

# Ontario Energy Board Modernization Review Panel

FINAL REPORT | OCTOBER 2018

<b>Introduction: The Evolving Role of the Ontario Energy Board</b>	<b>4</b>
<b>Engagement Process</b>	<b>6</b>
Phase One	6
Phase Two	6
Phase Three	7
<b>The Challenges Ahead</b>	<b>8</b>
<b>Regulatory Excellence</b>	<b>10</b>
<b>Recommendations</b>	<b>12</b>
<b>Analysis and Comments</b>	<b>14</b>
Independence and Accountability (Recommendations #1, #3)	14
Certainty (Recommendations #2, #5)	16
Effectiveness (Recommendations #4, #8)	18
Efficiency (Recommendations #6, #7)	19
<b>Conclusion</b>	<b>21</b>

<b>Appendix A: Terms of Reference</b>	<b>22</b>
<b>Appendix B: Selected Works Consulted</b>	<b>27</b>
<b>Appendix C: Discussion Notes</b>	<b>30</b>
Discussion Theme: OEB Mandate and Activities	34
Discussion Theme: Disruption and Innovation	36
Discussion Theme: Governance Framework	37
Discussion Theme: Stakeholder Relationship	38
Discussion Theme: Relationship with Government	40
Discussion Theme: Regulatory Excellence and Benchmarking	41
Discussion Theme: Resourcing	42
<b>Appendix D: What We Heard</b>	<b>44</b>
Mandate and Activities	48
Disruption and Innovation	50
Governance Framework	52
Stakeholder Relationship and Process	54
Relationship to Government	56
Regulatory Excellence and Benchmarking	58
Resourcing	61
Panel Members	63

# 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.<sup>1</sup>

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.<sup>2</sup> 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.

<sup>1</sup> 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

<sup>2</sup> 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.<sup>3</sup> 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<sup>4</sup> 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

<sup>3</sup> Appendix B: Selected Works Consulted

<sup>4</sup> 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.<sup>5</sup>

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.

<sup>5</sup> 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.<sup>6</sup>

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.

<sup>6</sup> "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,<sup>7</sup> 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

<sup>7</sup> 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

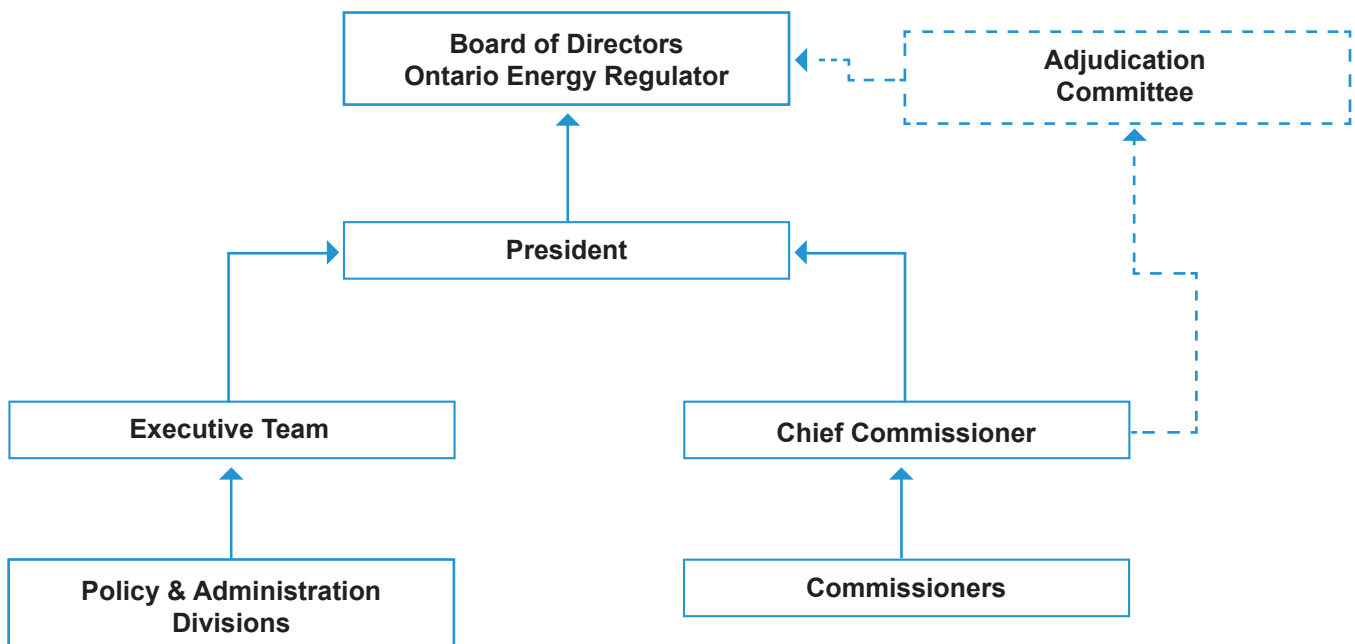
The analysis and comments below are intended to support the effective implementation of our recommendations and help achieve their intended outcomes.

## 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),<sup>8</sup> the British Columbia Utilities Commission (BCUC),<sup>9</sup> and the Office of Gas and Electricity Markets (Ofgem)<sup>10</sup> 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](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](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  
Minister of Energy, Northern Development and Mines

Date: 28<sup>th</sup> August, 2018

# 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<sup>11</sup> 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<sup>12</sup> 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

<sup>11</sup> 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.

<sup>12</sup> 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.”<sup>13</sup>

The OECD has outlined 7 principles for the governance of regulators,<sup>14</sup> 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.*<sup>15</sup>

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](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<sup>16</sup> 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.<sup>17</sup>

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

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

<sup>17</sup> 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<sup>18</sup> (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)<sup>19</sup> 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.<sup>20</sup> The Utilities Consumer Advocate<sup>21</sup> (UCA) holds mandate for consumer education and advocacy.

The Public Utilities Board of Manitoba (PUB)<sup>22</sup> "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.<sup>23</sup>

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

<sup>23</sup> 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.<sup>24</sup> Regulators in California are exploring models like locational net benefits to facilitate the transition to a distributed energy future.<sup>25</sup> In Great Britain, Ofgem established the RIIO framework, which “encourages[s] a more flexible and forward looking approach.”<sup>26</sup> Ofgem’s framework does not differentiate between capital and operational expenditures in determining utility rate-of-return, which avoids debate over expenditure types<sup>27</sup> 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)<sup>28</sup> 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<sup>29</sup> 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,<sup>30</sup> 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).<sup>31</sup>

**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 consider 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.<sup>32</sup> 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.<sup>33</sup>

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.<sup>34</sup> The federal government has recently introduced legislation to reform the NEB and require the new regulator to establish participant funding.<sup>35</sup>

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.<sup>36</sup>

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/prcptn/hrng/pplngprcpt-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.<sup>37</sup>

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.<sup>38</sup>
- **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

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

<sup>38</sup> [https://www.oeb.ca/oeb/\\_Documents/About the OEB/Memorandum\\_of\\_Understanding\\_OEB\\_Ministry.pdf](https://www.oeb.ca/oeb/_Documents/About%20the%20OEB/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.<sup>39</sup>

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

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.<sup>42</sup>

**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”<sup>43</sup> has been made, many of the issues identified continue to be of concern to some stakeholders.<sup>44</sup> Expressed concerns include lack of transparency; increasing regulatory burden; concern with timeliness; lack of cost-benefit analysis;<sup>45</sup> and lack of “an outcome based approach”<sup>46</sup> when it comes to setting regulation.

The Annual Report<sup>47</sup> 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)<sup>48</sup> 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,<sup>49</sup> 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](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](https://www.aer.gov.au/system/files/AER%20Annual%20Report%202016-17.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).<sup>50</sup> Elsewhere, regulators, such as the California Public Utilities Commission and the Australian Energy Regulator<sup>51</sup> 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](http://www.auc.ab.ca/regulatory_documents/Pages/Administration.aspx); BC: [http://www.bcuc.com/Documents/AnnualReports/2017/DOC\\_48965\\_BCUC\\_AR20152016\\_FINAL.pdf](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](https://www.aer.gov.au/system/files/AER%20Annual%20Report%202016-17.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 30<sup>th</sup> 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*

Richard Dicerni  
Chair

*Original signed by*

Cara Clairman  
Panelist

*Original signed by*

Bruce Campbell  
Panelist

## Mandate and Activities

### Synopsis

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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.

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### 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

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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.

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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

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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.

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### 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

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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.

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### 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

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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.

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### 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

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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.

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### 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

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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.

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### 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.





