



BUREAU OF
MUNICIPAL
RESEARCH

A bulletin issued by the Bureau of Municipal Research

CIVIC AFFAIRS

WINTER 1971

TORONTO

4 RICHMOND ST. E.

*Urban Development
and the
Ontario Municipal Board*

This Bulletin in Brief—

The Ontario Municipal Board is a statutory corporation established by the Ontario Municipal Board Act, 1962, which is administered by the Ontario Ministry of Municipal Affairs and Housing. The Board's primary function is to provide a forum for the resolution of appeals from municipal decisions relating to zoning, planning and development.

The Board is composed of members appointed by the Lieutenant Governor in Council. It is divided into three divisions: the Planning Division, the Zoning Division and the Development Division. Each division is headed by a Divisional Chairman and consists of several members. The Board also has a Secretary and a Clerk.

URBAN DEVELOPMENT AND THE ONTARIO MUNICIPAL BOARD

The Ontario Municipal Board has been instrumental in the development of urban areas in Ontario. It has provided a forum for the resolution of appeals from municipal decisions relating to zoning, planning and development. The Board has also been involved in the development of urban areas through its planning and development divisions.

The Board has been instrumental in the development of urban areas in Ontario. It has provided a forum for the resolution of appeals from municipal decisions relating to zoning, planning and development. The Board has also been involved in the development of urban areas through its planning and development divisions.

The Board has been instrumental in the development of urban areas in Ontario. It has provided a forum for the resolution of appeals from municipal decisions relating to zoning, planning and development. The Board has also been involved in the development of urban areas through its planning and development divisions.

The Board has been instrumental in the development of urban areas in Ontario. It has provided a forum for the resolution of appeals from municipal decisions relating to zoning, planning and development. The Board has also been involved in the development of urban areas through its planning and development divisions.

This Bulletin in Brief—

The Ontario Municipal Board is a uniquely powerful provincial agency that is relatively independent from elected representatives, is quasi-judicial in its decision-making, and possesses wide-ranging powers over municipalities. Its responsibilities include:

- 1) application of provincial policy regarding municipal growth and development. Specifically, the OMB hears municipal applications regarding amalgamations, annexations,¹ and boundary revisions; approves capital borrowing and the imposition of rates and levies to recover the cost of these capital undertakings; approves zoning by-laws and plans of subdivisions; and, in some cases, determines levels of assessment.
- 2) arbitration to determine compensation to be paid by the provincial government and its agencies, municipalities and local authorities and by certain private corporations.

Because of its influence on municipal decision-making, the OMB has become the subject of considerable debate. Municipal councils frequently complain that the OMB (an appointed tribunal) can overrule decisions of elected representatives (municipal councils). In contrast, many citizens groups see the OMB as performing a useful "ombudsman" role in resolving disputes between municipal councils and local residents.

Despite the importance of the OMB in local government and the debate regarding its role, little is known about the Board except by those with an immediate familiarity of municipal problems. Certainly, it is not widely recognized by the electorate as being one of the chief architects of urban growth and development in Ontario. Yet, even for those familiar with the OMB, it remains a complex organization in terms of its wide jurisdiction with its numerous, and often unrelated, powers. This study attempts to document the history of the ad hoc collection of OMB powers, and the current structure, procedure, and extent of its jurisdiction.

¹*Amalgamation* refers to the "marriage" of two or more municipalities to create a new local unit; *Annexation* refers to the absorption of one or more municipalities by another existing local unit.

Urban Development and the Ontario Municipal Board

Prior to the establishment of the Ontario Municipal Board, provincial supervision of municipalities lay in the hands of the Provincial Municipal Auditor, an office which had been created in 1897 to oversee and improve municipal and school audits. Following investigations made by the Municipal Auditor, recommendations for change, made to local officials, had to proceed through private bills in the provincial legislature, or direct application to the Lieutenant Governor in Council, before approval was given for the necessary implementation. The procedure was indirect, cumbersome and time consuming. The Bill providing for the establishment of the Ontario Railway and Municipal Board introduced in the Ontario legislature in March 1906, was an attempt to streamline this procedure. One apparent purpose of the Bill was to encourage conformity, consistency and stability in the regulation of local railways which the Railway Committee, with its high rate of personnel turnover, had prevented. In addition, there had been some indications of political bias and patronage in the offices of the Committee and so, following the election of a new government in 1905, the body was disbanded. And finally, provincial regulation of municipal programmes, which had been recommended as early as 1902 by the Provincial Assessment Commission, was strengthened. Section 16 of the proposed bill, entitled "Jurisdiction and General Powers", was designed to transfer to the Board the supervisory powers over railways which had previously been exercised by the Railway Committee of

the Executive Council, and assigned to the Board the role of mediating the numerous disputes between local authorities and the railways. Under section 51, "Additional Powers of the Board", the Board was also assigned residual jurisdiction over the municipalities of the province. It was hoped that this would serve to introduce effective and expedient supervision into a system which the previous year had been overloaded with forty private municipal bills.

In view of the duties and functions of the Board, the introductory bill received relatively little criticism. The Honourable Mr. Ross, Leader of the Opposition, "doubted if there would be sufficient work for a permanent board".² In the debate on the Bill, the role of the Board as mediator and reviewer of municipal action seemed to be acceptable; any objections were generally questions of structure (for example, that two boards, a railway board and a municipal board, be established with the same members). No structural changes were made, however, and the Bill was passed and given Royal Assent on the eleventh of May.

At its inception *The Ontario Railway and Municipal Board Act* laid down broad jurisdictional guidelines governing the behaviour of the Board and giving it all the powers of a Court of Record to investigate relations between individuals, corporations, local authorities and railways. The Board was empowered to regulate the construction, operation, price levels and safety of local railways. Powers of approval with regard to annexations, amalgamations, boundary re-

visions, and certain municipal by-laws, were also vested with the Board. Any bill relating to municipal government could be referred to the Board by either a legislative committee or the Cabinet for its opinion.

In the subsequent years the powers of the Board were expanded periodically by other Acts and amendments: in 1907 the Legislature amended the House rules in order that bills relating to the consolidation of floating debts or the consolidation or renewal of debentures could be referred to the Board for investigation and report, rather than being thrashed out in committee.

The Ontario Municipal Securities Act of 1908 gave the Board powers to investigate and correct irregularities in municipal financing and to validate municipal debentures.³ Between April 14, 1908 and December 31, 1913 the Board dealt with 483 of these debentures by-laws. According to the Ninth Annual Report of the Board:⁴

"It is safe to say that the duties which the Board has performed under this statute alone have dispensed with more than three hundred bills which would have taken as much time of the Legislature as would equal two entire sessions. . . ."

The Assessment Amendment Act conferred on the Board the right to adjudicate assessment appeals where the amount exceeded \$40,000.⁵

The Ontario Telephone Act of 1910 established a needed centralized control by giving the Board regulatory powers over all local telephone lines and systems in the province.⁶

In 1912 the responsibilities of the Board were increased further. Under *The Public Parks Act* efforts to allocate a public park, in part or in whole, for athletic facilities required official Board approval.⁷ At the same time, certain municipal zoning by-laws were subject to the supervision and approval of the Board.⁸

In 1913 *The Ontario Railway and Municipal Board Act* was revamped with the result that the actions of the Board were no longer limited to the Act but rather to "any other general or special act or agreement, by -law or order of the Board".⁹

Paralleling the expanding jurisdiction of the Board was an increasing workload. Using the number of formal applications received by the Board as an indicator of the volume of business, the activity of the Board increased as follows:

Table I
FORMAL APPLICATIONS RECEIVED BY THE BOARD

1906 (from June 1)	1907	1908	1909	1910
57	191	202	183	274

Source: Ontario Railway and Municipal Board, *Annual Reports*.

The decisive role of the Board in the field of planning was confirmed in 1921. *The Municipal Act* was amended to

permit cities, towns, villages and bordering townships to prohibit the use of land or erection or use of a building within

³S.O. 1908, c. 51, s. 3(1).

⁴The Ontario Railway and Municipal Board, *Ninth Annual Report*, 1914, p. 564.

⁵S.O. 1910, c. 88, s. 76(1).

⁶S.O. 1910, c. 84, s. 3.

⁷S.O. 1912, c. 46, s. 13(6).

⁸*The City and Suburbs Plans Act*, 1912, S.O. 1912, c. 43, s. 2.

⁹*The Ontario Railway and Municipal Board Act*, 1913, S.O. 1913, c. 37, s. 21 (1a).

²*The Globe*, April 11, 1906.

any defined area "for any other purpose than that of a detached private residence".¹⁰ There was specific provision in the Act requiring Board approval before a zoning by-law controlling land use could come into force, be repealed, or be varied. In 1922 the Board received fifteen applications for approval of by-laws under this Act, ten of which were from the City of Toronto. By and large, such by-laws were given routine approval if they were considered satisfactory in the opinion of the Board.

In 1932, the Province further expanded Board jurisdictional control of municipalities.¹¹ The Board had become less occupied with railway matters, owing largely to the demise of local systems, and more concerned with municipal affairs. As this trend became evident, the Board acquired a new name, The Ontario Municipal Board (OMB), more in keeping with its likely future functions. Not only did the OMB continue to exercise the responsibilities of the Railway and Municipal Board but, in addition, it assumed the powers of the Bureau of Municipal Affairs. Provision was also made for the designation of one Board member as Commissioner for Municipal Affairs in charge of municipal accounts, audits, and statistics.

Many of these revisions were made with a view toward the inability of local officials to cope with the effects of a faltering economy. During the depression, thirty-nine municipalities had defaulted and many more were finding it difficult to maintain their financial contracts. The task of supervising defaulting municipalities was assigned to strengthen both municipal and provincial credit standing.

However, amidst this expansion of jurisdiction, little thought was given to structural adjustment and efficiency. The consequent over-burdening of the Board was noted in the Legislative Assembly:

"The provision of the present Railway and Municipal Board Act have been followed with only such changes . . . of a minor character as are necessary to correspond with added jurisdictions."¹²

In 1934 the OMB began to administer the former functions of the Registrar of Motor Vehicles.¹³ The following year a more general power to inquire into local government affairs was granted to the Board.¹⁴ In 1935 the OMB was placed under the newly established Department of Municipal Affairs.¹⁵ The new department assumed the Board's powers over municipal statistics and accounts and was to administer all acts in respect to municipal institutions and affairs, including *The Ontario Municipal Board Act*.¹⁶ An added provision, however, stipulated that all municipal capital expenditures to be financed through the issue of debentures had to be approved by the Board.¹⁷ This regulatory power was expanded in 1946 to include any project if any portion of the cost was to be financed beyond the current fiscal year.¹⁸

The new Act, encouraging the control of elected local representatives by an appointed body, was immediately defended before the Ontario Municipal Association:¹⁹

"... the main object of the Act of 1932 is to make the Ontario Municipal Board a more useful and assisting body to the municipalities of this province; not to direct them as

to what they shall or shall not do; not to interfere in their affairs, but to be a central body, to whom the municipalities can appeal for guidance and advice and information, so that the municipalities can carry on their affairs to the best advantage."

Although these amendments were framed as legislation to create public confidence in municipal and provincial investments, they were severely criticized by local officials. Their arguments were articulated in the Legislature quite clearly and forcefully by Mr. W. Heighington:²⁰

"This legislation says the people are not to be trusted. It plainly holds that those whom the people elect to office in the municipal sphere are so spineless and inept that we must have their actions reviewed by the 'sea-green incorruptible'; the worthy gentlemen composing the Board."

Finally, in 1954, two new Acts were initiated which, to some extent, circumscribed the vast jurisdictional growth of the Board. The Ontario Fuel Board²¹ and The Ontario Telephone Authority²² were established to relieve the OMB of some of its duties, and the following year the Ontario Highway Transport Board received all the former powers of the OMB under The Public Commercial Vehicle Act and The Public Vehicle Act.²³

MEMBERSHIP OF THE BOARD

At its inception, the Railway and Municipal Board was composed of three members, appointed by the Lieutenant-Governor in Council, and serving at pleasure.²⁴ The importance of the membership, given the nature of the Board, was pointed out by the Honourable Mr. Hendrie, the sponsor of the Bill:²⁵

"... a great deal would depend on how the bill was construed. The gentlemen appointed to regulate railway and municipal affairs would have a large responsibility cast upon them. . . . the government [must] get the right men to fill these very important posts."

Membership on the OMB was to be a full-time position and members were prevented from holding any other position. (This was amended, however, in 1932 to prohibit the acceptance of other positions "unless otherwise authorized by statute in the rules of the Assembly or the Lieutenant-Governor in Council".²⁶ Consequently the appointment of the Deputy Minister of Municipal Affairs to the Board was permitted.) Board members were also prohibited from holding interests in railways or public utilities or in any company which holds such interests,²⁷ and in any municipal corporation.²⁸ Members were obliged to dispose of such holdings within a year of appointment to ensure the impartiality of Board decisions. In the interim, members were required to withdraw from any hearing which would pose a conflict of interest.

Today, the membership of the Board has been increased to fifteen. Members are still to be appointed by the Lieutenant-Governor in Council and hold office during pleasure. The holdings and interests of Board members continue to be restricted, and any compromising concerns must be disposed of within one year. Although there have never been any requirements as to professional qualifications, a definite pattern has emerged. The Chairman is usually legally trained with his skills complemented by members with other occupational specialties. The present composition of

¹⁰S.O. 1921, c. 63, s. 10 (1).

¹¹*The OMB Act, 1932*, S.O. 1932, c. 27.

¹²Bill No. 116, 3rd Session, 18. Leg. Ont., 22 Geo. V, 1932, p. 1.

¹³*The Public Commercial Vehicle Act, 1934*, S.O. 1934, c. 46, s. 6 (1) (2).

¹⁴*The Ontario Municipal Board Amendment Act, 1934*, S.O. 1934, c. 39, s. 3(hh).

¹⁵*The Department of Municipal Affairs Act, 1935*, S.O. 1935, c. 16.

¹⁶*Ibid.*, s. 4(1).

¹⁷*The OMB Amendment Act, 1935*, S.O. 1935, c. 51, s. 4.

¹⁸*The OMB Amendment Act, 1946*, S.O. 1946, c. 66, s. 1.

¹⁹H. L. Cummings, "Organization and Functions of the Municipal Board", *Proceedings, O.M.A.*, 1932, p. 43.

²⁰*The Globe*, April 13, 1935.

²¹*The Ontario Fuel Board Act, 1954*, S.O. 1954, c. 63, s. 2.

²²*The Telephone Act, 1954*, S.O. 1954, c. 94, s. 101.

²³*The Ontario Highway Transport Board Act, 1955*, S.O. 1955, c. 54, s. 2(1).

²⁴*The Ontario Railway and Municipal Board Act, 1906*, c. 31, s. 4(3) s. 4(6).

²⁵*The Globe*, May 9, 1906.

²⁶*The OMB Act, 1932*, S.O. 1932, c. 27, s. 18.

²⁷*The Ontario Railway and Municipal Board Act, 1906*, S.O. 1906, c. 3, s. 8(1).

²⁸*The OMB Act, 1932*, S.O. 1932, c. 27, s. 20.

the Board includes: eight lawyers, three accountants, one engineer, two businessmen and one planner. In addition, the Board may avail itself of external expertise. Since 1932, the Board has been able to borrow the services of staff members of any provincial department or commission, providing the consent of the Minister concerned has been received. The Lieutenant-Governor in Council may also appoint specially qualified personnel as acting members of the Board to assist with particular matters.²⁹ These provisions for expertise at the Board member level partially account for the lack of legal and planning branches within the Board; a lack that has often been questioned. Arguments in defense of the structure of the Board suggest that:³⁰

"It must be remembered that the Board is a tribunal and in contentious cases such planners who have expressed opinions would have to appear as witnesses at the hearing, give these opinions under oath, and submit to cross-examination. . . . the witness in the box should not be an employee of the judge on the bench — certainly not if he is giving opinion evidence."

HEARINGS

While a quorum is formed by two Board members, the Chairman may authorize one member, with all the powers of the Board, to conduct the hearing of an application. The report of the designated member is to be adopted by two other members of the Board (one of whom has to be the Vice-Chairman) or the Chairman himself may approve the report.³¹ The talents of the Board members may be more effectively employed if one member were to be assigned to the more routine cases which would

permit three members to sit on the more complex hearings and review decisions. This system of functional distribution is being studied by the Board and certainly merits serious consideration.³² A large percentage of the applications to the OMB are dealt with informally by the Board officials. Also, applications which do not require notice, or receive no objections, are decided without a hearing. Many applications, however, do require a formal public hearing with one or more Board members duly assigned.

Generally, ten days notice on any Board hearing, or of any application to the Board is considered sufficient. Under special circumstances, however, the period of notice of an application may be varied. For example, upon grounds of urgency which the Board approves, an application may be heard when no notice is given. In such cases, any party feeling insufficiently notified may apply to the Board for reconsideration of the application.

The meetings themselves are formally focused upon the Chairman. It is his responsibility, when present, to preside over all hearings of the Board and his opinion prevails on any question of law. While not bound by the technical rules of evidence, Board hearings are generally conducted in a strict and judicial fashion. The Board operates according to the adversary system, with applicants usually represented by legal counsel and evidence being given under oath. A formal case presentation and proper court-room behaviour are generally insisted upon.³³

By statute, the Board is vested with all the powers of the Supreme Court "with respect to the amendment of proceedings, addition or substitution of parties, attendance and examination of witnesses, production and inspection of documents,

entry in and inspection of property, enforcement of its orders, and all other matters necessary or proper therefore."³⁴ The Board is given powers of examination, inspection, and discovery of documents, as well being authorized to compel examinations for discovery in applications before the Board.³⁵ The Board, not undertaking its own investigation, can only "know" evidence presented before it except when an application is submitted to the Minister of Municipal Affairs and is, in turn, referred to the OMB. In this instance, the departmental file is usually sent to the Board and in turn disclosed to the parties. Whether this procedure affects what the Department, in fact, sends or transfers is uncertain.

The Board is permitted to make general rules regulating its own practice and procedure. The desirability of this operational flexibility was pointed to in the first Annual Report of the Board:³⁶

"In the preparation of their rules the Board endeavoured to make them as simple and free from technicalities as possible, keeping in view the necessity for the order and method that should mark the proceedings of every judicial tribunal."

While several recommendations have come forward for strict procedural guidelines, the Bureau feels this would unnecessarily restrict the effectiveness of the Board. The OMB, in view of the variety and uniqueness of its functions, must preserve a flexible method of procedure.

STATUS OF THE BOARD

The OMB is not a court in the sense of a passive body which determines the

private rights and liabilities of immediate and interested parties. Rather, in view of its varied functions, the Board generally finds itself interpreting laws and applying policy for the sake of the public interest. At the same time, while the Board imposes principles, rules, and regulations typical of an administrative tribunal, it also imposes legal principles and value judgments characteristic of a judicial tribunal.

The Board should be viewed, as is pointed out in an Annual Report, as "primarily and essentially a tribunal rather than an agency or commission".³⁷ As a tribunal the Board sees itself as having two distinct and separate functions. In some instances the Board must act as a judicial tribunal, such as the hearing of assessment appeals or the arbitration of compensation awards, while in other cases it acts as an administrative tribunal, as in its jurisdiction under *The Planning Act*. The Board has explained this distinction as follows:³⁸

"In this connection reference is made to a judgment of the Ontario Court of Appeal in *Re Ashby*, 1934. . . . at page 421. There the Court adopted with approval an article setting forth the difference between a judicial and an administrative tribunal. A judicial tribunal hears evidence, makes findings and applies the law; an administrative tribunal hears evidence, makes findings and applies policy."

In other words, as an administrative agency the Board decides according to public policy and expediency, whereas judicially these decisions are made according to legal rights and liability.*

The authority of a provincial body to exercise both administrative and judicial

²⁹*The OMB Act*, R.S.O. 1960, c. 274, s. 26.

³⁰J. A. Kennedy, Q.C., "Some Observations on Planning Law", Law Society of Upper Canada, *Special Lectures*, 1970, p. 3.

³¹*The OMB Amendment Act*, 1967, S.O. 1967, c. 68, s. 1.

³²*Sixty-third Annual Report*, 1968, p. 2.

³³*Re Diamond and Ontario Municipal Board*, (1962), 32 D.L.R. (2d), 103, (1962). The Board may find a party guilty of contempt committed in its presence.

³⁴*The OMB Act*, R.S.O. 1960, c. 274, s. 37.

³⁵*Re Pasquale and Twp. of Vaughan*, (1967) 1 O.R. 417 (C.A.).

³⁶*First Annual Report*, 1906, p. 3.

³⁷*Sixty-third Annual Report*, 1968, p. 1.

³⁸*Sixty-fourth Annual Report*, 1969, p. 3.

*This distinction overlooks the legislative role played by the Board. In the amalgamation of Metropolitan Toronto the Board decided to "assume the responsibility of presenting its own proposals for the organization of a suitable form of metropolitan government in the Toronto area." — Decision of the Ontario Municipal Board, January 20, 1953, p. 42.

powers has raised some interesting legal questions. The ability of the Province to establish a judicial tribunal has been challenged under the constitution. According to section 96 of *The British North America Act* the Governor General in Council shall appoint judges of the superior, district and county courts in each province. As early as 1910 the Board was ruled an administrative tribunal and not a court under S. 96:³⁹

"The Board, it must be remembered, is not a Court, but an administrative body having, in connection with its primary duty, power to construe the agreement which it is called upon to enforce; but no general powers such as the superior Courts possess of adjudication upon questions of construct in the abstract."

The fact that a body exercises judicial functions does not automatically constitute it as a section 96 court. This is particularly true of the OMB where judicial functions are entangled with, and complimentary to, the execution of the Board's administrative functions.⁴⁰ To the extent, then, that the judicial powers of the Board are exercised in conjunction with its administrative responsibilities, it is considered to be a validly constituted tribunal.⁴¹

FUNCTIONS, DUTIES, AND POWERS OF THE BOARD

The general jurisdictional guidelines of the OMB are to be found in *The On-*

tario Municipal Board Act and especially in part III (General Jurisdiction and Powers), part IV (General Municipal Jurisdiction), and part V (Railway and Utilities Jurisdiction). The functions and duties of the Board are also to be found in *The Assessment Act*, *The Planning Act*, *The Municipal Act* and the school board acts as well as in a multitude of other general and special acts. Within the jurisdiction conferred on the Board by the *Ontario Municipal Board Act* or any general or special act, the Board "has exclusive jurisdiction in all cases and in respect of all matters."⁴² The general functions and jurisdiction of the Board may be divided into two broad categories:

1. Arbitrator to determine compensation to be paid by the Province and its agencies, by municipalities and other local authorities, and by certain private corporations, and
2. Responsibility for municipal growth and development within the framework of the statutes with regard for economic stability.

Arbitration

Under *The Municipal Act* and *The Municipal Arbitration Act* the Board is authorized, upon the application of any interested party, to determine compensation or damages for lands taken or ingeniously affected by authorities under

public statutes. In the past, these appeals have consumed a large proportion of Board time. The following figures show

the number of applications for compensation awards which the Board has received in the past decade:

Table II
APPLICATIONS FOR COMPENSATION AWARDS

	1960	1961	1962	1963	1964	1965	1966	1967	1968	1969
The Conservation Authorities Act	3	8	7	27	19	15	18	11	14	20
The Highway Improvement Act	41	40	46	42	43	34	35	32	18	17
The Municipal Act	19	20	45	23	45	58	57	36	71	56
The Ontario Water Resources Commission Act ..	5	1	11	7	13	6	2	2	2	1
Other Statutes	21	32	5	11	12	100	38	33	9	15
Total	89	101	114	110	132	213	150	104	115	109

Source: OMB Annual Reports.

In that each compensation application to the Board demands a full hearing conducted according to formal legal principles, the implications for Board workload become more clear.

Not only have compensation appeals taxed the energies of the Board but, coupled with its responsibilities for municipal growth and development, they may compromise the position of the Board. The McRuer Commission, noting the varied powers of the Board and their implications, cited a judgment of the Honourable Mr. Justice Kelly:⁴³

"Relevant legislation entrusts to the Board a number of difficult duties to be discharged by it in various capacities; the combined result is really an embarrassment to the Board and such as to make it extremely difficult for it to proceed objectively to determine the compensation to be payable to the appellant or to anyone in a position similar to that of appellant (sic)."

The recommendations of the Commission have been largely incorporated in *The Expropriations Act*, 1968-69. The judicial function of compensation arbitration

has been removed from the authority of the Board and assumed by the newly-established Land Compensation Board.⁴⁴

Responsibility for Municipal Growth and Development

Board responsibility for municipal growth and development may be divided into the following four categories:

- (1) Amalgamation, annexation, and boundary revision,
- (2) Approval of capital undertakings and the imposition of rates and levies to recover costs thereof,
- (3) Approval of restricted area by-laws, official plans and plans of subdivision,
- (4) Assessment appeals.

Amalgamation, annexation, and boundary revision: The OMB has jurisdiction over the amalgamation, annexation, and boundary revision of local governments, except police villages and counties. Applications are made to the Board under a by-law passed by the local council on its own initiative, under a by-law proceeding upon a petition sanctioned by

³⁹*Re Sandwich and Sandwich v. Windsor and Amherstburg Rwy.*, (1910) 2 O.W.N. 93 (C.A.).

⁴⁰B. Laskin, "Provincial Administrative Tribunals and Judicial Power — The Exaggeration of Section 96 of The BNA Act", *Canadian Bar Review*, 41 (1963), pp. 450-51.

⁴¹In the case of *Toronto Corporation v. Work Corporation*, (1938) A.C. 415, it was held that while the Board was not validly appointed to receive judicial authority, it was legitimate for the Province to establish a tribunal which can adjudicate questions and possess powers of examination, inspection and discovery. In 1940 it was the decision of the court in *Quance v. Thomas Ivey and Sons Ltd.* (1940) O.R. 1937 that those sections of *The Assessment Act* which empowered the Board to determine whether a person or thing was exempt were *ultra vires*. While the Board is primarily an administrative body, validly constituted and within the competence of the Province, it could not be assigned such judicial functions. (*Stephens v. Richmond Hill* (1955) O.R. 806, (1955) 4 D.L.R. 572, affd. on other grounds (1956) O.R. 88, 1 D.L.R. (2d) 569 (C.A.)). According to Rodgers, "to the extent that the Act purports to give it powers to construe private agreements, it is *ultra vires*." Ian MacFee Rodgers, *The Law of Municipal Corporations* (Toronto, 1959) Vol. 2, p. 1342.

⁴²*The OMB Act*, R.S.O. 1960, c. 274, S. 35.

⁴³*Valley Improvement Co. Ltd. v. Metro Toronto and Regional Conservation Authority*, (1961) O.R. 783, cited in J. C. McRuer, *Royal Commission Inquiry into Civil Rights*, Report No. 1, vol. 3, p. 1041.

⁴⁴S.O. 1968-69, c. 36, s. 28.

the local electorate, or by the Minister of Municipal Affairs authorized by the Lieutenant-Governor in Council.

Once the application has been received, the Board holds a public hearing to assess the terms and conditions of the action, to determine an equitable adjustment of assets and liabilities, and to provide for the continued and efficient administration of local services. In this situation the Board generally places the onus upon the applicant municipality. Messrs. Cumming and Yates articulated the philosophy of the Board in this regard:⁴⁵

"In previous annexation decisions the Board has laid down the principle that when a municipality seeks to extend its boundaries and to bring under its jurisdiction substantial areas administered by one or more neighbouring municipalities it must assume the general burden of proof."

In the same decision the Board stated that rather than discourage change, Board policy was to permit orderly municipal growth:

"The general policy is to give effect to boundary adjustments where this will have the effect of bringing within the municipality not only the homes of those working in the municipality and the commercial and industrial areas where they obtain employment, but also the schools, public buildings, public works and parks which the municipality has supplied to serve them."

Approval of capital undertakings: During the depression the supervisory role of the OMB was tightened in the face of many defaulting municipalities. Today, in compliance with both *The Municipal Act* and *The Ontario Municipal Board Act*, municipal councils are required to obtain the approval of the Board before capital projects are undertaken. Any debt to be incurred must be approved and any debenture to be issued must be certi-

fied and validated. As well, where special rates are assessed to pay the cost of the projects, those persons to be specially assessed to provide repayment are notified. If these rates are objected to, the Board will convene a formal hearing. Under certain statutes, referendum of voters on money by-laws is required. However, under the Ontario Municipal Board Act, the OMB has the authority to dispense with such assent.⁴⁶

Capital projects undertaken on behalf of the municipality by government agencies must also be approved by the Board. For example, under *The Ontario Water Resources Commission Act* the construction of water and sewage works may be completed by the Commission for a municipality. Since the municipality generally incurs a sizeable debt as a result, these projects must be approved by the Board. More recently, school board projects to be financed under the statutory provision of *The Ontario Education Capital Aid Corporation Act, 1966* must also be approved by the Board. Many separate school boards are now required, for the first time, to obtain the approval of the OMB. Consequently, separate school debenture debt, which was previously the responsibility of the Department of Education, now rests in the hands of the Board.

In the past, the Board approved the issue of debentures and the plan of repayment in a piece-meal fashion. Applications from municipalities were given project by project review by the Board, resulting in somewhat unnecessary delays for municipal officials who were conscious of rising labour costs and prices and voided tenders. Substantial procedural reforms adopted by the Board now permit municipal financial standings to be assessed with greater speed and efficiency. For example, the Board has adopted a policy of requesting mid-range financial forecasts. Since 1962 the submission to the OMB of a one-year capital budget projection was made mandatory.

Each municipality must return a completed questionnaire to the Board indicating the capital needs and resources of the area. More recently, a number of municipalities, including all cities, are required to file an official plan and a five-year financial forecast. This forecast lists the proposed capital expenditures and taxable assessment of the municipality for the next five years, and projects the funds required to retire the municipality's capital debt, including any new debts to be incurred. This information is then studied and a debt limit guide is established according to the credit standing of the municipality. The Board then uses this guide to evaluate the amount of new debt that may be safely assumed. The Board then may, and usually does, issue a blanket approval of all expenditures within this limit.⁴⁷ If the Board is satisfied that sufficient funds remain to assume the cost of a new capital project, approval is reduced to administrative formality.

These procedural innovations have a two-fold effect: (1) they foster expedient decision-making on the part of the Board, and (2) they suggest Board confidence, within set limits, in the competence of civic officials. The new Board procedures, rather than being viewed as impinging on local autonomy, have been interpreted as increasing it:⁴⁸

"This procedure will certainly result in most of the necessary control being exercised by local elected representatives and a minimum of restriction will be necessary."

Approval of restricted area by-laws, official plans and plans of subdivision: In compliance with *The Planning Act*, the Board is given broad authority over municipal zoning.⁴⁹ The Board members themselves admit that "the duties of this nature conferred on the Board are perhaps unique in any democratic jurisdiction".⁵⁰ The power to approve official plans and plans of subdivision is vested with the Minister of Municipal Affairs. However, applications for approval may, and, in certain cases, must be referred to the Board for decision.⁵¹ Although there are likely to be differences in approach between the Board and the Minister, the decision of the Board is to be considered a decision of the Minister himself.

Without the approval of the Board, no by-law or any amendment passed under section 30 of *The Planning Act* is enforceable. The Board need not outrightly approve or reject each zoning by-law, but may give conditional approval with the promise that if the conditions are not met approval will be withdrawn.⁵² To control the overwhelming delay involved in such complex tasks, a procedure has been adopted whereby municipalities are required to give public notice of their intention to apply for Board approval of any such by-law that has been passed. At the same time, the Department of Municipal Affairs (Community Planning Branch) is notified in order that the Board may receive technical opinions on the by-law. It is difficult to assess the impact, if any, of this departmental report on the actions of the Board. If the departmental opinions decided upon are critical, however, they are to be made available to those concerned. A period of time which is deemed sufficient, usually fourteen days, is allowed for written objections to the zoning by-law to be delivered to the municipal clerk. If no objections are received approval is generally given in a routine fashion. However, when objections do arise, a hearing is scheduled and all objectors and property owners concerned are notified.

Again, as in the approval of capital undertakings, the Board is given no indication as to the criteria for judging zoning by-laws. The Legislature has left any

⁴⁷*The OMB Amendment Act, 1967*, S.O. 1967, c. 68, s. 2(7).

⁴⁸*Fifty-eighth Annual Report, 1963*, p. 5.

⁴⁹R.S.O. 1960, c. 296, s. 30, as am. 1967, c. 75, s. 4.

⁵⁰*Sixty-fourth Annual Report, 1969*, p. 11.

⁵¹*The Planning Amendment Act, 1965*, S.O. 1965, c. 98, s. 1.

⁵²*Rodgers and Pyke v. North York*, (1951) O.R. 79 (C.A.).

⁴⁵*Re Brantford Annexation*, (1954) O.W.N. 834.

⁴⁶*The Ontario Municipal Board Act*, R.S.O., 1960, c. 274, s. 63(1).

concrete guidelines to the discretion of the Board. Consequently, it is difficult to postulate what criteria the Board employs, how regularly, and how rigidly. Some suggestion as to the content of the criteria was given by a former Chairman of the Board:⁵³

"The matters to be considered in dealing with each of the applications now before the Board might well include the following:

- a) The nature and extent of the proposed variation.
- b) The actual character of the immediate neighbourhood and the propriety of its present zoning designation.
- c) Whether the character of the neighbourhood has already been changed by the erection or authorization of similar buildings.
- d) Whether the project appears likely to place an excessive strain on existing services.
- e) Whether there is serious local opposition from adjacent owners.
- f) Whether the design of the project can be altered to meet the most serious objections.
- g) The actual financial loss to be sustained by the applicant if relief is not granted."

Assessment Appeals: Each year assessment appeals are made to the Board under various provincial statutes (see Appendix 11D). Generally, the Board, acting as a judicial tribunal, entertains an assessment appeal after it has been heard by a Court of Revision and a County or District Court judge.⁵⁴ In certain cases, however, an appeal may go directly to the Board without first going to the County or District Court. The jurisdiction of the Board in such matters is limited to questions of fact; only questions

of the amount or value of assessment may be heard in the Board offices. The Board cannot adjudicate as to whether a party is liable to assessment or exempt. These are questions of law which are considered to be beyond the competence of the Board.⁵⁵

APPEAL PROCEDURES

In any decision-making system, the clarity and availability of appeals are extremely important. Mention is often made of the so-called "privative" clause with the OMB. And, in fact, statutory provision allows that "every decision or order of the Board is 'final' and that 'no Board shall be questioned or reviewed, restrained, or removed by prohibition, injunction, certiorari or any other process or proceeding in any court.'"⁵⁶ This provision is designed to protect the discretionary powers of the Board from judicial review.

Certain appeal procedures, however, are recognized and provided in the Act. Generally there lies a right of appeal from the Board to the Court of Appeal on questions of law or jurisdiction, but not on questions of fact. Any interested party, may, however, petition the Lieutenant-Governor in Council to appeal a decision of the Board. In compliance with the Act, the Lieutenant-Governor in Council has the authority to hear all the parties concerned and subsequently to "vary or rescind any order, decision, rule or regulation of the Board".⁵⁷ The decision of the Lieutenant-Governor in Council is final and binding upon the Board and all of the parties. Since it is the role of the OMB to "apply policy", the latter route of appeal may well create a situation in which the Lieutenant-Governor in Council is asked to rehear a Board order which was to have been

made in accordance with government policy. This presents the very real chance that the Cabinet may be petitioned to review its own policy decision. Since relatively few appeals are received and heard by Cabinet, this rarely is the case. The Cabinet instead tends to encourage the Board to exercise its powers to review, rescind, or alter any of its deci-

sions. Usually a more pragmatic and politically palatable approach, this prevents the Cabinet from being weighed down with the administrative details of appeal cases. At the same time, it preserves the credibility and efficacy of the Board while ensuring that its decisions are being made within the parameters of government policy.

Conclusions and Recommendations

The jurisdiction of the OMB should be further rationalized to ensure coherence, expediency, and efficiency.

Since 1906, the provincial government has placed a variety of unrelated functions within the jurisdiction of the Ontario Municipal Board. The present-day responsibilities of the Board have resulted from an awesome, and, to some extent, haphazard, accumulation of powers. The various roles assigned to the OMB have resulted in a dissipation of Board energy. Such an approach is inconsistent with the goals of efficiency while maintaining an individual consideration of issues. For example, in view of the diminishing significance of local railway systems in this province, and their lack of any clear or natural connection with a municipal board, these functions should be removed from Board jurisdiction.

Assessment appeals should be removed from the jurisdiction of the OMB and transferred to a judicial tribunal.

When the Board acts as a judicial tribunal, for example the hearing of assessment appeals, it must act as an impartial arbitrator imposing value judgments. As a judicial agency, the Board should be firmly independent of the parties to the hearing over which it presides. However, when a claim is heard against the provincial government this principle is being violated. This is not to suggest that the members of the Board have been influ-

enced, but, rather, that the appearance and vestige of justice has been shaded. These conflicting roles should be separated in the field of assessment appeals as has already been done for the same reasons in the case of compensation appeals.

The Provincial Government must ensure that the OMB is provided with broad and general outlines of provincial policy with regard to municipal development.

As an administrative tribunal, the Board is called upon to impose principles, rules and regulations according to government policy. As the relationship between the Community Planning Branch of the Department of Municipal Affairs is close, with information and files being exchanged, the Board does receive requested information. However, to the extent that the Board applies government policy it must rely upon the Cabinet for guidance in policy matters. The Bureau finds it imperative that the Provincial Government provide more substantial policy guidelines.

As an administrative tribunal, the Board must be aware of the general policy directions of the government as a prerequisite for action. The Board must not be left in a virtual policy vacuum as it has in the past. While these guidelines must be made explicit they must not, on the other hand, be rigid and confining, or interfere with the freedom of the Board

⁵³L. R. Cumming, "Is Zoning Wagging the Dog?", Conference of the American Society of Planning Officials, *Planning* 1955, 1955, p. 121.

⁵⁴The Assessment Act, R.S.O. 1960, c. 23, s. 37 and s. 83.

⁵⁵Quance v. Thomas Ivey and Sons Ltd., (1940) O.R. 1937.

⁵⁶The OMB Act, R.S.O. 1960, c. 274, s. 95 (7) (a) (b).

⁵⁷Ibid., s. 94.

to consider and adjudicate individual social issues. They must be broad and flexible enough to free the Board from a mechanistic or partisan view of local development.

The general functions of the Board should be reviewed and distinguished according to the nature of the various municipalities in Ontario, providing increased autonomy to larger municipalities with expert staffs.

On occasion, the Board is seen as an agency used to relieve the Cabinet of numerous technical and potentially explosive issues which must be faced. Certainly, the task of adjusting important social and economic interests can be strategically transferred to the Board, an apparently expert and non-partisan agency, eminently qualified to exercise control over certain volatile areas of municipal behavior. Nevertheless, this authority of an appointed body over elected local officials has been sharply criticized as early as 1935.⁵⁸ Board critics argue that elected councils should determine the scope and extent of municipal endeavours, not the province, and especially not a provincial appointed tribunal.

"If it could be shown that the Ontario Municipal Board has never held up an important facility through its deliberations, it would still remain unclear how such "outside" appeals are supposed to foster and encourage responsible local government when so much responsibility rests with an appointed board."⁵⁹

Board critics go on to suggest that the powers of the Board were allocated during a period of municipal inexperience and financial uncertainty; since the environment has changed, this regulatory authority has become anachronistic and ill-suited to effective government.

Board supporters, however, would contend that control is not exercised to circumscribe municipal actions, but to encourage acts which are consistent and

coherent. Provision is made for the Board to bring about, where necessary, greater services throughout the province. Through a variety of recent procedural revisions, it may be argued that the Board has actually encouraged local autonomy. Board functions, however, have not been distinguished according to the various types of municipalities in the Province. Administrative tensions have developed primarily where the Board has exercised its cautionary function over the larger municipal areas. It is an implicit assumption of *The Ontario Municipal Board Act* that all local governments require the same basic controls to encourage municipal, as well as provincial, stability. This assumption is clearly inappropriate in the case of urban municipalities which have capable research and planning branches staffed with qualified and responsible professionals. This was partially recognized when Metropolitan Toronto planning officials were authorized to review proposed by-laws to determine their congruence with the Toronto Official Plan. Such authorization constitutes an important step toward increasing local autonomy and might well be extended to all regional municipalities in the Province.

The Board should exercise its authority to assess costs in order to discourage vexatious applications.

Despite all the arguments about the inappropriateness of control of elected officials by an appointed tribunal, there is a propensity on the part of some local councils to exploit the powers of the Board by transferring complex or politically unpalatable decisions to its offices. The auspices of the Board have been used in the past as a forwarding agent to circumvent direct responsibility by local officials. Recently Toronto City Council clearly deferred two major decisions, one regarding a high-rise development on Parkside Drive and the other concerning the construction of a police communica-

tion tower, to the Board for a ruling. In both cases the questions were returned to Council. Clearly, a call for increased municipal independence from the authority of the Board must carry with it a concomitant readiness to accept responsibility for decisions.

All Board decisions should be comprehensively written, printed, and available to the public.

Finally, in arriving at its decisions, the Board too seldom explains its assumptions and criteria. For example, in assessing municipal credit standing, the Board officially admits to no standard measure. Members of the Board have indicated, however, that the ratio of the outstanding capital debt to the equalized taxable assessment of the municipalities are

closely inspected. The precision of this ratio is highly questionable as the debt level may well fluctuate according to the indicators selected. Factors the Board has taken into account, values which it has accepted, the reasons for its final decisions, should be made explicit and open to public scrutiny and criticism. In the past, some attempts have been made to publish the decisions of the Board. For a time, decisions were published in the *Ontario Weekly Notes* and certain selected decisions in 1958 and 1959 were printed by the Department of Municipal Affairs.

The Bureau is of the opinion that every decision of the Board should be comprehensively written, printed, and made available to the public, particularly for use by those who intend to plead or appeal cases before the Board.

⁵⁸*Supra*, p. 7.

⁵⁹S. Fyfe, *Waterloo Area Local Government Review Report*, February, 1970, p. 146.

Appendix

FINANCIAL STATISTICS OF THE ONTARIO MUNICIPAL BOARD

1) Fees Received (in Dollars) by the OMB per Fiscal Year

1960-61	1961-62	1962-63	1963-64	1964-65	1965-66	1966-67	1967-68	1968-69
320,022	294,002	319,006	308,631	308,066	442,623	578,484	611,816	563,957

2) Revenue (in Dollars) of the OMB per Calendar Year

1960	1961	1962	1963	1964
295,292	310,871	316,611	361,174	
1965	1966	1967	1968	1969
412,731	536,256	568,051	625,420	513,279

Source: OMB Annual Reports

CHANGES IN MUNICIPAL STATUS AND BOUNDARY REVISIONS ORDERED BY THE ONTARIO MUNICIPAL BOARD

	1960	1961	1962	1963	1964	1965	1966	1967	1968*1969*
Annexation & Amalgamation	17	12	12	14	18	18	30	18	29
Incorporation	4	9	1	1	2	—	—	—	—
Separation	1	—	—	—	—	—	—	—	—
Elevation & Erection	1	3	4	1	—	2	—	1	3
Dissolution	—	—	—	—	—	—	1	—	1
Total	23	24	17	16	20	20	31	19	33

Source: OMB Annual Reports

*In 1968 and 1969 52 and 14 orders respectively were made under *The Municipal Corporations Act* establishing legal existence, corporate status, proper area and boundaries.

APPROVAL OF MUNICIPAL CAPITAL EXPENDITURES BY THE ONTARIO MUNICIPAL BOARD

	1960	1961	1962	1963	1964	1965	1966	1967	1968	1969
Applications Received	2,415	2,299	2,344	2,107	2,641	2,690	2,874	2,869	2,841	2,456
Amount Approved (in Millions)	\$318	274	391	383	477	510	619	609	704	666

Source: OMB Annual Reports

GENERAL DIVISION OF THE CAPITAL EXPENDITURES APPROVED (IN MILLIONS)

	1960	1961	1962	1963	1964	1965	1966	1967	1968	1969
General Government	\$185	171	237	255	307	264	250	314	353	330
Education	\$104	70	135	103	129	194	318	243	287	265
Municipal Enterprises	\$ 29	32	19	25	41	52	52	52	63	71

Source: OMB Annual Reports

ASSESSMENT APPEALS RECEIVED BY THE OMB

	1960	1961	1962	1963	1964	1965	1966	1967	1968	1969
The Assessment Act	118	235	435	264	236	168	171	223	227	613
The Conservation Authorities Act	—	—	—	—	—	—	—	—	4	6
The Local Improvement Act	2	4	21	15	5	3	4	5	4	1
The Mining Tax Act	1	1	—	—	—	—	—	—	—	—
The Municipal Tax Assistance Act	—	1	1	3	1	1	—	—	3	4
The Power Commission Act	1	—	5	5	—	—	—	—	5	9
Appeals for a Review of the Division of Liability Among Municipalities Comprising High Schools Districts	6	6	3	5	6	8	2	2	—	—

Source: OMB Annual Reports

APPLICATIONS TO THE OMB FOR APPROVAL OF RESTRICTED
AREA BY-LAWS, OFFICIAL PLANS AND PLANS OF SUBDIVISION

	1960	1961	1962	1963	1964	1965	1966	1967	1968	1969
Applications for Approval of Restricted Area By-Laws	837	851	939	1001	1134	1129	1184	1208	1526	1749
Applications for Approval of Plans of Redevelopment ..	1	3	2	5	1	3	8	2	2	2
Applications for approval of proposed plans of subdivision ..	18	23	22	18	29	12	18	11	5	6
Applications for Approval of Official Plan Amendments	32	67	47	31	25	21	41	33	19	37
Appeals to Board for a Direction that a Restricted Area By-Law be Amended by Council	66	64	46	39	45	47	43	45	54	62
Appeals From Committees of Adjustment	114	116	129	153	162	302	413	401	561	292

Source: OMB Annual Reports



BUREAU OF MUNICIPAL RESEARCH

Founded in 1914 as a non-profit research agency staffed by well qualified personnel, the Bureau of Municipal Research maintains continuous study of the problems facing municipalities and their residents.

Long an advocate of responsive and responsible government, the Bureau has gained wide recognition for the high calibre of its quarterly *Civic Affairs*, its monthly *BMR Comment*, its information and advisory services, and the participation of its staff in the public discussion of issues.

The Bureau is an independent agency supported by a broad cross-section of business and professional firms, organizations, governments, and individuals.

your inquiries are invited:

BUREAU OF MUNICIPAL RESEARCH

Suite 406, 4 RICHMOND ST. E., Toronto 1, 363-9265
