The Avista and East-West Tie Cases, and Their Implications for the Governance of the Electricity Sector in Ontario

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I Introduction

Two recent cases have highlighted a serious weakness in the governance of the electricity sector in Ontario. The cases illustrate not just the immediate adverse effects of Government interference in specific matters but the deeper damage the Government's role does to governance of the sector as a whole.

The first case involves the denial by state regulatory authorities in the United States of the attempt by Hydro One Limited ("Hydro One") to acquire the shares of Avista Corporation ("Avista"), (referred to hereinafter as the "Avista Case"). The second case is the Province's intervention in the applications to the Ontario Energy Board ("OEB") for approval of leave-to-construct ("LTC") a transmission line in northwestern Ontario (referred to hereinafter as the "East-West Tie" or "EWT" case).

The two cases differ superficially but are similar in one critical respect. In the Avista case, the Province did not intervene directly to affect the outcome of the state's regulatory process; rather, it imposed the governance arrangements on Hydro One, arrangements which led the State of Washington's Washington Utilities and Transportation Commission ("WUTC") to deny approval of the proposed acquisition. In the EWT case, the Province intervened directly to dictate the result of the OEB's regulatory process.

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What the two cases have in common is the provincial Government's interference in the governance of the electricity sector, in one case as a shareholder of Hydro One and in the other case as a Government exercising directive power. In both cases, the Government interference had adverse financial impacts. In the Avista case, Hydro One must pay a break-up fee of $103 million as a result of the denial of approval of the acquisition. In the EWT case, the result may be an increase in the range of at least $100 to $125 million to the cost of the transmission line.

But the adverse financial implications of the Government's actions, while important, may be less significant in the long run than the implications of those actions for the governance of the electricity sector in Ontario and for the protection of ratepayer interests. By its actions in the Avista case, the Government has affected shareholder rights and interests in ways which bring the reputation of the Province as a secure place in which to invest into disrepute and so may have long-term implications for investment in the electricity sector. By interfering in the EWT case, the Government has, among other things, undermined the independence of the Ontario Energy Board ("OEB") and the integrity of the regulatory system. That, in turn, may have adverse implications for investment in the sector.

This paper is divided into the following sections:

1. In the first, I describe the Avista and EWT cases;

2. In the second, I set out the principles which I suggest should apply to governance in the electricity sector and why adherence to those principles is important;

3. In the third, I discuss the governance of the electricity sector and what the Avista and EWT cases say about the present state of governance in the sector; and

4. In the final section I discuss the changes in the governance of the electricity sector required to protect the interests of ratepayers and the reputation of both the Province and the electricity sector as places in which to invest.

II The Avista and EWT Cases

A) The Avista Case

Before considering the Avista transaction and its regulatory treatment, it is necessary to provide background to the ownership structure and governance arrangements for Hydro One.

i) The Governance Structure of Hydro One

Hydro One is a corporation formed under the *Ontario Business Corporations Act* whose sole shareholder used to be the Ontario Government. In 2015 the then-Liberal Government decided to sell a portion of its interest in Hydro One. The stated reasons for doing so were, first, to use the revenue generated from the sale to finance infrastructure improvements and, second, to in the words of the Governance Agreement between Hydro One and the Government, "strengthen the long-term performance of Hydro One"[1].

The decision by the Government to sell a portion of its interest in Hydro One was controversial. There were two main lines of criticism, offered by the then opposition parties, among others. The first was that the sale would deprive the Province of an ongoing stream of revenue, a stream that would in the long-term be more valuable that the immediate capital gain. This criticism, simply put, was that the sale made no economic sense: a government that could borrow money at less than 3% should not sell an asset that consistently earned more than 10% in order to invest in new infrastructure. In proceeding with the sale, the government in effect ignored this line of criticism. I will return to this point below.

The second line of criticism was that the loss of Government control over Hydro One would subject ratepayers to the risk of rate increases[2]. The Government asserted, correctly in my view, that this

latter line of argument had no factual foundation as Hydro One's rates were set by the OEB, notionally an independent regulator[3].

In an attempt to mitigate the criticism that owning less than 100% of the shares of Hydro One would somehow put Ontario ratepayers at risk, the Government put in place a mechanism by which it would retain a measure of control over Hydro One after the sale.

The mechanism chosen by the Government was the Governance Agreement between Hydro One and the Government. While the Government owned only approximately 47% of the shares of Hydro One, and had the right to appoint only 40% of the members of the board of directors, the Governance Agreement permitted the Government to require that the entire board be replaced[4].

The Governance Agreement served two, fundamentally contradictory, purposes. On the one hand, it was to provide the public with assurance that, even though the Government owned only 47% of Hydro One shares, it could exercise a measure of control over Hydro One's actions through the power to affect a change in the board of directors. On the other hand, the Governance Agreement was intended to assure investors that Hydro One was, as the WUTC was itself assured, "fully in charge of its own affairs"[5].

Three sections of the Governance Agreement serve to illustrate these contradictory purposes. Section 2.1 of the Governance Agreement set out the "Governance Principles" which included the following:

> "2.1.3 The Province shall, with respect to its ownership interest in Hydro One, engage in the business and affairs of Hydro One and the Hydro One Entities as an investor and not as a manager."[6]

Section 2.3 of the Governance Agreement provides that included in the matters for which the Board of Hydro One is responsible and in respect of which it has full authority are:

> the appointment, termination, supervision and compensation of the CEO, the Chief Financial Officer and the other senior officers of Hydro One" and the "remuneration of directors.[7]

In contrast, section 4.7.1 permitted the Government to require Hydro One to hold a shareholders' meeting for the purpose of removing all of the directors[8]. This power is at odds with the concept, set out in the sections cited above, that the Government is a mere shareholder and that Hydro One is an independent, privately-owned Corporation not managed or directed by the Province.

ii) The Proposed Acquisition of Avista

The proposed transaction between Avista and Hydro One would have had Hydro One, acting through a wholly-owned subsidiary, Olympus Equity LLC, enter into an agreement to acquire all of the outstanding common stock of Avista. Had the transaction gone through, Avista would become an indirect, wholly-owned subsidiary of Hydro One.

The WUTC, relying on the evidence provided to it by Hydro One, stated that:

> Throughout this proceeding, we received repeated assurances from Hydro One's witnesses that despite the province's large ownership share, Hydro One is a private, publicly traded corporation, fully in charge of its own affairs with the direction of an independent board of directors. We received assurances that the Province of Ontario would not interfere in the direction and management of Hydro One.[9]

Those assurances were based, in substantial measure, on the provisions of the Governance Agreement.

The transaction required approval of the state regulators in the states where Avista operated[10]. As noted above, for the purpose of this analysis I focus on the regulatory decision in only one of those states, Washington.

In determining whether to approve the transaction, the WUTC applied two tests. The first was whether the transaction provided a net benefit to Avista's customers. The second was whether the transaction was consistent with the public interest[11].

As noted above, Hydro One provided evidence to the WUTC to mitigate the perception that the Province's 47% ownership of Hydro One's shares posed a risk to Avista and its customers. The core of that evidence was that Hydro One was protected from political interference by the terms of the Governance Agreement.

Notwithstanding the assurances of the Ontario Government and the provisions of the Governance Agreement, the WUTC learned, through press reports and after the hearing for approval of the transaction had ended but before a decision had been rendered, of the decision of the new Conservative Government to interfere in the governance of Hydro One. The WUTC referred to a letter agreement, dated July 11, 2018[12], between Hydro One and the Ontario Government whereby the CEO of Hydro One would be removed immediately and the entire Hydro One board removed and replaced on August 15, 2018. The WUTC also referred to press reports about the Conservative party's promise that, if elected, it would reduce Hydro One's rates by 12%[13]. Finally, the WUTC referred to Bill 2, the legislation that, among other things, allowed the Government to set the compensation for Hydro One executives[14].

The WUTC described these "developing facts" as having "undermined more or less completely assurances we had been given earlier concerning the potential risks associated with the large ownership interest in Hydro One retained by the Province of Ontario"[15].

Based on this information about the actions and proposed actions of the new Government, the WUTC reopened the record to receive additional evidence. Hydro One provided additional evidence in an

attempt to persuade the WUTC that, notwithstanding the actions of the new provincial Government, the ratepayers of Avista would be protected from the impact of political interference in Hydro One.

The WUTC rejected Hydro One's evidence about the risk of political interference.

The WUTC made the following findings:

1. Hydro One remains subject to management control by the Province, and that the Province may not limit itself, or allow itself to be limited, to the role of "shareholder" as had been represented to the Commission[16].

2. Hydro One's directors cannot be considered independent and the Province's role is not limited to that of a minority shareholder in a publicly traded corporation[17].

3. The Governance Agreement between Hydro One and the Province cannot be considered protective of Hydro One's status as a publicly traded corporation[18].

4. Hydro One's board acted without a due diligence review of the potential adverse impacts of the precipitous changes in direction and executive management to which it agreed. These changes, in fact, caused harm to Hydro One and its shareholders, and to Avista and its shareholders[19].

5. Bill 2[20] gave the Province a direct and active role in setting, and continuing oversight of, executive compensation at Hydro One. There appeared to be nothing that would prevent this level of interference from occurring again if the Government leadership became dissatisfied in some respect with decisions by the new board of directors or with the new CEO, or simply due to political considerations without regard to sound business practices. The WUTC further noted that additional legislation might be forthcoming to effectuate a 12 percent rate reduction promised by the new Government. In the words of the WUTC, "Hydro One continues to be subject fully to the provincial Government and the political will of its leadership"[21].

The WUTC concluded that:

> ..the evidence demonstrates that Hydro One lacks sufficient independence from its former owner and now largest shareholder, the Province of Ontario, to be a reasonable and appropriate merger partner for Avista. The events following the provincial election in June 2018 demonstrate the material and significant risk of the proposed transaction to Avista's customers that results from the Province of Ontario's dominant ownership interest in Hydro One and the willingness of the provincial Government to exert its dominance in ways that are contrary to the best interests of Hydro One and, by extension, Avista, were it to be owned by Hydro One. The financial and other benefits for Avista customers and the broader public promised by the transaction, including rate credits, are inadequate to compensate for the risks of harm Avista's customers would face were we to approve this transaction.[22] [Emphasis added]

To fully understand the implications of the Avista decision for Hydro One and the governance of the electricity sector in Ontario, it is useful to cite a number of the WUTC's findings, as follows:

> i) The provincial Government also promises to lower Hydro One's rates by a specific percentage, apparently without having first considered the impact this could have on the safety and reliability of services Hydro One provides[23].
>
> ii) It no longer is clear that Hydro One can be regarded as a private, publicly-traded corporation. While not legally a Crown Corporation, Hydro One manifestly is subject to being controlled by the Province's legislative power[24].
>
> iii) It appears that Hydro One's corporate identity as a private, publicly-traded corporation depends significantly on the identity of the ruling party in Ontario or even on the leadership of that party[25].
>
> iv) Soon after the change in majority leadership resulting from the June 7, 2018 Ontario general election, it became apparent that the force of the Governance Agreement as an enforceable contract that would protect Hydro One's independence and freedom from political insurance depended less on its language than on the identity of the governing party in power and the willingness of the board to enforce its terms in court, if necessary[26].

> v) Considering events that have already transpired, we cannot trust that the Province will not take additional actions without regard to the harmful consequences they may have for Hydro One and Avista[27].
>
> vi) The character of Hydro One as a publicly traded corporation is seriously impaired by virtue of the Province's interference in the company's affairs[28].
>
> vii) It [Hydro One] simply cannot be considered an independent, publicly traded company with a board of directors possessed of sufficient independence and power to protect Hydro One from political interference likely to cause harm to the company, much less to protect Avista from the consequences of bad decisions that Hydro One driven by the political whims of a controlling party in Ontario[29].

Reduced to their essence, these findings are that the Province cannot be trusted to honour its contracts. That is, in my view, devastating for the reputation of the Province as a secure place in which to invest.

The WUTC also commented on the effects of the Province's action on the protection of shareholder interest. The WUTC first observed that the "spirit and intent" of certain provisions of the governance agreement was to "protect the rights of all shareholders and to prevent a removal and replacement process for the board that elevated the interests of a single shareholder, the Province, above that of all other shareholders"[30]. Having made that observation, the WUTC then commented as follows:

> The point is that all shareholders in a private corporation have equal rights and their rights should be acknowledged in all processes that call for their participation. In this case, their rights were ignored; they were given no opportunity to air any concerns they may have had in connection with the removal of the CEO and the entire board of directors. In addition, waiving these provisions of the governance agreement in a singular effort to effect as quickly as possible the results the new provincial Government had promised in the run up to the June 7, 2018 election, shows that Hydro One remains very much subject to the Province's authority, and, as a practical matter in the Province's control. It simply can't be considered an independent publicly-traded company with a board of directors possessed of sufficient independence and power to protect Hydro One from political

> interference likely to cause harm to the company, much less to protect Avista from the consequences of bad decisions at Hydro One driven by the political whims of the controlling party in Ontario.[31]

These comments seem, at first glance, to be outside the scope of the WUTC's interest. It was not a regulatory proceeding dealing with shareholder rights. The comments may also be unfair to Hydro One's senior management, faced as it was with the threat of legislation if it did not comply with the Government's will. The important point is that the evident willingness of the Province to override shareholder interests suggests that the nature of the corporate governance of Hydro One, the largest distribution and transmission utility in the Province, is now a matter of interest to the governance of the electricity sector as a whole. The implications of this point are explored below.

Hydro One sought to have the WUTC's decision reversed. It was unsuccessful in doing so[32].

B) The East-West Tie Case

In 2010, the Government's Long Term Energy Plan identified the need for an enhanced transmission line between Wawa and Thunder Bay. What is now the Independent Electricity System Operator ("IESO") had originally said that the EWT should be in service by 2018. It subsequently changed the needed in-service date to 2020. As discussed below, the date when the line could be in service was a central issue in the hearing of the applications for LTC under section 92 of the *Ontario Energy Board Act 1998* ("OEBA").

The development of the required transmission line (hereinafter referred to as the "EWT") into northwestern Ontario was to be subject to the OEB's new transmission development policy. That policy, set out in the report entitled "Board Policy: Framework for Transmission Development Plans", set out the OEB's conclusion that "economic efficiency will be best pursued by introducing competition in transmission service"[33]. In that Policy, the OEB also noted that included in the

principles it uses in fulfilling its transmission policy was "regulatory predictability"[34]. That Policy, in turn, reflected the Government's policy on developing transmission through competitive processes[35].

The EWT required upgrades to the existing Hydro One Networks Inc. ("HONI") feeding stations. These upgrades were to be evaluated as part of an application filed by HONI with the OEB (the "stations application"). The stations application was a process at once separate from but directly related to the competition for the construction of the EWT. Indeed, delays in the completion of the stations upgrade, caused by environmental assessment issues, meant that the transmission line could not be in service before the end of 2021, regardless of the result of the competitive process implemented by the OEB for the EWT.

In 2012, the OEB convened a process whereby it divided the work on the EWT into two phases. The first phase, referred to the "Designation Phase", contemplated the receipt of bids for the development of work. The actual construction of the EWT required the approval, by the OEB, of an application LTC. The second phase, which I refer to as the "Construction Phase", was to commence with the filing of that application.

With respect to the Designation Phase, the OEB's proposal was that a successful bidder would be allowed to do the development phase work (for example, engineering design, Indigenous consultation, environmental assessment, and so forth) and be allowed to recover the costs of that development work from ratepayers.

Six bidders submitted proposals in the Designation Phase. The proposals included a forecast cost for the development work as well as for the construction work that was to take place in the Construction Phase.

Upper Canada Transmission Inc., operating as NextBridge Infrastructure LP ("NB"), was awarded the development phase work, and was allowed to recover $22.2 million in development costs. NB had estimated its construction costs in the range of $450 million. In designating NB to do the development work, the OEB stated that the construction phase of the work would be open to competition[36].

In its December 20, 2018 Decision and Order, discussed in detail below, the OEB made the following observation:

> In accordance with the Transmission Policy Framework, the Designation Decision clarified the designation did not carry with it the exclusive right to build the new line between Wawa and Thunder Bay or the exclusive right to apply for leave to construct. The designated transmitter was only assured of recovery of the budgeted amount for project development. As a result, a non-designated transmitter would be able to apply for a leave to construct the line between Wawa and Thunder Bay as there were no specific criteria set out in the Transmission Policy Framework to prevent this situation. This would enable an application by a non-designated transmitter that would require, presumably, a comparison of the leave to construct applications using the consideration set out in the act.[37]

As stated above, the Construction Phase of the process commenced with an application for LTC the EWT. NB filed an application, pursuant to section 92 of the OEBA for LTC. In its Designation Phase bid, NB had forecast a construction cost of $450 million. In its LTC application it forecast a cost of $737 million, an increase of approximately 80%.

Hydro One Networks Inc. ("HONI") filed its own application to construct the line, at a forecast cost of approximately $642 million.

NB filed a motion asking the OEB to dismiss HONI's application for LTC, a motion that was, after a hearing, dismissed[38].

The OEB combined the two LTC applications and the stations application into one proceeding, and a hearing was held in October of 2018. The evidence at the hearing was that NB's costs would be in the range of $737 to $810 million, while Hydro One's costs would be in the range of $642 to $681 million[39].

The criteria which the OEB must apply, in determining whether to approve an application for LTC a transmission line are set out in subsection 96(2) of the OEBA. That subsection provides:

> 2) In an application under section 92, the Board shall only consider the following when, under subsection (1), it considers whether the construction, expansion or reinforcement of the electricity transmission line or electricity distribution line, or the making of the interconnection, is in the public interest:
>
> 1. The interests of consumers with respect to prices and the reliability and quality of electricity service.
>
> 2. Where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy sources.[40]

Since renewable energy resources were not a relevant consideration in the circumstances of the NB and HONI applications, the OEB was limited to only one consideration, namely the interests of consumers with respect to prices and the reliability and quality of electricity services.

Notwithstanding that narrow jurisdiction, the parties to the hearing of the applications supporting NB focussed on three issues that were unrelated to the price of electricity services. One was the question of which of the applicants could have the line in service by 2020. The second was which of the applicants conferred greater benefits on, and reflected more thorough consultation with, Indigenous groups. The third was the status of Environmental Assessment ("EA") approvals that were required to build the line.

The OEB issued a decision in the applications, on December 20, 2018[41]. I will refer to this as the "First Leave-To-Construct Decision". Critically, this decision did not award the right to construct the EWT.

In the First Leave-To-Construct Decision, the OEB dealt first with the duty to consult and the environmental assessment issues. With respect to the former, the OEB relied on the decision of the Supreme Court of Canada in *Carrier Sekani*[42] to hold that its role in relation to consultation was limited by the wording of sections 92 and 96 of the OEBA. The OEB held that it was required to "follow the Legislature's intent and confine its review to the issues set out in Section 96(2) of the Act"[43]. As noted above, those issues were, in the circumstances of the two applications, the impact of the proposals on the price of electricity and the reliability and quality of service.

The OEB also held that its jurisdiction to consider environmental matters was likewise limited to the impact, if any, on the issues of price, reliability and quality of electricity where they can impact the costs of and schedule for a project[44].

In considering the criteria in subsection 96(2) the OEB found that "both projects are acceptable from a reliability and quality of electricity service perspective. As a result, prices will determine which Applicant is granted leave to construct the new transmission line."[45]

With respect to the in-service date, the OEB concluded that, because of the timing of required environmental approvals on the stations project, the in-service date of 2020 was no longer relevant and that both projects were capable of being in-service by the end of 2021[46].

With respect to the issue of consultation with and economic benefits for Indigenous communities, the OEB found that both applicants were capable of reaching satisfactory arrangements with these communities[47].

On the determinative issue of price, the OEB took the unusual step of offering the parties the opportunity to submit a not-to-exceed ("NTE") price, and to do so by January 31, 2019. The OEB stated that the successful applicant was to agree not to seek recovery in rates for amounts beyond the NTE price specified[48]. That NTE price was, in other words, to be a cap on the cost of constructing the line.

On January 30, 2019, an Order in Council (OIC) was issued directing the OEB to amend NB's transmission licence to permit it to construct the EWT[49]. The OIC was issued pursuant to the authority contained in section 28.6.1 of the OEBA[50], an authority authorizing the Minister of Energy to issue directives to the OEB related to, among other things, the construction of transmission lines.

Section 97.1, added to the OEBA in 2016, limits the authority of the OEB to grant leave-to- construct applications pursuant to section 92 of the OEBA in circumstances where a directive has been issued pursuant to section 28.6.1[51]. So while the OIC could not use section 28.6.1 to grant LTC, that is its practical effect. The OEB must grant LTC but its doing so is purely a formality.

The OIC made the filing NTE prices at the OEB moot. Because of that, ratepayers were precluded from knowing how much lower the cost might have been had NB and HONI filed NTE prices.

The OEB subsequently issued a Decision and Order, dated February 11, 2019, pursuant to section 92 of the OEBA, granting NB LTC as effectively required by the OIC[52]. I will refer to this as the "Final Leave-to-Construct Decision".

In the Final Leave-to-Construct Decision, the OEB expressed its concern with the construction costs put forward by NB. It noted that the costs had increased from $409 million at the time of the designation proceeding to $737 million at the time NB filed its LTC application[53]. The OEB also noted that NB had not filed an updated construction cost since the application had been filed, some 18 months earlier[54]. This was important because the evidence in the hearing was that NB's construction costs were pegged to a 2020 in-service date and that delays in the construction schedule would likely cause the cost of construction to increase.

The practical result of the OIC, thus, was that the OEB was forced to approve NB's application for LTC without knowing the impact of NB's proposal on the cost to build the EWT. As the cost of construction would be recovered from ratepayers, the impact on ratepayers could not be known. Put another way, ratepayers were precluded from knowing how much lower the cost might have been had NB and HONI filed NTE prices. The OEB put this result bluntly when it stated, in the Final Leave to Construct Decision and that "Given the Directive, mitigation of ratepayer risk through a comparative analysis of two competing applications based on costs is no longer an option"[55]. The OEB was, thus, compelled to issue an LTC decision without being able to fulfill its obligation, set out in subsection 96(2) of the OEBA, to consider the interests of consumers with respect to prices when deciding whether to approve an application for LTC.

The ostensible reasons for the issuance of the OIC were, first, that it would "provide an increased level of regulatory certainty to the processes currently being undertaken by the Ontario Energy Board"[56]. That is a puzzling rationale, given that the OEB's regulatory processes were within days of being completed, with the only uncertainty being which of the two competitors would offer the lowest not-to-exceed price.

The second reason offered for the OIC was that the "economic participation of Indigenous communities is a policy objective of the Ontario Government and an increased level of regulatory certainty would support partnerships entered into in respect of the East West Tie Line Project"[57]. That too is a puzzling rationale in that both NB and HONI had offered economic participation to Indigenous communities and neither could begin construction until the required environmental approvals were in place. As noted above, the OEB, having heard the evidence of both parties, concluded, in its First Leave-to-Construct Decision that both parties were capable of offering economic benefits to Indigenous communities.

Neither of those reasons set out in the OIC were supported by the evidence that had been examined by the OEB during the hearing of the competing LTC applications. The OEB's finding, noted above, was that, because of the requirements of environmental assessment approvals for the stations upgrade, neither Hydro One nor NB could have the line in service before the end of 2021. As a result of that, the economic benefits to Indigenous communities could not be provided any faster by NB than they could by Hydro One. The evidence was that Hydro One was offering Indigenous communities economic benefits equal to, or in one case superior to[58], the economic benefits offered by NB. Finally, since the OEB's decision on the LTC applications would, presumably, have been issued within days of the filing of the NTE prices, the regulatory delay could be measured in, at most, days if not hours.

The OIC made no reference to the cost of constructing the EWT. As a result NB had accomplished something that it could never have accomplished in its LTC application, namely having no limits on the cost to construct the EWT.

Although not reflected in the OIC, it would appear that the Government made the decision to intervene based on submissions, written or oral, to it from NB. NB had, as early as August of 2018, written to two Ministers asking that they grant NB the right to build the line, thus by-passing the OEB while its hearing process was about to begin. NB wrote to the Minister of Energy on January 21, 2019, again asking for that relief. That letter refers to a letter of January 8, 2019, a copy of which has not been disclosed.

In the letters NB wrote to the Government that have been disclosed, NB provided information about its proposal and that of HONI. The information included in these letters was in some cases inaccurate. For example, in its January 21, 2019 letter to the Minister of Energy, Northern Development and Mines NB stated that "Hydro One's project would be completed much later than the Next Bridge-BLP One causing delays and corresponding losses in economic development and risks to the electrical reliability"[59]. As reflected in its December 20, 2018 Decision and Order, OEB had found that neither NB nor HONI would have the line in service before the end of 2021 and had found that neither project caused a risk to electrical reliability.

In that same letter, NB included what it described as a "comparison of net project cost"[60]. That comparison included assumptions about HONI's costs, for example, additional costs to follow an alternate route, which were not correct.

The important point was that neither NB nor the Government disclosed the fact of or the contents of the letters at the time they were sent to the Government and in circumstances where they could be examined in a public proceeding and where stakeholders could respond.

The point of these observations is not to argue that Hydro One's application was superior to that of NB. The evidence in the OEB proceedings can be evaluated on its merits. The findings of the OEB

with respect to construction costs are set out in the First Leave-to-Construct Decision and in the Final Leave-to-Construct Decision.

It is arguable that the regulatory process originally created by the OEB for the development of the EWT was flawed from the outset. The Designation Decision created substantial competitive advantages for the party awarded the right to do the development work. To give effect to the policy of having competition to construct the EWT, any party other than NB would have to overcome those competitive advantages. That, in turn, would require the OEB to allow a competing party the full opportunity to make its case in an LTC application. That, in turn, would involve some regulatory delay. To its credit, the OEB, at least implicitly, recognized the problems in the original regulatory process it had created and gave NB and HONI the opportunity to make their cases. That meant there was a transparent process whereby the competing proposals could be thoroughly examined. To put the matter another way, the OEB had given effect to its policy, and to the Government's policy, of having transmission lines developed through a competitive process. It was the Government's intervention that nullified the process, and reversed the policy.

The effects of the Government's decision to effectively grant NB the right to construct the EWT are the following:

1. The right to construct the line was granted in violation of the statutory obligation in the OEBA to consider in the interests of consumers with respect to prices;

2. Beyond that, given the evidence in the hearing, the right to construct was granted by the Government knowing, based on the findings of the OEB, that it almost certainly would cost more than the alternative proposal, ensuring that ratepayers would pay more than they would otherwise have had to;

3. The Government's decision was based on considerations that were, again based on the findings of the OEB, demonstrably incorrect, namely that it would end regulatory delay and uncertainty and result in economic benefits flowing more quickly to Indigenous groups;

4. The Government undermined the OEB's regulatory process, which included nullifying the open and transparent consideration of competing evidence and the opportunity for affected stakeholders to express their concerns.

5. By acting on untested information submitted by NB, the Government violated the rules of natural justice which are supposed to govern decisions in the electricity sector affecting the interests of ratepayers; and

6. The Government abandoned the policy of having transmission lines developed through competitive processes, but did so without acknowledging that it had done so.

IV Governance in the Public Sector

In this section I consider the principles of governance in the public sector, and why adherence to those principles is important.

The OECD describes governance in the public sector as follows:

> Public governance refers to the formal and informal arrangements that determine how public decisions are made and how public actions are carried out, from the perspective of maintaining a country's constitutional values when facing changing problems and environments.[61]

The OECD has commented on the importance of good governance for regulators as follows:

> How a regulator is set up, directed, controlled, resourced and held to account – including the nature of the relationships between the regulatory decision-maker, political actors, the legislature, the executive administration, judicial processes and regulatory entities – builds trust in the regulator and is crucial to the overall effectiveness of

> regulation. Improving governance arrangements can benefit the community by enhancing the effectiveness of regulators and, ultimately, the achievement of important public policy goals.[62]

The OECD, among others, has identified the following characteristics of effective regulatory systems:

1. Independence;
2. Accountability;
3. Certainty;
4. Effectiveness;
5. Efficiency[63].

The OECD also noted the importance of the relationship between regulatory integrity and independence as follows:

> Establishing the regulator with a degree of independence (both from those it regulates and from Government) can provide greater confidence and trust that regulatory decisions are made with integrity. A high level of integrity improves outcomes of the regulatory decisions.[64]

Considerations of the proper governance of regulatory agencies necessarily require a consideration of the relationship between the Government and those agencies. For that reason, the OECD's principles of good governance can be applied in considering the governance arrangements for the electricity sector as a whole, and for the impact of the Avista and EWT cases on that governance.

V The Governance of the Electricity Sector

The governance of regulatory agencies can be defined as follows:

> For regulatory agencies, governance may be defined, broadly, as the mechanisms or instruments, processes, and relations by which a regulator is controlled and directed, and by which its decisions and actions are measured and held to account. The mechanisms or instruments would include the governing legislation, any regulations made under that legislation, and the rules governing the regulatory agency's relations with the Government, the legislature, and the courts. It would also include the regulatory agency's own structures, rules, and practices.[65]

Electricity is, along with food and shelter, essential to the wellbeing of citizens. Governments must ensure that there is a sufficient supply of electricity at prices every citizen can afford. To accomplish those objectives, provincial Governments have created a governance structure for the electricity sector. The structure, created by legislation and regulation, sets out the respective roles of the Government and its two regulatory agencies, the OEB and IESO.

As originally conceived, the core of the governance structure for the electricity sector was a system by which an independent regulator, the OEB, approves rates based on evidence filed in public proceedings and which is available to be tested by ratepayers.

Again as originally conceived, the governance structure of the electricity sector had the following major components:

1. The OEB was given the authority, by statute, to approve the rates charged for the transmission and distribution of electricity, and for the construction of transmission lines. The statute sets out the tests which the OEB must apply. It also specifies how it is to make those decisions, namely by a hearing. The fact that it is required to make its decisions by a hearing means that it has an obligation to follow the rules of natural justice.

2. Decisions of the OEB may be appealed to courts on issues of law.

It is an accepted fact of governance in the electricity sector and indeed in the governance of regulatory agencies in all sectors, that the Government may establish policies which the OEB is required to follow. It is essential, in a democratic society, that regulatory agencies be responsive to the policies of the Government. There may be circumstances where government intervention is necessary, for example to ensure adherence to a policy. However, such intervention should be done in a manner that is transparent.

There is always a tension between the obligation to be responsive, and indeed to implement policies, and the need for independence. However, absent specific statutory direction, how the OEB interprets and applies those policies lies within its discretion. Put another way, how the OEB interprets those policies in light of its statutory obligation to set, for example, just and reasonable transmission and distribution rates, lies within the discretion of the OEB. It is essential that, in striking the balance between the obligation to interpret policies and exercising its discretion, the OEB do so in an open and transparent way.

In this context, section 1 of the OEBA is an illustration of how the balance between Government policies and regulatory independence may be struck[66]. That section sets out the objectives by which the OEB, in carrying out its responsibilities under the OEBA, is to be guided. The Government's objectives are clearly stated, but the discretion as to how those objectives are to be achieved in keeping with its statutory obligations is left to the OEB.

The relationship between the Government and the OEB is formally prescribed in the "Memorandum of Understanding between the Minister of Energy and the Chair of the Ontario Energy Board" (hereinafter referred to as the MOU)[67]. Section 1 of the MOU sets out the "Purposes of this Memorandum". Section 1.2 provides as follows:

> This Memorandum does not affect, modify or limit the powers or responsibilities of the Ontario Energy Board or the powers or responsibilities of individuals or entities that are derived from the Ontario Energy Board, set out in applicable legislation, or otherwise established by law.[68]

Section 4 of the MOU sets out the "Guiding Principles". Section 4.1 reads as follows:

> The Minister recognizes that the Board is a statutory corporation and that the Board, the Chair and the Management Committee each exercise powers and perform duties in accordance with the Act and other applicable Legislation. The Minister also recognizes that as a statutory entity, the exercise of the Board's powers and duties is subject to limitations, constraints and conditions that flow from applicable Legislation, from the Board's status as an independent quasi-judicial tribunal or both. The Minister acknowledges that the Board's adjudicative and regulatory decisions must be made, and be seen by the public to be made, independently and impartially. The Parties agree that this Memorandum and all obligations contained in it shall be interpreted and applied in a manner that is compatible with the foregoing.[69]

This basic structure for the governance of the electricity sector began to change with the introduction, in 1998, of the first amendment to the OEBA allowing the Government to issue directives to the OEB. What is now section 27 of the OEBA provides that the Government may issue policy directives "concerning general policy and the objectives to be pursued by the Board. The section provides that when the directives are issued, the Board is required to implement them[70].

What is now section 27 of the OEBA has served, with one exception, as a template for the subsequent amendments in the OEBA granting the Government the power to issue directives. The wording of what is now section 27 contemplates that directives will be issued by the Government and then applied by the OEB. The practical result is that the application of the directives would, in most cases, be considered in hearings. While the effect of the directives would be to limit the OEB's discretion, the relationship between what was required by the directive and the exercise of the Board's discretion

would be subject to stakeholder input in a transparent process. That process was not followed in the EWT case, a distinguishing feature of the case and of the Government's use of the directive power.

In the following 15 years, the OEBA was amended by adding ten (10) sections authorizing the issuance of directives. Many of those directives were intended to allow the Government to direct how its renewable energy and energy conservation initiatives were to be implemented.

The directive power used by the Government in the EWT case was added to the OEBA by amendments in 2016. This directive is an exception to the other directives in the OEBA in that, by virtue of section 97 of the OEBA, exercising it strips the OEB of its discretion to approve the construction of transmission lines. That amendment was not subject to any discussion in either legislative committee or the legislature itself.

The new provincial Government has arguably taken the power to issue directives to new lengths. The *Hydro One Accountability Act, 2018*,[71] gave the Government the power to issue directives to among other things, set the compensation of the CEO of Hydro One. On February 1st of this year the Government issued a directive allowing just that[72].

The *Electricity Act, 1998* has also been amended to give the Government control over the content of and the implementation of the long-term energy plan[73]. Where originally the IESO and the OEB were principally responsible for the content and application of the long-term energy plan, the decisions about the content and application of the plan now lie with the Government.

While making these amendments, successive Governments have, with the one exception of sections 28.0.1 and 97 of the OEBA, left intact the discretion of the OEB to exercise its core function of approving just and reasonable rates. The effect of these amendments arguably has been to change

the governance arrangements for the electricity sector in a material way by inserting the Government into the decision-making process and constraining the discretion of the OEB. However, the OEB retained a measure of independence in that it had some discretion in how the directives were to be applied. In addition, in cases where the directives did not apply, the discretion of the OEB was unchanged. The EWT and Avista cases have in my view changed that.

I use the OECD criteria to examine what are the governance arrangements for the electricity sector. I suggest that these arrangements, as originally conceived, created by statute and regulation, specify discrete roles for the Government and the OEB, and ensure the appropriate measure of independence for the OEB. In addition, the arrangements require that decisions affecting ratepayers, and in particular the costs which ratepayers must pay for electricity service, are to be made in open and transparent processes, with the evidence on which decisions are made available for public scrutiny and the OEB accountable for those decisions.

Ontario Governments, of all parties, have a long, and largely unhappy, history of intervening in the electricity sector[74]. Governments have frozen, and then unfrozen, electricity prices. Governments have reduced electricity prices. The auditor general, in his 2011 Report, observed, of the Government's *Green Energy and Green Economy Act, 2009*, that "the Government created a process to expedite the development of renewable energy by providing the Minister with the authority to supersede many of the Government's usual planning and regulatory oversight processes"[75]. That observation could stand as a useful summary of the effect of the Government's legislation in the electricity sector from 1998 on.

The power to issue directives has constrained the ability of the OEB to act as an independent, quasi-judicial decision-maker. But its use of the directive power in the EWT case has done

something fundamentally different, namely overriding the OEB processes, and making a decision on the basis of information that has not been tested or, indeed, on information that had been tested in a hearing and found to be incorrect.

What the Avista case discloses is that the Government can use its power, as the largest shareholder in Hydro One, to affect the governance over the sector. There is some irony in this in that, prior to the partial privatization, the Ontario Government was the sole shareholder of Hydro One, and so had complete control. However, as noted elsewhere in this paper, the Government entered into the Governance Agreement to signify that it would limit its control over Hydro One to corporate and business, rather than political, considerations.

Against that background, two questions arise. The first is whether, and if so to what extent, the principles of good governance, particularly those expressed by the OECD, can continue to apply in the electricity sector. The second is whether the Avista and EWT cases represent a material change in the governance of the electricity sector or are simply the logical culmination of the changes in the governance structure of the electricity sector that have taken place over the past 15 years.

VI The Avista and EWT Cases and the Governance of the Electricity Sector

The role of the provincial Government in both the Avista and EWT cases has had, as noted above, adverse economic effects. In the case of the Avista, the WUTC's denial of approval of the Avista transaction meant that Hydro One has to pay a breakup fee of some $103 million. In the case of the EWT, the Government intervention means that the transmission line may cost at least $100 to $120 million dollars more than would have otherwise been the case. In the case of the breakup fee, the cost may not be borne by ratepayers but by taxpayers. In the EWT case, the construction cost will be

borne by ratepayers. Since there is, for all intents and purposes, no distinction between taxpayers and ratepayers, it may be a distinction without a difference.

For purposes of this analysis, it is the indirect effects that, in my view, are more troubling. That the provincial Government owns the largest, and arguably the most important, transmission and distribution utilities means that how it exercises its ownership power will have a material impact on the governance of the electricity sector. This was implicitly recognized when, in the context of the sale of shares in Hydro One, the Government entered into the Governance Agreement.

As noted above, the Governance Agreement was intended to accomplish contradictory objectives. On the one hand, it was intended to reassure the public that the Government retained sufficient control to be able to protect ratepayers from rate increases, a form of protection, as I have noted, that was unnecessary because of the role of the OEB in approving rates. On the other hand, and as Hydro One argued in the Avista case, it was intended to reassure regulators and investors that the Government could not control Hydro One.

As the WUTC found, the Governance Agreement provided no protection for the independence of Hydro One. Hydro One's board waived the protection of the agreement and gave in to the desire of the Government to fire the CEO and the board. It did so, it would appear, under threat of legislation. In addition, the Government simply overrode the Governance Agreement to introduce legislation giving it the power to set the compensation levels for the executive and the board of Hydro One.

What the WUTC recognized, by necessary implication, is that the corporate governance arrangements for Hydro One, and in particular the role of the Government as shareholder in those arrangements, now play a significant role in the governance of the electricity sector as a whole.

In the EWT case, the Government used its power to by-pass the OEB's hearing process and negate the protection of ratepayer interests required by the OEBA.

As noted above, Ontario Governments of all parties have interfered in the electricity sector, often with adverse consequences. In addition, and again as noted above, the governance structure of the electricity sector has, over the course of the past 15 years, been changed to alter the relationship between the Government and its regulatory agencies. Given those things, it may be argued that the Avista and EWT cases do not represent anything new or different in the nature of the effects of the Government's interference in the governance structure of the electricity sector. I think they do, however, in three particular ways:

1. For the first time, the Government has used the power to issue directives to effectively dictate an OEB decision, using that power to nullify a process that had been undertaken following the rules of natural justice;

2. For the first time, the Government's interference in the corporate governance arrangements of Hydro One has made those arrangements a factor in the governance of the electricity sector as a whole;

3. For the first time, the Government has used the threat of legislation to coerce the making of decisions in the sector.

The shift in the governance structures in the electricity sector, and in particular the enhanced role of the Government, are, in and of themselves, causes for concern about political interference in the electricity sector and therefore its security as a place to invest. In my view, the EWT and Avista cases have highlighted those concerns in dramatic ways, and in the process damaged the reputation of the Province and the electricity sector as places to invest.

Measured against the OECD's principles of good governance, the Government's actions in the Avista and EWT cases fail in the following respects:

1. Particularly in the EWT case, the Government's actions were not transparent. The OEB process that was the essence of transparency, by contrast the Government's interference was the opposite of transparency;

2. Again, particularly in the EWT case, the Government's actions nullified the operation of the rules of natural justice that were at the centre of the governance arrangements for the electricity sector. That the Government was legally authorized to do what it did is not the point. The governance structure of the electricity sector was designed so that decisions affecting the price of electricity paid by consumers would be determined in processes governed by the rules of natural justice. The Government's interference nullified the protection provided by those rules;

3. The Government's interference in both cases was not effective, if measured by the impact on prices paid by ratepayers for electricity and, indirectly, by taxpayers. In the case of Avista, the interference led to the termination of a commercial agreement at a cost of $103 million. In the EWT case, the Government intervention will cost ratepayers more to build the transmission line;

4. The Government's interference in both cases was based on considerations that were demonstrably incorrect. In the Avista case, firing both the CEO of Hydro One and the board of directors would not have a material, if any, effect on rates. In the EWT case, the intervention would not speed up the regulatory process and would confer no material benefit on Indigenous communities. The Government's intervention was not based on facts;

5. The Government's intervention in both bases affected two costly regulatory proceedings. It resulted, in other words, in a waste of money, time, and effort. The Government's intervention was, in other words, the antithesis of efficient; and

6. The Government's interference in the EWT case robbed the regulator and its processes of accountability and certainty.

As noted above, the OECD noted the links between good public governance, investment, and development. The findings of the WUTC would make troubling reading for anyone considering investing in the electricity sector in Ontario. The Government's intervention in the EWT case means investors can have no confidence in the decisions of the OEB, or in the processes by which those decisions are made. The Government's intervention is an invitation to by-pass those processes. Potential investors can have no confidence that the Government of the day will not intervene to act in a way which diminishes the value of those investments. Confidence in the independence and integrity of the regulatory process is particularly important at a time of fundamental change in the electricity sector and when investment in new technologies will be essential.

I noted above that the partial privatization of Hydro One was criticized on economic grounds. There is an argument that a new government has the right to reverse a decision of a previous government that it regards as wrong. However, that is not what happened in the Avista case. The new Government did not reverse the privatization; indeed, it offered evidence to the WUTC of its continuing support of the acquisition. It intervened to affect one outcome of the privatization, namely the ability to fix executive remuneration, and in the process penalized Hydro One and all of its shareholders by causing Hydro One to have to pay a breakup fee.

There is also an argument that investors should be wary of dealing with Canadian governments given the explicit lack of a constitutional guarantee of private property and the primacy of legislative decisions. In the case of Avista, the existence of the Governance Agreement suggests that the Government wanted to neutralize those concerns.

In the case of the EWT, the authority of the OEB has been fundamentally undermined. Neither investors nor ratepayers can have confidence in the independence of the OEB as a quasi-judicial decision maker. The regulatory process is supposed to ensure that decisions are made in a transparent way, with evidence fully tested. The Government's interference in the EWT case meant that a decision was taken to undermine that process, and was based on information that was not subject to public review.

The protection of ratepayer interests requires that the integrity of the regulatory process be respected. Government interference in the governance of the sector, whether indirectly in the case of Avista or directly in the case of the EWT, destroys that integrity. The only way to ensure that the integrity is preserved would be to structure, and constrain, the ability of the Government to intervene, in at least two ways.

As I have stated, electricity is an essential commodity and the regulatory structure was designed not simply to ensure its availability but to give ratepayers a say in how it was transmitted and delivered and at what cost. The Avista and EWT cases illustrate how Government interference can nullify that by by-passing both the arrangements for, and the principles of, good governance.

I acknowledge that it may be naïve to believe that the Government would stay out of the governance of the electricity sector, and limit its role to setting broad, policy guidelines. It may be easier to find a cure for malaria than to get the Government out of the electricity sector. However, what the Avista and EWT cases make clear is that the Government ought to do that. The starting point is an acknowledgement of the importance of good governance, and the principles through which it should operate and a frank recognition of the adverse effect of violating those principles. In an ideal world, the Government would amend the OEBA to delete the authority to issue directives, and would either

sell its interest in Hydro One or do what it said it was doing in the Governance Agreement, namely allow Hydro One to operate as a publicly traded, private corporation. It should also adhere to the spirit and intent of the MOU.

On the assumption that Ontario governments will never get out of the electricity sector, I suggest that three measures are required. The first is to respect the integrity of the regulatory process by allowing the OEB to make decisions based only on evidence that has been tested in open and transparent processes. The second is that policy direction from the government be presented in open and transparent processes. The third is that communications between the Minister and the regulator be disclosed.

The Ontario Energy Board's Modernization Review Panel's Report[76], though dated October, 2018, has recently been released. In that Report, the Panel makes a number of recommendations on measures it believes are essential to making the operations of the OEB consistent with, among other things, OECD principles. The recommendations deal primarily with structural changes to the OEB. Those changes, while salutary, would be ineffective without a change in the Government's approach to the governance of the electricity sector. To put the matter another way, the Government's attitude to the governance of the electricity sector, as evidenced by the Avista and EWT cases, largely nullify the benefits of the changes the Panel recommends.

Endnotes:
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1 Governance Agreement between Hydro One Limited and her Majesty the Queen in Right of Ontario, 5 November, 2015, Recitals, Section A ("Governance Agreement")
2 See, for example, article by Andrea Horwath, the leader of the Ontario New Democratic Part, Toronto Star, April 15, 2015
3 See, for example, Canadian Press article dated April 20, 2015, citing Premier Kathleen Wynne
4 Governance Agreement, s 4.7.1
5 "Final Order Denying Joint Application for Transfer of Property", Washington Utilities and Transportation Commission, Docket U-170970, December 5, 2018 (the "WUTC Decision"), Page 17

6 Governance Agreement, section 2.1.3
7 Governance Agreement, section 2.3
8 Governance Agreement, section 4.7.1
9 WUTC Decision, p. 17
10 Avista operates in the states of Washington, Idaho, Montana, Oregon, and Alaska
11 WUTC Decision, p. 6
12 WUTC Decision, p. II
13 WUTC Decision, p. III
14 WUTC Decision, p. III
15 WUTC Decision, p. 4
16 WUTC Decision, p. II
17 WUTC Decision, p. II
18 WUTC Decision, p. II
19 WUTC Decision, p. III
20 *Urgent Priorities Act, 2018*, S.O. 2018, c. 10 - Bill 2
21 WUTC Decision, p. III
22 WUTC Decision, p. III - IV
23 WUTC Decision, p. 5
24 WUTC Decision, p. 17
25 WUTC Decision, p. 17
26 WUTC Decision, p. 25-26
27 WUTC Decision, p. 18-19
28 WUTC Decision, p. 29
29 WUTC Decision, p. 34
30 WUTC Decision, p. 34
31 WUTC Decision, p. 34
32 WUTC, Docket U-170970, Order 06, December 5, 2018
33 EB-2010-0059, "Board Policy: Framework for Transmission Development Plans", August 26, 2010 ("Policy"), p. 3
34 Policy, p. 3
35 Letter from the Minister of Energy to the Chair of the Ontario Energy Board, March 29, 2011
36 EB-2011-0140, "East-West Tie Line Designation, Phase 2 Decision and Order", August 7, 2013, p. 4
37 EB-2017-0182, EB-2017-0194, EB-2017-0364, Decision and Order December 20, 2018, (the "First Leave-to-Construct Decision"), p. 65
38 EB-2017-0364 , "Decision and Order", July 19, 2018
39 First Leave-to-Construct Decision, p. 46-47
40 *Ontario Energy Board Act 1998*, S.O. 1998, Chapter 15, Schedule B., ("OEBA"), Section 96
41 First Leave-To-Construct Decision
42 First Leave-To-Construct Decision, p. 12
43 First Leave-To-Construct Decision, p. 12
44 First Leave-To-Construct Decision, p. 13
45 First Leave-To-Construct Decision, p. 42
46 First Leave-To-Construct Decision, p. 60
47 First Leave-To-Construct Decision, p. 62
48 First Leave-To-Construct Decision, p. 66
49 Order In Council 52/2019,January 30, 2019 ("OIC")
50 OEBA, s. 28.6.1
51 OEBA, s. 97.1
52 EB-2017-0182, EB-2017-0194, EB-2017-0364, Decision and Order February 11, 2019 ("Final Leave-to-Construct Decision")
53 Final Leave-To-Construct Decision, p. 7
54 Final Leave-To-Construct Decision, p. 7
55 Final Leave-To-Construct Decision, p. 7
56 OIC, p. 1
57 OIC, p. 2.

58 The evidence in the hearing was that Hydro One was offering the Indigenous community most directly affected by the EWT a 34% equity interest, as opposed to the 20% equity interest offered to the same community by NextBridge.
59 Letter dated January 21, 2019, from Jennifer Tidmarsh of NextBridge Infrastructure to the Minister of Energy, Northern Development and Mines
60 *Ibid.*
61 "Policy Framework for Investment User's Toolkit", 2011, a publication of the Investment Division of the OECD Directorate for Financial and Enterprise Affairs, Chapter 10, p. 2
62 OECD, "Principles for the Government of Regulators: Public Consultation Draft", 21 June 2013 (Paris: OECD Publishing, 2013) ("OECD Principles")
63 Report of the Ontario Energy Board Modernization Review Panel, October, 2018
64 OECD Principles, p. 47
65 Warren, Robert, "The Governance of Regulatory Agencies: A Case Study of the Ontario Energy Board", Council for Clean and Reliable Energy, January 2015, p. 5
66 OEBA, section 1
67 "Memorandum of Understanding Between the Minister of Energy and the Chair of the Ontario Energy Board", section 1.2
68 MOU, section 1.2
69 MOU, section 4
70 OEBA, s. 27
71 *Hydro One Accountability Act, 2018*, S.O. 2018, c. 10, Sched. 1
72 Directive dated February 21, 2019
73 *Electricity Act, 1998*, S.O. 1998, c. 15, Sched. A, sections 25.29 and 25.30.
74 Examples of Government interference are legion. The following examples are indicative.

1. The *Energy Competition Act, 1998*, created a competitive market in the electricity sector. One of the objectives was to have ratepayers pay the true cost of power;
2. The *Electricity Pricing, Conservation and Supply Act, 2002*. This legislation capped electricity prices for two years. It also froze transmission and distribution rates until 2006. The effect of the legislation was to undue the experiment in market pricing as established by the 1998 legislation.
3. The *Electricity Restructuring Act, 2004*. That legislation reorganized the institutional structure of the electricity sector. Among other things, the legislation granted the Ontario Power Authority, the predecessor to the IESO, the power to develop what is now called the Long Term Energy Plan. As noted in the text, that power now lies with the Minister.
5. The *Green Energy Act* and *Green Economy Act, 2009*. This legislation reflected the Government's embrace of renewable energy generation, and substantially enhanced the Government's power to issue directives;
6. *Ontario Clean Energy Benefit, 2011*. This legislation introduced a 10% discount on ratepayers' electricity bills.
7. The *Ontario Rebate for Electricity Consumers Act, 2016*, lowered hydro rates by 8% starting on January 1, 2017.
8. The *Fair Hydro Act, 2017*, reduced hydro rates by a further 17%, for a total reduction of 25%.

75 Ontario, Office of the Auditor General of Ontario, *2011 Annual Report*, (Toronto: Queen's Printer for Ontario, 2011), p. 89
76 Report of the Ontario Energy Board Modernization Review Panel, October, 2018