REWRITING THE RULES OF THE GAME: THE COMMON SENSE REVOLUTION AND ADMINISTRATIVE JUSTICE

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INTRODUCTION

This paper analyzes the impact of the Common Sense Revolution (CSR) on administrative justice in Ontario, a largely uncharted field of inquiry among political scientists. Like their neo-liberal counterparts in other jurisdictions, the Harris Conservatives were exemplary practitioners of what has been described as the "politics of systemic retrenchment."[1] They understood that rolling back the Keynesian welfare state was not simply a matter of spending reductions and program downsizing, but required the re-structuring of the decision-making process itself. In the words of the famous CSR platform, "(i)t's time for us to take a fresh look at government. To re-invent the way it works, to make it work for people. While many [specific policy] goals remain important to us…The political system itself stands in the way of making many of the changes we need right now."[2] If the Keynesian welfare state was embedded in public institutions, then institutional reform was a necessary precondition to implementing neo-liberal policies successfully.

Since the neo-liberal enterprise is inevitably controversial, successful reformers must learn the art of "blame avoidance."[3] Arm's length tribunals are an attractive vehicle for a government bent on fundamental change, as they hold out the potential of implementing desired reforms without directly implicating the governing party in the consequences. As structural heretics, tribunals have an ambiguous relationship with the core executive in the Westminster-style political system. While they are certainly expected to operate at arm's length from the elected government in their role as quasi-judicial adjudicators, ultimately the cabinet controls the statutory framework within which the tribunals

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[1] Paul Pierson, *Dismantling the Welfare State? Reagan, Thatcher, and the Politics of Retrenchment* (Cambridge University Press, 1994)
[2] Ontario Progressive Conservative Party, *The Common Sense Revolution* (Toronto 1994), pp. 1-2.
[3] Pierson, p. 2.

perform. Ministers can often successfully declaim any immediate responsibility for controversial tribunal decisions, while holding in reserve the power to revamp the tribunal decision-making procedures which generated policy outcomes deemed politically unacceptable. Thus, tribunals lend themselves to procedural "stacking the deck"[4] in favour of the governing party's constituencies, at the expense of other interests wedded to the previous policy status quo. By re-writing the rules dictating how tribunals make their decisions, a government can divert the institutional channels in directions which will more reliably produce the desired pattern of policy outcomes.

This paper pursues this analysis through a study of the impact of the Common Sense Revolution on a high profile provincial tribunal, the Ontario Municipal Board (OMB). Not only is the regulation of land and real property a major regulatory function of the provincial state in Canada, but as well this tribunal was an integral component of a regulatory regime[5] subject to significant and controversial reforms by the Harris government. The government's overhaul of the land-use planning system was endorsed by the Conservatives' private sector constituencies, and opposed with equal fervour by their inveterate opponents: environmentalists, public interest lawyers, and as well, by many municipalities.

The paper begins with a general overview of the role of administrative tribunals, stressing the tension inherent in their status as both quasi-judicial adjudicators and as government agencies charged with a statutory duty to abide by government policies. The tribunals' uncertain status within the conventional framework of ministerial accountability poses the inevitable question of what is the appropriate criteria by which their legitimacy can be judged.

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[4] Michael McCubbins, Roger Noll and Barry Weingast, "Administrative Procedures as Instruments of Political Control," *Journal of Law, Economics and Organization*, vol. 6 (1990), p. 261, quoted in Jane Kelsey, *The New Zealand Experiment: A World Model for Structural Adjustment?* (Auckland University Press, rev. ed., 1997), p. 72. Kelsey's well-known study of neo-liberalism in New Zealand is an excellent case-study in the politics of systemic retrenchment.

[5] On the concept of a regulatory regime, see G. Bruce Doern, Margaret M. Hill, Michael J. Prince and Richard J. Schultz, "Canadian Regulatory Institutions: Converging and Colliding Regimes," in Doern et al., *Changing The Rules: Canadian Regulatory Regimes and Institutions* (University of Toronto Press, 1999), p. 8 ff.

The paper then turns to a discussion of the Harris government's typically neo-liberal understanding of the role of government in effecting change, which shaped its approach to tribunal reform. If decision-making authority must be centralized within the core executive, in order to reduce the ability of self-seeking interest groups to leverage access to public resources, then it followed that tribunal procedures must be drawn to sharply limit the influence of such interest groups, in contrast to the access accorded to clients of the CSR. This theme is illustrated through a recounting of the Harris government's reforms to the statutory framework within which the OMB operated.

Finally, the paper concludes with an evaluation of the Harris government's success at managing the re-structuring of the administrative regime for land-use planning, including the role of the OMB. Any such assessment must not simply query the government's success at structuring tribunals to be effective agents of policy, but also ask whether the reforms respected the legitimacy of the tribunals as independent adjudicators.

ADMINISTRATIVE TRIBUNALS UNDER RESPONSIBLE GOVERNMENT

As the Law Reform Commission of Canada observed two decades ago, "the appropriate place for independent agencies in the constitutional framework, both under political theory and in their practical relationship with Parliament, remains unresolved."[6] Because agencies or tribunals play a dual role, as both an instrument of government policy and as adjudicative decision-maker, it has always been difficult to make categorical statements about the appropriate distance between a tribunal and the minister who is ultimately accountable for the operation of the tribunal to the legislature. The term of art "arm's length," which is typically employed to sum up the working relationship between the cabinet and tribunals, denotes two competing criteria of legitimacy for tribunals in the Westminster system, reflecting their dual role.[7] On the one hand, it is argued that

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[6] Law Reform Commission of Canada, *Independent Administrative Agencies* (Working Paper 25, 1980), p. 11.

[7] Paul G. Thomas and Orest W. Zajcew, "Structural Heretics: Crown Corporations and Regulatory Agencies," in Michael M. Atkinson, ed., *Governing Canada: Institutions and Public Policy* (Harcourt Brace Jovanovich Canada, 1993), p. 134.

agencies or tribunals fulfill their allotted role under the Westminster system when they marshall their expertise to administer, adhere to, or implement government policy, in their day-to-day disposition of cases arising in their jurisdiction. On the other hand, agencies or tribunals are perceived to derive their legitimacy from their fidelity to the court-like procedures familiar to every student of administrative law, such as the impartial consideration of evidence presented on the record, public hearings, and generally, procedural fairness for all parties to a dispute. There is an inherent tension between these criteria. For instance, if one believes that agencies exist to serve the ends of government policy, one may well conclude that the trappings of institutional independence surrounding the typical agency or tribunal constitute an "elaborate hoax," enabling a minister to effectively influence a tribunal's decisions without having to accept responsibility for them.[8]

The difficulty of delineating the acceptable limits to political direction of a tribunal's operations can be briefly illustrated with reference to the recent scholarship on the OMB. It is a truism that because the OMB is not a court but an administrative tribunal, it does not base its decisions solely on the evidence before it, but will have regard to matters of public policy. The terms of the *Planning Act* enable the Minister of Municipal Affairs and Housing to ensure that the OMB takes government policies into consideration. Under s. 2 of the Act, the OMB (as well as local municipal councils and the Minister) must "have regard to" matters deemed to be of "provincial interest," such as environmental protection, waste management, and the adequate supply of public services such as energy, water, sewage and housing. Under s. 3 of the Act, the Minister may issue "policy statements" on matters related to land-use planning. These are developed after public consultations and then published in the *Ontario Gazette*. The OMB is also required to "have regard to" such statements when making decisions.[9]

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[8] Ibid.

[9] The NDP government's comprehensive reform of the *Planning Act*, the *Planning and Municipal Statute Law Amendment Act, 1994* (Bill 163), replaced this language with the phrase "be consistent with," but the Harris government restored "have regard to", with the passage of the *Land Use Planning and Protection Act, 1996* (Bill 20). This issue is discussed in the text below.

However, John Chipman, the pre-eminent authority on the contemporary OMB, has meticulously demonstrated that the Board has not given priority to provincial policy, but instead has subordinated statements of policy to its own interpretation of planning law. For Chipman, this is illegitimate, because the OMB is a provincially-appointed regulatory tribunal with a policy-making role. A government body whose role is to give effect to provincial policy calls it own existence into question when it does not adhere to such policies, as they are expressed by governments from time to time.[10]

Yet policy statements issued by the government under the terms of the *Planning Act* are not formally binding on the OMB, nor could they be. The courts have held that administrative tribunals such as the Board have the responsibility to exercise their considered judgement as to the weight to be given to government policy accepted as evidence before them. For example, the parties in a proceeding before the OMB have the right to cross-examine and call evidence to contradict the policy. In *Innisfil Township v. Vespara Township* (1981),[11] a leading judicial decision on this question, the Supreme Court held that a tribunal which blindly or mechanically follows a ministerial policy may be exceeding its jurisdiction and its decision may be declared a nullity. As the OMB itself put it in one of its *Annual Reports*, "courts operate under strict rules and interpret and follow statutes and precedents," but the Board in contrast "administer(s) what is sometimes called 'discretionary justice' having a minimum of rules and a wide spectrum of discretion."[12] Discretion once conferred by the Legislature on a tribunal cannot subsequently be restricted or fettered in its operation.[13]

Robert Macaulay's comprehensive study of Ontario agencies, boards and commissions, undertaken at the behest of the Peterson government, concluded that tribunals could legitimately be described as arm's length from the cabinet when they exercised an

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[10] Chipman's full-length study is *A Law Unto Itself* (University of Toronto Press, 2002), but his views are conveniently summarized in "A Tribunal out of Time: A study of decision-making by the Ontario Municipal Board," Presentation to the GTA Forum on *Behind the Scenes in Municipal Planning* (29 March 2001).
[11] *Innisfil Township v. Vespara Township* [1981], 2 S.C.R. 145 (Estey J.).
[12] Ontario Municipal Board, *Annual Report* (Toronto, 1986), p. 5.
[13] Sara Blake, "An Introduction to Administrative Law in Canada," in Christopher Dunn, ed., *The Handbook of Canadian Public Administration* (Oxford University Press, 2002), p. 469.

"independence of decision-making."[14] This functional quality of independence could be achieved in a variety of regulatory settings, with full recognition that tribunals, unlike the courts, were not politically independent, but accountable not only to the cabinet but also to the Legislature. Certainly, litigation before either tribunals or the courts can be sponsored by interest groups as part of an over-all political strategy aimed as much at persuading legislators to effect a policy change, as it is at achieving justice in the present case. In such instances, the formal hearing is but a platform for an interest group seeking to influence public opinion. OMB hearings, for instance, often function as a *mise-en-scène* whose protagonists are a local ratepayer or environmental group, the municipal council, and a developer -- with the climax to the drama, as it were, often being staged in the wings, in the form of private negotiations between the council and developer. However, unlike the dialogue between legislatures and courts, partisan critiques of tribunals and their operations are a legitimate strategy in legislative debates, and often the subject-matter of opposition attacks in Question Period, legislative committee inquiries, and Private Member's Public Bills.

A review of how arm's length tribunals and their workings are discussed in the Ontario Legislature suggests that MPPs are adept at variously invoking the tribunal's role as both government agency and as quasi-judicial adjudicator, depending on the circumstances. Since 1991, the most important institutionalized forum available to MPPs for discussing tribunals has been the interviews of cabinet appointees to agencies, boards and commissions (ABCs) conducted by the Standing Committee on Government Agencies. Modelled on a similar procedure introduced in the House of Commons under the Mulroney government, the Standing Committee has reviewed no less than 760 appointments made by the NDP (1990-95) and Conservative (1995-2003) governments. While the Committee does not have a veto over the cabinet's choices, the Committee's power to select appointees at its discretion for interviews does provide the opposition

[14] Robert Macaulay, *Directions: Review of Ontario's Regulatory Agencies* (Queen's Printer, September 1989), pp. 2-17 to 2-22. Macaulay had been a senior cabinet minister under Premiers Frost and Robarts; chair of the Ontario Energy Board; and a distinguished lawyer in private practice, specializing in administrative law.

parties with a useful tool for exposing the government's patronage politics to the light of day. The Committee reviews of five Conservative government appointments to the OMB (as well as of other appointments to quasi-judicial tribunals, such as the Environmental Review Tribunal, the Ontario Rental Housing Tribunal and the Social Assistance Review Board/Social Benefits Tribunal), reveal a pattern in the opposition Members' questioning. The witnesses were usually challenged to disclose any connection to the Conservative party, and asked to volunteer their views on the policy issues before the tribunal to which they were seeking an appointment.[15] Such queries reflected the Members' understanding that tribunals do play a policy-making role and serve as a delivery agent for the governing party's agenda. If this is indeed the tribunals' mission, then it is legitimate for elected MPPs to ask prospective tribunal members about their political views. However, any concession by appointees of a partisan connection to the Conservatives often prompted complaints by opposition Members that the witnesses were inappropriate choices for a position on a tribunal, because their partisan views would render them incapable of making decisions in the non-partisan and impartial manner expected of a quasi-judicial adjudicator. On the other hand, if witnesses took the opposite tack and declined to respond to probes about their partisan views, on the grounds that the public admission of personal opinions would compromise their duty as tribunal members to interpret the statutory mandate as neutrally as possible, then they were likely to be lectured for failing to frankly acknowledge that adjudicators did exercise some degree of discretion in administering the law.[16]

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[15] Three of the five appointees to the OMB interviewed by the Committee (or 60%) disclosed a Conservative partisan connection, compared to 55% for all Conservative government appointees to ABCs reviewed by the Standing Committee between 1995 and 2003 (235 out of 427 appointees). The figures for two other important land-use tribunals are as follows: five of the six appointees to the Environmental Review Tribunal (ERT) interviewed (or 83%) disclosed a partisan Conservative connection; and four of the 10 appointees to the Ontario Rental Housing Tribunal (ORHT) interviewed (or 40%) did so. These statistics are drawn from an article in progress on the work of the Standing Committee on Government Agencies.

[16] For examples of such interviews, see Ontario Legislature, Standing Committee on Government Agencies, *Debates*, 15 January 1997 (appointee to the OMB); *Debates*, 21 October 1998 (appointee to the OMB); *Debates*, 13 July 2000 (appointee to the ORHT); *Debates*, 21 November 2001 (appointee to the ORHT); *Debates*, 19 March 2002 (appointee to the OMB); *Debates*, 23 July 2002 (appointee to the ORHT); and *Debates*, 11 June 2003 (appointee to the ERT).

The recent Tay River case before another important provincial land-use tribunal, the Environmental Review Tribunal, well illustrates how the parliamentary cut and thrust can shape legislators' understanding of the status of tribunals, and as well the elemental truth that in a political system organized under the principle of ministerial accountability, tribunals are not likely to be permitted the final word.[17]

The case involved an appeal of a Permit To Take Water (PTTW) issued by the Ministry of the Environment in August 2000 under the *Ontario Water Resources Act* to the calcium carbonate manufacturer OMYA (Canada) Inc., permitting the company to significantly increase the volume of water it drew daily from the Tay River in Lanark County.[18] The PTTW authorized OMYA to draw 1.48 million litres daily from the River until January 2004; and subsequently, 4.5 million litres daily until 2010. This permit was promptly challenged by a loose coalition of local residents, cottage-owners, and environmentalists, who were concerned about the potential impact of this volume of water-taking on the Tay River and its watershed, which is a major reservoir of the Rideau Canal and the source of drinking water for the 6,000 residents of the Town of Perth. For instance, OMYA's projected water needs of 4.5 million litres daily during the 2004-2010 phase was roughly the equivalent of the entire volume of drinking water consumed by Perth residents in 2000. At the time the PTTW was granted, the scientific evidence as to the ecological impact of this volume of water-taking on the River's aquatic life and habitat was incomplete.

OMYA's local opponents won the right to appeal the PTTW to the Environmental Review Tribunal under the terms of the innovative "third party" process enshrined in the *Environmental Bill of Rights* (EBR). Section 38 of the EBR grants citizens the right to apply for permission to appeal a tribunal decision. Hitherto, the traditional legal right of

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[17] Richard Schultz and G. Bruce Doern, "No Longer 'Governments in Miniature': Canadian Sectoral Regulatory Institutions," in G. Bruce Doern and Stephen Wilks, eds., *Changing Regulatory Institutions in Britain and North America* (University of Toronto Press, 1999), p. 110.

[18] OMYA mixes the water with calcium carbonate to produce a slurry used in a variety of products, including toothpaste, drywall and glossy white paper, which are shipped all over North America. OMYA's Perth facilities include its processing plant at Glen Tay, about six kilometres west of Perth, and a quarry at Tatlock, about 30 kilometres north of the plant, where calcium carbonate is extracted.

standing was a barrier to active citizen involvement, as it excluded from the hearing anyone who was not an immediate party to the dispute.[19] When the EBR was introduced by the NDP government, this new procedural right was hailed as a potentially important tool enabling the public to participate in environmental and land-use decisions.

The Tribunal commenced hearings in April 2001. Much to the consternation of OMYA and its local supporters in Lanark County (where the company employed, directly and indirectly, approximately 250 people, and injected about $20 million annually into a chronically depressed local economy), the Tribunal member conducting the proceedings[20] permitted the hearing to become a broad inquiry into a variety of issues only tangentially related to the company's operations on the Tay River, including the merits of bulk water exports under NAFTA, the failure of the provincial government to incorporate environmental values into its decision-making processes, and the impact of the *Environmental Bill of Rights* on the internal workings of the Ministry of the Environment. The hearing effectively became a platform for lobby groups such as the Council of Canadians, environmental legal activists, the Environmental Commissioner of Ontario, and local cottagers seeking to turn the hearing into a de facto environmental assessment of the impact of OMYA's truck traffic on the rural roads near their properties.

The Tribunal did not conclude until October 2001. In June, while the Tribunal hearing was still ongoing, the Legislature debated a Private Member's Public Bill introduced by Liberal MPP Leona Dombrowsky, whose eastern Ontario riding encompassed OMYA's Tay River operations. Bill 79 sought to address a concern raised by Environmental Commissioner Gord Miller in his testimony before the Tribunal as well as in his brief to the Walkerton Inquiry. The bill would have amended the *Ontario Water Resources Act*

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[19] S. 38 of the EBR permitted an application by private citizens to a separate panel of the Environmental Review Tribunal for leave to appeal the Ministry decision to grant the permit. This panel, consisting of the distinguished geographer Len Gertler, granted leave to appeal on November 6, 2000. One of the appellants in the OMYA case was former provincial NDP leader Michael Cassidy, who owned a cottage near OMYA's calcite quarry at Tatlock.

[20] Pauline Browes, a former Conservative cabinet minister in the Mulroney government, whose appointment to the Tribunal by the Harris government in 1995 had been denounced by the opposition at Queen's Park as crude patronage. See Ontario Legislature, *Debates*, 18 October 1995, p. 313.

to direct Ministry of the Environment officials to consider applications for PTTWs in light of the Ministry's Statement of Environmental Values, as mandated by the *Environmental Bill of Rights*. In her speech on the bill, Ms. Dombrowsky cited the testimony on this issue before the Tribunal in the ongoing OMYA case.[21] For this she was criticized by Conservative MPPs, who argued that such references constituted blatant "political interference" in a "judicial proceeding," and were a thinly veiled attempt to "prejudice" the Tribunal hearing.[22] On these grounds they opposed her bill, which was eventually defeated on a straight partisan vote.[23]

In February 2002, the Environmental Review Tribunal finally ruled that OMYA could only extract 1.5 million litres a day from the Tay River, one-third of the volume the company had applied for, on the grounds that adequate scientific information was not available to justify granting the company permission to extract the full 4.5 million litres.[24] OMYA promptly appealed the Tribunal's decision to the then Minister of the Environment in the Conservative government, Chris Stockwell, pursuant to s. 144(3) of the *Environmental Protection Act*, which allowed for an appeal to the Minister "on any matter other than a question of law," and provided that the Minister "shall confirm, alter or revoke the decision of the Tribunal….as the Minister considers in the public interest."

Lined up on OMYA's side was much of the local business community in Lanark County, the Ontario Mining Association,[25] and prominent right-wing journalists.[26] As is the habit of corporations faced with unpalatable government regulations, OMYA hinted that an adverse decision by the cabinet might lead to lay-offs and even a move to a more attractive regulatory climate.[27] On the other side was the panopoly of activists and local

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[21] Ontario Legislature, *Debates*, 28 June 2001, p. 1997.
[22] Ibid., pp. 1997, 1999.
[23] Ibid., p. 2005.
[24] *Dillon et al. v. Director, Ministry of the Environment* (19 February 2002) (Case No.: 00-119/00-120/00-121/00-122/00-123/00-124).
[25] See Ontario Mining Association, "Minister's Decision Supports Science," *Newsletter* March 2003.
[26] Peter Foster, "Water torture in a limestone quarry," *National Post*, 19 October 2001, p. 15; Terence Corcoran, "Green murder at Bobs Lake," *National Post*, 21 March 2002, p. 15.
[27] Dave Rogers, "Water ruling disappoints OMYA boss," *The Ottawa Citizen*, 21 February 2002.

residents' associations who had opposed OMYA before the Tribunal, and now the beneficiary of sympathetic media coverage.

Cabinet appeals of tribunal decisions are inherently political, not quasi-judicial exercises. The statutory language cited above authorizing the appeal of the Environmental Review Tribunal decision is typical of such provisions. The decision on such an appeal is made behind closed doors, on the basis of any information or evidence the Minister chooses to consider, regardless of whether the tribunal considered it as relevant, or the parties to the tribunal hearing had an opportunity to address it.[28] Thus, such appeals sharply mark the limits of a tribunal's role, in a political system where another participant, the minister, must accept public responsibility for the tribunal's decision. A cabinet appeal in effect re-politicizes a matter which up to that point had been the exclusive province of a non-partisan tribunal to consider, as the Conservative MPPs present in the Legislature for the vote on Ms. Dombrowsky's bill purported to accept. No wonder, then, that Minister Stockwell's decision in February 2003 over-turning the Environmental Review Tribunal's ruling was denounced as undermining the integrity of the Tribunal hearing as well as the EBR's third party appeal process, and discounting the evidence presented at the hearing which had undoubtedly exposed accountability gaps in the Ministry of the Environment's permit-granting process.[29] In the absence of any evidence to the contrary the critics were free to accuse the Minister of succumbing to OMYA's back door lobbying.[30] In vain did the Minister point out that he had merely followed his officials' advice and restored the terms of the original August 2000 permit permitting OMYA to withdraw 4.5 million litres a day between 2004 and 2010, on the condition that the company submitted satisfactory evidence that a taking of this volume would not cause

[28] See the brief discussion in Law Reform Commission of Canada, *Independent Administrative Agencies* (Working Paper 25, 1980), p. 87.
[29] E.g., *Perth Courier* (editorial), "A new political low," 19 February 2003; and Michael Cassidy and Carol Dillon, "OMYA decree makes farce of due process," *Ottawa Citizen*, 7 March 2003. Cassidy and Dillon were two of the appellants in the case.
[30] E.g., Council of Canadians Press Release, "Chris Stockwell's Valentine Gift: A slap in the face of citizens," 14 February 2003; and *Ottawa Citizen* (Editorial), "Tay tribunal washed away," 18 February 2003.

harm.[31] For environmentalists, this ministerial reversal simply confirmed an already tarnished environmental record; while for the government's opponents in eastern Ontario, the decision was added to the existing litany of local grievances harboured against the Conservatives.[32]

The discussion above suggests that as the criteria for evaluating the legitimate division of labour between tribunals and politicians is inherently ambiguous, one's point of view will reflect the political exigencies of the moment. As long as the spectre of improper political interference with the operations of tribunals is available as an effective rhetorical weapon, to be called in aid as required, then ministers must proceed with caution. Their challenge is to avoid the appearance of impugning the integrity of a tribunal while exerting their constitutional authority to set the direction of public policy.

THE COMMON SENSE REVOLUTION AND TRIBUNALS

An abiding theme in the neo-liberal world-view is a hostility to the policy networks which became a characteristic feature of the state as it became embedded in civil society during the heyday of the Keynesian welfare state. The Harris Conservatives' views on the state of representative democracy in Ontario in the early 1990s, which are readily gleaned from the CSR document, the newly elected government's 1996 Discussion Paper *Your, Ontario, Your Choice*, other formal statements, speeches in the Legislature and media interviews, can be briefly summarized as follows. In the 1980s and early 1990s – the "ten lost years," as Harris and his colleagues were fond of describing them, when the party was out of power – the provincial state had become dangerously over-extended. It assumed tasks it could not satisfactorily manage, thereby creating a cumbersome and expensive bureaucracy, and inflaming the expectations of interest and client groups. When a state did become over-extended in this manner, it was vulnerable to colonization by rent-seeking interest groups who formed unholy alliances with the careerist bureaucracy. As the Common Sense Revolution document bluntly declared, "the

[31] April Lindgren, "OMYA won't hurt the Tay: Stockwell," *Ottawa Citizen*, 19 February 2003; Colin Perkel, "Stockwell defends water diversion," *London Free Press*, 21 February 2003; and Canadian Press, "Massive water-taking from river defended," 21 February 2003.
[32] Tom Spears, "Who's in charge here?," *Ottawa Citizen*, 16 February 2003.

political system has become a captive to big special interests."[33] Eventually, the state risked decline into a condition of immobilization, where it could no longer adequately perform even its core functions (which are variously defined, depending on the policy area in question). In short, the influence wielded by interest groups over the public sector's protracted decision-making processes prevented the government from acting effectively in response to the popular will, as expressed at the ballot box on election day. This was the root cause of both the Liberal-NDP fiscal crisis, and the well-documented popular disillusionment with politicians and the political process.

Hence the "free economy, strong state" strategy, to use Andrew Gamble's brilliant phrase from his work on Thatcherism.[34] In order to reduce the role of the state, paradoxically a stronger state was required, in order to counter the political forces arraigned against a reformist government. Not only did a newly elected neo-liberal government have to move quickly and decisively to implement its reforms before Keynesian client groups mobilized to defend their public rents, but just as importantly, the processes of the welfare state had to be re-structured as well. The number of access points to the state had to be reduced to discourage rent-seekers from attempting to reverse the verdict of the ballot box. Thus, under the Harris Conservatives, the number of elected politicians – MPPs, municipal councillors, school trustees – was reduced; the Legislature's procedural ability to stymie the executive was restricted; massive omnibus bills delegating significant discretionary powers to ministers were rushed through the legislative process, thereby relieving ministers of the obligation of returning to the open forum of the Legislature for further authorization; the number of external agencies advising the executive was reduced; freedom-of-information legislation was weakened; the *Environmental Bill of Rights'* consultative processes were curtailed; the fiscal capacity of subordinate levels of government to cater to interest groups was circumscribed; and finally, procedural obstacles, in the form of a balanced budget law and mandatory referenda before any proposed tax increase, were put in place to discourage any future

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[33] Ontario Progressive Conservative Party, *The Common Sense Revolution* (Toronto 1994), p. 1.
[34] See e.g. Andrew Gamble, *The Free Economy and the Strong State: The Politics of Thatcherism*. rev ed. (Macmillan, 1994).

government from reverting to traditional Keynesian deficit-financing.[35] The result, from the Conservatives' point of view, was a more autonomous executive, endowed with the institutional authority needed to implement the reforms the voters had sanctioned on election day.

Because of their accessibility, arm's length tribunals would appear to be a natural candidate for attention from a neo-liberal government. Adjudicative tribunals deal directly with client groups independently of the executive. They are formally enjoined in the name of procedural fairness to follow structured decision-making processes guaranteeing their client groups into their decisions, and therefore opportunities to influence how they allocate public resources. Moreover, if tribunals compromise such rights of access, their decisions may be vulnerable to reversal by another branch of the state over which the political executive has no control – the judiciary. Tribunals offer the prospect of an access-point to the state which projects an image of credibility precisely because the executive cannot directly interfere with how they allocate regulatory goods.[36] For a reform-minded government, re-structuring tribunals must be on the agenda when it appears that the statutory framework under which they operate has institutionalized modes of decision-making which continue to privilege interests who were the beneficiaries of a previous and now defunct status quo. By re-organizing procedural access to the tribunals, the government can hope to achieve by indirect means its objective of protecting the public treasury from importuning special interest groups.

In their pathbreaking work on regulation produced two decades ago, Michael Trebilcock and others noted that institutional design was the essential tool in the hands of the cabinet enabling it to adjust the rules of engagement between the executive and tribunals along lines acceptable to the government's client groups, but without compromising the arm's

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[35] For an analysis of the impact of the Harris Conservatives on political democracy in Ontario see David Cameron, Celine Mulhern and Graham White, *Democracy in Ontario* (Paper Prepared for the Panel on the Role of Government, August 2003).

[36] Matthew Flinders, "Quangos: Why Do Governments Love Them?," in Flinders and Martin J. Smith, eds., *Quangos, Accountability and Reform* (Macmillan, 1999), pp. 30-31.

length principle.[37] The degree of independence a tribunal enjoys will in part reflect the extent to which its statutory mandate directly addresses the needs of the client groups to which the government responds. If the framework itself delivers the regulatory goods, then the government can afford to grant considerable legal authority to the tribunal, having assured that it will be limited to making individuated decisions, which effectively work out the details of the statutory mandate in the context of empirical fact-situations. The Ontario Rental Housing Tribunal is an example. This tribunal was created by the *Tenant Protection Act, 1997*, which ushered in a complex re-working of the law governing relations between landlords and tenants. The central thrust of the legislation was to re-introduce market principles to the housing business in Ontario. The Act itself contained the essential elements of the new regulatory regime: the replacement of rent control with "vacancy decontrol"; a complex formula for determining the permissible rent levels; and the detailed prescription of landlords and tenants' respective legal rights. Within this framework, the quasi-judicial ORHT hears appeals brought by landlords and tenants seeking to enforce their rights under the Act.

On the other hand, where the government is for whatever reason unable or unwilling to effect a compromise among the relevant interests, then it may choose to delegate this first-level task to the tribunal itself, but in recognition of the eminently political nature of this exercise, retain some crucial degree of ongoing influence over the tribunal's workings or even its jurisdiction. The OMB falls into this category.

THE ONTARIO MUNICIPAL BOARD

The OMB is perhaps the supreme example of an arm's length tribunal in Ontario to which the cabinet has chosen to delegate an important policy-making role. The *Planning Act's* purpose clause declares that one of the statute's objects is "to provide for a land use planning system led by provincial policy." However, the Act is mainly a process statute,

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[37] Michael J. Trebilcock, Leonard Waverman and J. Robert S. Pritchard, "Markets for Regulation: Implications for Performance Standards and Institutional design," in Ontario Economic Council, *Government Regulation: Issues and Alternatives* (Toronto, 1978), pp. 11-66; and Michael J. Trebilcock, Douglas G. Hartle, J. Robert S. Pritchard, and Donald N. Dewees, *The Choice of Governing Instrument* (Supply and Services Canada, 1982).

setting out the ground rules for development in land. The only substantive policy prescribed in the purpose clause indicates that the Act should "promote sustainable economic development in a healthy natural environment," but the clause is silent on how this is to be achieved, other than by enjoining due compliance with the statute's procedures. Not only does the Act offer no guidance on the substantive values land-use planning should pursue, but it also fails to set out any substantive criteria or standards to guide the OMB in hearing appeals from local government decisions.

As already noted above on page three, the cabinet does retain some tools under the Act to give direction to the OMB. However, the "have regard to" accountability mechanism contained in sections 2 and 3 was not introduced until 1983. In any case, before the NDP's ambitious planning reforms of the early 1990s, only four policy statements were formally adopted under s. 3. The province has typically exerted influence through its control over the levers of development, such as the siting and construction of highways, water and sewage systems, and housing policy. Such policies shape the environment which gives rise to the land-use disputes reaching the Board for resolution. Moreover, the Ministry of Municipal Affairs and Housing is routinely engaged with the municipal planning process, both formally through the exercise of various statutory powers and informally as a source of advice for local officials. Of course, it is always open to the province to adjust the macro framework within which local planning bodies work, for example by introducing greenbelt legislation.[38]

These are indirect methods of interaction. Thus, if the OMB has never considered itself strictly bound by provincial policy, one of the reasons was that until the 1990s, there were few formal statements of it to consider. Trebilcock notes that the cabinet may adopt *ex poste* and *ex ante* controls to manage its relationship with agencies, which will come into play when the interests to which the government responds are unhappy with the outcomes of the regulatory process. The criteria governing their use are explicitly political, unlike tribunal decision-making. The cabinet's powers under sections 2 and 3

[38] E.g., the *Niagara Escarpment Planning and Development Act*; or most recently, the *Oak Ridges Moraine Conservation Act, 2001*.

of the *Planning Act* are examples of *ex poste* controls which could be wielded to re-orient the policy framework the OMB takes into consideration.[39] The fact that until the last decade these powers were not heavily employed suggests a "general political equilibrium"[40] between the province, the OMB, and the regulated: municipal councils, the development industry, and property-owners.

Before the NDP came to office, the province stood aside and permitted the OMB to work out its own land-use policy, even though this entailed treating provincial policies as less than determinative, having no greater status under the Board's approach than any other source of evidence. The literature demonstrates that the principal theme in the Board's corpus has been a concern for private property rights, though balanced somewhat against a regard for the public interest as the Board understood it.[41] This state of affairs naturally raised important questions about democracy and accountability, which were dutifully noted in public debates about the role of the OMB.

Yet it was an open secret that the province was content with this relationship – an "unholy alliance," as an expert observer once observed[42] – because it enabled the elected government to avoid accepting responsibility for the day-to-day resolution of land-use disputes, which is at bottom an exercise in subjective judgement. Diverting the clash between interests to an adjudicative tribunal de-politicized the decision-making process without compromising the province's ultimate control over the broad parameters of policy. All this of course is well-known to the policy community, and it is a tribute to the skills of successive generations of OMB members that the repeat players before the Board – municipal governments, developers, ratepayers groups, and the like – were

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[39] An example of an *ex ante* control is s. 95 of the *Ontario Municipal Board Act* which permits petitions to cabinet to over-turn an OMB decision. However, the 1983 over-haul of the *Planning Act* abolished petitions to cabinet appealing OMB decisions arising specifically under that statute.
[40] Trebilcock et al., "Markets for Regulation: Implications for Performance Standards and Institutional design," p. 38.
[41] The leading authority is Chipman, *A Law Unto Itself*, whose work covers the OMB from the early 1970s to the millennium. An earlier study reached the same conclusion.; see Gerald M. Adler, *Land Planning by Administrative Regulation* (University of Toronto Press, 1971).
[42] J. Barry Cullingworth, *Notes on the Comay Report* (University of Toronto, Department of Urban and Regional Planning, October 1978), p. 24.

largely content to play by the rules. In the words of the leading authority, the OMB survived politically because it never crossed the "invisible line" and impeded the planning system's commitment to the protection of private property rights. The Board always understood that the preservation of its arm's length relationship with the executive, and with it the pretence that planning disputes could be resolved impartially in a legalized format, depended on its willingness to recognize the limits to its power.

Enter the NDP

The NDP government's ambitious transformation of the province's land-use planning system, the *Ontario Planning and Development Act, 1994* (Bill 163), contemplated a re-ordering of this institutional status quo.[43] The legislation purported to clearly delineate a division of responsibilities between the province and municipalities. The over-all objective was to reduce the province's power to intervene on a case-by-case basis in municipal development decisions, but to compensate by giving greater authority to the province's policy statements under s. 3 of the *Planning Act*. Thus, the provincial approval power over official plans, subdivision plans, and severances, among other instruments, was delegated to the municipalities. But on the other hand, the introduction of Bill 163 was accompanied by the release of a *Comprehensive Set of Policy Statements*, backed by hundreds of pages of detailed guidelines. The *Policy Statements* set out in detail what types of development the province deemed to be environmentally acceptable, and the social policy goals municipal land-use planning was expected to achieve, such as the provision of affordable housing. In order to ensure that the municipalities (and the OMB) heeded the *Policy Statements*, the phrase "have regard to" in sections 2 and 3 of the *Planning Act* was replaced with a new wording, "be consistent with." Consequently, under the amended s. 3, municipal planning decisions had to be consistent with, and not merely have regard to, the new comprehensive *Policy Statements*. Finally, the legislation provided the province with an additional enforcement tool, the power to stipulate the contents of municipal official plans by regulation. This could be deployed to ensure that

[43] The bill implemented most of the recommendations of *New Planning for Ontario*, the final report of the Commission on Planning and Development Reform in Ontario, headed by John Sewell, the former Toronto Mayor.

municipalities embraced the new emphasis on the environmental and social goals of planning.

Bill 163's central thrust was to establish ultimate control over the planning system at the provincial level. Only by this means could the NDP ensure that its environmental and social goals were effectively incorporated into a decentralized regulatory setting organized around private property rights. Within this context, it was possible to preserve the OMB's role as impartial adjudicator. As John Chipman has observed, despite its reforming impulses the NDP did not seek to alter the arm's length relationship, or arrogate the OMB's powers to itself.[44] Given the new framework, this was unnecessary.

The NDP also sought to strength municipal councils' bargaining position with developers in negotiations over the terms of proposed development projects. In such negotiations, councils are acutely aware that if they fail to reach a compromise acceptable to the developer, the latter can always resort to the OMB. From the council's point of view, such appeals are expensive and the results unpredictable. Bill 163 established firm and generous timelines for development appeals, which could potentially be worked by a council to its advantage. Under the legislation, when a council declined to make a decision on an application for an official plan amendment, an appeal could be made to the OMB 150 days after the date of the application. For subdivision applications, an appeal could be made 180 days after the application date. For zoning by-law amendment applications, the time period was increased from the previous 30 to 90 days. Depending on the circumstances of the case, these new deadlines offered councils a bargaining chip with developers who, faced with the unpalatable prospect of long and expensive delays in the approval process, might be induced to accept the changes to a proposed project requested by municipal planners.

Bill 163 also granted councils and the OMB itself new powers to dismiss development applications. For instance, councils were now empowered to deny a request for a referral of an official plan or plan amendment application to the OMB for a hearing, on the

[44] John Chipman, *A Law Unto Itself*, pp. 196-197.

grounds that the application was premature because the necessary water, sewage or roads services would not be available within a reasonable period of time. The OMB itself was authorized to summarily dismiss (i.e., dismiss without a hearing) official plan referrals, zoning appeals, sub-division referrals and consent appeals on the same grounds. These provisions were designed to strengthen councils' resolve to engage in sound planning practices, such as the promotion of compact urban form supported by mass transit, by ensuring that the servicing of new development was in place before a project could proceed.[45]

These provisions were subject to a spirited attack by the development and building industries and their supporters in the legal community during the public hearings on Bill 163.[46] The new emphasis on environmental and social objectives was denounced as excessively interventionist, smacking of top-down social engineering which would drive up the costs of economic development and damage Ontario's reputation as an attractive investment locale. A central theme in this critique was the importance of retaining an untrammelled right of appeal to the OMB. The tendency of elected councils to act capriciously needed to be constrained by the prospect of an appeal to an impartial adjudicator. In particular, councils' new power to refuse to refer official plan applications to the OMB was characterized as "one of the most dangerous sections" in the legislation, threatening "to do more damage to the economy of Ontario than anything else."[47]

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[45] See the analysis by Kathleen Cooper of the Canadian Environmental Law Association in her testimony before the legislative committee studying the Conservative government's Bill 20: Ontario Legislature, Standing Committee on Resources Development, *Debates*, 14 February 1996. The new dismissal powers (this article has discussed only one example) were also included to help streamline the approvals process and assist the OMB in addressing its burgeoning caseload.

[46] See the Canadian Bar Association and Urban Development Institute's testimony before the Standing Committee on Administration of Justice on September 12, and the Greater Toronto Home Builders' Association's on September 13, 1994.

[47] See the UDI's testimony on September 12.

The Conservative Response

The Conservative government's *Land Use Planning and Protection Act, 1996* (Bill 20), responded to not only the development industry's complaints about Bill 163, but also the municipalities who had resented the NDP's insistence that the local decision-making process actively balance environmental and social values against the traditional preoccupation with facilitating economic growth. The legislation reflected the government's neo-liberal commitment to reducing the regulatory burden on the private sector. The NDP's *Comprehensive Set of Policy Statements* was replaced with a much shorter *Provincial Policy Statement*. Like the package of directives it replaced, the new *Policy Statement* did provide for wetlands and farmland protection, and the direction of economic growth into already developed areas where possible. On the other hand, it also allowed more building near wetlands, rivers and ravines; permitted residential development on farmland; and removed the requirement that municipalities consider the social need for schools, hospitals and parks when planning new development. S. 3 of the *Planning Act* was amended to replace the phrase "be consistent with" with the traditional "have regard to," thereby signalling that the province did not expect even its diluted *Policy Statement* to be aggressively enforced at the local level or before the OMB. Moreover, Bill 20 removed the clause in the *Planning Act* authorizing the cabinet to add new matters of "provincial interest" to the list already contained in the Act, by means of a regulation. The cabinet also lost the regulatory power to dictate the contents of municipal official plans.

In keeping with the Conservatives' promise to municipalities to decentralize land-use regulation, the new legislation empowered the Minister to exempt municipalities from the statutory requirement that the Ministry of Municipal Affairs and Housing approve all official plans and plan amendments, and as well authorized the Minister to transfer the provincial authority to approve lower-tier official plans to upper-tier municipal governments. In the course of implementing Bill 20, the Ministry proceeded to delegate the approval of consents (i.e., land severances), subdivisions and condominium developments to the municipal level.

Bill 20 generally shortened the schedule for processing planning applications. The time periods for appealing a council's refusal to make a decision on both official plan amendments and sub-division applications was reduced to 90 days, the same as for zoning by-law amendment applications. Under Bill 163, municipalities had been required to hold a public meeting to consider a proposed official plan amendment within 120 days; Bill 20 reduced this to 65 days. Municipal councils lost the power to refuse requests for referrals to the OMB, and the latter, its power to summarily dismiss development applications. Finally, henceforward only one Ministry, the Ministry of Municipal Affairs and Housing, would be permitted to appeal planning decisions to the OMB, thereby depriving the tribunal of direct exposure to the views of other Ministries, such as Environment and Natural Resources.

The Impact of Bill 20

The intent of both the NDP and Conservative reforms was to devolve planning approval powers to the municipalities. However, under the NDP, the objective was to ensure that these powers were exercised under the province's firm direction. In contrast, under the Conservative government, the legal influence of provincial policy over planning was reduced, in favour of increasing the planning autonomy of the municipalities.

Bill 20 was implemented during a period of unprecedented growth throughout the GTA, as the development and building industries – Conservative client groups – pursued the opportunities afforded them under the new planning framework. The legislation did not purport to restore the "general political equilibrium" that might be said to have existed prior to the NDP. Instead, it aggressively tipped the balance in favour of the government's client groups at the expense of municipalities. This had the effect of raising the profile of the OMB in the planning process, since the withdrawal of the province from an active role in land-use regulation left the OMB as the only provincial agency with substantial authority over municipal planning decisions.

The problem for the municipalities was that under Bill 20's amendments to the *Planning Act*, development applications could be appealed to the OMB 90 days after they were

first filed with a municipality for consideration. But for complex applications, the municipal planning and decision-making process simply could not be completed within this timeframe. This process required staff evaluation, and perhaps the commissioning of technical studies; interdepartmental co-ordination; public meetings; and finally, consideration by council committees and then council. The 90-day timeframe enabled an aggressive proponent to short-circuit this process and proceed directly to the OMB for disposition of the application.

This raised the question of what exactly constituted an application, the filing of which triggered the 90-day countdown. Bill 163 had provided that an application consisted of "the prescribed information and material and such other information or material as the council or planning board may require." The GTHBA had criticized this provision during the Bill 163 hearings, on the grounds it gave municipalities too much discretionary control over the content of an application.[48] Bill 20 eliminated this language, and provided instead that an application was complete for the purposes of triggering the 90-day timeframe even if it consisted of no more than a completed form and the filing fee.[49] Consequently, the proponent of a development was under no obligation to provide municipal planners with the documentation they needed to properly analyze the application, or discuss it intelligently at a public meeting called for the purposes of soliciting local residents' input as required under the *Planning Act*. Indeed, the proponent was now under no obligation to release crucial information at any stage of the planning process at all up to the OMB hearing.

How the new rules affected the relationship between municipal councils and the private sector was well illustrated by a City of Toronto planning study which received much attention from other GTA municipalities. The study compared the City's success rate at the OMB between 1999 and 2001 on appeals of council decisions on official plan amendments, zoning by-law amendments and interim control by-laws, compared to

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[48] See Ontario Legislature, Standing Committee on Administration of Justice, *Debates*, 13 September 1994.
[49] See the Court of Appeal's analysis in *Paletta International Corporation v. Burlington* (7 January 2004).

appeals in cases where the council did not make a decision within the 90-day period. When council decisions were at stake, the City won 75% of the appeals in 1999, 80% in 2000, and 100% in 2001. But in the cases where the council had not made a decision within 90 days, the City won only 21% of the appeals, lost 36%, and settled in 43% of the cases.[50]

That the OMB hearing itself was de novo, and not an appeal, took on new significance in such cases where the municipality found itself at the Board in circumstances induced by the development proponent. In a typical appeal to an adjudicative body, whether it be a tribunal or court, the decision under review can only be reversed if the adjudicator detects an egregious procedural error or legal impropriety. But in a de novo hearing, the appellate body hears the matter anew. For many municipalities, the OMB's authority to conduct its own original inquiry into an application brought by a development proponent (who might well be leveraging its ready access to the OMB to bolster its bargaining position with the council) now appeared to usurp the municipal role as the primary planning agency at the local level.[51]

The government's supporters contended that only a handful of cases reaching the OMB under the new procedures in fact posed a challenge to the integrity of the municipal decision-making process. But the insistence by municipal leaders across the GTA that reform of the OMB be placed on the public agenda in the run-up to the 2003 election campaign, suggested that Bill 20 had fatally upset the balance of political forces supporting the Board's legitimacy as the impartial umpire at the centre of the planning system.

The OMB's Legitimation Crisis

By the end of the Conservative government the OMB was in the midst of a legitimation crisis. Opposition MPPs at Queen's Park, environmentalists, public interest lawyers,

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[50] City of Toronto, Commissioner of Urban Development Services, *Report on a Review of Ontario Municipal Board Decisions* (City of Toronto, 7 March 2002).
[51] GTA Task Force on OMB Reform, *Recommendations for Reforming the Ontario Municipal Board and Ontario's Planning Appeal Process* (7 March 2003), p. 7.

journalists and municipalities routinely excoriated OMB decisions with whose policy results they disagreed. A blue ribbon panel of municipal politicians from across the GTA had issued a report calling for fundamental reforms to the Board's jurisdiction and operations.[52] Even the development and building industries, the staunchest defenders of the OMB's role as appellate body, had conceded that public confidence in the Board had been shaken.[53] The future of the OMB became an issue in the fall 2003 election campaign, with the Liberals promising to "give the OMB clear planning rules to ensure that it follows provincial policies."[54]

A central thrust in the popular critique of the OMB was that Conservative government appointments to the OMB could not be trusted to perform as impartial adjudicators. It became an article of faith among the OMB's critics that any important Board decision in favour of a development proponent and not the municipality on the other side of the dispute could be explained with reference to the Board member's appointment by a Conservative government.[55] The importance of this charge lay not in its empirical

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[52] Ibid.

[53] UDI, *The Ontario Municipal Board: Making the Right Decisions to Implement Smart Growth* (Presentation to Association of Ontario Municipalities of Ontario Conference, 18 August 2002). See also the report issued jointly by the Association of Municipalities of Ontario, the Ontario Professional Planners Institute, the GTHBA, the Toronto Board of Trade, and the UDI, *Joint Recommendations on OMB Process and Procedures* (February 2003). Some lawyers specializing in land-use law argued that municipal complaints about the 90-day deadlines imposed by Bill 20 should not be taken at face value. They noted that municipalities were inveterate practitioners of the politics of blame avoidance, in that they were not adverse to avoid accepting responsibility for local controversies by delaying a decision until the matter was taken on appeal to the OMB. See J. Pitman Patterson, "The Future of the Ontario Municipal Board," Borden Ladner Gervais *Municipal Law News* (Winter 2003); and Stanley Makuch, "The OMB: Maintain it or scrap it?," *Toronto Star*, 17 November 2003. However, even defenders of the OMB conceded that public perceptions of the Board's partiality impeded its effectiveness as a tribunal and that this had to be addressed with reforms.

[54] See the chapter in the Liberals' campaign platform *Choose Change* entitled "Growing Strong Communities," pp. 15-16. Still available at time of writing on the party's website, http://www.ontarioliberal.ca.

[55] Section 8 of the *Ontario Municipal Board Act* states that members "shall hold during pleasure." However, the Peterson government had introduced standard fixed terms for all cabinet appointments to agencies, boards and commissions (ABCs), including to the OMB. (The logistical problems this caused for a tribunal whose members were hitherto accustomed to career appointments was well canvassed by the OMB panel appearing in Ontario Legislature, Standing Committee on Government Agencies, *Debates*, 22 January 1991). Today, most ABC appointees serve a three-year term, with the possibility of a re-appointment. Thus, by the time the

accuracy (which would be difficult to prove), but rather in its signalling of the criteria by which the OMB was to be judged. The Board's status as an arm's length adjudicator could no longer protect it from being drawn into public controversies over the Conservative government's land-use policies. Once the perception took root that the Board had become "the de facto planning arm of government,"[56] it became acceptable to evaluate the Board's work with the same politicized criteria employed to attack other operations of the provincial executive.

The Goldlist Properties case well illustrates how OMB rulings during the later Conservative years tended to be evaluated in light of their audience's position on the merits of the Conservative government's neo-liberal regulatory philosophy. The case arose in the aftermath of the passage by the Conservative government of its *Tenant Protection Act*, *1997*, which eased the previous restrictions on condo conversions introduced by the Peterson government. The result predictably enough in a tight housing market was a surge in the number of applications the City of Toronto received to demolish or convert rental units into condominium units. In order to protect its scarce supply of affordable rental housing, council passed Official Plan Amendment (OPA) 2, which forbade the conversion of rental apartments into condominiums as long as the City's vacancy for apartments was below 2.5%. At the time OPA 2 was enacted in April 1999, the vacancy rate was under 1%.

A group of developers appealed the OPA to the OMB, which struck it down in September 1999. What aroused the ire of City officials and proponents of affordable housing was that the OMB did not consider any testimony at all on the substantive merits of the OPA. Instead, its decision turned on the process question of whether it had the authority as a tribunal to make decisions about municipal jurisdiction. After concluding that it did, the OMB struck down the OPA on the grounds that the City did not have the authority to

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Conservative government left office after more than eight years in power, it had appointed over two-thirds of the OMB's membership of 28-30 members.

[56] Ontario Legislature, *Debates*, 10 May 2001, p. 574 (Mike Colle, Liberal MPP, an outspoken critic of the OMB when in opposition).

pass the by-law under the terms of the *Planning Act* and that it conflicted with the *Tenant Protection Act*.

The Divisional Court over-ruled the OMB in February 2002, holding that the Board did not have the jurisdictional authority to rule on the legal validity of OPA 2, and that the amendment was a valid exercise of the City's authority under the *Planning Act* and did not conflict with the *Tenant Protection Act*. This decision, and the subsequent ruling by the Court of Appeal in October 2003 upholding the City's position that the OPA was within its authority to enact, was welcomed by municipal officials not only in Toronto but also in Hamilton and Ottawa, which had similar by-laws. The judgements were greeted with delight by activists and others hostile to the Harris government.[57] However, the Court of Appeal also found that a tribunal such as the OMB did have the authority to rule on the legality of statutory instruments before it, when this was necessarily incidental to its substantive jurisdiction under the *Planning Act*. This was in fact a victory for the OMB, as the law on this point had been uncertain, and had constrained other Board panels in previous cases.[58] Moreover, the fact that the two courts had disagreed over the question of the OMB's legal authority to issue jurisdictional rulings suggested that the Board panel's own judgement on the issue was not an unreasonable one.

CONCLUSION

The immediate cause of the OMB's descent into the political cockpit during the Conservatives' second term was the government's reluctance to tackle urban sprawl on the Oak Ridges Moraine. Until it finally intervened in May 2001 and imposed a development freeze, the government was content to permit the OMB to be identified as the lead provincial agency on the issue. But as an adjudicative tribunal the Board was poorly equipped to mediate among the interests caught up in the public debate over the

[57] The *Globe and Mail's* city affairs columnist, John Barber, an articulate critic of the Harris government, crowed that the Divisional Court ruling had "all but decapitated the Ontario Municipal Board – the rogue regulator that has been terrorizing Ontario towns and cities since the election of the Mike Harris government in 1995." He concluded that OMB members were "submissive handmaidens" of "greedy developers." Barber, "Court slaps OMB, and does it with style," *The Globe and Mail*, 21 February 2002, p. A24. See also Bruce Livesey, "Gone by the Board," *eye magazine*, 4 May 2000.

[58] City of Toronto, City Solicitor, *Recent Court Decisions* (City of Toronto, 2 February 2004).

future of the Moraine. The *Policy Statement* introduced under the terms of Bill 20 offered little direction to Board panels seeking guidance on the government's views on the appropriate balance to be struck between economic development and environmental protection. The Board's formalistic, court-like decision-making procedures discouraged the effective participation of environmental and residents' groups in its public hearings, who sought to draw Board panels' attention to the cumulative environmental impacts of the individual development proposals under consideration.[59]

The Board's decision in the King City case perfectly illustrated the limitations of employing an adjudicative tribunal to resolve polycentric controversies suggesting fundamental questions about the direction of policy. In March 2000, a Board panel sanctioned an official plan amendment approved by King City, which linked the municipality to the "big pipe," the York-Durham sewage system. The new pipe was large enough to facilitate the doubling of King City's population.[60] Opposition by environmentalists and local residents' groups to the official plan amendment was vociferous. They correctly pointed out that the Board's decision would facilitate sprawl on the Moraine, and contribute to the GTA's growing gridlock and environmental problems. Community activists had gathered 1,463 names on a petition protesting the amendment. In his ruling, OMB member Ronald Emo dismissed the evidential relevance of this petition, pointing out that such an exercise in "direct democracy" was not germane to a hearing under the *Planning Act*. For this he was denounced by residents' groups, who had been compelled to raise $167,000 to participate in the case.[61]

A little over a year later, the government bowed to public opinion and introduced the *Oak Ridges Moraine Protection Act, 2001*, staying a Board panel's protracted hearing into an official plan amendment sanctioning development on 3,520 hectares of the Moraine within the boundaries of Richmond Hill. This hearing had commenced in May 2000.

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[59] See the discussion in Linda Pim and Joel Ornoy, *A Smart Future for Ontario* (Federation of Ontario Naturalists, October 2002), pp. 28, 31.
[60] The project also enabled the municipality to shut down its faulty septic systems.
[61] *The Globe and Mail*, "Public opinion not pivotal, OMB ruling makes clear," 9 March 2000; Gail Swainson, "Moraine supporters probe for snags in King ruling," *Toronto Star*, 10 March 2000; and Bruce Livesey, "Gone by the Board," *eye magazine*, 5 May 2000.

The provincial government had appeared before the Board as a witness opposed to the development proposal, but otherwise touting the continued efficacy of the existing decentralized planning process, whereby the municipal official plan served as the principal policy instrument for protecting the environment of the Moraine. For the next year, the Conservatives resisted all proposals for more aggressive provincial intervention in the form of a co-ordinated regional plan. Its intervention in May 2001 was followed a few months later with a permanent freeze on development, in the form of the *Oak Ridges Moraine Conservation Act*. This legislation removed the OMB from any role in hearing development proposals on the Moraine lands now protected from development.

This episode illustrates the failure of the Conservative government's strategy to exploit the status of the OMB in order to deflect accountability for its re-structuring of the province's land-use planning system. The strategy asked too much of the Board. It attempted to conscript an adjudicative tribunal into the role of a democratic decision-maker, charged with resolving disputes over the fundamental values at the heart of the planning system. The casualty was the OMB's legitimacy as an arm's length tribunal.