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SPEECH

Women In Energy

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Thank You

First of all, I would like to thank Rhonda and the other organizers for arranging tonight's event. It's been a great opportunity to catch up with old friends and make some new ones. So thank you.

Thank you also for giving me the opportunity to talk about the Ontario Energy Board. The OEB has been an important institution to me personally. I worked at the Board as a staff member for 8 years until 1995. And after working in London for some years, I returned to Toronto, and returned to the Board. I now have the privilege of serving as a Board Member, a position I have held for 4 years.

My job tonight is to go some way in convincing you that the OEB is not an obstacle or a "necessary evil", but rather an important facilitator for success in our industry.

Theme for the Talk

When Rhonda and I exchanged e-mails about tonight's presentation, she suggested that there was interest in learning more about the OEB's hearing process – in particular oral hearings. So when I was thinking of a theme for my talk – I immediately thought: OEB Hearings: The GOOD, the BAD and the UGLY.

But then I thought – WHOA – I shouldn't use that iconic macho imagery if I'm talking to a group of women. So I tried to think of a better theme, more in keeping with tonight's event – something light yet insightful – and I thought "Aha": Bridget Jones' OEB Diary.

The possibilities seemed good. I could provide a wardrobe critique of the regulatory community – only the lawyers of course – they have thick skins and smart suits. Or, I could discuss which wine best aids in the digestion of 500 pages of evidence. Or maybe I could speculate on office politics and romantic entanglements.

Tempting as all that was, I decided I must take a more dignified approach. So instead of Bridget Jones Diary I've decided to go back to that book's antecedent – *Pride and Prejudice* – and perhaps the original "chick lit" author – Jane Austen. And in some weird ways – an oral hearing before the OEB is a bit like an Austen novel. Let me see if I can convince you and perhaps illuminate the ways of the OEB at the same time.

So, tonight I present my "book report" on the OEB hearing process.

I will explain each of the main components: Setting, Context, Character, Plot, Conflict, and Resolution.

Hopefully by the end you will have a finer appreciation for our work at the OEB and I won't have bored you silly.

OK – so first we have setting:

Setting

The setting for an Austen novel is usually a gracious manor house in the idyllic English countryside. Our setting is Ontario's electricity and natural gas sector. And while the sector might have been a relatively gracious and tranquil setting in the pastoral days of regulation before market restructuring, it certainly isn't now.

Today's setting is marked by unprecedented change: some aspects of the sector are growing; others are shrinking. There is greater emphasis on environmental issues. There are new competitive markets.

There is consumer choice and consumer confusion. What was once characterized by evolution seems now more often characterized by revolution.

The traditional focus of energy utility regulation is the transmission and distribution of gas and electricity. These are considered "natural monopolies", because the cost structures are such that it is unlikely that successful competition could develop. To protect consumers from monopoly abuse, legislatures institute regulation.

Regulation is a bargain of sorts: the utility is given an exclusive right to serve an area and an opportunity to earn a fair return for its shareholders and, in exchange, has an obligation to serve customers reliably at just and reasonable rates.

Customers are protected by having their rates set by a regulator and not by the monopoly – but the regulator is responsible for ensuring that the rates are sufficient to cover reasonable costs and a fair return to the shareholder.

Regulation also considers issues of market structure– including how to ensure successful competition in those areas of the sector that are competitive.

But the OEB hearing setting has expanded beyond traditional utility regulation. The legislature has given us additional regulatory responsibilities – namely setting payment amounts for some of the generation assets owned by Ontario Power Generation and reviewing the Ontario Power Authority's Integrated Power System Plan.

We recently concluded the oral hearing on OPG's regulated assets. That hearing is significant because it will set the price for about 30% of the province's electricity generation.

And until last week, the Board was in the midst of the IPSP hearing. That hearing is remarkable in terms of its scope and the number of active participants it has attracted – there have been over 25 active intervenors. As you are probably aware, the IPSP hearing was adjourned last week in order for the OPA to respond to the government’s recent directive and to file updated evidence.

So our role is not only to regulate natural monopolies. We are also charged with using our expertise as an independent economic regulator in making other decisions affecting the energy sector in Ontario – decisions related to identifying the public interest in a fair and transparent way.

So that’s the setting for the OEB. Next we have Context.

Context

In Jane Austen’s novels the context is the subtle yet complex and rigid social structure of late 18th and early 19th century England. For many, the OEB’s methods and approach may seem equally rigid and arcane, not to mention needlessly complex and time consuming.

And yet our context provides a strong and enduring framework in which to make decisions on difficult issues in changing circumstances. Our job is to make that context comprehensible and accessible.

The OEB’s Vision is – and I quote – “a viable and efficient energy sector with informed customers served by responsive regulatory processes that are effective, fair and transparent.”

The *Ontario Energy Board Act* sets out our objectives and defines our role in the energy sector. Our objectives are set out up front and they form a set of criteria: consumer protection; a financially viable energy sector; economic efficiency. It is these criteria that we use to assess the public interest.

The OEB Act and the Electricity Act set out our authority and define how we may conduct our work. In some areas our authority is very broad – for example in setting just and reasonable rates, “the Board may adopt any method or technique it considers appropriate” (that’s from section 36(3) of the OEB Act.)

In other situations our authority is defined more narrowly – for example when we are considering an application for an electricity transmission facility we may ONLY consider the impact on consumers in terms of price, reliability and quality of service.

In reviewing the IPSP we are required to “ensure it complies with any directions issued by the Minister and is economically prudent and cost effective.” If it is not, we may refer the plan back to the OPA with comments.

Another important context is the legislation which governs our hearing process – the *Statutory Powers Procedure Act*.

Through the SPPA and our own Rules of Practice and Procedure we are governed by the administrative law principle of natural justice. Natural justice requires that those who are affected by a decision have the right to know about the decision being considered, have the right to be heard before an impartial decision maker, and have the right to a transparent process.

These are important legal principles: the right to notice; the right to a hearing; and the right to an impartial decision maker and a transparent process. However, they can also be time consuming. The principles are there to ensure a good decision – not necessarily a quick decision. But there are pressures from all sides for timeliness in decision making.

As a result, the regulator must be constantly working to find ways to be efficient without compromising the fundamental principles. Some examples of the ways in which the OEB has increased the efficiency of the regulatory process include settlement conferences; regulatory policies; benchmarking; multi-year incentive ratemaking; written hearings; guidelines for applicants; and performance standards for our own activities.

So that is the context. Next we have the Characters.

Character

Now what can I tell you about the colourful cast of characters that makes up a typical oral hearing at the OEB. Well, it’s much like the group of people gathered in a Jane Austen manor house.

Board Members – We like to think of ourselves as the wise and long-suffering matriarchs (and patriarchs) of the process. What we must always guard against, though, is *Pride and Prejudice*. Pride is dangerous because it may lead us to believe we know all that need be known – before the process is complete. And Prejudice is a danger too, because it may lead us to be less than objective in our approach. The decision maker must always be unbiased.

Board members must read the evidence and listen to the testimony carefully, and critically. We must read and listen not with a mind to accuse or condemn but with the goal of discerning facts from assumptions or assertions. We avoid forming opinions before a hearing, but we do identify issues that warrant further enquiry.

Next we have Board staff and Board counsel – these are the folks that toil in the manor house ensuring that things run smoothly and effectively – they do the most and they know the most. In an oral hearing, we rely on staff to ensure we have the information we need to make a good decision.

The extent of their involvement in the oral phase of a hearing varies, and depends on the scope of the proceeding, the level of intervenor involvement and the quality of the application. We have lawyers, accountants, finance experts, economists, engineers, and environmentalists, all of whom contribute their considerable expertise to the task at hand.

Next we have the applicant – this is the guest and her staff that come to the manor house. Sometimes they arrive unexpectedly, sometimes they appear by invitation. Some perhaps appear too frequently while others studiously avoid us. They are a serious lot, under pressure to provide the right information at the right time and to ensure their interests are protected. By and large these characters are well-behaved and dedicated to ensuring a fair process.

And of course we have the intervenors – all the relatives and friends that also come to stay; they are a lively and strong-willed bunch. They come from all walks of life and they have a multitude of perspectives. They may be customers, land owners, Aboriginal peoples; unions, municipalities or environmental groups.

In all cases they will be affected by the outcome of the proceeding and therefore have the right to be heard.

And in the words of our Chair: “public participation is essential to understanding the public interest.”

So now we have our cast of characters. Next comes the plot.

Plot

We try to ensure that the plot of an OEB hearing is predictable and efficient but it can often take unexpected twists and turns and we must balance the need for flexibility with the need to ensure a fair hearing for all involved – applicant and intervenors.

The purpose of a public hearing is to ensure the Board has the information it needs to make a decision in the public interest.

The Board ensures it gets the relevant information it needs by allowing the parties an opportunity to challenge the positions and evidence of the applicant – we call this “testing” the evidence. Intervenors also have the opportunity to bring forth their own evidence which the applicant can test.

In the words of our Vice Chair, Pamela Nowina: “I firmly believe that a just result comes when as a regulator we are able to provide an environment in which all stakeholders – regardless of their experience with Board processes – feel confident enough to bring their case forward secure in the knowledge that their issues will be dealt with respectfully, thoughtfully, openly and transparently.”

The plot of an oral hearing goes something like this:

First, the applicant makes its application – this should provide all the evidence that the Applicant intends to rely on in making its case.

Second, there is a process of pre-hearing discovery. This may include written interrogatories, technical conferences, and a settlement conference.

Then there is the oral hearing itself – with evidence and cross-examination. Witnesses appear for the applicant and, quite frequently, for the intervenors.

Then there is what I would call the *Persuasion* phase – a period of argument or submissions in which the applicant and the intervenors try to persuade the Panel about how the evidence should be interpreted and what conclusion should be reached.

The final – well not quite final – part is the Decision. I say not quite final, because the applicant or an intervenor can appeal the decision – either to the Board or to the Divisional Court.

Daunting as an oral hearing may be in terms of time and resources, it is often an effective process for applicants and intervenors to present their case in a compelling way directly to the decision maker.

So that’s the plot. Next comes the Conflict...

Conflict

Of course no Jane Austen novel would be complete without some sort of conflict. The plucky heroine must face adversity. In the public hearing context, the conflict is around identifying and furthering the Public Interest.

I think Scott Hempling, the Executive Director of the National Regulatory Research Institute in the US, says it well: “The purpose of regulation is to align private behaviour with the public interest.”

So what is the public interest – I think there may be as many definitions of the public interest as there are regulators. To me the public interest represents the best balance possible amongst competing interests.

I don't mean a balancing of competing private interests: customers who want reliable service at below-cost prices versus shareholders who want high returns with low risk. I mean the trade-offs that must be made among public interest goals: reasonable prices; fair return; reliable systems; access to competition; environmental protection; rational development.

The public interest means a focus on economic efficiency and an articulation of long-term goals. But that alone is not enough: it must be combined with the discipline to advance incrementally and transparently toward the long-term goals and the commitment to educate effectively and listen responsively to ensure accountability for our decisions.

Resolution

And just as there must be conflict to drive the narrative forward there must at the end also be resolution. For the OEB, the resolution of the public hearing process is in the decision.

I call this the *Sense and Sensibility* phase. By "sense" I mean a rational and measured approach to the issues; by "sensibility" I mean responsiveness to the nuances and complexities of a proceeding.

The Board can't just make a decision like "yes" "no" or "\$3 million." We must explain the reasons for our decision. That is an integral part of a fair and transparent process.

The reasons for a decision should explain why a position was accepted or why it was rejected – and the reasons must be grounded in the evidence presented in the hearing.

It is sometimes said that a good decision ensures that the losing party knows their position was heard and understands why it was rejected. They may not be happy but they should be satisfied that they had a fair hearing.

No matter how large and complex the hearing – it gets distilled into a decision. In some cases (for example a leave to construct like the recent Bruce to Milton hearing) the decision is essentially a "yes" or a "no". In cases like that, the decision document provides a road map to how that final decision was made. It's the cumulative assessment of a number of issues that results in a final conclusion.

A rates decision is more like a collection of decisions; many of the issues can be considered discreetly and decided separately within the overall rates decision, although it's important to keep in perspective the overall application and be

aware of the interactions amongst issues. And at the end there is a single set of rates which is implemented.

And although a decision is in some respects the conclusion of a proceeding – it may also indicate the future direction of the Board. It may set out expectations for the next application; it may even direct the applicant to undertake certain work for the next proceeding. And so the process comes full circle.

CLOSE

So there you have it – the six parts of the OEB hearing process: setting, context, character, plot, conflict and resolution. I hope this has been helpful and that perhaps you now understand the OEB hearing process a little better.

I hope that perhaps I have even tempted you to come and see an oral hearing in action. You are certainly welcome to do so – in fact I would encourage you to do so.

In closing, I would like to thank you for your attention and while I would be happy to take your questions, please don't ask me to speculate on the regulatory equivalent of the dashing Mr. Darcy!