

The Role of Board Counsel at Hearings: An Experiment

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The Experiment

- Ontario Energy Board carries out economic regulation of Ontario energy sector
- From 1960s, regulating natural gas sector; in late 1990s, responsibilities grew:
 - Extended to electricity sector (growth in financial impact, range of interested parties, and political consequences).
 - Regulatory instruments include rule making as well as adjudication.

Role of Staff

- OEB's hearing practice changed in early 1990s:
 - Movement from "advocacy staff" to "facilitative staff"
 - Cost award system for intervenors
 - Extensive reliance on settlement agreements
- Consequence was that leadership in hearings carried out by intervenors.
- Leadership in rule making carried out by OEB Staff.

Review of Process

- In 2006, OEB commenced review of hearing process (Vegh, Sossin, Rosenberg).
- Review looked at role of staff, role of intervenors, pre-hearing process, etc.
- Key recommendations:
 - adjudicative hearings be restricted to “adjudicative facts”;
 - staff play leadership role in hearings, including advocacy on public interest issues; and
 - restrictions on settlement of policy issues.

Advocacy Staff Issues

- Counsel in adjudicative hearings both advised panel and took positions on the record.
 - Fairness for parties?
 - Who was staff's client (panel or institution)?
 - Consistent with honest broker role?
 - Expertise in developing positions?

Challenges with Approach

- Intervenor Counsel:
 - resented suggestion that they were not representing public interest and publicly critical of changes.
- Applicant Counsel:
 - resented interference with ability to settle cases.
- Board:
 - Staff challenged by new substantive role
 - Panels questioned whether staff was adding value and could continue to advise

Sector's Response

- Industry association (OEA) carried out survey of utilities and NGOs. Key Findings:

Survey Results

Topic	Support	Opposed
Removing Policy from Hearings	67%	26%
Role of Advocacy Staff	62%	22%
Restrictions on Settlement	56%	31%

Outcome

- Some changes implemented but:
 - More incremental than categorical
 - specific cases or parts of cases
 - sectors have different approach (gas is more adjudicative, electricity is more policy oriented)

Materials

- Ontario Energy Board, A Report with Respect to Decision-Making Processes at the OEB, September 2006.
- OEA Working Dialogue on OEB Regulatory Efficiency and Effectiveness: Final Report of Elenchus Research Associates Inc. (Ontario Energy Association, October 2007).

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