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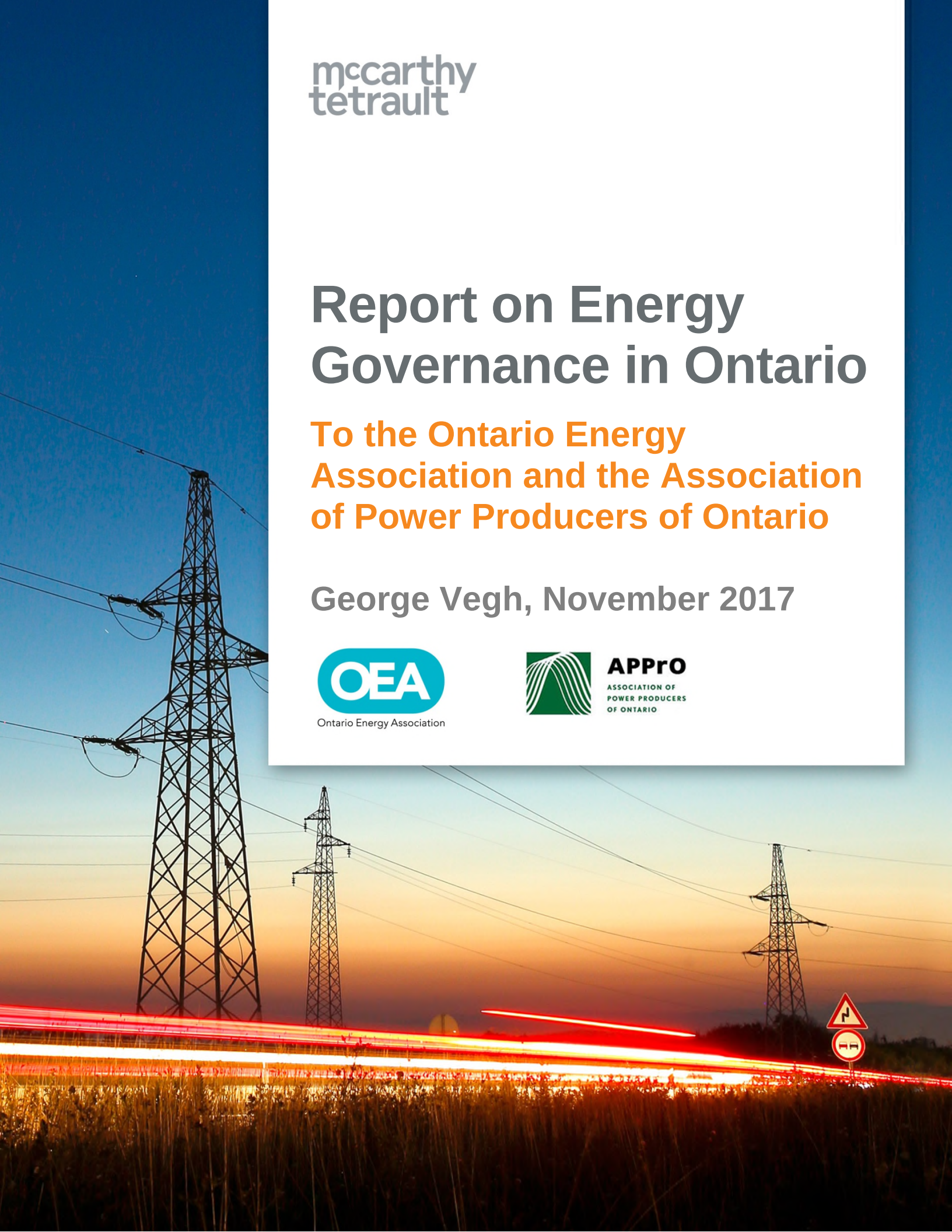
Report on Energy Governance in Ontario

To the Ontario Energy Association and the Association of Power Producers of Ontario

George Vegh, November 2017

OEA
Ontario Energy Association

APPrO
ASSOCIATION OF POWER PRODUCERS OF ONTARIO



Introduction and Summary of Conclusions

This report addresses how energy decisions are governed in Ontario and proposes solutions to improve it. The main conclusion in this report is that energy agencies have not provided the check and balance function that regulators typically perform in other jurisdictions. Rather, with some exceptions in relation to some types of decisions, agencies largely implement government policy and communications goals. Rather than operating as providing a fact-based constraint on political decision making, agencies are often the partner and implementer of political decision making.

While it is always tempting to argue that agencies should simply exercise their authorities more independently, it is more fruitful, in my view, to acknowledge the lack of agency independence and consider improvements to governance that takes this into account. Because having checks and balances in major energy policy areas, it is important to consider alternative approaches to agency decision making and to address governance in the sector using alternative oversight mechanisms.

The timing is particularly for a reconsideration of governance in the Ontario energy sector.

First, Ontario, like other western jurisdictions, is undergoing transformative change in its resource mix and faces opportunities and challenges from emerging and disruptive technologies. Managing this change for the benefit of the province and its ratepayers requires long term and fact-based decision making.

Second, private sector investment will be required to meet the province's energy goals. Improved governance creates an environment that permits long term investment decisions to be made on their own merit and lessens the extent to which financial premiums for political risk are necessary.

Finally, unconstrained government control over energy decision-making has reached levels never experienced in Ontario. Through the Fair Hydro Plan legislation, the government has effectively taken over fixing electricity bills for most customers.[1] This has put the government in virtually complete control over electricity pricing.

As well, the Government's LTEP released on October 26, 2017 was accompanied by Directives to both the Ontario Energy Board (the "OEB" or the "Board") and the Independent Electricity

[1] Ontario Fair Hydro Plan Act, 2017, S.O. 2017, CHAPTER 16, SCHEDULE 1, s. 7.

System Operator (the “IESO”) requiring each of them to develop implementation plans in respect of a number of LTEP initiatives (16 for the OEB and 14 for the IESO). The Directives to both agencies require their implementation plans to “comprehensively detail the key implementation milestones for each initiative, provide sufficient detail on process and timing, and articulate intended outcomes.” The agencies are statutorily required to submit these plans to the government for approval. As a result, the government will essentially be directing the priorities of the agencies and engaging in ongoing oversight and supervision of their policy initiatives.

This expanded role for government creates the need for a principled governance model under which the government and the agencies (which still continue to have independent statutory mandates) should work together.

This report recommends that energy governance should be improved to better reflect the principles of transparency, accountability and integration. This involves, at a minimum, that the process for making all agency policy instruments (including LTEP implementation plans) include a public record of all communications and facts put before the agency, including all communications with government. This will address the credibility and independence of agency decision making.

Even with this change, as a practical matter, there are limitations on the ability and willingness of Ontario energy agencies to play a leading role in improving transparency, accountability and integration of decision making in the sector. To the contrary, agency actions themselves are in need of public oversight to the same degree and for the same reasons as decisions made directly by the government.

It is therefore necessary to have these oversight functions provided elsewhere. This report recommends that, where feasible, all major proposed energy policy decisions (whether made by the government or the agencies) should be required to undergo a rigorous and independent cost benefit analysis. Given the agencies’ lack of independence, one has to look elsewhere for this oversight. An ideal candidate would be an independent officer of the Legislature, here termed the “Energy Information Officer”, or “EIO”. The EIO, like other legislative officers, would have its own staff and statutory mandate. The EIO would report to the Legislature prior to a decision being made. After the report, the responsible decision maker (whether the government or the agency) would continue to have authority to determine over how to proceed. While there

are other potential sources of review, such as Treasury Board, none of them have the independence that would permit a review that can include conclusions that the government would not want to hear.

In summary, my conclusions and recommendations are as follows:

1. The OEB and the IESO should be required to maintain a complete record of all communications and information that is relied upon in making all non-adjudicative decisions, including all communications with government.

2. The criteria for determining when the OEB uses non-adjudicative decision making (through rules, codes and guidelines) and the IESO uses instruments other than market rules (e.g. market manuals and other instruments) should be clarified and these instruments should only be used when they clearly do not involve a delegation or transfer of decision making authority from an OEB panel or the IESO Board, respectively.

3. All major energy policy decisions whether made by the government or an agency should be required to undergo rigorous cost benefit analysis by an independent officer of the Legislature. These decisions include Long Term Energy Plans.

4. Governmental objectives, whether used for the Long Term Energy Plan or for other areas of regulatory implementation, should state broad social, economic and environmental goals and should not contain prescriptive directions for the regulatory agencies to implement.

5. Where feasible, all procurements should go through a competitive process to achieve specified objectives (such as reliability, economic and environmental performance) and should be technologically neutral.

PART I - WHAT IS GOVERNANCE AND WHY IS IT IMPORTANT?

We are said to be living in a regulatory state.

What differentiates the regulatory state from more traditional ideas of "government" is that the regulatory state attempts to supplement command and control methods of government – legislation, taxation, public ownership, etc. - with a rule based approach to incenting preferred social outcomes. Under this approach, the role of the government is said to be transitioned from dictating and implementing specific outcomes to instead providing policy direction with rules developed by independent agencies and implemented by civil society. The government is to be "steering" the ship of state, not "rowing" it. The rowing is carried out by individuals and private sector companies following broad policies set by governments and rules set by regulatory agencies.[2]

Governance is about how those rules are developed and implemented. Whether called "regulatory governance", "meta-governance" or "meta-regulation", the focus of governance is on "the process of regulating a process of regulation itself".[3] Put simply, it is about the way in which public decision makers make decisions, and specifically, their mandates and processes.

From a normative perspective, the issue is how *should* public decision makers make decisions. This has been addressed by the Organization of Economic Co-operation and Development ("OECD") as follows:

> "The implementation of regulatory reform is critically dependent on the existence of appropriate government commitment and institutions. <u>These institutions need to be transparent and accountable</u>, with mandates and sufficient power to ensure that reform translates into action on the ground. <u>They will need to ensure that regulation is part of the policy environment, not simply the tail end of the process</u>. To meet policy objectives, regulation needs to be integrated into the policy cycle, so it can deliver those objectives."[4]

Governance is central to energy regulation. Because energy regulation involves decisions that have significant long term impacts on economic development, environmental sustainability and the allocation of public and private capital, it is generally considered important to have a

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2 Jacinct Jordanna and David Levi-Faur, "The Politics of Regulation in the Age of Governance" in Jacinct Jordanna and David Levi-Faur, The Politics of Regulation (Edward Elgar, 2004), p. 11. Citing John Braithwaite, "The New Regulatory State and the Transformation of Criminology", 40 British Journal of Criminology (2000), 222.

3 Orly Lobel, "New Governance as Regulatory Governance", in *Oxford Handbook of Governance,* 2012, at p. 69.

4 OECD, "Regulatory Governance: The New Frontier", 2010.

decision-making system that can take these factors into account in a way that insulates these decisions from short term political calculus.

This was certainly the belief when Ontario's current energy regulatory system was designed.

Governance in the Ontario Energy Sector

In the 1990s, Ontario, like many Western jurisdictions, restructured its electricity system to adopt a rules-based governance model.

Prior to restructuring, electricity investment was often made without reference to electricity demand, leading to an over-investment in supply. These over-investments led to large rate increases. The rate increases led to consumer backlash, which then led the government to freeze electricity rates.[5] In short, the system was politically and economically unsustainable.

Many observers pointed to poor governance as the reason for this unsustainable system. Investment decisions were made by Ontario Hydro in consultation with the government. There was little meaningful oversight or transparency and decisions were often made to meet short term political goals. In 1996, looking forward to a post-Ontario Hydro structure of regulatory oversight, Daniels and Trebilcock criticized Ontario's regulatory structure as having "subverted public transparency and fostered government micromanagement."[6]

The solution was a new governance model for the sector.

Ontario Hydro's vertical integration of generation, delivery and system operations was to be unbundled so that each of these components would be subject to different regulatory regimes. Delivery would be regulated by the OEB in much the same way that it had regulated natural gas delivery prior to that time. System operations would be managed independently to ensure that the investment in and operations of electricity generation would be guided by transparent market price signals.

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5 *See:* Aynsley Kellow, Ontario: The decline and fall of the electric empire, in *Transforming Power: The Politics of Electricity Planning*, (Cambridge, 1995), and Jamie Swift; Keith Stewart (2004). *Hydro: The Decline and Fall of Ontario's Electric Empire.*

6 Ronald Daniels, Michael Trebilcock, The Future of Ontario Hydro: A Review of Structural and Regulatory Options, in Ronald Daniels, ed., Ontario Hydro at the Millennium: Has Monopoly's Moment Passed (1996), at p. 6.

Establishing a governance model was key to this transition. To guide the transition, the government established a royal commission, released a white paper, and appointed a market design committee. A central feature addressed by all of these initiatives was to design a governance model that would strike the appropriate balance between the role of government as policy maker and the role of agencies to design policy instruments to facilitate the role of private actors to enhance efficiency and cost effectiveness. As the McDonald Report put it in its 1996 Advisory Commission Report, "the Legislature should state the goals of regulation and leave the selection of techniques to the regulator." (at p. 99).

Today, fifteen years after the opening of the electricity market in 2002, Ontario is, again, in a supply surplus which has resulted in large rate increases. Those increases led to a consumer backlash and, again, the government cut and froze electricity bills through the Fair Hydro Plan. This leads one to consider how the electricity system is currently governed and how that governance can be improved.

Addressing this requires a more detailed consideration of the values reflected in the governance principles of transparency, accountability and integration.

Principles of Governance: Transparency, Accountability and Integration

In this report, the term transparency refers to decision making that is fact-based and based on publicly available information; accountability means that the decisions should be "owned" by the responsible agency, not directly or indirectly imposed on it; and integration means that the agencies should be guided by official government policy, but not simply be the custodians of policy instruments that are exercised by government.

These principles are both instrumentally valuable and intrinsically valuable.

They are instrumentally valuable in the sense that transparent, accountable and integrated decision making and decision-makers are more likely to lead to better outcomes than decision making processes that are obscure, unaccountable and occur after the "real" decisions are made elsewhere.

They are inherently valuable in the sense that they represent ideas such as the rule of law and deliberative fact-based decision making. This is an important part of liberal democracy. Indeed, these principles can be characterized as the "liberal" component of a liberal democracy, while elected governments are the "democratic" component of a liberal democracy. As a result,

transparent, accountable and integrated decision making is important even without regard to the content of the actual policy decisions that result. In other words, as well as leading to better policy decisions, these values are ends in themselves.

The Meaning of Agency Independence

Closely tied to the values of transparency, accountability and integration is the concept of regulatory independence. Independence is a key concept because, by definition, regulation involves the transfer of decision making authority from Ministries to regulators so that decisions may be made by reference to a rule based system, and not political discretion. In other words, what distinguishes regulators from other government actors is that regulators exercise public powers in accordance with rules and operate outside of the direct managerial authority of government. This is the sense in which they are independent from governments.

However, independence is not an end in itself, nor can agencies be completely independent from government. Independence is valuable to the extent that it permits the goals of transparency, accountability and integration into the policy making process. In other words, the goal of independence is not to further the autonomy of energy agencies so that they are free to pursue their own agendas. Rather, independence imposes an obligation on agencies to make decisions in a transparent, accountable and integrated manner. The premise is that regulators require independence in order to incorporate these values into their decision making. If regulators simply implement what the government tells it them to do, they are not acting independently and therefore cannot meet their obligation of acting in a transparent, accountable and integrated manner.

A lack of independence also raises questions about the integrity of the regulatory process. The integrity issue arises in two different scenarios.

The first scenario is where the regulator is required to act independently but, in reality, simply implements what the government tells it to do. For example, in the energy sector, if the IESO develops market rule proposals or the OEB develops rules or codes based on what the government tells them it would like to see, they would be failing to exercise their independent judgment.

Acting in this way may benefit an agencies' relationship with the government, but it can also undermine their processes and lead to a lack of confidence in their ability to make principled

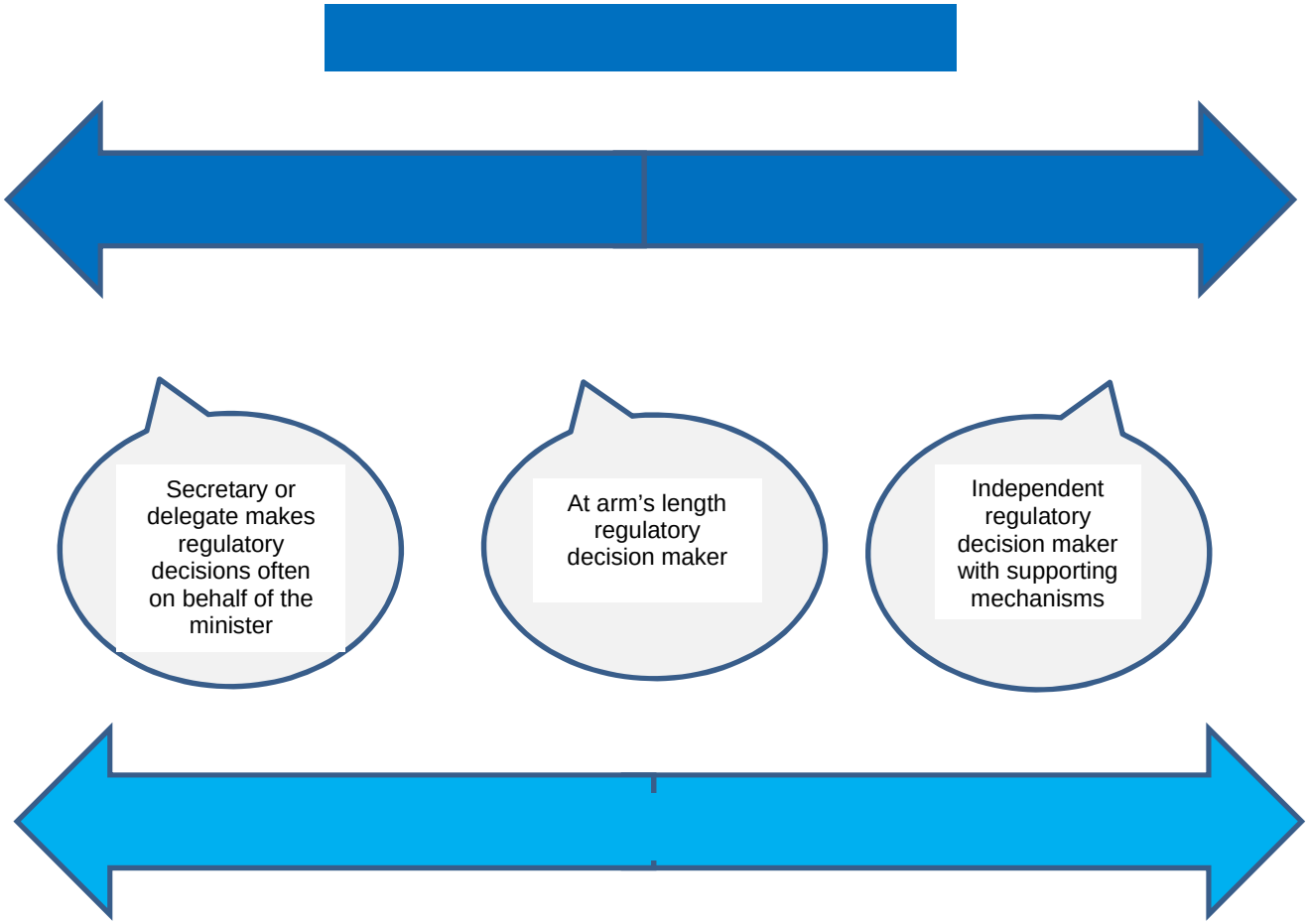
decisions. Under this scenario, the regulator lacks not only independence; it also lacks trust that it is meeting its duties to the public. In other words, the regulator may be perceived to be acting in the interests of the government, as opposed to the interest of the public generally and the ratepayer in particular. As the authors of the leading textbook on regulation have stated, "Reputation and credibility are critical in establishing and sustaining a regulator's ability to act autonomously."[7]

A second and different scenario is where the regulator does not have legal independence in decision making in the first place. In this case, the regulator does not have the statutory duty and/or authority to exercise its own decision-making authority, it is simply using its policy instruments in a way that the government directs it to. What makes this scenario different is that the regulator is not acting independently, but it is also not purporting to act independently: the regulator is not the decision maker, the government is the decision maker. The concepts of transparency, accountability and integration are still important, and the credibility of the regulatory system is still in issue, but these requirements apply directly to the government, and how it makes decisions and communicates them to the regulator.

What distinguishes these processes is that the former involves a failure of the regulator to meet its duty to act independently while the latter does not. Regulatory integrity is most threatened when an agency is supposed to be acting independently (i.e., transparently, accountably and in an integrated manner), but in reality, it is working in concert with the government.

[7] Baldwin, Cave and Lodge, *Understanding Regulation*: Theory, Strategy and Practice (2d), P. 71.

The OECD provides the following spectrum to capture how the risk of regulatory integrity is related to the lack of regulatory independence.[8]



[8] OECD, The Governance of Regulators, July, 2014, Figure 2.1. http://www.oecd-ilibrary.org/docserver/download/4214061e.pdf?expires=1505401717&id=id&accname=guest&checksum=8272E6CEBB96587406C0E734CB47C9C7

PART II: HOW DO ONTARIO ENERGY AGENCIES MAKE DECISIONS?

Locating Ontario energy agencies in this range of independence and integrity requires reviewing the specific decisions that they make and how they make them. Some of their decisions are made more independently than others. For example, OEB adjudication involves a legal requirement to make decisions by reference to a formal adjudicative process where a panel is required to make decisions on the basis of a record and independent from outside influences. This puts it at the high end of the range of independence. By contrast, IESO procurement decisions simply implement the Minister's determinations. This puts it at the low end of the spectrum.

Other decisions by each of the agencies are situated within the spectrum and, as will be observed, the very lack of transparency in how those decisions are made, including the role of the government in making those decisions, could very well render them at the low end.

Further, where decisions fit in this spectrum may change over time. For example, if the IESO were to develop a procurement process that was not dependent on governmental procurement directives, say through an incremental capacity market, it would be in the position of having to demonstrate that it is, in fact, acting independently. Otherwise, the integrity of its procurement model would be threatened. Indeed, given that the vast majority of the estimated benefits of the IESO's Market Renewal Initiative are premised on the procurement of resources to achieve electricity requirements, as opposed to political objectives, the failure to act more independently would effectively defeat the purposes of that initiative. This is discussed in the context of procurements at p. 28-29, below.

Non-Adjudicative Regulatory Decisions

Starting first with the OEB, it makes two types of non-adjudicative decisions: codes/rules on the one hand, and guidelines on the other.[9] Codes/Rules and guidelines implement policy in that they are broad prescriptions that apply to the sector generally as opposed to orders, which typically apply only to one party.

The IESO makes two general types of policy decisions: market rules and other instruments, including market manuals, interpretation bulletins and other types of policy documents.

[9] Codes are imposed on electricity participants as a condition of licence and rules are imposed on gas participants. See OEB Act, 1998, ss. 70.2 and 44.

The processes by which the OEB and the IESO make decisions are set out below:

OEB: Nature of Instrument	**Subject Matter**	**Transparency**	**Accountability**	**Integration**
Order	Rates, Compliance, MAADs, etc.	High: Decisions made on basis of record	High: Decisions made by Panels	High: Follows explicit policy directives from government and legislature
Code/Rules	DSC, RSC, etc	Low: No record of basis for decision	Medium: Requirement to consider costs and benefits, but at very low rigour and limited judicial enforcement	Low: Government has independent power to develop codes (e.g., Conservation Code), and role of government in OEB code development process is not addressed.
Guidelines	Cost of Capital, Cap & Trade guidance	Low: No record of basis for decision	Low: no legal requirements but can have major impact on orders (e.g., cost of capital)	Low: Role of government not addressed in processes
IESO: Nature of Instrument	Subject Matter	Transparency	Accountability	Integration
Rule Making	Market Rules/ Manuals	Low – Medium: public processes are used but do not provide full information on which decisions are made. Substantive decisions are made by Board in private and many substantive decisions are left to manuals.	Low – Medium: IESO Technical Panel and IESO Board rely on staff who developed proposed rule and interprets others' concerns. Market manual process lacks clear role for Technical Panel and IESO Board	Low: Role of government and even public policy is obscure and not discussed.

The high-water mark in these decision making processes are OEB orders, which result from adjudicative decision making. This is not surprising in that there are legally enforceable procedural requirements that govern how the Board makes orders. While the adjudicative process has its limitations,[10] and there are other transparent and accountable processes that do not involve adjudication, the adjudicative process certainly has a high level of independence and integrity.

The focus here is on OEB codes/rules and guidelines and IESO rule making and market manual development. They are somewhat similar from a governance perspective because, in each case, decisions are made by their respective boards after receiving reports and draft rules by staff and the consultants retained by them. Although parties are given notice of proposed changes and the opportunity to comment upon them, the decision-making process is somewhat obscure: the meetings where decisions are made are held privately without a complete public record of what's been discussed; the reasons for the decisions are limited and sometimes non-existent, and most importantly, there is no record of what the government's role has been in decision making.

There are three governance concerns in this area:

1. The basis for these decisions and, in particular, what is the role of the government in these decisions;
2. How agencies determine which type of instrument the agency intends to use; and
3. The lack of meaningful cost benefit analysis in making these decisions.

Each will be addressed in turn.

Governance Concerns: 1. What are Decisions Based On?

The first concern is that the record on which OEB codes/rules and guidelines and IESO Market Rules are developed is not clear, in particular with respect to the role of the government in making these decisions.

Both agencies' web sites list the submissions that are made by registered participants in a process, but they do not provide information on all sources of information and advice relied upon in making determinations. In particular, they do not provide a log of meetings with

[10] See: Report on Decision Making Processes at the OEB (2006), at pp. 11-13, citing H. Janisch, "The Choice of Decision-Making Method: Adjudication, Policies and Rule Making" (1992), Law Society of Upper Canada Lectures 259.

stakeholders or, more importantly, the government or its proxies (such as the other agencies) that can influence decisions. As a result, the basis for the boards' decisions is unclear.

As for the IESO in particular, its "Principles of Stakeholder Engagement" ("Principles") provides obligations on the IESO with respect to stakeholder participation. The Principles include goals such as "transparency and openness", and "meaningful dialogue and input". However, unless stakeholders are informed about the positions taken by the most important influencer – the government – it is hard to see how the Principles are being met.

For example, the IESO has been working on its market renewal project for some months. The rationale for the project was said to be based on a business case that was presented to stakeholders for comment on April 20, 2017. However, in November, 2016 – some five months before stakeholders had the opportunity to comment – the Minster of Energy publicly spoke about the savings and other benefits that would result from market renewal. It is hard to believe that stakeholder comments -- made much later in the process after the Minister had already made conclusions and endorsed the project -- had a meaningful impact on the IESO's determinations.

The lack of transparency on the role of government in OEB decision making is also an issue.

To take one example, in 2015, the province created a cap and trade program for the purposes of imposing a cost of allowances for green-house gas emissions. Because natural gas distributors had responsibility for passing on the cost of emission allowances to its customers, fixing the actual amount to be charged to customers requires a Board order. However, the policy issues respecting the charge were addressed through a Board consultation.

One issue before the Board was how the cost of allowances should be passed through to customers; in particular, the issue was whether the cost of allowances should be passed through to customers as a discrete line item on the customer bill or simply incorporated into gas delivery rates.

Because this was a consultation leading to a report (a type of guideline), none of the rules of adjudicative processes applied. Instead, the basis for the Board's decision was a report prepared by Board staff (presumably at the direction of Board leadership).

The Board received comments from 40 stakeholders in the process, including many consumer groups; none of the consumer groups endorsed staff's recommendation on this point.[11]

In a letter to stakeholders, the Board wrote that it has approved staff's recommendations that the cost be included in delivery rates and not separately identified on the bill. Following this report, a number of participants wrote to the Board seeking more complete reasons for its decisions, one in particular, citing a number of judicial decisions respecting the duty to give reasons.[12]

The Board did not provide reasons, inevitably leading to speculation on what its decision was based on.

The lack of transparency and record for OEB and IESO engagement can be compared with the legal requirements imposed on American regulators. The obligations on American agencies have been recently described as follows:[13]

> "Today, when agencies engage in rulemaking, they are expected to maintain a systemic record, to disclose the evidence on which their factual claims rest, and to respond to significant public comments. Moreover, executive agencies conduct intensive cost-benefit analysis of their major rules under the supervision of the Office of Information and Regulatory Affairs. In addition, all agencies must engage in "reasoned analysis" that can survive judicial review under the arbitrary-and-capricious standard of the APA [i.e., the Administrative Procedures Act]."

Applying these types of requirements to OEB codes/guidelines and IESO rules/manuals would greatly benefit Ontario energy governance.

Governance Concerns: 2. The Agencies' Choice of Process

Given the different decision making processes that govern different agency policy instruments, it is important to have clear criteria over the type of process that should apply in any given case

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11 An environmental group, Environmental Defence, supported the Board staff proposal, see: OEB, Consultation to Develop a Regulatory Framework for Natural Gas Distributors' Cap and Trade Compliance Plans (EB-2015-0363) (C&T Consultation) https://www.oeb.ca/industry/policy-initiatives-and-consultations/consultation-develop-regulatory-framework-natural-gas

12 See letter from Industrial Gas Users Association in the C&T Consultation, see: OEB, Consultation to Develop a Regulatory Framework for Natural Gas Distributors' Cap and Trade Compliance Plans (EB-2015-0363) (C&T Consultation) https://www.oeb.ca/industry/policy-initiatives-and-consultations/consultation-develop-regulatory-framework-natural-gas

13 See Ronald Levin, The Regulatory Accountability Act and the Obsolescence of Formal Rulemaking, Regulatory Review, August 21, 2017, https://www.theregreview.org/2017/08/21/levin-regulatory-accountability-act-formal-rulemaking/

and, in particular, the circumstances under which either an order, code/rule or guideline should be used. Unfortunately, this is often not very clear.

Addressing this point requires consideration of the policy instruments available to each of the agencies and how they are exercised.

While focusing on the appropriate decision making process may seem technical, it is central to the rule of law value of governance. As the Ontario Divisional Court put it in the context of a purported delegation by the Ontario Securities Commission to staff, "the carefully constructed legislative schemes governing the power and conduct of the O.S.C., and other such agencies, would be rendered meaningless. The rule of law, a central concept in our legal system, would be undermined."[14]

The OEB has offered no basis for differentiating among the types of policy instruments it uses and why. Instead, the Board has given itself discretion over which instrument to use. The Board can thus often use a code or guideline (both of which are weak in terms of governance) instead of an order (which has strong governance attributes).

For example, in the rate making process, the Board must use a rate order to fix a rate. However, in making that order, the Board effectively follows guidelines which have a major impact on the outcome. These guidelines can range from being very specific – the guidelines on cost of capital – to generic and policy oriented – such as the Report on the Renewed Regulatory Framework ("RRFE"). While neither of these guidelines is technically binding on the Board, it invariably follows them, so that the panels set the rate of return using the cost of capital guidelines and the Board will not entertain a rates application that does not conform with the RRFE.

As for the IESO, the market rules address the formal distinction between market rules and other instruments, but the rules are not clearly written. In addition to the statutory power to make market rules, IESO market rules provide that the IESO may also make "policies, guidelines, and other instruments", as well as market manuals.[15]

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[14] *Ainsley Financial Corporation* v. *Ontario Securities Commission* (1993), 14 O.R. (3d) 280 (Div. Ct.) at 302; affirmed by Court of Appeal: (1994), 21 O.R. (3d) 104.

[15] The Market Rules specifically provide that a market manual is not a policy, guideline or other instrument: Market Rules, Chaper 1, Section 7.7.1 – 7.7.3. The market rules stated that all of these instruments are binding on market participants, though, in light of the *Ainsley* decision, the basis for that is questionable.

The distinction between when the IESO Board makes market rules and IESO staff makes guidelines and market rules, etc. is also unclear. Chapter 1, s. 7.7.4 of the Market Rules provides:

> "Any policy, guideline and other document referred to in section 7.7.1 or in the market manual which, by virtue of its prohibitive or mandatory character or its importance to the efficient operation of the IESO-administered markets or the reliable operation of the IESO-controlled grid, should have a legislative character shall be implemented by the IESO as an amendment to the market rules."

Thus, although the rules state that these instruments can be binding (and therefore presumably mandatory), they also state when they are "mandatory in character", the instrument should be implemented as a market rule. This distinction can clearly use some clarification.

The criteria for determining when the OEB uses non-adjudicative decision making (through rules, codes and guidelines) and the IESO uses instrument other than market rules (e.g. market manuals and other instruments) should be clarified. Further, these instruments should only be used when they clearly do not involve a delegation or transfer of decision making authority from an OEB panel or the IESO Board, respectively.

Governance Concerns: 3. Lack of Cost Benefit Analysis

As mentioned above, the American Administrative Procedures Act requires executive agencies to apply Cost benefit analysis ("CBA") to their major rules under the supervision of the Office of Information and Regulatory Affairs ("OIRA"). CBA and other forms of sometimes called Regulatory Impact Analyses ("RIA") are regulatory tools that have become common place in many western jurisdictions. RIA has been characterized as "a fundamental component of the smart regulatory state."[16] The OECD has described it as "an essential tool for regulatory quality."[17]

At the federal level in the United States, originating under the Reagan administration, and continuing through important revisions under President Obama, CBA is used to systematically review the benefits and costs of regulation. It is focused on collecting and analyzing data to identify create a bank of information and methodology to assist in decision making.

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[16] Claudio Radelli and Fabrizaio De Francesco, "Regulatory Impact Analysis" in Baldwin, Cave and Lodge, *The Oxford Handbook of Regulation*, 2010.

[17] OECD, Building an Institutional Framework for Regulatory Impact Analysis (RIA), Guidance for Policy Makers, 2008, p. 7

One of the leading authorities of CBA is noted Harvard Law Professor Cass Sunstein, who was responsible for administering CBA as the head of OIRA under the Obama Administration. Sunstein argues that a major benefit of CBA is that it allows for rational decision making based on facts, as opposed to anecdotal evidence. It also overcomes ingrained and often unconscious biases.

The importance of these biases is recognized by behavioural economists who note that experts, including regulators, develop "blind spots" from their assumptions and methodologies that tend to reduce their ability to use and interpret data objectively. Specifically, the tendency of decision makers is to overstate benefits and understate costs.[18] CBA attempts to overcome these behavioural biases through the mandatory use of empirical data and methodologies.[19]

The only statutory requirement respecting cost benefit analysis in the Ontario energy sector is the requirement in ss. 44 (2) (f) and 70.2 (f) of the OEB Act, 1998, which provide that, when providing notice of a proposed rule or code, the OEB is required to include "a description of the anticipated costs and benefits of the proposed code".

However, the Board's cost benefit discussions are cursory at best. They do not quantify costs and the benefits, they do not address the costs and benefits that are incurred by the economy as a whole, and they do not address the risk that assumed benefits may not materialize. Nor is there any "look back" to determine whether the assumed costs or benefits of previous proposals have materialized.

Further, the courts have not been willing to impose a meaningful obligation to provide CBA.[20] Indeed, the Ontario Court of Appeal rejected out of hand the argument that CBA should be required to impose an intellectual discipline on the Board to carefully look at costs and benefits before making a rule. According to the Court, the Ontario public does not need to be protected from engaging in "thoughtless rule making".

The Court of Appeal's dismissiveness of CBA can be compared to the requirement of the United States Supreme Court which has struck down decisions of regulators as "arbitrary and

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[18] Kahneman, Daniel; Tversky, Amos (1979). "Intuitive prediction: biases and corrective procedures". TIMS Studies in Management Science. 12: 313.

[19] See, for example, Christine Jolls, Cass R. Sunstein, and Richard Thaler, "A Behavioral Approach to Law and Economics" The Law School, The University Of Chicago, 1998.

[20] See Enbridge Gas Distribution Inc. v. Ontario Energy Board (2005), 74 O.R. (3d) 147 (Ont. C.A.).

capricious" for failing to consider quantifiable costs and benefits in their decisions.[21] Not all agencies have performed equally. The Environmental Protection Agency is the gold standard in the U.S. while other agencies, the Consumer Protection Bureau and the Security Exchange Commission have underperformed. Others, such as the Commodity Futures Trading Commission have contracted with OIRA to conduct cost benefit analysis to assist in in achieving its regulatory goals.[22]

As for the IESO, its practice is to retain a consultant who prepares a report, often identifying the benefits of a proposed change. For example, it retained the Brattle Group to provide a "benefits case" for its market renewal initiative. However, their consultants are on retainer to the IESO and are not independent. To the contrary, the continued engagement of the consultant could well depend on whether the initiative continues. It is unlikely that they are in an objective position to determine whether the costs of proceeding with an initiative would outweigh the benefits. Similarly, like the OEB, there is no accounting for the risk that the assumed benefits may not actually be achieved.

One would think that the need for thorough CBA is obvious. As Sunstein has observed, "The Plea for empirical foundations may seem obvious, a little like a plea for sense rather than nonsense, or a day of sunshine rather than brutal cold."[23]

It is equally obvious that using CBA would benefit the Ontario energy sector.

However, neither the Ministry of Energy nor the agencies have embraced CBA. As the Auditor General has noted, the Government has pursued many major regulatory initiatives, such as smart meters and feed in tariffs without any cost benefit analysis.[24]

It is important to recognize the reasons for the reluctance to apply CBA in Ontario to address how CBA can be incorporated and by whom.

The first reason is that CBA has not been used is that it is a constraint on discretion and, ultimately, on political decision making. As Sunstein observes, while the benefits of CBA are obvious, it replaces decision making on the basis of political discretion. In his experience as

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21 See: Michigan v. Environmental Protection Agency 576 U. S. 1 (2015).

22 Kraus and Raso, "Rational Boundaries for SEC Cost Benefit Analysis" and Revesz, "Cost-Benefit Analysis Analysis and the Structure of the Administrative State: The Case of Financial Services Regulation, 34 *Yale Journal of Regulation* (2017), 545.

23 Cass R. Sunstein, *Simpler: The Future of Government* (Simon Shuster, 2013), p. 5.

24 Report of the Ontario Auditor General, Electricity System Planning (2015).

the head of OIRA, he found that discussions around regulation centered around what he terms "sewer talk":[25]

> "Those seeking or resisting regulation say, 'The public is very worried,' or Polls show that the majority of people strongly favor protection against air pollution,' or 'The industry has strong views,' or "The environmental groups will go nuts,' or 'A powerful senator is very upset,' or 'If an accident occurs, there will be hell to pay. In government, I heard one or more of these claims every week."

Politics and the ability of a government to implement its will has been a central feature of Ontario energy regulation for decades. The impulse to retain discretion should not be under-estimated.

A recent and telling example of the triumph of political decision making over CBA and other approaches to RIA is found in the introduction of emissions cap and trade regulation.

The Government's Climate Change Action Plan stated that the government will establish a "green bank" and "ensure the new organization applies a rational and evidence-based approach to program delivery, with carbon emission reductions as its priority."[26] However, the enabling legislation did not impose any meaningful constraints on how expenditures of revenues could be spent. Rather, it provided that the Treasury Board will spend revenues by reference to a long and open-ended list of objects.

When the government did establish its Green Bank (renamed the "Ontario Climate Change Solutions Deployment Corporation"), the enabling regulation did not impose any type of RIA or CBA on the expenditures. It did, however, include a government directive power.[27]

On August 14, 2017, the Minister of Environment and Climate Change announced a $100 million Municipal GHG Challenge Fund, permitting municipalities to apply for up to $10 million each for projects aimed at reducing greenhouse gas emissions. The Minister "emphasized that the government intends to get this newly announced money flowing quickly."[28] The application material for the fund describes eligible projects that those that reduce emissions in "any sector

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25 Cass R. Sunstein, *Simpler: The Future of Government* (Simon Shuster, 2013), p. 6.

26 Ontario, Climate Change Action Plan, p. 17.

27 Ontario Regulation 46/17, s. 8.

28 http://tvo.org/article/current-affairs/the-next-ontario/-a-share-of-the-loot-liberals-announce-100m-in-cap-and-trade-cash-for-municipalities

including buildings, energy supply, transportation, water, waste and organics sector"[29]. Again, there is no reference to cost benefit analysis of these expenditures or how expenditures in those sectors compare to expenditures in other sectors or, for that matter, different policy alternatives for addressing GHGs.

Thus, even when the Ontario government may initially intend to adopt fact-based decision making, it quickly resorts to political management.

A second, and related reason that Ontario does not use CBA in energy policy, is that regulatory agencies – which are typically tasked with conducting CBA - are not sufficiently independent from government. As indicated, they do not have insulation from the government in preparing policy documents. It is therefore not realistic to expect them to conduct a cost benefit analysis of a decision that may already have been approved by government.

This is an important consideration and has a major impact on who should be implementing a proposed cost-benefit analysis.

Cost Benefit Analysis and Independent Decision-Making

If there is to be mandatory cost-benefit analysis (and I argue that there should be), the question is who should carry it out. As the OECD has emphasized, regulatory governance models have to be tailored for different jurisdictions. Jurisdictions have histories and cultures with respect to the role of regulation within a governing framework. It is important to bear this in mind when proposing a structure for regulatory governance: There is no use in proposing a governance model for the energy sector that is incompatible with how government and agencies actually operate in this sector.

The history of Ontario regulatory governance has shown the dangers of misaligning a proposed regulatory structure with the practical reality of how decisions are made.

For example, in 2004, the legislature created the Ontario Power Authority with the obligation to carry out independent electricity planning and procurement. Its plans and procurement processes were to be reviewed by the OEB. The process was thus designed to use a fact-based transparent planning and procurement process.

[29] http://www.grants.gov.on.ca/prodconsum/groups/grants_web_contents/documents/grants_web_contents/prdr017561.pdf

However, two weeks into the OEB hearing of the first planning and procurement proposal, the Minister of Energy made a speech announcing that he would be providing new planning directives to the OPA. The OPA then withdrew its proposal, first on a temporary basis and then permanently. It did not file another one despite an ongoing legal obligation to do so and the OEB did not enforce the requirement that one be filed.

This went on for several years until the legislature formally withdrew independent planning and procurement from the (now) IESO and put it under the direct control of the government. As noted earlier, the government now controls planning, and the implementation of its plans, through directives and ongoing oversight of agencies.

The lesson to be drawn from this is that establishing independent responsibilities in agencies is not sufficient to ensure that these powers will, in fact, be exercised independently and in accordance with statutory purposes. In fact, agency policy instruments (rules, codes, guidelines, etc.) may eventually be exercised directly or indirectly by the government.

One reason for the agencies' lack sufficient independence from government to provide this type of oversight is the province's constitutional structure. Independent regulation largely arose in the United States which has a separation of powers between the legislature and the executive. Regulation takes the form of legislation creating a power to be exercised by the executive (through a regulator) subject to various forms of oversight. In this system, regulators operate relatively independently from the government, and have been characterized as a "fourth branch" of government.[30]

Under the Parliamentary system, there is no fourth branch. The government is responsible solely to the Legislature. Regulation is a branch of the executive and does not have any constitutional independence.[31]

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[30] For a discussion, see Richard B. Stewart, "The Reformation of American Administrative Law*",* (1975), *Harvard Law Review*, 1669.

[31] See: Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch), [2001] 2 S.C.R. 781.

The constitutional theory of responsible government in its relation to regulatory independence has been expressed by Richard Schultz as follows:[32]

> "The objective of the system of ministerial responsibility is to ensure the accountability of the government to the House of Commons; it is premised on the convention that ministers are responsible to the House both for their actions and for those of public servants who act in their names. The central assumption is that, because a minister's officials are under his control, he is responsible for their action. Consequently, regulatory agencies (along with other non-departmental entities) do 'violence to the constituted system of ministerial responsibility' to the extent that they are free from, or independent of, ministerial control. If ministers cannot in law control the actions of regulatory agencies, then they cannot be held accountable and responsible for Parliament for such actions."

Thus, for constitutional purposes, administrative agencies barely rank above ministerial staff with respect to independence from Ministerial oversight.

As Hudson Janisch has noted, this constitutional structure has often left Canadian regulators in "a half-way position between independence and accountability". This has led to "a form of uneasy compromise between regulatory independence and political control has often led to tension, confusion, and misunderstanding". Janisch provides examples of regulatory decisions that were rejected by governments in Nova Scotia and Saskatchewan and which ultimately led to the termination of regulators and the statutory abolition of regulatory agencies.[33]

Apart from the constitutional parameters of responsible government, there is a culture and history in Ontario of a lack of regulatory independence in the electricity sector. While there have been confrontations between regulators and the federal government,[34] that has not been the case in Ontario. Ontario regulators are accommodating.

The result is that, if there is a need to have an independent body to ensure that energy policy decisions are evaluated and implemented in a transparent, accountable and integrated way, it is more realistic to view the agencies as playing a role akin to the Ministry than as an independent watch-dog. The agencies are therefore simply not in a position to play the role that is traditionally granted to independent agencies to conduct CBAs.

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[32] Richard Schultz, *Federalism and the Regulatory Process,* Institute for Research on Public Policy, at pp. 14-15, citing J.E. Hodgetts, *The Canadian Public Service: A Physiology of Government, 1867-1970* (Toronto University of Toronto Press, 1973), at p. 140.

[33] Hudson Janisch, "in Search of the Cat's Pajamas" in at p. 363. See discussion at pp. 364-367.

[34] See: Lorne Sossin, "The Puzzle of Independence for Administrative Bodies", Presentation to Yale Law School, Workshop on Comparative Administrative Law, May, 2009 and Richard J. Schultz, "Still Standing: The CRTC, 1976-1996" in Doern, Hill, Prince, and Schultz, Changing the Rules: Canadian Regulatory Regimes and Institutions (University of Toronto, 1999), 29.

Officers of Legislature

It is therefore necessary to consider which public entities are capable of acting independently in the consideration of costs and benefits of major policy decisions. True, some branches of the government are more independent than others; for example, the Treasury Board may be more independent than line ministries.

However, the only Ontario institutions which have proven capable of independently evaluating government policy are Officers of the Legislative Assembly ("OLA"). Ontario now has 8 legislative officers, including the Auditor General, the Environmental Commissioner and the Financial Accountability Office.

The key attribute of OLAs is independence from the executive.[35] Paul Thomas described OLAs as "independent accountable agencies", whose first objective is to "assist Parliament in holding ministers and the bureaucracy accountable".[36]

Given the relationship between the agencies and the government, the agencies are not only incapable of conducting an independent review, they should be the *object* of independent reviews. To use Thomas' term, the agencies are part of the bureaucracy that needs to be held accountable. In other words, the agencies are not the holders of the check on government power, they are the holders of government power that need to be checked.

As a result, rigorous cost benefit analysis can simply not be undertaken by agencies and can most effectively be conducted by an OLA.

One option is to use existing OLAs to conduct a cost benefit analysis. The reason for this would be primarily because these officers already exist and some of them, i.e., the Auditor General, the Environmental Commissioner and the Financial Accountability Office have already reviewed some components of energy policy. While each of these OLAs has made important contributions to energy policy, there are limitations in their mandates and roles.

First, they have no expertise or experience with CBA. Ideally, a specialized CBA review would develop expertise in using methodologies that can be used to systematically evaluate policy initiatives. For example, the discounting methodologies for different types of energy

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35 L. M. Hanna, "Watch Dogs Wading in: Ontario's Legislative Officers in Public Policy Development, Draft Paper presented to Annual Meeting of the Canadian Political Science Association, June, 2012, p. 1.

36 Paul G. Thomas, "The Past, Present and future officers of Parliament", *Canadian Public Administration* 46 (2003): 1.

technologies and supply payments can be contestable and even controversial. It would be helpful to have a universal approach that can produce a knowledge bank.

Second, while they have addressed energy issues, none of the existing OLAs have expertise or specific experience in the sector. This lack of expertise has been used to undermine their work.

For example, in response to an Auditor General's Report that observed that electricity customers received few benefits from the government's smart meter program, the Minister of Energy said that "The electricity system is very complex, is very difficult to understand."[37] Similarly, following another report of the Auditor General that criticized electricity procurements, a number of senior energy commentators authored editorials essentially arguing that the Auditor General's report failed to understand electricity pricing.[38]

Without acknowledging the merits of these criticisms, it certainly seems the case that a report of an OLA with energy expertise will have more credibility with the media and the general public than the more generalist Auditor General.

Third, and perhaps most importantly, the work carried out by the OLAs have been ex-post and seemingly also aimed at garnering media attention to champion a cause. As a former Environmental Commissioner of Ontario put it, "The more public attention and media attention, the more MPPs will believe it is important."[39] The limitation of this mandate is that, while it may be successful at garnering media attention, debates in the media can tend to get bogged down with finger pointing over past decisions. It is more practical to have this review carried out prior to the decision being made (*ex ante*).

This requirement is key. The role of an energy OLA that conducts cost-benefit analysis would not be to criticize the government. It is to present an objective fact-based analysis of major energy policy decisions so that these facts can be publicly debated and, hopefully, taken into account.

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[37] https://www.thestar.com/news/canada/2014/12/09/few_benefits_from_2_billion_smart_meter_program_auditor_says.html

[38] David Butters, The truth about the price of electricity, Toronto Star, December 15, 2015, Bob Huggard, The Auditor-General left consumers in the dark about Ontario's electricity upgrades, December 25, 2015 and Jatin Nathwani, Auditor-General offers incomplete picture of Ontario's power upgrade, Globe and Mail, December 10, 2015.

[39] L. M. Hanna, "Watch Dogs Wading in: Ontario's Legislative Officers in Public Policy Development, Draft Paper presented to Annual Meeting of the Canadian Political Science Association, June, 2012, p. 10.

This suggests that there should be a new OLA, or at least a specialized department of an existing OLA to address energy policy.

Mandates of the EIO, the Government and the Agencies

An EIO would have to operate as one member of a constellation of decision makers that operate in the energy sector. It can provide an independent check on government and agency decision-making to ensure that the costs and the benefits of the policy change will be independently evaluated before they are implemented. The EIO could also perform a "look back" function to evaluate current policies.

To be sure, the definition of a "major energy policy decision" will have to be addressed as well as special circumstances which will have to exempt a review where there is insufficient time. But these cases will be extremely rare. Energy policy decisions do not deal with urgent issues. To the contrary, many major decisions would benefit from a process that requires a decision maker to slow down and think through policies before imposing them.

Two candidates for an independent cost-benefit analysis are energy planning and procurement. Each will be addressed in turn.

Energy Planning

One major policy decision that the EIO should evaluate is the government's long term energy plan (the "LTEP") and the Implementation Plans developed by the agencies. The LTEP was designed to replace the IPSP model, and to identify and implement the government's "goals and objectives respecting energy for the period specified in the plan."[40]

With the replacement of the IPSP model, and notwithstanding the current LTEP, the LTEP process presents the opportunity for taking a different approach to electricity planning. Under the IPSP model, the government essentially set a supply mix objective that the OPA was to achieve. The supply mix was made up of generation technologies and conservation targets. The IPSP was a plan to implement those technologies and targets.

The model of expressing government policy objectives through a prescribed supply mix had its origins in the need to replace coal-fired generation. As I have argued elsewhere, "In the face of these challenges, the imperative for the Government and the sector was to acquire new facilities

[40] Electricity Act, 1998, s. 25.29(1).

as quickly and forcefully as possible. To meet that challenge, the Province essentially took over the entire reins of electricity supply decisions through the central procurement and central planning mechanisms of the newly created OPA. These were drastic measures that may have been called for at the time; it is not clear whether they are still required."[41]

Now that the coal replacement challenge has been achieved, government policy does not have to take the extraordinary measure of prescribing generation technologies that should serve the province. Rather, it can be expressed at a higher policy level. To adopt the metaphor used earlier, the government can now stop rowing the ship and can steer it instead.

Given the surplus supply situation of the province, the most recent LTEP does not propose new procurements. However, it is no less prescriptive in its control of the agencies.

The LTEP is accompanied by directives to the agencies requiring them to prepare implementation plans that cover dozens of issues (16 for the OEB and 15 for the IESO) addressed in the LTEP. Under the directives, the agencies are required to submit plans to the government that "include steps that clearly demonstrate" how each of the agencies will "implement the policy reviews, processes and other initiatives enumerated below." The government emphasizes that it will be in charge of the process:

> "The implementation plan should comprehensively detail the key implementation milestones for each initiative, provide sufficient detail on process and timing, and articulate intended outcomes."

The government will review, approve and amend implementation plans and the agencies are required to follow them.

While recognizing the need for agency accountability, the current LTEP implementation directives increase the risk that agency developed planning and evaluative criteria will be exercised entirely by political decision-making. In other words, if the agencies do not exercise independent judgment in developing implementation plans, and the only goal of the plans is to obtain the government's approval, the integrity of regulatory or planning principles will be diminished, if not lost all together. As a result, the need for transparency, accountability and integration in the ongoing relationship between the government and the agencies is more important than ever.

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[41] George Vegh, Energy Planning: The Case for a Less Prescriptive Approach, September 23, 2013, p. 9. https://www.mccarthy.ca/pubs/George_Vegh_Sept23_2013.pdf

In considering less prescriptive approaches, a useful model is the one adopted in the United Kingdom. Under that model, the responsible Minister is to provide guidance on the "attainment of any social or environmental policies" that are to be achieved; the regulatory authorities must "have regard to the guidance issued."[42]

The guidance recognizes that the regulator's "principal objective is to protect the interests of consumers existing and future", and supplements that objective with the goals of reducing carbon and ensuring "secure and affordable energy". It identifies targets, not by selecting the types of renewable technology capacity, but by ensuring that such technology results in reduced greenhouse gas emissions.[43]

This approach is a superior one from a governance perspective for two reasons. First, it is much less prescriptive than Ontario's approach has been; and second, it is presented to the legislature, where it can be openly debated. If there is the establishment of an EIO, the costs and benefits of the proposed guidance can inform that debate.

Another area where current practice can be made less prescriptive is with respect to procurements.

Procurement

The current practice is for government to direct IESO procurements relating to specific technologies and even projects, as opposed to procurement aimed at achieving outcomes. For example, the government has directed the procurement of storage facilities as opposed to the flexibility services that storage is capable of providing. If the system need is flexibility, then all technologies and services that can provide that need should be able to compete for it.

The need for a less prescriptive approach to procurements is demonstrated by the IESO's market renewal initiative. According to the IESO, market renewal will produce operational efficiency and reduced procurement costs. Of these, the reduced procurement costs account for approximately 70% of total estimated savings. However, these savings are estimated to arise from procuring electricity capacity to meet system needs as opposed to procuring capacity for the sake of broader "political" goals, such as economic development and inter-provincial trade initiatives. The IESO's consultant notes, "Ontario's current capacity procurement

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42 Gas Act, 1986, s, 4AB and Electricity Act, 1989, s. 3B

43 https://www.ofgem.gov.uk/sites/default/files/docs/2007/05/file37517_2.pdf

framework has resulted in excess supply conditions and does not ensure that the lowest cost resources are procured."[44]

As a result, the vast majority of the benefits of market renewal would result from the government no longer controlling energy procurements. This requires governance reform, not changes to market design. If the government continues to engage in its prescriptive procurement process, rate payers may be incurring the costs of market renewal (estimated at $200 million by the IESO plus)[45] for very little value.

Procurement decisions should therefore be subject to cost benefit analysis. In addition, competitive procurement processes can operate as a check and balance if they are conducted in a transparent and neutral approach.

Where feasible, all procurements should go through a competitive process to achieve specified objectives (such as reliability, economic and environmental performance) and should be technologically neutral.

Conclusion

This report proposes solutions to improving energy governance in Ontario. It observes that energy agencies have not provided the check and balance function that regulators perform in other jurisdictions. Rather, with some exceptions the role of agencies is to facilitate government decision making.

In light of this regular and ongoing relationship between government and agencies, this report recommends that energy governance should be improved to better reflect the principles of transparency, accountability and integration.

In summary, my conclusions and recommendations are as follows:

1. The OEB and the IESO should be required to maintain a complete record of all communications and information that is relied upon in making all non-adjudicative decisions, including all communications with government.

[44] Brattle, "The Future of Ontario's Electricity Market: A Benefits Case Assessment of the Market Renewal Project, Report to the IESO, 2017, p. vi.

[45] Brattle, "The Future of Ontario's Electricity Market: A Benefits Case Assessment of the Market Renewal Project, Report to the IESO, 2017, p. vi.

2. The criteria for determining when the OEB uses non-adjudicative decision making (through rules, codes and guidelines) and the IESO uses instruments other than market rules (e.g. market manuals and other instruments) should be clarified and these instruments should only be used when they clearly do not involve a delegation or transfer of decision making authority from an OEB panel or the IESO Board, respectively.

3. All major energy policy decisions whether made by the government or an agency should be required to undergo rigorous cost benefit analysis by an independent officer of the Legislature. These decisions include Long Term Energy Plans and their implementation directives.

4. Governmental objectives, whether used for the Long Term Energy Plan or for other areas of regulatory implementation should state broad social, economic and environmental goals and should not contain prescriptive directions for the regulatory agencies to implement.

5. Where feasible, all procurements should go through a competitive process to achieve specified objectives (such as reliability, economic and environmental performance) and should be technologically neutral.