



ONTARIO  
BAR ASSOCIATION  
A Branch of the  
Canadian Bar Association

L'ASSOCIATION DU  
BARREAU DE L'ONTARIO  
Une division de l'Association  
du Barreau canadien

## **ONTARIO BAR ASSOCIATION**

### **REVIEW OF THE** **ONTARIO MUNICIPAL BOARD**

### **SUBMISSION TO THE** **STANDING COMMITTEE ON** **GOVERNMENT AGENCIES**

Submitted on September 8<sup>th</sup>, 2009  
Submitted by:

Carole Brown  
President  
Ontario Bar Association

David Potts  
Chair  
Municipal Law Section  
Ontario Bar Association

## **I) INTRODUCTION**

### **OBA**

The Ontario Bar Association (OBA) is an autonomous provincial branch of the Canadian Bar Association (CBA). The OBA is a voluntary, non-partisan professional association representing over 16,000 lawyers, judges and law students across the province. As 'the voice of the legal profession', the OBA is the only legal association that represents lawyers from every practice area across the province.

### **OBA Municipal Law Section**

The OBA Municipal Law Section is comprised of approximately four hundred private sector and public service lawyers, who in turn represent the various stakeholders in municipal, planning and development law matters in the province of Ontario. Its members regularly practice before the Ontario Municipal Board (OMB), and appear before other provincial tribunals and municipal councils.

The OBA Municipal Law Section Executive is elected by the members of the Section to act as advocates on behalf of the Section.

### **Section Representatives**

David Potts is the Chair of the OBA Municipal Law Section. Colin Grant is a Vice Chair of the OBA Municipal Law Section. Mr. Potts and Mr. Grant are City Solicitors for the City of Oshawa and the City of Brampton respectively. Leo Longo, an active member of the OBA Municipal Law Section, is a senior partner of Aird & Berlis LLP. Mr. Longo appears in all editions of Lexpert's Guide to the Leading 500 Lawyers in Canada in the area of property development. He chaired the Law Society of Upper Canada's Municipal Law Specialty Committee and is a Certified Specialist in Municipal Law in both Local Government and Land Use Planning & Development.

### **Municipal Section involvement in municipal and planning reform**

The OBA Municipal Law Section is grateful for the many opportunities we have been given to comment on provincial proposals for municipal and planning law reform, including Ontario Municipal Board reform. OBA Municipal Law Section comments generally do not directly address policy, but focus on the mechanics necessary to assist the legislature in achieving its goals. For example, the OBA Municipal Law Section has made several relatively recent submissions relating to the province's goals of supporting local decision making while at the same time protecting the broader provincial public interest, and providing clearer rules for the OMB, as follows:

- April 2007 submissions to the OMB Rules Committee

- February 2007 submissions to the Agency Cluster Facilitator
- January 2007 submissions to the Agency Cluster Facilitator
- February 2006 submissions to the Attorney General regarding OMB appointment reforms
- February 2006 submissions to the Public Appointments Secretariat regarding OMB appointment reforms
- January 2006 oral submissions to the Minister of Municipal Affairs regarding “Bill 51” OMB and Planning Act reforms
- August 2005 submissions to the Ministry of Municipal Affairs addressing OMB compensation
- August 2004 submissions to the Ministry of Municipal Affairs regarding OMB reform

### ***Standing Committee’s Mandate***

Standing Order of the Legislature, subsection 108(f) sets out the Committee's mandate:

“Standing Committee on Government Agencies which is empowered to review and report to the House its observations, opinions and recommendations on the operation of all agencies, boards and commissions to which the Lieutenant Governor in Council makes some or all of the appointments, and all corporations to which the Crown in right of Ontario is a majority shareholder, **such reviews to be made with a view to reducing possible redundancy and overlapping, improving the accountability of agencies, rationalizing the functions of the agencies, identifying those agencies or parts of agencies which could be subject to sunset provisions, and revising the mandates and roles of agencies, and to review the intended appointments of persons to agencies, ....**”[emphasis added]

The necessity for and the utility, effectiveness and worth of the role and function of administrative and quasi-judicial agencies, boards and commissions in general, and the Ontario Municipal Board in particular, have been well documented and need not be repeated.<sup>1</sup> Simply put, it is the best means we have of balancing competing public interests while maintaining government efficiency and the rule of law.

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<sup>1</sup> G. Regimbald, *Canadian Administrative Law*, 1st ed. (Markham: LexisNexis Canada Inc., 2008) at pp. 2-3. See also the reports listed in the selected bibliography.

The Ontario Bar Association supports the continued role of the Ontario Municipal Board as an independent quasi-judicial administrative tribunal. The Province must ensure that the Board is well funded and resourced with qualified members and a professional staff, each appropriately compensated for their duties.

While it is not possible to know in advance what issues and matters this Standing Committee might wish to explore during its present review of the Ontario Municipal Board, our Association wishes to address the following topics for the Committee's consideration.

### **Purpose of these submissions to the Standing Committee**

The purpose of the OBA Municipal Law Section submissions is to assist the Standing Committee in focusing on the need for administrative tribunals – in this case the OMB -- to fulfil statutory mandates as expert tribunals in an effective and fair manner. The province has a fundamental public obligation to attract and retain people with expertise to serve on provincial administrative tribunals.

With that purpose in mind, in this submission to the Standing Committee the OBA Municipal Law Section will focus on:

- previous concerns of the OBA which remain outstanding: Board member compensation, appointment tenure, and administrative resources. The province needs to address the disparity between publicly funded provincial tribunals such as the OMB in contrast to privately funded provincial tribunals such as the Ontario Energy Board;
- the need to consider the OMB in the context of the matrix of provincial legislative, regulatory and policy regimes, and public interests (local municipal and provincial), within which the OMB operates; and
- the need for the legislature to pass legislation before the proposed Cluster Project reforms may be implemented.

## **II) BACKGROUND THE ONTARIO MUNICIPAL BOARD**

The Ontario Municipal Board holds the distinction of being the first administrative tribunal to be established by the Province.<sup>2</sup>

The legislative authority of the Ontario Municipal Board has been intertwined with the legislative authority of municipalities in Ontario for a very long time. The OMB has evolved with municipalities. The provincial legislature has passed a vast number of public statutes over many years that confer jurisdiction on the OMB.

### **Legislative Authority of the OMB**

Since 1906 the Board's jurisdiction has continually grown as the Province has assigned to it various tasks pursuant to legislation enacted by successive governments. While not purporting to be a complete listing, the Board presently derives its powers and duties from the following public Acts:

*Ontario Municipal Board Act*, R.S.O. 1990, c. O.28

*Planning Act*, R.S.O. 1990, c. P.13

*Expropriations Act*, R.S.O. c. E.26

*Development Charges Act, 1997*, S.O. 1997, c. 27

*Education Act*, R.S.O. 1990, c. E.2

*Municipal Act, 2001*, S.O. 2001, c. 25

*City of Toronto Act, 2006*, S.O. 2006, c. 11, Sched. A

*Ontario Heritage Act*, R.S.O. 1990, c. O.18

*Shortline Railways Act, 1995*, S.O. 1995, c.2

*Assessment Act*, R.S.O. 1990, c. A.31

*City of Ottawa Act, 1999*, S.O. 1999, c. 14, Sched. E

*Consolidated Hearings Act*, R.S.O. 1990, c. C.29

*Aggregate Resources Act*, R.S.O. 1990. c. A.8

*Waste Management Act, 1992*, S.O. 1992, c. 1

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<sup>2</sup> "The Creation of the Ontario Municipal Board: The OMB's Centenary and Its Significance for Administrative Law within the Province of Ontario", Leo F. Longo, (2006) 52 O.M.B.R. 129.

*Conservation Authorities Act*, R.S.O. 1990, c. C.27

*Commercial Concentration Tax Act*, R.S.O. 1990. c. C.16

*Funeral, Burial and Cremation Services Act, 2002*, S.O. 2002, c. 33

*Ontario Planning and Development Act, 1994*, S.O. 1994, c. 23, Sched. A

*Town of Haldimand Act, 1999*, S.O. 1999, c. 14, Sched. B

*Town of Norfolk Act, 1999*, S.O. 1999, c. 14, Sched. D

*City of Hamilton Act, 1999*, S.O. 1999, c. 14, Sched. C

*City of Greater Sudbury Act, 1999*, S.O. 1999, c. 14, Sched. A

*Cemeteries Act (Revised)*, R.S.O. 1990, c. C.4

*Public Service Works on Highways Act*, R.S.O. 1990, c. P.49

*Retail Business Holidays Act*, R.S.O. 1990, c. R.30

*Social Housing Reform Act, 2000*, S.O. 2000, c. 27

*Housing Development Act*, R.S.O. 1990, H.18

*Municipal Arbitrations Act*, R.S.O. 1990, c. M.48

*Public Utilities Act*, R.S.O. 1990, c. P.52

*Toronto District Heating Corporation Act, 1998*, S.O. 1998, c. 15, Sched. C

*Public Transportation and Highway Improvement Act*, R.S.O. 1990, c. P.50

*Health Protection and Promotion Act*, R.S.O. 1990, c. H.7

*Ontario Water Resources Act*, R.S.O. 1990, c. O.40

*Town of Moosonee Act, 2000*, S.O. 2000, c. 5, Sched.

*Homes for the Aged and Rest Homes Act*, R.S.O. 1990, c. H.13

*Municipal Corporations Quieting Orders Act*, R.S.O. 1990, c. M.51

*Trustee Act*, R.S.O. 1990, c. T.23

*Municipal Water and Sewage Transfer Act, 1997*, S.O. 1997, c. 6, Sched. A

*Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B

*Safe Drinking Water Act, 2002, S.O. 2002, c. 32*

*Municipal Affairs Act, R.S.O. 1990, c. M.46*

*The Railways Act, R.S.O. 1950, c. 331*

There are also an uncertain number of private Acts which grant certain powers and jurisdiction upon the Board.<sup>3</sup>

As noted by the *Royal Commission Inquiry into Civil Rights* [the *McRuer Report*]:

“It would appear...that it has often been the practice of successive legislatures, when faced with the necessity of creating a jurisdiction to cope with a particular problem, to assign the problem to the Municipal Board.”<sup>4</sup>

In a previous standing committee review of the Board, it was stated:

“One of the most important and powerful regulatory agencies in the province, the Ontario Municipal Board has a well deserved reputation for fairness and excellence. As an independent administrative tribunal, the OMB’s prime duty is to hear and decide upon applications and appeals under various statutes, mostly in regard to municipal matters.”<sup>5</sup>

Notwithstanding this rather imposing listing of legislation, the majority of hearings presently conducted by the Ontario Municipal Board arise from appeal rights bestowed upon various parties pursuant to the *Planning Act*.

Over the years the Board has issued one hundred Annual Reports to its responsible Minister.

Since 1972, selected Board decisions have been professionally reported in the *Ontario Municipal Board Reports* reporter service; now consisting of sixty-one volumes of Board and judicial decisions.

The Board has a modern and comprehensive set of rules and procedures.

On its website [www.omb.gov.on.ca](http://www.omb.gov.on.ca) the Board provides the public with a vast array of useful information including search capabilities of all of its decisions since 2001, the current status of all matters presently before it, copies of required forms, “how-to” guides and contact information.

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<sup>3</sup> See the *Royal Commission Inquiry into Civil Rights*, Report No. Three, Volume V, (Queen’s Printer, 1971) Chapter 125, pp. 2015-2016 and *Report on Agencies, Boards and Commissions (No. 19)*, Standing Committee on Government Agencies, June, 1993, 3<sup>rd</sup> Session 35<sup>th</sup> Parliament, Margaret Marland, M.P.P. Chair, at p. 42 where it is stated that “there are over 100 private Acts for individual municipalities which confer jurisdiction” on the Board.

<sup>4</sup> *Ibid*, p. 2016.

<sup>5</sup> *Second Report on Agencies, Boards and Commissions, Standing Procedural Affairs Committee*, undated [1979], 3<sup>rd</sup> Session 31<sup>st</sup> Legislature, Mike Breough, M.P.P. Chairman, p. 28

## ***Previous Provincial Government-Initiated Reviews of the OMB***

Being the longest-serving administrative tribunal in the province and exercising significant powers under a variety of legislation, it comes as no surprise that the Board has probably been reviewed by the Province on more occasions than any of its other agencies, boards and commissions. Listed below is a selected bibliography of Provincial Government-initiated reviews which have considered either the role, jurisdiction or procedures of the OMB over the past four decades:

- 1968 *Royal Commission Inquiry Into Civil Rights*, “McRuer Report”, Part V, Report Number Three, February 22, 1971; Chapter 125 – The Ontario Municipal Board, pp.2013-2067
- 1972 *Report of the Select Committee on the Ontario Municipal Board*, November 21, 1972, 2<sup>nd</sup> Session 29<sup>th</sup> Legislature, John P. MacBeth, Q.C., M.P.P. Chairman, 34 p.
- 1973 *Subject to Approval: A Review of Municipal Planning in Ontario*, Ontario Economic Council, May, 1973, pp. 23-26 & 102-103
- 1977 *Report of the Planning Act Review Committee*, “Comay Report”, April 29, 1977; Chapter 10 - The Ontario Municipal Board, pp. 81-92
- 1979 *White Paper on the Planning Act*, Government of Ontario, May, 1979, Chapter 13 – The Ontario Municipal Board, pp. 113-124
- 1979 *Some Legal Implications of the Report of the Planning Act Review Committee*, White Paper on the Planning Act: Background Paper #2, G.J. Smith Q.C. for the Ministry of Housing, pp. 3-20
- 1979 *Second Report on Agencies, Boards and Commissions*, Standing Procedural Affairs Committee, undated, 3<sup>rd</sup> Session 31<sup>st</sup> Legislature, Mike Breough, M.P.P. Chairman, pp. 28-30
- 1989 *Directions: Review of Ontario’s Regulatory Agencies*, “Macaulay Report”, Management Board of Cabinet, September, 1989
- 1993 *New Planning for Ontario: Final Report*, “Sewell Report”, Commission on Planning and Development Reform in Ontario, June, 1993, Chapter 9, pp. 113-122
- 1993 *Report on Agencies, Boards and Commissions (No.19)*, Standing Committee on Government Agencies, June, 1993, 3<sup>rd</sup> Session 35<sup>th</sup> Parliament, Margaret Marland, M.P.P. Chair, pp. 37-57
- 1997 *Report on Restructuring Regulatory & Adjudicative Agencies*, “Wood Report”, Government Task Force on Agencies, Boards and Commissions, Ministry of Government Services, February 26, 1997, 39 p.
- 2004 *Ontario Municipal Board Reform: Consultation Discussion Paper #3*, Ministry of Municipal Affairs and Housing, June, 2004, 23 p.

2007 *Final Report of the Agency Cluster Facilitator for the Municipal, Environment and Land Planning Tribunals*, "Whitaker Report", Agency Cluster Project, Ministry of Government Services, August 22, 2007. 25 p.

It is interesting to note that many of these reviews were undertaken as part of a broader consideration of legislative reform related to the *Planning Act*. Significant additions and revisions to the Board's role, jurisdiction and procedures have resulted from significant *Planning Act* amendments which took effect in 1983, 1995, 1996 and 2007.<sup>6</sup>

It is respectfully submitted that careful consideration of these prior reviews would be beneficial to the present standing committee in undertaking its current task.

### **The OMB's role in enforcing provincial policy**

The OMB plays a key role in reviewing local decisions to ensure that the broader provincial public interest is protected.

The decisions of the OMB are far-reaching and have a direct impact on the quality of life of citizens living in urban, rural and northern communities. Its decisions can, for example, determine or influence issues of:

#### Land use planning

- the location, intensity and type of urban growth;
- the efficient and safe integration of land uses in communities, including residential, commercial, and industrial uses, often with competing requirements for intensities of use, noise, odour and other emissions;
- the redevelopment of vacant industrial lands (e.g. Brownfields), and the physical revitalization of downtown neighbourhoods;
- the implementation of Provincial Policy Statements and Provincial Plans such as the Greenbelt Plan and the Growth Plan.

#### Public infrastructure projects and finance

- the location and type of public infrastructure, including roads, bridges and community centres, and impact future municipal waste, waste water and water requirements;
- municipal development charges levied on new developments;
- the taking of private land for public uses;

#### Protection of the natural environment and heritage

- the protection of natural areas;
- the protection of agricultural lands;
- the preservation of heritage structures.

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<sup>6</sup> *Planning Act*, 1983, S.O. 1983, c. 1 (Bill 159); *Planning and Municipal Statute Law Amendment Act*, 1994, S.O. 1994, c. 23 (Bill 163); *Land Use Planning and Protection Act*, 1996, S.O. 1996, c. 4 (Bill 20); *Planning and Conservation Land Statute Law Amendment Act*, 2006, S.O. 2006, c. 23 (Bill 51).

These are all very important issues which require decision-makers to be independent and able to balance competing interests and rights of landowners, neighbours and municipalities. The OMB plays a vital role in ensuring that these issues are fairly and adequately addressed, that the broad public interest is protected, and that Provincial initiatives and policies are carried forward.

The OMB is unique in the scope of its power and its decision-making authority. There is no tribunal in Ontario that has a similarly broad jurisdiction and responsibility as the OMB, and there is no comparable tribunal or agency in any other province.

### III) RECENT LEGISLATIVE CHANGE AND THE OMB

The OBA Municipal Law Section has taken great interest in provincial legislative changes that affect municipalities and the OMB. Under the provincial planning and growth reforms, the OMB will continue to play a critical role in Ontario's land-use planning process. Matters before the OMB are often complex; consider the introduction of the new Provincial Policy Statement, the *Greenbelt Act, 2005*, the *Places to Grow Act, 2005* as well as the recent significant amendments to the *Planning Act* (through "Bill 51", *Planning and Conservation Land Statute Law amendment Act, 2006*).

One of the principal purposes of Bill 51 was to empower municipal councils to make local planning decisions. A stated goal of Bill 51 was to modify the role of the OMB. Now the OMB is meant to have an appellate role, to review local decisions, and is not meant to make planning decisions in the first instance.

Here are just three examples:

1) **OMB's mandate to have regard to municipal councils:  
*Section 2.1 of the Planning Act***

As of January 1, 2007 the *Planning Act* has had the following new provision which was added by Bill 51:

**"Decisions of councils and approval authorities**

2.1 When an approval authority or the Municipal Board makes a decision under this Act that relates to a planning matter, it shall have regard to,

- (a) any decision that is made under this Act by a municipal council or by an approval authority and relates to the same planning matter; and
- (b) any supporting information and material that the municipal council or approval authority considered in making the decision described in clause (a)."

Four initial observations should be made respecting the Legislature's decision to use the words "shall have regard to" in this new section:

- i) the term "shall have regard to" has been used in other sections of the *Planning Act* since 1983 and there is a good deal of Board and judicial consideration of its meaning;
- ii) the *Planning Act* uses a different term "shall be consistent with" in other of its sections and there is a good deal of Board and judicial consideration of that term's meaning;

- iii) when different terms are used in the same Act, it is presumed that different meanings are to be given to each<sup>7</sup>; and
- iv) the Act mandates that regard not be had simply to the Council decision made but also to the supporting information and material considered by Council in making its decision.

How then is the Board to approach the interpretation of section 2.1 and fulfill the mandated responsibility imposed upon it?

As used in the *Planning Act*, the phrase “shall have regard to” has been stated by our courts as falling “somewhere on the scale that stretches from ‘recite...then ignore’ to ‘adhere...slavishly and rigidly’”.<sup>8</sup> The court concluded that the words meant more than “simply paying lip service” to the matters that had to be regarded and obliges the OMB to “consider them carefully in relation to the circumstances at hand, their objectives and the statements as a whole, and what they seek to protect”.<sup>9</sup>

The Board has made the following observation in comparing the phrase “shall have regard to” with the words “shall be consistent with”:

“The higher standard [“be consistent with”] stood for only about one year, and following a change in the composition of the legislature, the original language ‘have regard to’ was restored. The implication of this is that the intent of the legislation was to abandon the higher test, unfetter the Board (and others) in its exercise of judgment, and provide the Board with the latitude to make the most appropriate decision in the given circumstances.”<sup>10</sup>

Do these words “shall have regard to” imply that there has been an onus shift on those challenging a municipal decision? Or does this phrase simply provide some evidentiary direction to the OMB; i.e. to understand what decision Council made and the information and materials [or the lack thereof] that Council had before it when the decision was made?

As the Board itself recently noted:

“Legitimacy of purpose is the *sine qua non* of any planning decision. It is also...a fundamental ingredient for any finding by this Board that a planning exercise is in fact proper. Having regard for a municipal decision must include examining how that decision was arrived at so as to ascertain whether that fundamental ingredient exists...Were it otherwise, municipal planning decisions would be impervious to review and critical examination, the transparency of those decision processes would be greatly diminished, and the Board’s ability to ascertain legitimacy would be severely hindered. Given

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<sup>7</sup> R. Sullivan, *Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada Inc., 2008) at pp. 216-218.

<sup>8</sup> *Concerned Citizens of King (Township) v. King (Township)* (2000), 42 O.M.B.R. 3 (Div.Ct.) at p. 9.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Material Handling Problem Solvers Inc. v. Ontario (Ministry of Municipal Affairs and Housing)* (2002), 44 O.M.B.R. 364 (OMB) at p. 399.

the Board's broad mandate...it is within the Board's jurisdiction to look behind a municipal council's decision, and that it was properly done in this case."<sup>11</sup>

In a different recent decision the Board interpreted and applied section 2.1 in the following manner:

"In reaching my decision, I have been particularly mindful of the provisions of s.2.1 of the Planning Act ("Act") which states that I shall have regard to any decision made under the Act by a municipal council. This section, in my view, requires the Ontario Municipal Board to consider the decisions of council and to weigh those decisions against the evidence heard by the Board. To read this section as creating some type of obligation on the Board to be bound by and to implement such decisions would be placing far too narrow an interpretation on the section. Other provisions of the Act such as ss.17(36), 17(50), 34(19) and 34(26) clearly allow for, and contemplate the possibility of, parties appealing a decision of a municipal council and the Board overturning it. Therefore, notwithstanding a level of inherent deference contained in s.2.1, the Board does, and should, for obvious reasons, retain its independent decision making authority. When considering the decisions made by Town Council and Regional Council, it is incumbent upon me to scrutinize those decisions to the extent possible. In that regard, I have reviewed the transcript of discussions held by council members and the reasons given for rejection. Those decisions, in my opinion, are not supported by the preponderance of evidence, both expert and otherwise, which I have heard and as a result, I simply cannot agree with them. In the final analysis I am satisfied that the proposal represents good planning and will serve the residents of the Halton Hills rural area."<sup>12</sup>

The issue of a provincially-appointed board overturning a decision [or non-decision] of an elected municipal council on a planning matter is neither new nor unconsidered.<sup>13</sup> Successive governments occasionally hear from disgruntled municipalities and other stakeholders when the Board renders a decision contrary to their positions in certain "high-profile" matters.

As a previous standing committee commented on this issue:

"Similarly, it is argued that the Board should not be empowered to overturn municipal decisions on the merits of the case. Not only would this substantially lighten to Board's workload, but it would also remove the problem of having an appointed body overturn the decisions of electorally accountable municipal councils on other than clearly defined legal grounds.

Yet the Committee is extremely concerned that such changes might inadvertently reduce or eliminate the prospects of legitimate appeals and grievances being fully and fairly heard. The Committee is therefore unable to offer a specific

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<sup>11</sup> *Smart Centres Inc. v. Toronto (City)* (2009), 61 O.M.B.R. 129 (OMB) at pp. 160-161.

<sup>12</sup> *Re Keswick Sutherland School Inc. and Halton (Region) and Halton Hills (Town)*, OMB Case No. PL080918, issued July 24, 2009.

<sup>13</sup> See the selected bibliography *supra*.

recommendation, but does wish to register its twin concerns that: 1) the Board is overburdened with unnecessary appeals; and that 2) the right of appeal is of fundamental importance and must be treated with extreme care.”<sup>14</sup>

The Ontario Bar Association shares that concern that the right of appeal to the Ontario Municipal Board is one of fundamental importance. The opportunity to challenge a municipal council decision and test its legitimacy before an independent tribunal is in the general public interest and as such fosters good planning, proper and orderly development and community protection and enhancement.

## **2) Restrictions on Parties at the OMB**

Bill 51 narrows the scope of persons who have a right to appeal a matter to the OMB in planning matters. In addition, no persons (other than the Minister) shall be added as a party to an OMB hearing unless the Board believes there are reasonable grounds to add the person as a party, or they have made oral or written submissions to council prior to council making its decision.

## **3) Restrictions on Evidence at the OMB**

First, Bill 51 supports the filing of complete information at the outset of the application process. Prior to Bill 51, a development proponent could “file and flip” its application by submitting minimal supporting documents, waiting the statutory period for an appeal, and then flipping the matter to the Board. The proponent could then produce reports and studies to justify the proposal on planning grounds, shifting the planning process from local government to the OMB for a *de novo* hearing. Municipalities are now empowered to prescribe in their official plans requirements for a complete application.

Second, information and material submitted at an OMB hearing but not provided to council before it renders its decision shall be subject to the new *Planning Act* provisions. The intent is to ensure that all supporting material is filed with the municipality in advance of council’s decision. With the changes to the *Planning Act*, while new evidence may be filed with the OMB, if the OMB determines that the new material could have materially affected council’s decision, it shall not be admitted until council is given an opportunity to reconsider its decision in light of the new information.

The OBA Municipal Law Section has made recommendations to the OMB Rules Committee to suggest modifications to the OMB Rules that may assist the Board in implementing Bill 51.

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<sup>14</sup> *Second Report on Agencies, Boards and Commissions, Standing Procedural Affairs Committee*, undated [1979], 3<sup>rd</sup> Session 31<sup>st</sup> Legislature, Mike Breough, M.P.P. Chairman, p. 30

#### **IV) RECENT ADMINISTRATIVE CHANGES AND THE OMB**

In addition to the many legislative changes mentioned above, the OBA Municipal Law Section has taken great interest in the Ministry of Government Services' "Agency Cluster Pilot Project."

##### **The Agency Cluster Pilot Project**

The Ministry of Government Services commenced a cluster review of five tribunals that share common stakeholders and have related mandates. Called the "Agency Cluster Pilot Project", the review is meant to ensure administrative justice agencies deliver high-quality public services that are effective, efficient and accessible. The five agencies are tribunals that hear appeals of decisions on municipal, environmental and land use related matters, as follows:

- Assessment Review Board (ARB): hears property assessment complaints related to value and classification, and hears municipal property tax appeals
- Board of Negotiation (BON): negotiates compensation settlements in expropriation cases
- Conservation Review Board (CRB): reviews municipal and provincial decisions on designations of cultural heritage properties and provincial decisions on archaeological licences
- Environmental Review Tribunal (ERT): adjudicates applications and appeals under various environmental and planning statutes
- Ontario Municipal Board (OMB): hears applications and appeals on land-use disputes and other municipal matters.

All five tribunals now report to the Attorney General.

The Ministry's stated objectives for the Agency Cluster Pilot Project were to:

- Provide a modern, accessible, efficient and effective tribunal system for municipal, environment and land-planning adjudication
- Achieve administrative efficiencies and enhance consistency in tribunal practices, procedures and decision-making
- Enable the government and the tribunal system to respond quickly and effectively to shifts in demand and emerging policy issues.

The Ministry of Government Services appointed Kevin Whitaker (Chair of the Ontario Labour Relations Board) to head up the Agency Cluster Pilot Project as Facilitator.

On August 22, 2007 Mr. Whitaker submitted to the Minister of Government Services the "Final Report of the Agency Cluster Facilitator for the Municipal, Environmental and Land Planning Tribunals." The report details sixteen change initiatives to group

together the five municipal, environmental and land planning tribunals. Many of the recommendations in the report have now been implemented or are in the process of being implemented.

In this Final Report, the Facilitator has recognized the critical importance of “expertise” to administrative tribunals, as follows:

“Perhaps the most **fundamental assumption** about the appropriate delivery of administrative justice dispute resolution deals with the central concept of **expertise.**”

“The preservation of tribunal independence, **expertise** and individual mandate has remained at the core of the exercise.” [emphasis added]<sup>15</sup>

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<sup>15</sup> Final Report of the Agency Cluster Facilitator for the Municipal, Environmental and Land Planning Tribunals, pages 7 and 25.

## **V) OBA MUNICIPAL LAW SECTION RECOMMENDATIONS**

The OBA Municipal Law Section has and continues to support the Agency Cluster Pilot Project.

The OBA Municipal Law Section agrees that the maintenance of expertise is of critical importance to any review of the OMB.

Enhancement of necessary expertise to be a qualified OMB Member is of primary concern to our Section. This is important to ensure that qualified individuals will be hearing appeals and rendering timely decisions on important matters which have direct impact on the quality of life for citizens living in Ontario.

The Municipal Section has submitted to the Facilitator that the primary objective of the Agency Cluster Pilot Project ought to be to ensure that all of the tribunals involved in this proposal have the resources necessary to fulfill their important statutory roles. There should be a cautious approach to any cross-appointments from other clustered tribunals to the OMB to ensure that expertise is maintained and enhanced.

In particular, the OMB plays a central role in adjudicating disputes that directly impact the communities we live in across Ontario. With the introduction of the new Provincial Policy Statement, the *Greenbelt Act, 2005* and the *Places to Grow Act, 2005* as well as the recent significant amendments to the *Planning Act* (through "Bill 51"), the OMB will continue to play a critical role in Ontario's land-use planning process.

### **Need for Legislative Amendments**

The OBA Municipal Law Section is also concerned as to whether the appropriate legislative amendments will be made to allow the recommendations of the Facilitator to be implemented. The recommendations that are being put forward may require amendments to, for instance, the *Ontario Municipal Board Act*, R.S.O. 1990, c. O.28, as amended, and other related legislation. To ensure there is no legal basis to challenge the proposed changes, we would recommend that this issue be properly researched and any necessary legislative amendments be enacted to properly enable the Facilitator's recommendations.

### **Expertise is Paramount**

The oldest administrative tribunal in Ontario, the OMB has a demonstrated tradition of excellence.

The stated goal of the Agency Cluster Pilot Project was to create options "so that dispute resolution services can be delivered in an improved way with existing resources." Again the OBA Municipal Law Section supports that worthy goal.

But there is no point in the provincial government making changes to “service delivery models” if the OMB will lack modern resources necessary to effectively perform its functions, and attract and retain qualified members.

To ensure that the OMB succeeds in fulfilling its important public role, the OBA Municipal Law Section makes three recommendations to the Standing Committee:

1. The OMB should have the resources to implement technological improvements to its administrative and hearing processes, likely in conjunction with the other tribunals subject to the Agency Cluster Pilot Project. Achieving this goal may require the consideration of new funding mechanisms for the Board. In direct contrast to the OMB, the self-funded Ontario Energy Board, has significant staff resources at its disposal, and has the ability to disseminate hearing transcripts and other information to members of the public throughout the hearing process. The OMB has no such tools at its disposal, even though OMB hearings often generate significant public interest and impact on the quality of life of Ontario residents.
2. The level of compensation and benefits to OMB members should be increased. The August 2005 submission of the Municipal Law Section to the Ministry of Municipal Affairs addressed this issue in detail and its recommendations remain relevant to this day.
3. It is fundamental that OMB members be free to make independent decisions on all matters that come before the Board. For this reason, the length of tenure of appointments to the Board should be allowed to be increased, and the renewal process should allow for some appointments to exceed ten years. Reforming tenure of appointments would assist the Board in attracting and retaining excellence and experience.

## **Conclusion**

For over 100 years, the OMB has played a vital role in ensuring that the broad public interest is protected in a variety of decisions impacting on the quality of life of citizens living in urban, rural and northern communities throughout Ontario. The right of appeal to the OMB is one of fundamental importance. The opportunity to challenge a municipal council’s decision and test its legitimacy before an independent tribunal is in the general public interest and as such fosters good planning, proper and orderly development, and community protection and enhancement.

With the introduction of the new Provincial Policy Statement, the *Greenbelt Act, 2005*, and the *Places to Grow Act, 2005*, as well as several recent significant amendments to the *Planning Act*, the OMB should continue to play a critical role in land use planning in Ontario.

The OBA Municipal Law Section has, and continues to also support the Agency Cluster Pilot Project; however, this support is on the understanding that the necessary expertise of the Board and its Members will be enhanced by this Project. The OBA Municipal Law Section has previously made several recommendations to the Agency Cluster Pilot Project Facilitator, which are again set out in this submission and which we respectfully submit should be implemented, to enhance the Board's expertise and the ability of the Board to make fair and independent decisions on all matters that come before it.

Respectfully submitted this 8th day of September, 2009.