Notes for Remarks to the Municipal Law Section of the Ontario Bar Association

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Environment and Land Tribunals Ontario

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As always, my sincere thanks to the OBA Municipal Law Section for again providing me the opportunity to continue a dialogue with the municipal law bar. As I have said on previous occasions, I believe it is critical for tribunals to engage with members of their stakeholder community. Certainly, the OBA and its municipal and environmental law sections are important parts of that community.

The past year has been both challenging and exciting – a period of change and reflection, a period in which we developed a mission, mandate and set of core values for ELTO as a whole, and a period in which we began examining our resources and processes in the context of our new mission, mandate and values.

It has also been a period in which we sought to fully engage staff and members in the evolution of ELTO and, importantly, to have staff and members of each constituent tribunal engage with each other. And, we have made significant and sustained efforts to reach out to users, including those who perhaps had not been traditionally consulted, such as residents' associations, NGOs' and other groups like MLDAO.

As you know, the boards and tribunals that make up the Environment and Land Tribunal Ontario cluster were co-located a few years ago, but over the past year, a number of events and initiatives have made ELTO more of a concrete reality.

I was appointed as Executive Chair, and chair of each tribunal last November, and the ELTO cluster was formally established by a regulation under the *Tribunals Act* in April of this year. All of the work we do in our tribunals must reflect this new reality. To begin to reflect this, we have been working across ELTO to formulate several of the joint governance and accountability documents required by the *Tribunals Act*.

As I mentioned at the outset, we have developed, for ELTO as a whole, a statement of our mission, mandate and core values. I mentioned this at the start of my remarks because it not only shows an early success in developing a unified approach to values within ELTO, but because I firmly believe that the mission, mandate and core values are essential touchstones in everything we do. They are living guides to the work we do every day, values which exemplify excellence in administrative justice and a professional tribunal culture.

Importantly, they were developed through a pan-ELTO strategic planning process involving a group of staff and adjudicators from across ELTO, and which also included canvassing every person who works at ELTO for their comments on options developed

for these important statements. These and related initiatives help break customary silos, as well as giving us the broadest base of experience and expertise for our initiatives.

We have developed new position descriptions for the Associate Chairs, Vice-chairs and Members. These are uniform across ELTO, and include important features such as making it clear that the Associate Chairs are responsible for participating in the overall management of ELTO, rather than merely being delegated heads of individual tribunals. The position descriptions also include references to ongoing professional development, ethical standards, decision review processes, working in teams as appropriate, respecting diversity, facilitating access to justice and other aspects of a modern tribunal committed to excellence and accessibility. Reflecting our value of transparency, these position descriptions have all been posted on the ELTO website.

The government recently appointed Associate Chairs at ELTO – for the ARB, Rick Stephenson; for the CRB, Peter Zakarow; for the ERT, Jerry DeMarco; and for the OMB, Wilson Lee – thus consolidating our senior leadership team for the next two years. This provides me with a fine set of colleagues, and also should provide stakeholders with some desired stability as ELTO develops its potential over that time frame.

I have undertaken extensive stakeholder engagement over the past 10 months, whether through forums such as this one or through informal, getting-to-know-you sessions. Our next steps will involve a more structured approach to engagement.

We are in the course of preparing, again on a pan-ELTO basis, the other accountability and governance documents which will be required under the *Tribunals Act* when the relevant sections are proclaimed. As many will know, these include service standards, complaint policies, ethics plans, codes of conduct, a consultation policy, a business plan and annual report, as well as an MOU with the Ministry. The MOU in particular provides a practical, structured and transparent framework which can be used to reinforce the independent and accountable nature of ELTO and its constituent tribunals. All these documents will be publicly available on our website.

Recognizing the important work of the OMB, and the relatively low proportion of adjudicators there who are Vice-chairs compared to tribunals doing similar work, we have been able to convert four Member positions to Vice-chair positions. These are being filled through an internal competitive process, again respecting the spirit of the *Tribunals Act*.

As well, we are about to advertise for two additional Vice-Chairs to replace persons who have left the Board. Following receipt of applications, we will be conducting interviews, and will then make recommendations to the Minister based on merit. The new *Tribunals Act* provides that no person shall be appointed to a tribunal without the recommendation of the Chair.

In an effort to add to the OMB's existing capacity in the area of heritage and environment, we are highlighting knowledge and experience in those areas as an asset

in this competition. This may also allow us to have the new Vice Chairs cross appointed to other tribunals.

We recently published new ERT Rules to deal with green energy appeals. I mention them here because they include a number of modest but significant measures designed to support a more active adjudication approach, something which the tight timelines for these matters requires, but something that we will also consider for other ELTO tribunals in the short run.

In terms of matters for the near and medium term, let me just list some of the topics:

Enhancing adjudicative expertise, capacity and excellence. We are focusing on professional development through a pan-ELTO committee which will bring a planed and structured approach to this important area. ELTO's training plan will feature ELTO-wide programs offered to members of all tribunals. Where, as appropriate, tribunal-specific programs are also offered, they will be priorized, developed and coordinated through the pan-ELTO training committee.

Better use of the skills of staff to enhance the dispute resolution process as part of tribunal teams, with adjudicators, committed to responsiveness to users and adjudicative excellence.

Cross appointments: we will explore this carefully and strategically. There won't be a wholesale approach to cross-appointments, but we will look for ways to strengthen the skill sets available to those making case assignments within a tribunal. This flows from the view I have often expressed that the expertise of a tribunal vests in its members as a group, not necessarily in each individual member. When you broaden the skill sets within a tribunal, you strengthen its collective expertise, and its ability to deploy that expertise to serve the tribunal's users and the public interest.

Establishment of stakeholder advisory committees. These will be designed around the needs and interests of the stakeholders, not the tribunal. They will be chaired by people outside the tribunal, and will set their own agendas. The tribunals will be active – but not controlling – participants.

Section 43 review. We have heard concerns about the section 43 process, ranging from how reviews are determined, to the appropriateness of the criteria upon which the Chair will grant a rehearing. This fall we will be undertaking a review of the process. Initially we will hold a focus group session to benchmark a range of issues. I have asked Patrick Devine and Jane Pepino to act as a steering committee to assist in the establishment of the focus group. Once we have some proposed approaches, they will be circulated to the broader stakeholder community for comment and input. I look forward to this consultative process

Joint Board rules. These are, by definition, complex and important proceedings which raise issues within the jurisdiction of two Boards. I think we can do better than forcing them into one or other of a tribunal's set of rules built for matters

within its jurisdiction alone. Instead, we should think carefully about the issues that are dealt with in these joint board proceedings, and design a stand-alone set of rules to ensure that they can be dealt with in an accessible, just and expeditious fashion.

Mediation: One theme I have heard in many discussions is the desire for more mediation services. I fully agree, and want to work with those inside and outside ELTO to build on what we have already developed in this area. As you will all know, this requires training and, sometimes, recruitment, and must be advanced carefully and well if it is to gain the support and acceptance it needs to become a more regular way to resolve matters before ELTO tribunals.

As you can see, we have quite a bit of work ahead of us, in addition to the vital work of ensuring accessible processes and just and timely outcomes on the matters before us each and every day. At the same time, we have come quite a distance in the past 10 months, in significant measure because of the ideas and comments which groups such of this have so helpfully made available to us. I am grateful for all the external, as well as internal, advice and assistance I have received to date, and very much look forward to more of the same.

In that spirit, I now look forward to addressing your questions and to hearing your comments and perspectives.

Responses to Questions

1) **Do you foresee any changes in the role of expert witnesses especially in light of the Niagara Jet Boat decision?**

I know the Jet Boat case has already been discussed extensively amongst this group and in other forums. For that reason, and because the decision may well arise in proceedings before ELTO tribunals, I won't comment beyond noting that as a decision of the Court of Appeal it binds all of the ELTO tribunals.

Quite apart from the determinations made in that case, I think that the role of experts in the planning process, and the scope of expert evidence at the Board, are important issues that we at the Board, and the municipal law community, need to think about, and come to terms with.

I was recently invited to Australia to participate at an Australasian conference of land and environment courts and tribunals. What struck me was the depth of thinking and the range of practices that had developed surrounding expert evidence.

Virtually all courts and tribunals represented at the conference had adopted the requirement for experts to meet in advance, and to sign an acknowledgement of their duty to the court. Some required experts to produce joint reports, and then the parties were required to seek leave to submit individual reports on specified issues that remained in dispute. Some heard experts in panels, others did not. Some had the judges or adjudicators ask questions first, then counsel could ask questions.

All of these approaches have been developed recently because of a recognition that the length and cost of litigation was getting out of control, and the use of experts and the scope of expert evidence played a role in that.

There is no question that many of the cases the ELTO boards, including the OMB, deal with are complex matters, involving scientific and technical issues. There will be a need for expert evidence.

Because of that, the OMB and the municipal law community should be leaders across the justice system as a whole in the thinking and practice in this area – on how required scientific, technical and expert evidence can be efficiently and effectively put before the Board, in a way that ensures proportionality and cost effectiveness, and as importantly, in a non-positional, non-adversarial way that assists the decision-maker and respects the Board's adjudicative authority.

It strikes me, as I look at other tribunals in Canada and elsewhere, and indeed even in looking at the courts in Ontario, that we are lagging behind, rather than being the leaders and innovators we should be in this area.

So to return to the jet boat case, I think it is a wake up call from the Court of Appeal, and we go back to sleep at our peril.

2) What can the Municipal and Planning Bar do to help stream line hearings?

I suppose the first question is whether the municipal bar wants to streamline hearings.

I believe that the length, and consequentially the cost, of hearings is definitely a problem:

- It undermines access to justice, not just for the public who, while having a statutory right to appeal and participate, may not be able to afford to exercise it, but also for municipalities, developers and proponents who, even if they can afford the costs, are required to spend more money and accept more delay than is required to fairly adjudicate the matter.

- It also undermines effective adjudication. While it is not impossible for an adjudicator to properly decide a hearing with 6 months of evidence, it certainly is a challenge.

The question of how to streamline hearings, while ensuring that the relevant issues are properly considered, is a complex question.

Board matters are generally polycentric - multiple, often competing, interests are involved. There is also often much at stake – financially, socially, politically, economically, and often generationally.

I think that the capacity of the Board to deal effectively with matters, and the community's confidence in the capacity of the Board, are important factors, as are the role and scope of expert evidence.

And the culture of litigation is a significant factor.

If the question is what the municipal law bar, as opposed to lawyers retained in a particular case, can do, the answer is to accept that there is a problem, to work with the Board and each other to explore, with an open mind, options and solutions, and to recognize that in so doing many of the approaches that might be considered are not untested or controversial, but rather now the mainstream in administrative law elsewhere and in civil litigation.

3) It is common knowledge that OMB decisions are reviewed internally by the Vice-Chairs before they are formally issued. What is the scope of this review process and how do you ensure that the administrative law principle of "he who hears must decide" is preserved?

In the spirit of full disclosure and transparency, I will admit that I was given a heads up on several of these questions. So I dug up a couple of quotes from Supreme Court of Canada decisions dealing with this issue:

"As our legal system abhors whatever is arbitrary, it must be based on a degree of consistency, equality and predictability in the application of law."[i]

L'Heureux-Dube J. in *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionelles)*

"It is obvious that coherence in administrative decision making must be fostered. The outcome of disputes should not depend on the identity of the persons sitting on the panel for this result would be 'difficult to reconcile with the notion of equality before the law, which is one of the main corollaries of the rule of law, and perhaps also the most intelligible one."[ii]

Gonthier J. in *I.W.A. v. Consolidated-Bathurst Packaging Ltd.*

I think these statements make clear that the principle of adjudicative independence is an important, but not the only, principle of natural justice and procedural fairness, or value to be fostered.

Equality before the law, the absence of arbitrariness, the value of coherence and consistency, parties' reasonable expectations, are also all fundamental principles of justice.

In addition, the requirement to provide clear, intelligible and responsive reasons for a decision is, as we know, a fundamental right of the parties and responsibility of the adjudicator.

Decision review process, like the Board's "red file" process, support and enhance these legal principles. They support:

- clear, concise, accessible and intelligible reasons for a decision
- consistency in procedural approach, and coherence across a body of substantive outcomes – in the sense that like facts should produce like outcomes, subject always to the acceptance of the development of the law, and the independence of the adjudicator
- coherence with the applicable legislative and policy framework
- where an adjudicator chooses to diverge from a line of jurisprudence, an explanation in their reasons [i.e., not a justification to the tribunal] of why they are doing so. This provides fairness to the parties, and further assists in a richer body of tribunal jurisprudence.
- In the red file, and in any decision review process – what is made clear is that the adjudicator is solely responsible for the outcome.

The current red file process involves a draft decision going to a duty vice chair, who may provide comments to the adjudicator for his or her consideration.

The duty vice chair may flag the decision as involving significant policy issues, and as a result, suggest that the adjudicator also discuss the draft with the associate chair, counsel or the executive chair.

Other tribunals may have variations of this process, and may include discussions with teams of adjudicators or full Board discussions.

Again, as in any acceptable model of decision review, in the red file system, the right, or as I prefer to say, the responsibility, of the adjudicator who heard the case to make the decision, is made clear, and fully respected. It also provides that if an issue or case comes to light during the internal discussions that the parties had not addressed, the parties must always have an opportunity to make submissions on it if it will factor into the decision.

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[i] *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionelles)*, [1993] 2 S.C.R. 756, 1993 CanLII 106 at para. 59.

[ii] *I.W.A. v. Consolidated Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, 1990 CanLII 132 at para. 74 [*Consolidated Bathurst*].