine factors that the Commission "may consider" in "determining the amount of costs" including undue repetition of questions and evidence coming from other participants and a failure to cooperate with other participants in guarding against duplication of questions and evidence. More generally, the Commission is entitled to consider whether the eligible participant

> … engaged in conduct that unnecessarily lengthened the duration of the hearing or other proceeding or resulted in unnecessary costs to the applicant or other participants.

As for the quantum of costs, Section 9.2 of Rule 022 states:

> An eligible participant may only claim costs in accordance with the scale of costs.

That scale of costs is found in Appendix A to Rule 022 and is based on categories and maximum amounts. However, it does provide for the award of greater amounts where

> … an eligible participant can advance persuasive argument that the scale is inadequate given the complexity of the case.

4.3.3.6. Efficiency Concerns with Existing Costs Regime

Several utilities that made submissions to the Committee expressed concerns about the involvement of interveners in the Commission's hearings. It was asserted that there are inadequate disincentives to dragging out the hearing of applications. However, the Committee believes that generally the discipline available to the Commission through diminution in intervener costs awards on the basis of the criteria spelled out in Section 11, and more assertive case management should coalesce to provide a basis on which the Commission's hearings can become more focused on what is truly in scope.

4.3.3.7. Recovery of Full Legal or Regulatory Costs Outside the Scale of Costs Against Another Participant

There remains the question, anticipated above, of whether under Rule 022 or otherwise, the Commission, in addition to reducing or even denying an eligible intervener's or an applicant's costs claim, can also order an intervener or an applicant to pay some or even all of the other's legal or regulatory costs.

Some guidance on this question comes from the 2014 judgment of Fraser CJA in *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*,[183] though it is by no means clear that the other majority justice of appeal or the dissenting justice of appeal supported these elements of her analysis. This case involved appeals from the failure of the Commission to award ATCO the full legal costs of its participation in two generic Commission hearings: Utilities Assets Disposition and Performance Based Reform. In other words, ATCO argued that it was not confined to the Scale of costs established in Appendix A of Rule 022. Rather, the Commission had authority, indeed the obligation to award its full legal costs on the basis of the Commission's costs powers in sections 11 and 21(1) of the *AUC* Act, and a utility's entitlement to recover legal and other regulatory costs that it had prudently incurred.

Fraser CJA held that general authority for Rule 022, as a structuring exercise of the Commission's discretionary powers over costs in rates matters, existed under sections 11, 21, and 76(1)(e) of the *AUC Act*. In doing so, she rejected arguments by ATCO that section 21 applied only to the recovery of costs by the Commission or interveners. It was clear to Fraser CJA that section 21(1) authorized and Rule 022 covered the award of costs to participants as defined to include applicants. Moreover, Section 9.2 of Rule 022 meant that it was a complete code for the recovery of costs:

> An eligible participant may only claim costs in accordance with the scale of costs.

In other words, cost claims by applicants as well as interveners were constrained by the Scale of costs set out in Appendix A in Rule 022. There was no at large residual authority under section 11, section 21(1), or on the basis of an asserted right to recover all of its prudently incurred costs, to award costs to a utility on some other basis or at higher levels than permitted under the Scale of costs.

All this led Fraser CJA to the conclusion that the Commission was not acting unreasonably or, for that matter, incorrectly when it held that Rule 022 provided the framework and the criteria on which the Commission was entitled to base its consideration of ATCO's costs claims in these two generic proceedings. More particularly, it meant that ATCO had no independent entitlement to an award of costs that reflected its full legal and other regulatory costs.

[183] 2014 ABCA 397, 588 AR 134.

In so ruling, Fraser CJA took care to point out that the issue of who should be responsible for costs that the Commission had awarded to ATCO was not before the Court, nor did her judgment in any way speak to the principles on which the Commission should exercise its authority over costs in rate-setting applications as opposed to generic hearings. In other words, she did not deal with the question whether the Commission's authority under Section 13.1 of Rule 022, to order "by whom" costs should be paid, extended to allowing an order that an intervener pay costs to either an applicant or other participant.

In the legislative history of Rule 022, there are indicators that the Commission did not intend that it be available for costs claims by applicants against interveners. In Bulletin 2008-16, it is stated that the

> … rationale for an award of costs in a regulatory proceeding is different from that in a judicial proceeding. A regulatory cost award does not depend on the outcome of the proceeding.[184]

The Bulletin goes on to explain that Section 3.3 of Rule 022 providing that "an applicant is eligible to obtain costs" should be read in the context of the Commission continuing "to allow the prudent costs of a utility to be recovered through rates."[185] From this, it could be inferred that, when Section 12 on Liability for costs addresses only the payment of eligible intervener costs by an applicant utility, and the payment of participant costs by the Commission (or other utilities) in generic hearings, it must be taken to be excluding the possibility of applicants seeking application costs against interveners. This is further underscored by Section 13.4 and its provision for the Commission to allow applicants to record the costs awarded to them in their hearing costs reserve account.

In sum, it is highly likely that for costs to be recovered by an applicant or an intervener against the other, Rule 022 would have to be amended. That, we do not recommend.

4.3.4. *Consolidated-Bathurst Discussions*

In *Vavilov*, the Court rejected an argument to the effect that the time had come to recognize that inconsistency could under certain circumstances constitute a free-standing ground of judicial review on a correctness standard.[186] This was so even in the case of "persistent discord and internal disagreement"[187] on an issue in the jurisprudence of an administrative decision-maker. The majority did, however, concede that the existence of internal conflicts could be a factor in the application of "the more robust form of reasonableness review" to be elaborated later in the judgment.[188] In so doing, they acknowledged that a failure on the part of an

[184] Draft Revised Rule 022, *Rules on Intervener Costs in Utility Rate Matters* (July 31, 2008), at page 1.
[185] *Ibid*., page 4.
[186] *Supra*, note 49, at paras. 71-72.
[187] *Id.*, at para. 71.
[188] *Id.*, at para. 72.

administrative tribunal or agency to resolve inconsistencies in its decision-making could represent a threat to the rule of law.[189] This could give rise to arbitrariness and presumably judicial review in certain situations on the basis of unreasonableness. However, the majority also put the onus on the "internal administrative processes" of agencies as the primary vehicle for the promotion of consistency.[190]

Once again, this gives legitimacy to various devices that agencies deploy to encourage consistency in the treatment of issues that are material to their mandate. Outside of the context of particular applications or hearings, full board (or institutionalized) meetings to discuss material issues of substance or procedure on which panels have differed, with a view to finding common ground, provide one such mechanism. Chair-issued Guidelines are also, within limits, a permissible device.[191]

Moreover, even in the context of an already filed application, such discussions are permissible within the constraints recognized in *IWA v. Consolidated-Bathurst Packaging Ltd.*[192] and *Tremblay v. Québec (Commission des affaires sociales)*.[193] Prominent among those constraints is the admonition that the initiative should come from the sitting member or panel, and not be dictated by the Chair or other members. At such meetings, it is also recognized that the insinuation of new evidence is impermissible and that there should be no interference with the sitting panel's or member's fact-finding. As for matters of policy and law, they are legitimate matters for discussion provided that

> … the parties are given a reasonable opportunity to respond to any new ground arising from such a meeting.[194]

Provided, however, that the Commission operates within those constraints, as the majority judgment of Gonthier J in *Consolidated-Bathurst* makes clear, significant operational advantages can result from internal consultations of this kind:

> The institutionalization of the consultation process adopted by the Board provides a framework within which the experience of the chairman, vice-chairmen and members of the Board can be shared to improve the overall quality of its decisions. Although respect for the judicial independence of Board members will impede total coherence in decision-making, the Board through this consultation process seeks to avoid inadvertent contradictory results and to achieve the highest degree of coherence possible under these circumstances. An institutionalized consultation process will not necessarily lead

[189] *Ibid*.
[190] *Ibid.*
[191] *Tharmotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198, [2008] 1 FCR 385.
[192] [1990] 1 SCR 282.
[193] [1992] 1 SCR 752.
[194] *Supra*, note 192, at p. 339.

> Board members to reach a consensus but it provides a forum where such a consensus can be reached freely as a result of thoughtful discussion of the issues at hand.[195]

Given *Vavilov*'s placing of trust in regulatory agencies for the elimination of internal inconsistencies, both procedural and substantive, this statement provides a legally appropriate methodology for the fulfilment of that responsibility. This is underscored by the fact that the majority in *Vavilov* specifically acknowledged *Consolidated-Bathurst* plenary meetings as one of several effective tools in the fostering of coherence and avoiding conflicting results.[196]

4.3.5. *Member Training*

Mandatory training for members of the Commission would not give rise to any legal issues. Section 8(2) of the *AUC Act* and its conferring of "necessary" and "incidental" powers on the Commission provides clear warrant for the adoption of such a regime. There is no credible argument that making participation mandatory would impinge on the independence of members.

[195] *Id.*, at page 340.
[196] *Supra*, note 49, at para. 131, citing *Consolidated-Bathurst*, *id.*, at pages 324-28.

Appendix IV
Recommendations of the AUC Committee on Procedures and Processes

Assertive Case Management

Recommendation #1
The Committee recommends that the AUC apply an overarching, assertive case management approach to the development and implementation of the Commission's procedures and processes and to the implementation of the Committee's specific recommendations.

Recommendation #2
In the context of specific proceedings before the Commission, it should be recognized that responsibility for implementing assertive case management, particularly with respect to Scoping and Scheduling, rests with the Commission members assigned to process the relevant application, led by the Panel Chair and assisted as appropriate by Commission staff.

Scoping

Recommendation #3
The Committee recommends that the Commission issue Directions on Procedure for each application that include a preliminary List of Issues, and that a date for filing written comments on the List of Issues be fixed in the Schedule for that proceeding. Thereafter, there should be an onus on the parties to persuade the Commission that there are exigent circumstances that make it appropriate to vary the List of Issues, based on the record to date in the particular proceeding.

Recommendation #4
The Committee recommends that the Commission apply the List of Issues as the framework for assessing the relevance of subsequent steps in each proceeding, such as interrogatories and motions to amend or expand the List of Issues.

Scheduling

Recommendation #5
The Committee recommends that the Commission formalize the issuance of Directions on Procedure, including a schedule that establishes dates for each step of the proceeding.

Time Limits

Recommendation #6
The Committee is not recommending that there be legislative change to implement time limits. However, the Committee recommends that the Commission retain its current performance standards for record development (e.g. 143-205 days for Full Process; 80% of the time) and disposition documents (90 days from close of the record; 100% of the time), and strictly adhere to them.

Recommendation #7
The Commission's commitment in Section 2.2 of Rule 001 to the "expeditious and efficient determination on the merits of every proceeding" is more appropriately achieved through a rigorous scoping of issues and scheduling of proceedings as recommended in Sections 5.3 and 5.4 of this Report than by the imposition of statutory time limits.

Confidentiality

Recommendation #8
The Commission should build on its proactive resolution of the confidentiality issue and aggressively apply case management to enhance the efficiency of its processes in this respect.

Hearings

Recommendation #9
There should be a strong presumption that all Commission rate-setting hearings be conducted in writing, subject to the applicant or a party demonstrating to the satisfaction of the Commission, or the Commission determining in view of its own needs, that a hearing or part thereof be oral.

Recommendation #10
Issues as to whether a hearing should be written, oral, or partly oral and partly written should be determined in the context of the recommended scoping of issues (Recommendation #3) and scheduling (Recommendation #5), within an assertive case management process.

Interrogatories

Recommendation #11
The Committee recommends that the Commission:

1. Strictly limit interrogatories to matters within the List of Issues as settled by the Commission for each specific proceeding (Recommendation #3).

2. Include in the schedule for each proceeding (Recommendation #5) fixed dates for filing interrogatories, responses to interrogatories, motions to compel further and better responses, and the issuance of Commission rulings on such motions.

3. Adopt the practice of other regulators of processing motions relating to interrogatories in writing, using a Word document template.

4. Not permit interrogatories to parties that are not adverse in interest to the requesting party.

5. Hold technical meetings, including AUC staff or Commission members, to discuss potential interrogatories questions (particularly on technical issues), including relevance, materiality, and proportionality, to reduce the number and expanse of interrogatories.

6. Enforce the interrogatory parameters established in the ATCO Gas 2008 IR Ruling. Each interrogatory must contain justification of the value of the requested information to the Commission Panel in considering the particular application, including:

    a. Implementing a materiality filter: what is the amount in question on the issue, and what will it cost to deal with it?

    b. Applying a proportionality test: is the effort involved in the preparation of a "full and adequate response" to the interrogatory, and in dealing with the response in evidence, justified by the probative value of the information that is requested?

7. In written hearings, permit additional rounds of IRs only where determined to be absolutely necessary, and consider permitting oral cross-examination on IR responses where it appears to be more expeditious than additional rounds of IRs.

8. In oral hearings, establish a presumption that there will be only one round of Interrogatories, with follow up questions as necessary in cross-examination.

9. Penalize abuse or inefficient use of the interrogatory process through reduction of costs allowed to utilities and eligible interveners.

Cross-Examination

Recommendation #12
The Committee recommends that the Commission maintain and increase its focus on reduction of regulatory burden in determining whether to allow cross-examination.

Recommendation #13
The Commission should provide for cross-examination only where, in its considered view, it would be necessary or worthwhile in the circumstances of the case. An opportunity for cross-examination should only be provided when the Commission determines that it is necessary for it to discharge its mandate. It should limit cross-examination to specific evidence. Most importantly, however, the Commission should engage in assertive case management in the hearing room (see Recommendation #21). Cross-examination should be limited to areas and issues that the Commission considers to be necessary to inform its judgment on the application before it.

Recommendation #14
Aids to cross-examination should be strictly controlled in accordance with the Commission's *Rules of Practice* and stated policies.

Recommendation #15
Non-expert opinion evidence should be discouraged through reduction of costs allowed to utilities and eligible interveners.

Motions

Recommendation #16
The Commission should establish a schedule for written motions in the Directions on Procedure (Recommendation #5), including dates by which the decisions on the motions are to be issued.

Recommendation #17
The Commission should enforce the ATCO Gas 2008 IR Ruling and implement materiality and proportionality standards for requested information. Parties requesting information, and bringing motions for further and better responses to such requests, bear the onus of persuading the Commission that the information requested is not only relevant but material, and that the time required to generate the response does not exceed the probative value of the information requested.

Recommendation #18
The Commission should implement a rebuttable presumption of *stare decisis* in respect of previous rulings on similar motions.

Argument

Recommendation #19
The Committee recommends that the Commission adopt a presumption for efficient and expeditious oral argument to be delivered within 3 business days of the close of the hearing record, using the top down/bottom up format. This presumption should be varied only in exceptional circumstances with appropriate justification.

Recommendation #20

The Committee recommends that the Commission adopt an assertive approach to management of oral argument including utilization of time limits, stipulation of topics on which it will hear argument, or other measures as it deems necessary or advisable in pursuit of the goal of improving efficiency and expedition.

Adequacy of the Record

Recommendation #21
The Committee recommends that the Commission assess the adequacy of the record in each proceeding by reference to the List of Issues (Recommendation #3) and that it resist attempts to persuade it that more information is necessarily better.

Assertiveness

Recommendation #22
The Committee recommends, consistent with the focus of this Report on assertive case management, that the Commission endorse assertiveness not only in the hearing room but generally throughout the process as a virtue that should inform all rate-setting and rate-related proceedings.

Decisions

Recommendation #23
The Commission should adopt a template for decision-writing that is issue-driven.

Recommendation #24
The Commission should provide appropriate training to its members and staff on issue-driven decision-writing.

Member Training

Recommendation #25
The Committee recommends that members of the AUC be provided with training on the nature of the Commission's role as a quasi-judicial tribunal and on the principles of procedural fairness and the elements of conducting a quasi-judicial process, particularly with respect to balancing procedural requirements with the need to conduct an effective and efficient process intended to enable the Commission to fulfil its mandated responsibilities. "Refresher" training programs for members should also be available periodically. Such training should include reference to Appendix III: Legal Framework and Risk Assessment, particularly as it relates to the minimal legal risks of assertive case management.

Plenary Meetings

Recommendation #26
The Commission should formally recognize the benefits of plenary meetings to discuss generic issues that arise in proceedings before individual Panels, within the terms of the guidance on such meetings provided by the Supreme Court of Canada in the *Consolidated-Bathurst* and *Vavilov* decisions.

Intervention

Recommendation #27
The Committee recommends that the Commission should, through its case management powers, more assertively hold all parties to the scoped issues and guard against repetitious evidence and submissions.

Recommendation #28
The Committee recommends that the Commission should, in appropriate cases, continue to recognize and apply the extensive discretionary authority that it possesses under Section 11 of Rule 022, *Rules on Costs in Utility Rate Proceedings*, to deny or reduce the cost claims of both utilities and eligible interveners.

Costs

Recommendation #29
The Committee recommends that the Commission rigorously apply to costs claims in rate-setting and rate-related proceedings the considerations governing eligibility and quantum of recovery set out in Section 11 of Rule 022, *Rules on Costs in Utility Rate Proceedings*.

Rules Review

Recommendation #30
The Committee recommends that the Commission review Rule 001: *Rules of Practice* with a view to supporting implementation of the Committee's recommendations, as the Commission may deem appropriate.