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From: Chris Cincar
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To: Rosemarie Leclair
Subject: New Concept - Positive thoughts from Jay Shepherd on OEB

Rose

I thought you might want to read this. It's been a long time since I've heard anything positive from Jay on the OEB and this is quite positive. He just posted it.

Energy #18 – How Bad is the OEB, Anyway?

Posted on [July 16, 2017](#) by [Jay Shepherd](#)

The other day I was having a discussion with someone about a possible speaking engagement, and he said “You can always be relied on to give the OEB a few well-aimed kicks.”

That gave me a little pause.

There was, of course, a “regime change” at the Ontario Energy Board in 2011 with the ascension to the OEB throne of Rosemarie Leclair as Chair. Regime change is, at its heart, about change, and there's little doubt that many people in the industry – myself included – have had some resistance to that change. Human nature. Not always good, but quite normal.

So yes, I have been known to be a tad critical of some of the actions of the OEB in recent years. Sometimes I've even been right. Not always, but sometimes. (Resistance to some change is justified, when the change is unwise.)

In September Chair Leclair is scheduled to speak to the Ontario Energy Association, and deliver what you might call a mid-term review just over six years through her ten year appointment as head of the OEB. Now may therefore be an appropriate time to talk about some of the things the OEB is getting right.

Oh, never fear. This writer has not given up on whacking the OEB. Wait until you read about the relationship between the Fair Hydro Plan and OEB regulatory performance.

But I digress.

Since 2011 there are a number of things at the OEB that are more worthy of applause than approbation.

Staff Renewal

The last six years have seen a **steady stream of retirements from the OEB**, as older more experienced hands are being **replaced with younger, fresher professional staff**.

The strategy is referred to internally by OEB management as “clearing out the deadwood”, and **in fairness some of the staff who have now retired were in fact past their “best before” date**. Many of these were people who had **made valuable contributions over the years**, but were **bringing less energy and originality and creative drive to their jobs in recent days** than perhaps was optimal.

So the Board **lost some institutional memory**. And, some of the people who felt the pressure to retire were in fact not the ones you want to lose, whatever their age.

Not only that, but the same management techniques that put pressure on some employees to retire **also created a situation in which many valuable employees had their resumes on the street**. That has declined somewhat over the last few months. (I don’t know why.) However, **there remains a surprising number of OEB staff who are quietly but actively looking for somewhere else to work**.

Still, every organization needs new blood. The OEB is no different, and as a result of the renewal that has been going on, with older employees retiring and newer people coming on, there is a new energy (no pun intended) at the OEB that should be welcomed.

Now, some will argue that **the newer staff are, just naturally, less feisty and more “party line” than their predecessors**. In fairness, that is **probably a little bit true, given the more top-down corporate culture at the OEB today**. On the other hand, it is fair to say that people usually take some time to find their voice in an organization. **Many of the recent hires at the OEB are smart, capable professionals**. After a period of feeling their way, they are likely to have an increasingly important influence over the policies and actions of the OEB. Patience. Just give it some time.

Overall, though, it is clear that the **strategy of renewing and upgrading the OEB’s staffing resources has been a success, and will form a foundation for a stronger OEB in the future**.

Board Members

The **Board went aggressively in the direction of more part-time members** and less full-time members, a move that was widely criticized (including [by this writer](#)).

Shifting to part-time members was not completely stupid. It is, for example, the **method used by 90% of tribunals** federally and provincially to staff their adjudicative teams. It delivers maximum flexibility and diversity, and provides a productive role for experienced people who no longer want to work full-time, but still are willing and able to make a meaningful contribution.

It didn’t work at the OEB, largely because the role of Board members is more than just as adjudicators of cases. They provided, and continue to **provide, a worthwhile function in policy development**, management, and staff guidance. That’s pretty **difficult to do if you’re only at the OEB offices on a sporadic basis**.

Happily, the OEB has decided to move back to reliance on more full-time Board members. A couple of new appointments have indirectly announced this change. Behind the scenes, it is more extensive. The existing part-time members will likely not be renewed,

and there are probably one or two more full-time additions to come.

What's the phrase? "Something's lost, and something's gained..."

Pivoting back to full-time members means there is **probably no room at the OEB for even the best of the part-timers**, people like **Emad Elsayed and Peter Thompson**. In choosing part-time members, the OEB and its Chair have in a number of cases made inspired choices. That success may be lost.

On the other hand, the **addition of new full-time members** like **Mike Janigan and Lynne Anderson** can be **expected to add strength to the regulatory roster**.

The **most interesting point** here, though, is that the **OEB listened, and shifted its approach in response to what it heard**. **Largely as a result of input from its own staff** (and **not** primarily because of **external commentators**, I might add), the OEB is solidifying and stabilizing its Board members in a sensible and thoughtful manner.

Gas Demand Side Management

For a decade stakeholder involvement in the evaluation and supervision of conservation plans delivered by the gas distributors was the driving force behind changes and improvements in those programs. Then, **in 2015, the OEB announced** that, in conjunction with a substantial increase in gas conservation funding, **it would take on a central role in evaluating and monitoring gas DSM**.

This move was **widely criticized**, and I will admit I was one of the most vocal critics. The **OEB will not be able, we said, to hold the utilities' feet to the fire, as customer groups can**. It is simply not in their DNA.

Well, it is still early days, but the initial returns are in.

They were right. We were wrong.

Supervision of gas conservation programs by the OEB is still new, and some of the criticisms were well-founded. It is costing a lot more money, and in some respects (although not all) it is taking considerably longer.

On the other hand, the **early results show that the new evaluation and monitoring appears to be more thorough, and more independent**. A good evaluation contractor was selected by OEB staff. The approach has been **more hard-nosed and empirical** than anyone could have expected. While there is still probably more secret, behind the scenes guidance of their evaluation work than is appropriate, the **guidance is now from OEB staff, not the utilities**. That is likely to get better over time. The Evaluation Advisory Committee is providing solid input to the process. Key concerns are being identified and addressed. **OEB staff have demonstrated they are willing to listen**.

As well, the incessant yapping about arcane issues has been brought under control. There is still lots of talk, but with OEB staff pushing for debates to be constructive, and constantly demanding resolution of discussions, the kind of open-ended babbling that had been characteristic of some aspects of the process in the past has largely dissipated.

When things work well, it is often mostly because of the people involved, and this is no exception. That having been said, the OEB had confidence in its people, and set up a structure that appears to be working. Even if it is still early, kudos are in order for making this work well so far.

Renewed Regulatory Framework

OK, OK.

Before you get your knickers in a knot, yes I am very, very aware that **not everything in the RRFE is working well**. Yes, I have not forgotten that the RRFE is indirectly promoting the “[big build](#)”. Yes, I can see how **rates are rising much too quickly for many regulated entities**. Yes, **a lot of money is being wasted on additional paperwork**. Yes, there is some potential that the RRFE will continue to be **biased in favour of the larger, wealthier utilities**.

But **step back and look at the RRFE as an evolution of regulatory philosophy. Two things should stand out.** First, there is an **emphasis on outcomes**. Second, **expectations on utilities have been ramped up**.

When the RRFE was first introduced, there was **much mocking of the term “outcomes”**. Many in the industry thought it was simply a meaningless buzzword, promoted by the OEB because it was the latest craze, or maybe simply to mollify the OEB’s political masters. It was like a running gag, in which over a few beers between energy sector people you could be sure that at least one joke would come up with the punch line “outcomes”.

Was it really just a vapid, meaningless word at the outset? Or, did the OEB intend it to have real importance, but just fail to communicate it well? Was it the ultimate statement of the “market proxy” concept from the get-go, or was it a nothing that became something through use?

We’ll probably never know the answer to that, but we can see how the meaning and importance of outcomes has solidified in the last few years. After a series of decisions on [individual cases](#), the **meaning of “outcomes” is starting to become clear**.

In competitive markets, customers will pay for something they value. If a company wants a higher price, it has to deliver higher value. Results (outcomes) matter. All the other BS, not so much.

A regulated monopoly is no different. Customers are willing to pay more to get more. The **OEB’s role – wearing its market proxy hat – is to set rates that reflect the additional value or positive outcomes utilities are delivering to their customers**.

That leads to the **second philosophical driver of the RRFE: expectations**. This is inexorably **linked to that much-disparaged term, [customer engagement](#)**. When customer engagement was first promoted, **virtually everyone in the industry thought it meant “selling” the customers on the merits of the utility’s cost and rate increases**. Millions of dollars were spent on focus groups, and phony surveys, all designed to ensure that utilities could prove to the OEB that customers “approved” of their proposed rate increases. Hence the criticism.

Turns out, the point of customer engagement was **not a sales job**. **We all got it wrong**. As has become increasingly clear in decisions, and in (sometimes quite blunt) presentations by the Chair and others, **customer engagement is about listening to the customers. It is part of a broader paradigm, i.e. increasing expectations on the utility to take responsibility for their own business.**

The **intended message** appears to be: **Utilities, you are not municipal departments any more**. You have **obligations to your customers, like any other business** selling a product or service. We expect you to understand your customers – just as a competitive company must if they want to survive – and provide your customers with the service they want at a price they accept.

As one **OEB insider said** to me recently, ***“Regulation reaches its pinnacle of success when we can say ‘You’re doing exactly what your customers want and need’. Whenever we as regulators have to tell a utility to do things differently, that is a failure on both their part, and ours.”***

We’re not there yet, of course. But, sending a forceful message to utilities reminding them that they have the primary responsibility for their business, and for serving their customers, is undoubtedly a positive and constructive step.

There are lots of things wrong with the RRFE in terms of its real world implementation. The underlying regulatory philosophy – a reinvigorated market proxy approach – is the right direction.

The Future of Gas Regulation

Without much fanfare, the OEB appears to be ushering in a new era of gas distribution in Ontario. The most obvious example of that is the [Community Expansion generic decision](#), but that is not the only example.

Gas distribution has been regulated by the OEB for so long now that it has become stylized, like a Japanese Noh play, **with its own set of rules** and procedures just as tightly codified as the iemoto system in Noh. And, just like that art form, it has **become largely incomprehensible** to everyone but the cognoscenti.

Now, pretty much at the limit of their cost-effective service territories, there is little left to change for the **gas utilities**, at least from a regulatory point of view. **Same old, same old, as they say.**

The world, however, is changing. There are new entrants that want to serve Ontario customers, and those customers want to be connected. **Carbon pricing will change the economics of natural gas** and energy generally, probably permanently. **Changes in the sources of natural gas are fundamentally altering how natural gas gets to market.** The gas utilities, and others, are going to respond to those changes. The **regulator will be faced with new issues**, some of them biggies.

The OEB is not totally on top of all this stuff, by any means. **However, what they have done is take a proactive approach, seeking to learn more about the changes as they occur, and showing a willingness to think outside of the box when needed.**

If you had asked me two years ago whether I worried about the long term impacts of these

changes on Ontario's gas infrastructure, I would have said yes. I'm still worried, because there is still lots to worry about. However, **everyone in the industry can have just a little more confidence, because it is clear** that the **regulator has these important issues on its radar, and is apparently not going to wait until it's too late to do something about it.**

Conclusion

There's lots more to like about what the OEB has done over the last few years.
These are only some highlights.

Now, before you sigh with disappointment, there is also lots to criticize. If my readers remain interested, I may from time to time have something to say. It will, I suspect, sometimes continue to include the pointy end of the stick.

But with that caveat, **it is useful to remember that the OEB is not the evil empire. Good things are happening.**

Just as we jump all over the bad, it is appropriate once in a while to celebrate the good.

Not too often, of course....

– Jay Shepherd, July 16, 2017