

“Tribunals and Municipal Planning”

An interview with John Chipman

IPAC recently published John Chipman’s *A Law Unto Itself: How the Ontario Municipal Board has Developed and Applied Land Use Planning Policy* as part of its “Series in Public Management and Governance” with the University of Toronto Press. Patrice Dutil, IPAC’s Director of Research, recently discussed the book with Mr. Chipman, who practices law in Toronto.

Patrice Dutil: What attracted you to the idea of examining the Ontario Municipal Board?

John Chipman: I selected the OMB because I had been closely involved with it as both a participant in its hearings and as an observer, and because it has received remarkably little academic attention. The board plays a central role in the land use planning process in Ontario, and has done so since planning controls were first introduced. It exercises a much wider jurisdiction than similar boards in other provinces, as every municipal planning decision may be appealed to it.

I decided to focus on two elements of the board’s decision-making: the manner in which, through its decision-making, it has developed and applied its own planning policies, and the manner in which it has interpreted and applied provincial planning policy.

Patrice Dutil: What is the OMB? How has its mandate changed over the years?

John Chipman: The OMB is a tribunal consisting of members appointed by the Ontario government whose prime role is to hear appeals from local, mostly municipal, decisions. It was established in 1906 as the Ontario Railway and Municipal Board and was primarily responsible for regulating the operation of municipal and private street railways. Its mandate has expanded exponentially since then and it now exercises jurisdiction under more than 100 statutes. Most of its time is devoted to hearing appeals with respect to official plan, zoning and other matters under the Ontario Planning Act, while other major responsibilities include approving municipal capital expenditures and determining appropriate compensation arising from expropriations.

The OMB has since its creation functioned in a court-like manner. Its members conduct an adversarial form of hearing at which parties appear, frequently through legal counsel, and submit evidence which is subject to cross-examination. Its members base their decisions on the evidence and arguments placed before them by the parties and other interested persons. While it has in recent years encouraged parties to engage in mediation, its primary role remains that of hearing and deciding on contested matters.

Patrice Dutil: Why did you pick the 1971-78 and 1987-2000 periods for your review?

John Chipman: My initial research covered the periods 1971 to 1978 and 1987 to 1994. The two periods were divided by the enactment in 1983 of a substantially revised *Planning Act*,

which included many changes to the OMB's powers, and I wished to determine if the changes to its jurisdiction were reflected in the nature of its decision-making. Also, provincial land use planning policies changed greatly during the intervening years, and I wished to determine if there were changes in the manner in which the board dealt with these policies in the earlier and later periods. The 1995 to 2000 period was incorporated when the book was in preparation to provide an analysis of the board's more recent decisions. My analysis was based on 870 decisions issued during the three periods.

Patrice Dutil: Do you consider that the Government of Ontario has abandoned its mandate in setting policy for the OMB?

John Chipman: In one fundamental respect Ontario has since 1906 consistently followed a policy of treating municipalities as their "creatures" by having in place a tribunal of their own appointees to regulate certain types of municipal activity, most importantly borrowing and land use planning. This policy has not, to my knowledge, been explicitly stated, but it has been implicitly accepted for almost a century.

As far as provincial planning policies are concerned, I show that the approach taken by the province has been one of "benign neglect". While governments have adopted various planning policies, they have left it to the OMB to determine how to apply them. The statutory test has been that the board must "have regard to" provincial policy. The board has interpreted this to mean that it must consider such policy where it exists as one more piece of evidence to be evaluated, but not that it is required to apply such policy in making its decisions. Even when the province has appeared as a party to support its policies, the Board has given no greater weight to its evidence than to the evidence submitted by other parties. Other than briefly during the term of the New Democratic Party, no government has made an effort to require the board to follow its policies.

Patrice Dutil: Has the OMB been captured by private sector interests?

John Chipman: Every board hearing involves private sector interests, generally on both sides of the issue, and often it is only private interests that are at stake. Moreover, in most instances the members of the public who take an active part in hearings are property owners appearing in support of, or opposition to, development proposals because of the impact they hope or fear such proposals will have on their own properties.

If "private interests" is taken to mean the interests of those who are seeking the board's approval to develop their property, the evidence is mixed. My analysis shows that, during the 1971-78 and 1987-94 review periods, the board approved less than half of the applications before it, 44% and 47%, respectively. It was more likely to approve applications made by the development industry than by non-developer landowners seeking to do something with their properties, but even developers obtained approval of little more than half of their applications. A significant change occurred during the 1995-2000 period, however, in that the overall approval rate jumped from 44% and 47% in the two earlier periods to 59%. This strongly suggests that the board has been

more receptive to approving development proposals during the term of the current government, but the approval rate is not so great as to suggest that it has been captured by development interests.

Patrice Dutil: How have decisions of the OMB affected public administrators at the municipal level?

John Chipman: I discuss in Chapter 3 how the OMB has interfered with municipal council decisions and has assessed the adequacy of municipal decision-making. It has, through the decisions in which it has addressed these matters, given guidance as to what it expects a council to do when dealing with development proposals. Basically, a council must have adequate information to enable it to make an informed decision, and must be able to show that its decision was based on this information. Where the board has concluded that these matters were inadequately dealt with, it has refused to uphold council decisions. This suggests that the board has established operational benchmarks for dealing with development applications that municipal staff and councillors ignore at their peril.

Patrice Dutil: Is the OMB necessary because it does the dirty work for municipal politicians?

John Chipman: I believe there is some truth in this, but the evidence is largely anecdotal and circumstantial, and its extent is very difficult to determine.

The real problem is that having a tribunal with an all-encompassing review role tends to encourage this sort of behaviour. If councillors are faced with a contentious matter, it is tempting to make a quick decision which they know will be appealed and let the board deal with it and take the heat. This does not, however, make the OMB necessary, only convenient. In my concluding chapter I suggest certain reforms that would serve to both enhance and ensure municipal responsibility for planning matters.

Patrice Dutil: Should the OMB be reformed? Should a new process be established?

John Chipman: My major policy conclusion is that the OMB's planning review role is ripe for reform, if not abolition. I believe that it adds little of value to the planning process, and that the primary responsibility for planning decisions should rest with elected municipal councils. Even in this scenario, however, there is a role for a provincial tribunal in dealing with matters that cannot be resolved within a municipality or that are of provincial interest. Dealing with disputes between municipalities is an example of the former. Dealing with disputes regarding the application of provincial planning policy is an example of the latter.

The OMB cannot be reformed in isolation, however. The nature and extent of changes made to its role will dictate the need for changes to the larger planning approval process. If the board were to lose its planning appeal jurisdiction, and municipal decisions became final, it would be necessary to strengthen municipal hearing requirements to ensure that the rules of natural justice were followed. A failure to do this would likely lead to constant legal challenges to council

decision-making.

Patrice Dutil: What does my study of the OMB reveal about the province's ability to regulate municipalities?

John Chipman: Ontario has always subjected municipal planning decisions to review by a tribunal consisting of its own appointees and, by doing so, has avoided having to be directly involved in resolving planning issues. What my study shows, however, is the lack of provincial control over the manner in which the OMB operates, even when dealing with the application of provincial policies. Because the board is generally dealing with matters that are of interest at the municipal level but rarely impinge on significant provincial interests, successive provincial governments have let it make its own rules and establish its own policies, even when these impinge on provincial policies.

Patrice Dutil: Are there any lessons in the OMB's experience for other jurisdictions?

John Chipman: I think so. Some practical thoughts for policy-makers:

- If you have a tribunal exercising any form of planning appeal jurisdiction, look closely at what it actually does, and decide whether it is contributing anything to the planning process or just duplicating decision-making that is better left to municipalities.
- If you believe there is a need for some form of review of local planning decisions, consider carefully what powers you would give to an appeal body. Design those powers to meet the recognised need rather than just giving a general review authority.
- Give careful consideration to the nature and the degree of control that the government should exercise over the tribunal, and ensure that these controls are in place in the statutes or regulations governing its operation.
- Do not assume that a provincial tribunal will give any priority to provincial policies and interests unless it is clearly required to do so.