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**ENEMIES OF THE STATE?**

**The Alberta Energy and Utilities Board, Landowners, Spies, a 500Kv  
Transmission Line and Why Procedure Matters**

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## **Enemies of the State? – The Alberta Energy and Utilities Board, Landowners, Spies, a 500 kV Transmission Line and Why Procedure Matters**

### **Introduction**

In the summer of 2007, the Alberta energy industry was surprised by the revelation that, in a hearing on whether to approve the construction of a 500kV transmission line between Edmonton and Calgary, the Alberta Energy and Utilities Board (“Board”) had employed private investigators to covertly observe affected landowners intervening in the hearing. This news created a media and public firestorm, and compelled two separate inquiries, one by the Privacy Commissioner and another by a retired judge appointed by the government for this purpose. The Board was accused of “spying and lying”<sup>1</sup>, its process was described as “scandal plagued”<sup>2</sup> and the judge went so far as to describe aspects of the private investigators’ conduct as “repulsive.”<sup>3</sup>

On September 30, 2007 the newly appointed Chairman of the Board, William A. Tilleman, responded to this crisis by issuing Decision 2007-75, which vacated all Board decisions related to the transmission line. These included all decisions related to the facilities hearing during which the private investigators had been retained, but also Decision 2005-31, made by the Board pursuant to s. 34 of the *Electric Utilities Act*<sup>4</sup> and approving the “Needs Identification Document” filed by the Alberta Electric System Operator (“AESO”). This Decision had approved the AESO’s recommendation that the long-standing congestion on the Alberta transmission grid be addressed in part through the construction of two 500 kV lines in the “West Corridor” between Calgary and Edmonton.

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<sup>1</sup> Paula Simons, “EUB coverup shocking: Prove to be inept at spying and lying” *Edmonton Journal* August 18, 2007.

<sup>2</sup> Hanneke Brooymans and Gordon Jremko, “Divisive power project back to Square 1: Regulator scraps scandal-plagued transmission line” *Edmonton Journal* October 1, 2007.

<sup>3</sup> Justice D.W. Perras “Examination of the Alberta Energy and Utilities Board Security Measures Related to the AltaLink 500 kV Hearing” September 7, 2007 (under “Summary”)

<sup>4</sup> S.A. 2003 c. E-5.1 (hereinafter “EUA”)

In his decision Tilleman noted the significance of the issue with which the Board was faced:

At times, in the life of a judge, due to misadventure, questionable judgment or circumstances beyond the judge's ability to control, the judge must withdraw from a proceeding and declare a mistrial. They must do so when they can no longer decide the case with the apparent fairness and impartiality that is the foundation of our system of law.<sup>5</sup>

Tilleman went on to discuss the law related to reasonable apprehension of bias and the facts related to the transmission facilities hearing. He concluded that in these circumstances a reasonably informed person would have an apprehension of bias, with the result that the Board's jurisdiction had been lost.

This paper will review this remarkable and unfortunate incident in the otherwise respectable history of the Alberta Energy and Utilities Board. It will not do so in order to add to the criticism of the Board's engagement of private investigators (which has by now been well aired). Rather, it will attempt to delineate the precise nature of the Board's procedural wrongdoing so as to indicate how it, and other regulators facing contentious hearings, can avoid making equivalent mistakes. Its thesis will be that to avoid mistakes of this nature a regulator must not simply focus on the rules and requirements traditionally associated with procedural fairness – notice, a hearing and avoidance of bias (although doing so is obviously important and helpful). Rather, it must design a process that, given the regulatory context,<sup>6</sup> appropriately complies both with those rules *and* with the norms and values underlying procedural fairness.

Its secondary thesis will be that, when assessing the sufficiency of a regulatory process, courts must also be sensitive to the norms and values of procedural

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<sup>5</sup> Alberta Energy and Utilities Board Decision 2007-75.

<sup>6</sup> It is important to emphasize that this paper's orientation towards the values of procedural fairness is in no way intended to undermine the view that what constitutes appropriate process varies with the nature of the administrative decision being made. The point is simply that *within that contextual analysis* considering the values of procedural fairness should inform process design.

fairness. Most of the time procedural fairness can be ensured by application and enforcement of the categorical rules arising from that doctrine. However, from time to time – and in particular when a regulator has transgressed procedural fairness in a dramatic and unexpected way – those rules will not be sufficient to capture the regulator’s wrongdoing. Remembering the norms and values of procedural fairness will appropriately orientate the court’s review of the regulator’s process towards what procedural fairness is really about.

Procedural fairness exists for a reason: to ensure that decisions are accurate and legitimate, and that the process of decision-making respects the dignity and autonomy of the citizenry the decision directly affects. To presume that “some individuals have no point of view worth hearing or expressing” violates rather than respects those fundamental entitlements.<sup>7</sup> It results in a decision that is less likely to be accurate and is unlikely to be accepted as legitimate, and it does so through a process that treats affected parties without dignity. A regulator seeking to avoid making the same mistakes as the Board will need to do more than avoid retaining private investigators to watch and report on the conduct of interveners and their counsel. It will have to take positive steps to ensure that parties who should be included are included, that regulatory hearings allow those who ought to be heard to be heard effectively, and that the regulatory process truly respects those who will be affected by the decisions resulting therefrom. A reviewing court’s obligation is to ensure that it has done so.

### **What did the Board do? The Edmonton-Calgary Transmission Line Hearings 2004-2007.**

To understand its legal significance, the Board’s decision to employ covert private investigators to observe interveners must be placed within its broader factual context. In particular, the Board’s decision must be put within the context of the Board’s overall handling of local land owners’ legitimate concerns with the

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<sup>7</sup> David Luban, *Legal Ethics and Human Dignity* (Cambridge: Cambridge University Press, 2007) at x.

proposed transmission facility. Doing so indicates that the Board's decision to employ private investigators was, in significant part, simply the icing on the cake of a regulatory process that did not sufficiently respect the parties it would affect. The Board's process did not include landowners when making crucial decisions affecting their interests. Then, when it did, it did not provide an effective process to manage landowners' legitimate frustration, to weed out individuals whose interest did not entitle them to standing before the Board and to ensure that affected landowners were listened to.

The covert investigators were retained by the Board during its hearing into AltaLink's 2006 application, pursuant to the *Hydro and Electric Energy Act*,<sup>8</sup> to construct a 500 kV transmission line along what is known as the "West Corridor" between Edmonton and Calgary. That application had followed from the Board's approval, pursuant to s. 34 of the *EUA*, of a prior application by the Alberta Electric Systems Operator ("AESO") that this transmission line was "needed" from the perspective of the electricity system. In May, 2004 the AESO had filed a "Needs Identification Document" with the Board which outlined 13 different transmission "concepts" to address the need for improved transmission in the Edmonton Calgary corridor. The different concepts included varying line sizes and also three different north-south corridors, although twelve of the thirteen concepts would have placed transmission lines in the West Corridor.<sup>9</sup> The AESO recommended that the Board approve "Concept V," in which two 500 kV lines would be placed in the West Corridor.<sup>10</sup> On April 15, 2005, in Decision 2005-31, the Board approved the application, concluding that "Concept V is the superior option from the perspectives of transmission system planning and performance, routing considerations, and economics." On the issue of location the Board noted that the West Corridor location had the advantage of only requiring one new right-of-way to be obtained.

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<sup>8</sup> R.S.A. 2000 c. H-16 (hereinafter "HEEA")

<sup>9</sup> *Lavesta Area Group v. Alberta (Energy and Utilities Board)* 2007 ABCA 194 at para. 38 (hereinafter *Lavesta*)

<sup>10</sup> *Ibid.* para. 5.

The process for hearing the AESO's application pursuant to the *EUA* commenced with the issuance of a notice of hearing that was e-mailed to applicants, interveners and "other parties that had expressed an interest". Newspaper announcements were also placed in papers in Edmonton, Calgary and Red Deer, and in 31 weekly rural newspapers. The notice identified the AESO's preferred option and included a map of the West Corridor. The oral stage of the hearing commenced December 9, 2004 in Calgary and the evidentiary portion was concluded by December 21. Argument was filed in January, 2005.

The hearing process did not involve the landowners located in the West Corridor despite the centrality of that route to the AESO's application. None of them participated through making submissions, cross-examining witnesses or introducing evidence. This lack of involvement was for a variety of reasons, the most significant of which was that no specific notice of the hearing was given to the West Corridor landowners. They were notified in the same way as everyone else – through the public notice procedure – and apparently few either saw the public notice or (if they did) appreciated its significance for themselves.

After the issuance of Decision 2005-31, the next step was for the Board to consider whether to approve the construction of the transmission facility in the West Corridor pursuant to the *HEEA*. The AESO named AltaLink as the Transmission Facility Operator ("TFO") who would be responsible for building the line, and also for applying to the Board for approval to do so. At this point, the West Corridor landowners were specifically contacted by AltaLink through its consultation process, and became aware of the Board's prior approval under *EUA* s. 34 of construction of a transmission line in the West Corridor.

Upon realizing the proposed construction of a transmission line on their properties, and the Board's apparent *de facto* approval of that location, a group

of the affected landowners brought an application to the Board seeking review and variance of the Board's s. 34 decision and, in particular, objecting to the lack of specific notice to the West Corridor landowners. The Board agreed to review Decision 2005-31 but restricted that review to the single question of the suitability of the West Corridor location. It precluded submissions by the landowners on the fundamental statutory question of whether there was need for the transmission facility from an electric system perspective. For the purposes of its review and variance the Board conducted a hearing into issues related to the suitability of the West Corridor and considered, *inter alia*, residential impacts, agricultural impacts, and environmental impacts. On December 6, 2006, in Decision 2006-114, the Board concluded:

that the evidence presented at the review hearing did not demonstrate that the West Corridor is unsuitable for future transmission development or that any of the other corridors examined was markedly superior or inferior to it. To the contrary, the Review Panel finds that each corridor presents a roughly similar degree of challenge for future transmission development. While those challenges vary slightly for each corridor, depending upon the criteria considered, the Review Panel accepts the evidence of AESO, ATCO, and AltaLink that consideration of whether or to what degree those challenges may be mitigated is best addressed within the context of a route-specific transmission facility application.

In the result, the Board upheld Decision 2005-31 and dismissed the applications for review and variance.<sup>11</sup>

After so doing the Board carried on with its consideration of the specific facility location application brought by AltaLink pursuant to the *HEEA*. And by this point in time the West Corridor landowners were understandably frustrated. They were being consulted by AltaLink but advised that the location of the transmission line had in substance already been approved by the Board. This was the case although they themselves had not been heard with respect to the

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<sup>11</sup> Leave to appeal Decision 2006-114 was sought at the Alberta Court of Appeal and was ultimately granted on June 8, 2007: *Lavesta, ibid*. The particulars of this application and decision are discussed *infra*.

need for that line, and had only been heard on location on an *ad hoc* after the fact basis.

Perhaps as a consequence of that frustration, when the Board convened the *HEEA* application hearing in March, it was very well attended. On its first day, and apparently for the first time, a further problem with the Board's approach was identified. Joe Anglin, a layman advocate for some of the landowners, commenced the proceedings by introducing a number of "motions" for the Board to consider. The most significant of these was as to the effect of s. 14(3) of the *HEEA* – the key statutory provision governing the hearing – which requires the Board to determine whether the application for the facility meets the requirement of "public convenience and need". Anglin argued that s. 29 of the Transmission Regulation passed pursuant to the *EUA* required the Board in making its determination under s. 14(3) to consider the Needs Identification Document, but did not negate the Board's long-standing and independent statutory duty to determine whether a proposed transmission facility satisfied the "public convenience and need" standard. Anglin's argument was, in essence, that the Board cannot simply approve a facility on the basis that "need" was determined in a prior proceeding under a different statutory scheme. Notwithstanding its prior *EUA* decision, the Board must independently satisfy itself that there is need for the facility as required by s. 14(3).<sup>12</sup>

In a letter dated March 16 the Board ruled that as a consequence of s. 14(3), the Needs Identification Document must be filed as evidence in the *HEEA* proceeding. It held, however, that submissions on that document would be limited to whether the facility application and specific location are consistent with

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<sup>12</sup> Section 14(3) predates the deregulation of the electricity market in Alberta. Under the regime of vertically integrated utilities there was only a single hearing with respect to the construction of a transmission facility (apart from the final consideration of surface rights). Subsequent to deregulation transmission hearings were bifurcated to allow consideration of the development of the facility within the context of the general operation of the electricity market in one hearing and consideration of the particular transmission facility proposed to be constructed in the other. After the debacle of the Edmonton-Calgary line it would be prudent to review the wisdom of this bifurcated approach.

the need previously identified and approved by the Board. As later characterized by Justice O'Brien at the Court of Appeal, "[w]hile many other issues, including issues of public interest, remained to be dealt with by the Board, the ruling treats the NID application as having conclusively determined the issues excluded by its ruling."<sup>13</sup>

Following its March 16 ruling the Board adjourned until April 16. It also advised participants that from this point on all motions must be provided to the Board in advance and in writing.

When the hearing reconvened in April matters began to go very badly from a procedural point of view. At this point the interveners had had the initial Needs Identification proceeding (in which they didn't participate), the limited review of that proceeding, and the Board's refusal to re-consider questions of need in the context of the *HEEA* proceeding. On the question of need they had never been heard, and on the question of location they had never been heard meaningfully. As a consequence, the hearing room was tense and the audience, including interveners, was large. The hearing room was also very unusually set up, with lawyers sitting on each side, and the interveners and other general attendees sitting in close proximity to the Board members. Due to the significant general interest in the proceeding, there were numerous attendees in addition to the West Corridor landowners themselves.

At that April hearing the Board continued the approach, which it had taken in March but which was very unusual in general Board practice, of not registering all interested parties as part of the hearing process. It simply instructed parties who had not previously registered with the Board to register with a Board staff member at the back of the room. Further, the transcript suggests that the Board did not impose a structure on who would make submissions to the Board and in

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<sup>13</sup> As discussed *infra*, Justice O'Brien made these statements in the context of an application for leave to appeal of this decision, which he granted: *Bur v. Alberta (Energy and Utilities Board)* [2007] ABCA 210.

what order. It appears from the transcript that individuals simply approached the Board in a more or less random fashion to make submissions.

The first significant speaker in the morning was again Joe Anglin who raised various objections to the Board's process and consideration of the matter. On being advised by the Board of its prior ruling that motions should be in writing Anglin responded that he "didn't make a motion. I'm objecting. And I want you to hear the objections"<sup>14</sup>. As the Board members attempted to deal with Anglin's "objections" they were continually interrupted by hecklers and matters quickly descended into chaos. A group of women calling themselves the "Singing Grannies" regaled the Board with a song of their own making:

AESO's being doing smelly things, not following the rules.  
McKee accepts their monkey tricks, he takes us all for fools.  
They'd be sitting in their corners with their dunce caps and their stools.  
If this was a fair show.

The application's out of date, it shouldn't still apply.  
While you try to resurrect, weeks of precious time go by.  
Lets start again discussing need – what's the real reason why our homes  
are threatened so.

Calgarians pay extra for wind power to be used,  
But Calgary doesn't take it all, those folks are not amused.  
If we want a healthy planet clear power must be used.  
Coal-fired has to go.

Environmental Impact so far hasn't had much clout.  
If you want all to keep your jobs you'd better sort this out.  
Before our Mother Earth reacts  
with too much heat and drought.

Hunger and thirst we'll know.  
Life is sanctified for money.  
Too much life is lost for money and Mother Earth objects.<sup>15</sup>

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<sup>14</sup> Board Transcript, April 16, 2007, pp. 146-147.

<sup>15</sup> *Ibid.* pp. 148-149

The Chair asked the Grannies to sit down but they ignored his direction and continued to sing. Shortly thereafter things became even more chaotic. The Board was heckled in an aggressively hostile way by audience members who shouted remarks such as “piss off on you guys” and “let’s be honest, over in the country they took it with a gun. Here they take it with a pencil.”<sup>16</sup> The Board responded by turning off the microphones.<sup>17</sup> Interveners became even more agitated. The Board adjourned.<sup>18</sup>

After the adjournment the Board did a remarkable about face saying “The Board has reconsidered and we are prepared to listen [to] some oral objections today.”<sup>19</sup> The remainder of the day was taken up by statements by interveners without the Board imposing any normal hearing structure on those statements. The statements were neither argument nor evidence, and many were made by individuals who were not West Corridor landowners and who did not address issues in any way related to the *HEEA* application. The most notable of these was the contribution of one Jessica Ernst, who advised the Board that she lives in Rosebud, a town between Calgary and Drumheller many miles from the West Corridor area and in no way directly affected by the project. Ms. Ernst’s comments continue from page 204 of the transcript to page 237. At one point, according to counsel present at the hearing, Ms. Ernst turned her back to the panel and abandoned all pretence that her comments were submission as opposed to comments made to agitate, and for the benefit of, her audience. While some submissions, such as those of John Safronovich, made relevant points (in his case that the two 240kV lines already on his property made it inappropriate for additional lines to be situated there), those points (which were still neither argument nor evidence) were drowned out in the noise of participants like Ms. Ernst.

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<sup>16</sup> *Ibid.* pp. 151-152.

<sup>17</sup> *Ibid.* at 153.

<sup>18</sup> *Ibid.* at 154.

<sup>19</sup> *Ibid.*

Although this information was not communicated to participants at the time, in its subsequent submissions to the Alberta Information and Privacy Commissioner, the Board stated that the following incidents also took place at the hearing that day:

In the first incident, the EUB said an individual approached one EUB employee and swung twice at the employee's head with a closed fist. The EUB said the employee was able to duck and none of the punches landed. The EUB provided this Office with a copy of a news video which showed a second incident involving an individual raising his hand close to another EUB employee's neck and then grabbing the employee's arm and pushing the employee aside. The EUB said the third incident occurred later that same day when a group of landowners attempted to prevent a lawyer from approaching the podium to give evidence by physically standing between the lawyer and the podium.<sup>20</sup>

Through this dysfunctional day of hearing one substantive argument was made, to the effect that the Board's hearing of AltaLink's application should be stayed, or adjourned, pending the resolution of the as then undecided applications to the Alberta Court of Appeal for leave to appeal of the Board's review and variance decision and of its refusal to re-open need in the *HEEA* hearing.<sup>21</sup> The Board directed that submissions be made on that argument the following day, which they were. In the course of those submissions counsel made a number of observations about what had happened the previous day. The thrust of those comments was that due to incredible frustration with the Board's process, landowners had begun to behave very badly. Counsel suggested that it was up to the Board not simply to address the behavior, but also to address the legitimate frustration underlying it:

I have never been involved in a proceeding quite like this one. I would argue that indeed the proceeding and everything we saw yesterday and that has happened to date really is quite exceptional. Unfortunately, exceptional not for the right reasons... at present this proceeding is dysfunctional. It really is not working. And the best

<sup>20</sup> Alberta Information and Privacy Commissioner Report, Investigation Report F2007-IR-005, p. 3.

It is important to note, though, that at least one of these incidents

<sup>21</sup> The details of these applications are set out below.

evidence of that was yesterday when you had average citizens of this province yelling, booing, heckling, singing protest songs. And I think what this shows in spades, Mr. Chairman, is that people are intensely frustrated with this proceeding and this process; otherwise, people like the people behind me who are just average Alberta citizens would not have acted in such an overtly hostile and disrespectful manner. I mean, these are good people I think we can all agree, decent, hard-working rural Albertans, but they seem to have reached some kind of tipping point and so they are intensely frustrated and their frustrations boiled over yesterday...<sup>22</sup>

Make no mistake, Mr. Chairman, the outpouring of emotion and anger that we all heard yesterday I believe is a clear indication that the majority of people in this room do not accept the rules of the game as they are currently constituted, and “by rules of the game” I am referring, of course, to the scope of this hearing. To be blunt, the majority of the people in this room do not accept the legitimacy of this proceeding and that is a real serious problem for this Board... I, frankly, was quite shocked at what happened yesterday, and it seems to me that for better or worse, whether we like it or not, steps have to be taken to restore some legitimacy to this proceeding, steps have to be taken to try to get everyone to buy into it, and really at this point what that means is let the Court of Appeal do its job...<sup>23</sup>

On April 18 Board counsel advised by letter that the motion to adjourn was denied. The letter emphasized the need for the transmission line “to alleviate system constraints and to improve system efficiency”, that the “disruptive and disrespectful behavior by participants” was not a valid ground for adjournment, and that there was no evidence of harm warranting either a stay or an adjournment. Further, and most significantly, the Board stated that it needed to reconsider the conduct of the hearing. The Board referred to “three separate incidents in which Board staff and other hearing participants were either threatened with violence or physically confronted”. It gave no information about the incidents (although presumably they are the incidents they later communicated to the Privacy Commissioner), and acknowledged that they were

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<sup>22</sup> Board Transcript April 17, 2007 pp. 317-318.

<sup>23</sup> *Ibid.* at 322.

“isolated,” but nonetheless stated that it had now become necessary to establish a “hearing process that guarantees the safe and fair participation of all involved”.

On April 23 a further letter from Board counsel advised that to address its safety concerns the Board was abandoning its public oral hearing. “Henceforth this proceeding will be primarily a written process”. Interested parties would have some rights of cross-examination. They and their counsel would, though, be sequestered from the hearing room except for when specifically engaged in cross-examination. They would be in a separate facility with live video feed of the cross-examination but would not be permitted to be physically present.

The landowners objected to these restrictions in a letter co-signed by a large majority of intervener counsel, but on May 7 a letter from Board counsel communicated the Board’s refusal to reconsider its decision. The Board said that its decision “does not have any impact on the fairness of the proceeding, particularly in light of the fact that all parties will be given access to the live cross-examination by way of closed circuit television.”

On May 14 the hearing recommenced on this new basis, and proceeded intermittently from that time until June 8, with the Board at the Rimbey Court House and interveners at the local community centre.

What the interveners did not know, however, was that in addition to being segregated, they were also under observation. The Board’s security department had requested security assistance from the Solicitor General Security Services, who were able to provide three sheriffs on a rotation basis. They also approached the local RCMP who agreed to have an occasional presence and also to provide police in the event of reported illegal activities. The Board Security Services felt that this assistance was insufficient, and also felt that its own two employees would not allow them to ensure proper security at the hearing. The head of the Security Services thus entered into an oral contract

with a private firm, Schepp Johnman, for security services. Over the course of the hearing in May and June three private investigators from Schepp Johnman attended at the Rimbey Community Centre posing as persons interested in the transmission application. While the investigators apparently had no mandate from the Board “to collect information from private conversations... eavesdropping or use of electronic measures”<sup>24</sup> the uncontested sworn affidavit evidence of interveners is that the investigators did so.

In affidavits filed at the Alberta Court of Queen’s Bench with an Originating Notice dated July 17, 2007 (which sought judicial relief because of the investigators’ activities) it was noted that the private investigators posed as interested parties, placed themselves amongst the clients talking to counsel and were observed looking over counsel’s “shoulder to view what was on the screen of his lap top computer”<sup>25</sup>. In addition, one of the investigators was invited to participate in a conference call involving interveners and their counsel, did participate in the conference call and was additionally copied on e-mail correspondence including some related to litigation planning.<sup>26</sup>

Eventually some of the interveners became suspicious of the behaviour of the investigators and, on June 8, one of the investigators was confronted. As is apparently required by the investigators’ “code of conduct”, the investigator immediately acknowledged that he was an investigator but did not identify for whom he was working.

At this point the interveners brought an application to the Board seeking to compel the investigators to testify. To the surprise of many, the Board advised that the investigators were retained by the Board. “The panel stated that while it

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<sup>24</sup> Perras Report (p. 8).

<sup>25</sup> Affidavit of James Vetsch, paragraph 5.

<sup>26</sup> Affidavit of Lois Marie Barkley. Ms. Barkley’s Affidavit has attached some of the e-mails received by the private investigator. While nothing of substantive significance is contained in the e-mail correspondence it clearly related to litigation matters.

had not been involved in the decision to hire the four individuals, it did receive weekly high level security briefings by the Board's corporate security staff".<sup>27</sup>

The nature and extent of the Board's knowledge of the retention and activities of the investigators is clear from e-mails disclosed pursuant to the Freedom of Information and Privacy legislation. First, the panel members were copied on an e-mail indicating that a company had been retained "to provide a covert security presence as the Rimbey Community Centre". The e-mail indicated that the security guards were to provide "intelligence gathering and observation" and to note "and record any incidents of criminal activity or untoward activity". Other documents indicate that the head of the Board's security services was clearly aware of the private investigator's participation in the interveners' conference call.

As noted, on July 17, 2007 the interveners filed an Originating Notice with the Alberta Court of Queen's Bench seeking a new hearing with members untainted by the private investigator scandal. While arguments were filed with the Court on the legal issue of whether the interveners had satisfactorily demonstrated the existence of bias, the judicial review application was never heard and was ultimately overtaken by the Board's own decision – Decision 2007-75 – to void its prior decisions on the transmission application.

The final word on the Board's process was given by the Alberta Court of Appeal. In addition to filing the Originating Notice with respect to the use of covert private investigators, interveners had also filed applications for leave to appeal Decision 2006-114, the review and variance decision, and for leave to appeal the interlocutory decision to refuse to hear interveners arguments on "need" in the context of the facilities hearing. In June, 2007 both these applications for leave were granted by the Court of Appeal.<sup>28</sup>

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<sup>27</sup> Originating Notice July 17, 2007, paragraph 12.

<sup>28</sup> See footnotes 11 and 13, *supra*.

With respect to Decision 2006-114 (the review and variance), Madame Justice Conrad granted leave on a number of grounds, including whether the Board erred in making a determination of location at the stage of a Needs Identification hearing (rather than at the facility hearing) and whether the Board erred in restricting its review of the Needs Identification decision to issues of location. While obviously not deciding this latter issue Conrad noted the apparent absence of logic in the Board granting a review on the basis of a lack of participation but not opening up all aspects of the decision for review – “those same Albertans were denied more than just the opportunity to speak to the selection of the West Corridor. They were also denied the opportunity to make submissions on the need for the transmission line.”<sup>29</sup> Justice Conrad also granted leave with respect to the Board’s failure at the outset of the s. 34 process to give specific notice to landowners in the West Corridor. Justice Conrad held that given the Board’s broad interpretation of the scope of its hearing pursuant to s. 34 of the *EUA*, it was certainly arguable that the West Corridor landowners “were entitled to better notice of the NID hearing than they received.”<sup>30</sup>

With respect to the interlocutory decision on March 16 to limit consideration of need in the *HEEA* hearing, Justice O’Brien also granted leave. He noted Justice Conrad’s observation of the importance of the issues related to the intersection of the Needs Identification review process and the *HEEA* facilities hearing. He also held that the application for leave to appeal this decision was not premature, even though it related to an interlocutory decision: “I am satisfied that this is an exceptional case. The ruling is not so much interim in nature, as it is final in its determination that the applicants will not be permitted to present evidence or challenge project need or location within the West Corridor. Consequently, there

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<sup>29</sup> *Lavesta*, note 11, *supra* at para. 36.

<sup>30</sup> *Ibid.* at para. 41.

will be no further consideration of these issues nor any additional evidentiary record in that regard.”<sup>31</sup>

On October 29, 2007 the Court granted the two appeals for which leave had been granted in June. It did so on the basis that in Decision 2007-75 (vacating the past transmission decisions) the Board had acknowledged reasonable apprehension of bias. Due to that bias the appeals were allowed. The Court did not consider any of the specific legal arguments raised in the appeals – for example, with respect to the sufficiency of the notice given to interveners.

From this history of the transmission proceedings certain key facts need to be emphasized.

First, while it is true that the Board was in the difficult position of dealing with a new and arguably incoherent legislative scheme (in which location and need could be considered in two separate hearings, one relating to transmission system requirements and the other relating to approval of facility construction), it is also true that that the Board did not engage in a timely and satisfactory way with the problem of how to hear the West Corridor landowners effectively. While a number of options were presented to the Board in the Needs Identification phase, the West Corridor was identified by the AESO as the preferred location and was at issue in almost every AESO “concept”. It was thus readily apparent that landowners within the West Corridor were likely to have a significant interest in the outcome. Nonetheless, the Board did not provide specific notice to those landowners or ensure that they were aware of and engaged in the process.

Second, once landowners were involved at the *HEEA* hearing the Board did not structure its process effectively to ensure that those landowners were heard. They did not identify and register landowners with standing at the beginning of

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<sup>31</sup> *Bur*, note 13, *supra* at para.

the process and they did not establish a process to make it clear who would be heard and when.

Third, when faced with what it perceived as a security threat, the Board did not document the nature of the threat it was under. It simply referred vaguely to three “separate incidents in which Board staff and other hearing participants were either threatened with violence or physically confronted”. It did not (until justifying itself to the Privacy Commissioner) specify the magnitude or severity of the threat, or give any reasons to support the conclusion that the threat was significant enough to warrant interference with the procedural rights of the interveners.

Fourth, when the proceeding went sideways – descended into “chaos” – the Board reacted in the most drastic way possible. It excluded landowners and their counsel from the hearing room except during specific cross-examination and it employed covert private investigators to observe and report on the activities of interveners. Without articulating the precise nature and threat of the security issues it identified, the Board nonetheless imposed the most drastic possible measures to address that threat. Much less significant steps – such as having an overt security presence in the hearing room – were not undertaken.

The following section will assess these four key aspects of the Board’s conduct in terms of the requirements of procedural fairness.

## **What did the Board do wrong?**

### *Introduction*

In order to learn from the Board’s conduct it is necessary to assess that conduct against the requirements of procedural fairness. This section will assess the Board’s conduct in two stages. First, it will assess whether any aspects of the Board’s conduct can be understood as violating the basic rules of procedural fairness – for example, that the parties be given proper notice, that they have the

right to be heard and that the decision-maker be unbiased. Second, it will consider whether, even if not neatly described as a breach of a procedural fairness “rule”, the Board’s conduct can nonetheless be understood to violate norms of procedural fairness. It will do so through assessing the Board’s conduct against the moral and normative values which underlie the procedural fairness requirement.

The purpose of this section will be to understand precisely the nature of the Board’s wrongdoing. It will also be to suggest that in attempting to comply with the requirements of procedural fairness it is important both to understand what the rules of procedural fairness require and also, beyond those rules, to be able to identify conduct that, even if not obviously violating those rules, is nonetheless unfair and procedurally wrongful when undertaken by an administrative decision-maker.

#### *The rules of procedural fairness*

It is of course necessary to establish that the rules of procedural fairness and/or natural justice apply to a particular administrative decision. It appears uncontroversial, however, that procedural fairness was required in these circumstances. Even prior to the Supreme Court’s expansion of the application of procedural fairness in the seminal case of *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*<sup>32</sup> it was accepted that procedural fairness – or “natural justice” – was required prior to state interference with a common law right. And in the modern era it is accepted that procedural fairness entitlements arise in any circumstance where the government is to interfere with the “rights, privileges or interests of an individual”.<sup>33</sup> In this instance the ultimate effect of the Board’s approval of the transmission facility would be interference with the property rights of the West Corridor landowners. As a consequence, on

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<sup>32</sup> [1979] 1 S.C.R. 62

<sup>33</sup> *Cardinal v. Director of Kent Institution* [1985] 2 S.C.R. 643 at 653.

application of the normal rules of administrative law, those landowners were entitled to procedural fairness.

In addition, while the content of procedural fairness is variable,<sup>34</sup> it seems clear that the West Corridor landowners were entitled to a rigorous – approaching the quasi-judicial – level of procedure prior to the approval of the construction of a transmission facility on their lands. The decision affected their common law and legal rights; the statutory scheme pursuant to which it was made contemplated an oral hearing; the decision was highly important to the individuals; they had been given reason to expect that an oral hearing would be conducted; and, finally, the Board chose to provide notice and conduct a full quasi-judicial oral hearing. This means that, at minimum, the landowners could anticipate being given notice of the decision, being heard in an oral hearing on the issues of relevance to the decision and having the decision made by an unbiased decision-maker. These rules of procedural fairness uncontroversially govern the Board's conduct of the proceedings, and their application has never been disputed by any party.

It is much less obvious, however, that the majority of the Board's conduct can be meaningfully assessed through these rules as traditionally understood and applied. That is, when assessed against these rules, and without consideration of the underlying norms and values related to procedural fairness, only one of the four key features of the Board's conduct can be easily understood as a violation of these rules and requirements. The rest, while deeply problematic, do not obviously violate the right to notice, the right to a hearing or the right to an unbiased decision-maker.

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<sup>34</sup> According to *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817, the relevant considerations in determining the appropriate level of procedural fairness are: 1) "the nature of the decision and the process followed in making it" (at 838); 2) the statutory scheme; 3) "the importance of the decision to the individual or individuals affected" (at 838); 4) the legitimate expectations with respect to the process to be followed; 5) the agency's own choice of procedures; 6) other relevant factors.

The procedural decision made by the Board which fits most comfortably into the traditional categories of procedural fairness is the Board's failure to give specific notice to the landowners within the West Corridor. In *Re Central Ontario Coalition and Ontario Hydro*<sup>35</sup> the Ontario Divisional Court held that in an application for a proposed transmission line, landowners potentially affected by the construction of the line were entitled to adequate and specific notice. This was the case even though in that hearing, like in the Needs Identification hearing pursuant to s. 34 here, the decision maker was considering a variety of different transmission options. In *Ontario Hydro* the notice given was inaccurate in substance as well as not being specifically provided; however, the Court's reliance in that case on the fact that less than 0.8% of the affected parties were made aware of the hearing through the notice suggests that the lack of specific communication was important. As such, it is reasonable given the parallel facts of the two cases to conclude that the Board's failure to notify the West Corridor landowners specifically was a violation of the notice requirements. This position is supported by Justice Conrad's conclusion that the insufficiency of the Board's notice was "arguable" given the breadth of the Board's interpretation of the scope of the s. 34 hearing.

This position is also supported through analysis of notice cases subsequent to *Ontario Hydro*. Upon review of those cases it becomes clear that while each notice case stands on its own facts, courts will require "better" notice in situations where property interests are affected – the regulator should expect to either serve affected parties personally, or take additional steps to ensure public notice is achieving its goal.<sup>36</sup> Further, the contents of the notice must be unambiguous, particularly in delineating who potentially will be impacted by the decision. The Board's communication of notice of the s. 34 hearing through newspaper announcements, and without specific notification of the West Corridor

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<sup>35</sup> (1984) 10 D.L.R. (4<sup>th</sup>) 341 (Ont. Div. Ct.)

<sup>36</sup> See generally: *Re Hardy and Minister of Education* (1985) 22 D.L.R. (4<sup>th</sup>) 394 (B.C.S.C.); *Morlacci v. British Columbia (Minister of Energy, Mines and Petroleum Resources)* [1995] B.C.J. No. 53 (S.C.) (aff'd [1997] B.C.J. No. 2045 (C.A.))

landowners – including notification of how their property rights might ultimately be affected – was not sufficient to meet these notice requirements.

The next procedural issue with the Board's conduct of these hearings – its failure to structure the hearings so that parties without a legitimate interest did not participate and those with a legitimate interest were heard – fits much less straightforwardly into the “rules” of procedural fairness. No Canadian cases on the adequacy of a hearing dealt with this issue: research for this paper revealed no cases in which a court reviewed the fairness of a hearing on the basis that chaos at the hearing disrupted the ability of interested parties to be heard. The case law on hearings generally addresses variations on the problems which arise from a decision-maker's failure to hear an affected party appropriately (that is, at all), not on a decision-maker's failure to organize the hearing so that the affected party can be heard effectively – that is, listened to rather than simply heard.

Basic texts on administrative law do indicate the importance of ensuring that an administrative hearing is properly structured. In *Practice and Procedure Before Administrative Tribunals* Macaulay and Sprague argue that hearings are tools to collect necessary information, they “are not Hyde Park soap boxes for anyone with a view to espouse.”<sup>37</sup> The authors note that tribunals are created to accomplish a specific mandate and time spent hearing irrelevant matters is time taken away from relevant ones. A party that wishes to “blow off steam” is not typically going to be satisfied with one speech. This can also create the expectation that other parties are also entitled to do the same, making it difficult to keep hearing proceedings under control. Further, allowing this evidence to be heard can create confusion and uncertainty as to what affected parties should be speaking to. Should they submit evidence to counter this? Finally, hearing irrelevant evidence makes it difficult for decision-makers to focus on the issue and can lead to substantive error.

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<sup>37</sup> R.W. Macaulay and J. Sprague, *Practice and Procedure Before Administrative Tribunals* (Toronto: Carswell, looseleaf) at 12-9.

Macaulay and Sprague also assert the importance of a decision maker being in control of the hearing process:

A decision maker must at all times be aware of the purpose of the hearing, where it is going and how it should get there...

An individual, or panel, presiding over a hearing must appear at all times to be aware and competent to direct the proceedings... An unstructured hearing is an inefficient one and will delay the accomplishment of the agency's mandate and its ability to deal with other matters.<sup>38</sup>

These general principles certainly indicate the problems with the Board's approach. Absent judicial endorsement and application, however, they do not amount to an expression of a clear legal rule that the Board can be said to have violated.

Similar characterization problems arise with respect to the Board's failure to specify the nature of the security risk about which it was concerned. While Canadian courts have increasingly expressed support for a requirement that an administrative decision-maker issue reasons for its decisions, that support has been limited to the substantive issue before the administrative decision-maker. There is no case law indicating that an interlocutory procedural decision – in this case that there was a security risk requiring a modification in the Board's hearing process – must be supported by reasons.<sup>39</sup> Further, the traditional justifications for a reasons requirement – “where the decision has important significance for the individual, when there is a statutory right of appeal”<sup>40</sup> – do not apply here,

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<sup>38</sup> *Ibid.* at 12-10

<sup>39</sup> In *Baker, supra* L'Heureux-Dubé noted that a preliminary decision is in general entitled to a lower degree of procedural fairness. In *Jared v. Canada (Minister of Citizenship and Immigration)* 2004 FC 1458, the Federal Court Trial Division imposed a reasons requirement on an interlocutory decision. That decision was, however, substantive in nature and fundamentally determinative of the rights of the applicant for judicial review. It is thus obviously distinguishable from the Board's decision here.

<sup>40</sup> *Baker, supra* at 848.

and although “other circumstances”<sup>41</sup> can justify the imposition of a reasons requirement, it is unlikely that this decision would fall within a strict obligation to provide reasons.

The Board’s decision to shift to a “written” hearing, and to do so through segregating interveners and their counsel from the majority of the otherwise oral hearing, similarly does not obviously violate any procedural rules. The use of technology is becoming increasingly recognized within administrative agencies as an alternative to in person hearings (although in no cases has the use of technology been required of a particular group, and in general technology has been aimed at increasing convenience and accessibility, not at denying access).<sup>42</sup> In addition, courts have in general allowed administrative decision-makers considerable flexibility in how they structure particular administrative processes. As famously stated by Justice L’Heureux-Dubé in *Knight v. Indian Head School Division No. 19*,<sup>43</sup> every administrative decision-maker is “master of its own procedure”.<sup>44</sup> Given this open and flexible attitude, it is not obvious that re-structuring the hearing so interveners participate by video feed violates the rule requiring an affected party to be heard.

The final procedural decision by the Board – the hiring of covert private investigators – is more complicated to analyze. The reason for this is that the Board itself has held that there was a reasonable apprehension of bias arising from its conduct which warranted the vacating of all of the Board’s decisions in this matter. In addition, the Alberta Court of Appeal has used this concession by the Board to grant the appeals of the various proceedings of the Board. This makes it difficult to assert that the conclusion that there was a reasonable apprehension of bias is not well founded. Nonetheless, it is fair to say that the

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<sup>41</sup> *Ibid.*

<sup>42</sup> See in general Macaulay and Sprague, *supra* Chapter 21A.

<sup>43</sup> [1990] 1 S.C.R. 653

<sup>44</sup> *Ibid.* at 685.

Board's hiring of covert private investigators does not fit especially comfortably into a reasonable apprehension of bias analysis.

The test for determining whether there is a reasonable apprehension of bias is well established:

the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information.... [T]hat test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

The grounds for this apprehension must, however, be substantial and I ... refus[e] to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience"<sup>45</sup>

Based on the case law, the existence of a reasonable apprehension of bias will depend on the context of the administrative decision being made – the standard for bias is lower (i.e., easier to establish) in a quasi-judicial hearing than in a more political/public policy type process. In general, though, a reasonable apprehension of bias will arise in quasi-judicial matters where 1) the decision maker has a pecuniary or material interest in the case<sup>46</sup>; 2) there is an association between a decision maker and a party;<sup>47</sup> 3) the decision maker was involved at a preliminary stage of the case;<sup>48</sup> 4) the decision maker has an

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<sup>45</sup> *Committee for Justice and Liberty v. National Energy Board* [1978] 1 S.C.R. 369 at 394-95 per Grandpre J. dissenting (this standard has been accepted in many subsequent Supreme Court cases. See, e.g., *R. v. RDS* [1997] 3 S.C.R. 484 at para. 31.)

<sup>46</sup> *Regina v. Gough*, [1993] A.C. 646 (H. of L.)

<sup>47</sup> *Convent of the Sacred Heart v. Armstrong's Point Association and Bulgin* (1961), 29 DLR (2d) 373 (Man. CA) where a member of the Municipal Board was married to the owner of a home in the area under a zoning review, alternate ground for quashing the decision.

<sup>48</sup> See for example, *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 SCR 369 (Can.) where the chairman of the NEB was involved in the amalgamation process of several companies, prior to his position at the NEB, which resulted in the formation of the applicant before the board. A more common situation is where decision makers are involved in multiple hearings of the same matter. *Perez v. Canada (Minister of Citizenship and Immigration)*, 1998 CarswellNat 1765, 155 F.T.R. 131 (Fed. T.D.) where the same immigration officer denies a

attitude toward the outcome of the case;<sup>49</sup> or, 5) during a hearing the decision maker demonstrated antagonism toward a party or his or her counsel or witness.<sup>50</sup> The bias demonstrated must be with respect to the particular decision-maker and the particular decision at issue.<sup>51</sup> The basis for the bias must not be simply something which influences the deciding panel, but must also be something which will influence the deciding panel to decide that case unfairly.<sup>52</sup> In general, the courts have been cautious in finding that institutional bias – as distinguished from the individual bias evidenced by a conflict of interest in a particular decision-maker – exists.

The hiring of covert private investigators satisfies the requirement for bias if it would reasonably be perceived as indicating a pre-determined attitude in the Board panel towards the outcome of the case or as antagonism towards the interveners. In their application for judicial review, the applicants' claimed that "No right-minded person would find this appalling intrusion into the rights of landowners as anything less than an obvious indicator of bias". However, as noted by counsel in submissions filed on behalf of the Board (which at that time had not conceded the bias issue), the Perras report concluded that no personal or other inappropriate information about interveners was communicated to the deciding panel members; indeed, the report went so far as to conclude "that the security arrangements, given all the circumstances and available options, were

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claimant permission to stay in Canada upon reconsideration after making the original negative decision, though here there was no finding of bias.

<sup>49</sup> See *Baker, supra* and *Newfoundland Telephone Co. v. Newfoundland (Public Utilities Board)*, [1992] 1 SCR 623 (Nfld.).

<sup>50</sup> For example, *Sparvier v. Cowessess Indian Band No. 73*, [1993] 3 F.C. No. 142. where a member of the panel made disparaging remarks toward the applicant (see para 58); *Solicitor X v. Nova Scotia Barristers' Society* (1998), 171 D.L.R. (4<sup>th</sup>) 310 (N.S.C.A.) where the solicitor was subjected to excessive questioning from the panel, including question irrelevant to the allegations against him (para. 14); *Woolworth Canada Inc. v. Newfoundland (Human Rights Commission)*, [1994] N.J. 95 where one side was given the opportunity to review documentation and make submissions while the other side was not (para. 97) – this decision was appealed, but CA agreed on this issue ([1995] N.J. No. 324).

<sup>51</sup> *Lamontagne v. Law Society (Saskatchewan)* [1990] 46 Admin. L.R. 298 (Sask. Q.B.)

<sup>52</sup> *Devon Canada Corp. v. Alberta (Energy and Utilities Board)* 2003 ABCA 167

prudent and not abused save and except the May 28, 2007 okay to connect to the conference call".<sup>53</sup>

Further, and as indicated by the Perras assessment, while the Board's actions are deeply problematic (as discussed below), they had some basis in particular circumstances – they were not simply indicative of an irrational animus on the part of Board members towards the interveners. In addition, in the cases dealing with antagonism, the evidence of that antagonism almost always relates to a publicly demonstrated attitude of hostility towards a party from the decision-maker in question.<sup>54</sup>

Here, where the actions giving rise to these allegations are at some remove from the actual decision-makers, and are not simply an irrational public indication of hostility to a party, its counsel or its position, the existence of the antagonism associated with a reasonable apprehension of bias is less obvious. In sum,

There is simply nothing before this Honourable Court to suggest that anything arising from the recent controversy reasonably impairs the ability of this panel to impartially render its decision in accordance with its statutory mandate, the evidence before it and the arguments of the participants. Nothing in the Applicants' Brief touches upon any apprehended bias *in respect of the decision*.<sup>55</sup>

Thus, when the Board's conduct of the hearings into the transmission lines is assessed against the rules of procedural fairness there is some basis for viewing that conduct as inconsistent with those rules. However, this is only true to a limited extent. The Board's failure to control its hearing process to ensure that interested parties were given an effective opportunity to be heard, its failure to

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<sup>53</sup> Perras Report p. 18. With respect, this author disagrees strongly with this conclusion, for the reasons provided below. It is also not clear on what legal basis Perras reaches this conclusion. His analysis seems to be more factual and based on an assessment of the significance of the risk and the involvement of the Board panelists in deciding to hire the security guards.

<sup>54</sup> See note 50, *supra*. Also see the categories referenced with respect to this type of bias in Macaulay and Sprague, *supra* at 39- 16, which indicate this type of behaviour as associated with "antagonism".

<sup>55</sup> Brief of the Alberta Energy and Utilities Board, para. 63.

give reasons for its determination that there was a security threat sufficient to warrant interference with the normal conduct of its hearings, and its decision to banish interveners from the hearing room only fit awkwardly, if at all, into the normal rules of procedural fairness. When assessed against those rules, with no other consideration, it appears in fact that there was nothing much wrong with what the Board did. Further, while the Board itself has stated that there was a reasonable apprehension of bias arising from its decision to hire covert investigators, it is not entirely obvious why this is the case given the traditional articulations of the bias rules. The decision was at some remove from the panel hearing the facilities application, the decision to hire the investigators was not apparently motivated by an irrational animus to those interveners and the panel appears not to have received information relative to its decision from the investigators.

*The norms and values of procedural fairness*

Why does procedural fairness matter? In some ways this question has received surprisingly sparse consideration in the academic literature. Certainly it does not appear to have either interested or troubled commentators to anything like the extent that its judicial review counterpart – the standard of review – has done. Those who do write about this question tend to argue for a relatively singular understanding of the basis for imposing procedural fairness. That is, they try to identify the single underlying norm that explains why we use procedural fairness even when doing so makes the interests of an individual – the party claiming a right to procedural fairness – paramount to the interests of the majority.<sup>56</sup>

This paper rejects the search for a single idea justifying procedural fairness. It instead adopts a pluralist conception of the values underlying procedural fairness: procedural fairness exists in furtherance of a number of the core public

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<sup>56</sup> Although it is fair to say that the “single” value identified by some incorporate a variety of “sub-values” of importance. See, e.g., Jerry Mashaw, *Due Process in the Administrative State* (New Haven: Yale University Press, 1985) in which Mashaw locates within the “dignity” value of due process consideration of the values of accurate and efficient decision-making.

values of our legal system, and it is through all of these various (and perhaps occasionally competing and contradictory) public values that the content of procedural fairness needs to be understood. In so doing the paper will not attempt to justify pluralism as a philosophical position *per se*.<sup>57</sup> Instead it will review the arguments in favour of connecting procedural fairness to the accomplishment of these various values, and through so doing indicate that each value provides rational justification for the counter-majoritarian effects of procedural fairness.

The three core values that can be argued to underlie procedural fairness are accuracy (ensuring administrative decisions are accurate), dignity (ensuring administrative decisions are made in a way which respects the dignity of those affected by them) and legitimacy (ensuring administrative decisions are accepted by the citizens to whom they apply). The most prosaic of these values is accuracy, and the argument in favour of accuracy as an important underlying value is appropriately straightforward.

In order to have an effective and fair administrative state it is necessary that administrative decision-makers make accurate decisions – that decisions are based on a correct understanding of the facts and an appropriate application of the law to those facts.<sup>58</sup> Procedural fairness is of value because it helps to ensure accurate decision-making. It helps to ensure that the decision-maker has been given a full account of the evidence relevant for determining the facts, and has an appropriate airing of the arguments about the best interpretation of the applicable law: “Procedure is our traditional method for ensuring that the decision in question is accurate, thus protecting individuals from the potential oppressions of direct interaction with state agents”.<sup>59</sup>

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<sup>57</sup> For such a justification see: Isaiah Berlin, *The Crooked Timber of Humanity* (London: Harper Collins, 1990).

<sup>58</sup> Brown and Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback, looseleaf) at 7-3.

<sup>59</sup> Edward L. Rubin, “Due Process and the Administrative State” (1984) 72 Calif. L. Rev. 1044.

The validity of accuracy as an underlying norm has been challenged, primarily on the basis that it does not alone provide a satisfactory explanation for why we place so much value on procedural fairness within our legal system.<sup>60</sup> Since procedural fairness does not in fact ensure accurate decisions in many cases, and since we would still value procedural fairness even if accuracy could be otherwise guaranteed, accuracy is not in and of itself sufficient to explain why an individual's procedural claims are permitted to frustrate the quick accomplishment of majoritarian objectives (like, for example, the relief of transmission congestion on the Alberta transmission grid). Even critics of accuracy acknowledge, however, that any meaningful account of procedural fairness does have to accept accuracy as an important procedural function.<sup>61</sup> Accuracy may not sufficiently justify or account for the importance of procedural fairness, but a doctrine of procedural fairness unconcerned with achieving accuracy would be an odd sort of doctrine indeed.

A deeper understanding of the importance of procedural fairness arises from connecting procedural fairness to the state's obligation to respect the human dignity of its citizenry. Human dignity in this model is not a psychological condition – it is not the individual's subjective and personal feeling of having been treated with dignity – but is rather a political concept. It is dignity as a “particular *political* definition of personhood or citizenship.”<sup>62</sup> As moral and political agents living within a democratic system of laws individuals are entitled to be treated as such: “Although we cannot avoid consulting our feelings or intuitions as a source of ideas about procedural values, in the end our effort is to discover (or to construct) the process ideals that define a particular liberal-democratic constitutional structure”.<sup>63</sup>

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<sup>60</sup> See: Lawrence B. Solum, “Procedural Justice” (2004) 78 S. Cal. L. Rev. 181 and Mashaw, *supra*.

<sup>61</sup> *Ibid.*

<sup>62</sup> Mashaw, *supra* at 171.

<sup>63</sup> *Ibid.*

Procedural fairness is necessary to ensure dignity in this political sense because it is the only way to ensure that individuals who are being subjected to state action are taken seriously. It ensures that the decision-maker has listened to their point of view and accounted for it in reaching her decision. It treats individuals as ends in the political process and not merely as means through which political objectives are accomplished:

the ability to participate in decisions which affect one's welfare is tied to basic notions about human dignity. Participation means that we are being heard and that our views are significant; that we have some control over decisions about our lives; and that we are 'part of the process of collective decision-making, rather than... passive, external objects of judgment.' Participation is crucial to a sense of individual self-worth, of autonomy and of connectedness to others. In short, participation is essential to human dignity.<sup>64</sup>

Procedural fairness matters because without it our dignity as individuals will not be respected. Or, to put it conversely, where decisions are made without giving an individual the opportunity "to have input into the process of decision making and the right to have the reasons for decision publicly articulated"<sup>65</sup> then those decisions do not treat the affected parties with dignity, and as such are procedurally illegitimate. At its most general:

respect for human dignity, recognition of human freedom and the facilitation of self-realization all become possible only within a system of institutional constraints. Moreover, from a practical perspective, governments can only address our social and economic needs through administrative structures based on technical competence. The choice, then, is not between more bureaucracy or less bureaucracy, or between more law or less law, but between administrative relationships which enhance dignity, freedom and self-realization, and those which thwart our humanity.<sup>66</sup>

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<sup>64</sup> Martha Jackman, "Fundamental Interests and Fundamental Justice – The Right to Participate in Decision-making in Canadian Prisons: *Piche v. Solicitor General of Canada*" (1990) 24 U.B.C. Law Rev. 361 at para. 41.

<sup>65</sup> David Dyzenhaus and Evan Fox-Decent, "Rethinking the Process/Substance Distinction: *Baker v. Canada*" (2001) 51 U.T.L.J. 193 at 239.

<sup>66</sup> Lorne Sossin, "An Intimate Approach to Fairness, Impartiality and Reasonableness in Administrative Law" (2002) 27 Queen's L.J. 809 at para. 76.

Dignity theory is also not without its critics. Those critics assail the psychological aspect of dignity, claim that dignity does not in the end provide a sufficient reason to avoid the individual being subjected to majoritarian rule and argue that the dignity argument is essentially circular: “dignity does not create the right to participate – it is a reflection of that right”.<sup>67</sup> Again, though, even the critics of dignity theory recognize the value of dignity as a norm of our political democracy – “[d]ignity, equality and autonomy are fundamental political values.”<sup>68</sup> They also do not necessarily accurately portray the nuances of the dignity argument in their criticisms, particularly with respect to the fact that dignity theorists employ dignity as a political, not a psychological, concept.

Legitimacy, the final relevant value for explaining the importance of procedural fairness, is perhaps the best accepted of the norms identified here. In his comprehensive analysis of the normative justification for process in the context of litigation, Lawrence Solum provides a pragmatic and straightforward account of legitimacy theory. He argues that adjudicative decision-making (which would include administrative decision-making) is a form of law making. It is one of the ways in which the legal system performs its function of “action guidance” – of telling us what behaviour is, and is not, consistent with the norms of the legal system. Adjudicative decision-making is not simply a straightforward application of fully articulated legal norms set out by the common law or statute; it is itself a form of law-making. The difficulty, however, is that when making adjudicative decisions it is certain that, at least some of the time, those decisions will be erroneous. Because decision-makers will have imperfect knowledge of the law, legal norms will be incompletely specified, and legal decision-makers cannot be assumed to be fully impartial (not that they are assumed to be biased, but that true impartiality is impossible), it is certain that from time to time the decisions they make will be in error.

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<sup>67</sup> Solum *supra* at 287.

<sup>68</sup> *Ibid.* at 289.

For the legal system to operate, however, it is essential that individuals accept the binding authority of such decisions even when they are (or may be) erroneous. The alternative is anarchy. The only way for this acceptance to happen, though, is to ensure that such decisions are made pursuant to a system of procedural fairness. It is only when substantively incorrect decisions are fairly made that those decisions will be entitled to a degree of respect and compliance; otherwise they will simply be illegitimate:

We can regard ourselves as legitimately bound by erroneous judgment if it results from a procedure that affords us a meaningful opportunity to participate in a process that strikes a reasonable balance between the goal of accurate outcomes and the inevitable costs imposed by any system of dispute resolution. Procedural justice is the route to reconciliation with substantive error.<sup>69</sup>

While not expressing the legitimacy point in precisely this way, there is strong acceptance in Canada for the importance of legitimacy as a value justifying procedural fairness in the administrative context. In her 1999 paper, “The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law”, Chief Justice McLachlin clearly articulates the relationship between procedural fairness and legitimacy (or “justification”):

Where a society is marked by a culture of justification, an exercise of public power is only appropriate where it can be justified to citizens in terms of *rationality and fairness*. Arbitrary decisions and rules are seen as illegitimate. Rule by fiat is unaccepted...<sup>70</sup>

[T]he Rule of Law requires accountability, rationality, and public justification... Fair procedures, equitable treatment, and responsiveness to the public are the cornerstones of a system of administrative tribunals built according to the Rule of Law. I suggest that, in many important ways, it falls to the members and support staff of those administrative boards to ensure that every person dealing with the state is treated fairly and with respect.<sup>71</sup>

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<sup>69</sup> Solum, *supra* at 190.

<sup>70</sup> Beverley McLachlin, “The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law” (1999) 12 C.J.A.L.P. 171 at 174.

<sup>71</sup> *Ibid.* at 186.

Similarly, Macaulay and Sprague note the importance in administrative decision-making of individuals being prepared to accept decisions directed at them – for individuals to “buy into the process”.<sup>72</sup> They argue that “decisions which are not arrived at fairly will not likely accomplish their purpose. Decisions which are not respected will not be accepted by the public”.<sup>73</sup> Brown and Evans describe this as the principle of accountability which, they argue, lies along with accuracy at the heart of the justification for procedural fairness. Procedural fairness and natural justice originate in the common law and are “properly regarded as limitations on the exercise of delegated power imposed by the courts for the protection of individuals and the public from erroneous decisions, and on the non-accountable exercise of power”.<sup>74</sup>

Procedural fairness exists, therefore, to ensure that government decisions are accurate, that they properly respect the dignity of those to whom they apply and that those decisions are accepted as legitimate by the citizenry. In light of these underlying values, what can be said about the conduct of the Board in its conduct of the transmission hearings, and about how a court should review procedural fairness issues that do not fit neatly within the rules of procedural fairness?

*Violating the norms – why the Board’s conduct violated procedural fairness*

When considered through these norms the problems with the Board’s conduct, and how that conduct violates procedural fairness, becomes apparent. While it may not be clear that having no control over, or structure for, a hearing violates the rule that a person has a “right to be heard,” it is certainly clear that this

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<sup>72</sup> Macaulay and Sprague, *supra* at 9-20.1

<sup>73</sup> *Ibid.* at 12-5.

<sup>74</sup> Brown and Evans *supra* at 7-12. This account of legitimacy focuses on legitimacy in the adjudicative context of administrative decision-making. Legitimacy is a central value in all administrative decision-making, but its relationship to procedural fairness looks very different in the public policy context, both in terms of what it is accomplishing and in terms of the process it requires. In the policy-making context legitimacy is about ensuring appropriate democratic processes rather than ensuring acceptance of erroneous adjudicative decisions. I have argued elsewhere that Canadian courts have insufficiently accounted for the importance of process in establishing legitimacy in public policy-making: Alice Woolley, “Legitimizing Public Policy” (2008) UTLJ (forthcoming).

conduct is inconsistent with the norms underlying procedural fairness. When structured in that way (or lacking in structure in that way) a hearing does not allow a Board to obtain the information it needs about the facts from parties – it does not contribute to the accuracy of the decision. I would suggest, for example, that in this process the submissions of Mr. Safronovich as to the proliferation of transmission lines on his land would be drowned out by the submissions of Ms. Ernst about her childhood in Montreal and general dissatisfaction with Alberta's regulatory regime. Instead of being taken into account as relevant and accurate information regarding the suitability of this location for a further transmission line, Mr. Safronovich's submissions would simply become part of the general "noise" to which the Board allowed itself to be subjected.

Further, structuring the hearing in this way does not treat parties who will be personally affected by the decision with dignity. It does not recognize the difference between their interests and those of other Albertans, and it does not provide a meaningful opportunity for the Board to listen to their point of view. It also does not contribute to the likelihood that the Board's decision will be accepted as legitimate in the event that it is erroneous. Instead, the unacceptability of such a decision will be heightened by knowledge of the chaotic and unstructured hearing through which it was at least in part made.

The Board's failure to provide an explanation for its identification of a security risk sufficient to justify denial of procedural rights can also be understood as wrongful when analyzed through these norms. The failure to explain the nature of the threat it faced increases the likelihood that the Board's assessment of that threat will be inaccurate – that it will be driven by normal institutional distaste for emotional outbursts and scenes, rather than by a cogent and rational assessment of a threat which could result in bodily harm. It also increases the likelihood that the Board's assessment will not be accepted as legitimate. An unspecified assertion that there were "incidents" gives no one comfort in the

veracity of that claim, or reason to have accepted it in the event it should turn out to be erroneous. Indeed, a person reading this statement is as likely to have increased suspicions of its erroneous nature and illegitimacy, as he is to have faith in its *bona fides* and legitimacy.

The wrong arising from the segregation of interveners, and the hiring of covert private investigators to observe and report on the conduct of those interveners, lies in the dignitary importance of procedural rights. In a recent decision on legislation mandating open adoption records in Ontario, the Ontario trial court directly related the importance of privacy to the maintenance of human dignity:

the disclosure of the birth and adoption records under the new law, in circumstances where a reasonable expectation of privacy has been created...constitutes an invasion of the dignity and self-worth of each of the individual applicants, and their right to privacy as an essential aspect of their right to liberty in a free and democratic society has been violated.<sup>75</sup>

When the Board segregated interveners from the hearing room and used private investigators to observe and report on their activities, they humiliated them. They did not treat them as having the same standing as the corporate applicant, as individuals worthy of respect, privacy and dignity. Instead they treated them as lesser participants who could not be trusted, whose views should only be heard in a limited way and whose interests were secondary. This may or may not have constituted bias, but it certainly violated our basic intuitions about what procedural fairness should do:

We *do* distinguish between losing and being treated unfairly. And, however fuzzy our articulation of the process characteristics that yield a sense of unfairness, it is commonplace for us to describe process affronts as somehow related to disrespect for our individuality, to our not being taken seriously as persons.<sup>76</sup>

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<sup>75</sup> *Cheskes v. Ontario (Attorney General)* 2007 CanLII 38387 (Ont. S.C.)

<sup>76</sup> Mashaw at 163.

Given this failure to respect the interveners' privacy and dignity it follows, obviously, that those interveners would be highly unlikely to view any decision resulting from those procedures as legitimate, even if it identified the facts and law accurately, and applied the law to the facts correctly.

Overall, the process of the Board from the outset of the Needs Identification process right through the review and variance consideration of that process and into its final conduct of the *HEEA* facilities hearing showed an almost complete lack of appreciation for what procedural fairness is about. It is not about technical compliance with its general requirements and it is not about following the Board's own rules of practice and procedures (although both those things are important). It is instead about observing the paramount importance of the rule of law – the need for accurate decisions derived from a process which treats people with dignity and ensures that those decisions will be accepted as legitimate by the citizenry. This overall obligation appears to have escaped the Board.

It also, though, does not appear to have had any role to play in the legal consideration of the Board's conduct. At every stage of judicial review of the proceedings – in both leave to appeal applications to the Court of Appeal and in the Originating Notice filed with the Court of Queen's Bench – the Board's process was assessed through procedural fairness's traditional requirements. While this is understandable, it also leads to the potential for the entire review process to miss the conceptual point. While the rules and requirements are reasonable articulations of what procedural fairness requires, they are not themselves the content or purpose of procedural fairness. As such, while under normal circumstances they appropriately orientate consideration of whether a process is sufficient, they cannot, and should not, terminate the analysis. The question is not whether the Board's use of covert investigators created a reasonable apprehension of bias (although it may have done). The question is instead whether the Board's use of those investigators was procedurally unfair. It was.

**What follows?**

The two central messages of this paper should by now be clear: first, in determining the appropriate process for making an administrative decision, regulators must be aware both of the rules of procedural fairness and of the fundamental values which procedural fairness protects. Process should be orientated at appropriate respect for both those rules and the underlying values, taking into account the effect, content and legitimate expectations associated with the decision in question. Second, in assessing whether adequate process has been afforded, courts and administrative decision-makers should not be overly categorical in their analysis; instead they should acknowledge the possibility that procedural fairness can be violated in ways not easily comprehended by the traditional categories.

Two additional points must be noted, however. First, the identification of the relevance of underlying values to the assessment of what procedural fairness requires does not require a more absolutist conception of procedural fairness. Ensuring that procedural fairness helps to make decisions more accurate, legitimate and respecting of the dignity of participants does not mean that every administrative decision should be made through a quasi-judicial oral hearing. The process that will help ensure accuracy for a policy decision is not the same as it is for an adjudicative decision impacting the rights of participants – in the latter instance factual information possessed by the individual affected will be of considerable relevance whereas in the first it will not. What makes a public policy decision legitimate is not the same as what makes a quasi-adjudicative decision legitimate.<sup>77</sup> Further, as pointed out by Mashaw, voting is one of the most tangible processes through which political democracies respect the dignity of the citizenry, even though voting by each individual has no meaningful effect on political decisions. The point of looking at the values underlying procedural fairness is not, therefore, to constrain an administrative decision-maker as

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<sup>77</sup> See footnote 74, *supra*.

“master of its own procedure;” it is simply to orientate the consideration of appropriate procedures towards what those procedures are to accomplish normatively rather than categorically.

Second, in addition to these somewhat abstract lessons there are tangible lessons to be learned from the Board’s mistakes. The most important of these, I would argue, is that when faced with a difficult and almost certainly contentious hearing – which transmission facilities nearly universally are – a regulator *must* have control of its process. It has to be careful about mundane matters such as ensuring that the room is properly set up to minimize conflict and that participants are properly registered. It may be boring to focus on room set up, to register participants and ensure they have standing, and to establish timelines for when and how each participant will be heard, but if the Board had taken those steps they might well have avoided much of the chaos which took place. If people know who is going to be heard, when and why, it gives them certainty that they will be listened to and that their voices will not be drowned out. Macaulay and Sprague provide an excellent checklist for a regulator facing a contentious hearing, dealing with concerns as varied as “yelling” hearing participants and participants breast-feeding in the hearing room.<sup>78</sup> A regulator facing a contentious hearing could do much to ensure respect for the norms of procedural fairness by taking the prosaic step of consulting and implementing these practical guidelines as appropriate.

In addition, as noted in the Perras Report, there are practical steps a regulator can take to manage a perceived security threat which fall short of covert investigators, and which consequently better respect procedural norms:

In my view it would have been more palatable to identify security personnel openly and to so identify them as security. Under the circumstances with adequate back up to control anyone who was obstreperous or violent that would have been adequate to secure the hearing room and the recreational center where a number of

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<sup>78</sup> Macaulay and Sprague at 12-72.

staff were housed and where the general public including legal counsel attended to follow the proceedings.<sup>79</sup>

## **Conclusion**

Establishing a proper approach to procedural fairness is difficult. Regulatory bodies and courts have to make “tough choices” about how much process is appropriate given the nature of the decision at issue. Nothing in this paper is intended to diminish the complexity of that choice, or to deny the appropriateness of administrative decision-makers making it. Its suggestion is simply that when doing so it is important that regulators keep their eye on the fundamental principles at stake. Procedural fairness does involve a balancing of interests, but it also involves focusing the process adopted towards accuracy, dignity and legitimacy. Failing to take these fundamental values into account will lead an administrative decision-maker to make mistakes that are obvious to a disinterested observer in hindsight, but which when assessed at the time (or after) through the rules of procedural fairness do not seem especially wrongful. Orientating procedure in general towards accomplishment of the values of procedural fairness will help to avoid that outcome.

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<sup>79</sup> Justice D.W. Perras, Examination of the Alberta Energy and Utilities Board Security Measures Related to the AltaLink 500 kV Hearing, p. 9.