

Interim Report of the Agency  
Cluster Facilitator for the  
Municipal, Environment  
and Land Planning  
Tribunals

January 31, 2007

Agency Cluster Project  
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900 Bay Street  
Toronto ON M7A 1N3

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January 31, 2007

The Honourable Gerry Phillips  
Minister of Government Services

Dear Minister Phillips:

I am pleased to present my Interim Report as the Agency Cluster Facilitator for the Municipal, Environment and Land Planning Tribunals.

I embarked on this project in September 2006 with a mandate to work with five tribunals – the Assessment Review Board, the Board of Negotiation, the Conservation Review Board, the Environmental Review Tribunal and the Ontario Municipal Board – to find ways to improve services through cross-agency coordination and cooperation of operations, administration and dispute resolution.

Since that time, I have spoken with tribunal stakeholders and interested parties. This report sets out the highlights of what I have heard, proposes options for change and seeks written comment. Following this consultation period, I will work with the tribunals to achieve consensus and refine my recommendations.

I look forward to providing you with my final report later this summer.

Sincerely,

A handwritten signature in black ink, appearing to be 'Kevin Whitaker', with a long horizontal stroke extending to the right.

Kevin Whitaker  
Agency Cluster Facilitator

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## What This Report Is About

In September 2006, Kevin Whitaker was announced as the Agency Cluster Facilitator to work with five Tribunals in the municipal, environment and land planning sector to find ways to improve services through cross-agency coordination and cooperation of operations, administration and dispute resolution.

The five agencies are: the Assessment Review Board, the Board of Negotiation, the Conservation Review Board, the Environmental Review Tribunal and the Ontario Municipal Board.

Clustering is the grouping together of different tribunals that work in related areas and deal with related subject matter. Clustering is not the integration of separate tribunals into one agency or “super tribunal”. It is rather, the alignment of separate tribunals while permitting the sharing of commonly used resources, services and expertise.

The goal of clustering is to enhance the quality of dispute resolution services by rendering them simplified and more accessible. Clustering will enhance consistency of service and provides opportunities to implement best practices.

Clustering is not a cost-cutting exercise, but is intended to coordinate and enhance services with existing resources.

Following four months of informal consultation with stakeholders and interested parties, this Interim Report briefly summarizes the information collected to date and identifies a short list of viable options for change proposed by the Facilitator. Discussions with stakeholders focused on individual and institutional responses to proposals for change.

The Interim Report is not a “report card” identifying what is either deficient or well done by the Tribunals. Some of the proposed options for change describe processes or practices already found within some of the Tribunals.

Those interested are invited to comment on these proposed options by written submission provided to the Facilitator by February 28, 2007. Through spring 2007, the Facilitator will work with the Tribunals to achieve consensus and, further to government direction, assist the Tribunals with implementation. The Facilitator will provide a Final Report to the Minister of Government Services in summer 2007.

## Why This is Being Done Now

The participating Tribunals all play significant and critical roles in the administrative justice system in Ontario. This system is undergoing a period of rapid change and development both within Ontario and across Canada. These Tribunals were identified in a general review of agencies, boards and commissions as being best positioned to benefit from the clustering exercise.

## What the Facilitator Heard

### On Structure

- The Tribunals should be physically co-located and should share professional, administrative and support services.
- The Tribunals should use one common website.

### On Membership

- Although circumstances have improved, there remains a concern about the recruitment and retention of expert and trained adjudicators.
- Adjudicators need ongoing training, guidance and assessment.

### On Operations

- Public accessibility would be enhanced by the consolidation of services and functions where appropriate.
- Teleconference, electronic hearings and e-filing initiatives should be accelerated.

### On Procedure

- Rules of Practice and Procedure should be harmonized.
- Some form of decision review is required to ensure consistency of style, format and expression of reasoning.
- Cases should be streamed with tailored processes appropriate for the case type.
- Chairs should be responsible for case assignment.
- There should be an increased use of mediation, including early mediation.
- Consideration should be given to the use of a common, dedicated mediation unit.
- Internal protocols for discussion of policy and procedure should be enhanced.

## Options for Change for Consideration

The Facilitator proposes the following options for change for stakeholder consideration and comment:

1. The Tribunals should consider co-location for purposes of sharing the same physical space to provide one access portal for the public.
2. The Tribunals should consider adopting one single web access portal for “virtual” co-location.
3. Once co-located, the Tribunals should consider sharing operational units that provide similar and consistent types of different professional, administrative and support services.
4. The Tribunals should consider moving over time to an adjudicator model that is mainly full-time as opposed to part-time.

5. The Tribunals should consider the development of position descriptions in a standardized format for adjudicators and Chairs.
6. The Tribunals should consider the development of a written set of core competencies for adjudicators and Chairs.
7. The Tribunals should consider the adoption of a uniform Code of Conduct for adjudicators and Chairs.
8. The Tribunals should consider the adoption of written protocols for the recruitment and assessment of adjudicators.
9. The Tribunals should consider the adoption of a common and formalized adjudicator training program.
10. The Tribunals should consider taking steps to harmonize those portions of their Rules of Practice and Procedure that are of general application and not specifically tied to particular statutory regimes. These Rules of general application should be described and explained in appropriate Practice Directions and Information Bulletins.
11. Tribunals should consider adopting the practice that all written decisions be reviewed by the Chair, Vice-Chairs or Counsel to the Chair for adherence to style, format and expression of reasoning.
12. Chairs should exercise clear and primary responsibility for the assignment of panels of adjudicators.
13. The Tribunals should consider the use of a commonly shared mediation unit whose primary skill set is mediation.
14. The Tribunals should consider in appropriate cases the assignment of mediators early in the case management process.
15. The Tribunals should encourage and facilitate regular meetings and discussions amongst adjudicators to deal with issues of policy, law and practice.
16. The Tribunals should consider the establishment of a common Community Advisory Committee.

## **Next Steps**

Written submissions addressing issues and options described in the Interim Report will be considered if filed with the Facilitator by February 28, 2007.

Following consideration of these submissions and further to government direction, the Facilitator will begin to work with the Tribunals in April 2007 to implement appropriate changes. A Final Report will be provided to the Minister of Government Services in summer 2007.

This review and the consultation process are undertaken to determine the degree to which the five Tribunals can be aligned within the government's clustering goals while adhering to the principles of independence and the protection of the public interest. It is not intended to be an in-depth analysis or an evaluation of the effectiveness of individual Tribunals. Within this context, the Interim Report highlights high-level similarities and differences between the Tribunals, explains what the Facilitator has done to this point and suggests preliminary options for change, which are supported by the review to date. The purpose for suggesting preliminary options for change is to solicit focused feedback before taking any steps to assist the Tribunals in effecting change.

This is the Interim Report of the Facilitator in the clustering of the Assessment Review Board (ARB), the Board of Negotiation (BON), the Conservation Review Board (CRB), the Environmental Review Tribunal (ERT), and the Ontario Municipal Board (OMB). These are referred to in this report as the "Tribunals."

The responsible line Ministries for each tribunal are the Attorney General (for the OMB, BON and ARB), Environment (for the ERT) and Culture (for the CRB). Other interested Ministries responsible for legislation administered by the Tribunals are Municipal Affairs and Housing (OMB, ARB and ERT), Finance (ARB), Natural Resources (ERT) and Agriculture, Food and Rural Affairs (ERT).

The purpose of the Interim Report is to identify who has been consulted and what they have said, and to propose preliminary options for change in keeping with the government's overarching clustering goals as outlined below. The purpose for suggesting options for change at this point is to solicit focused feedback before any steps are taken to effect change.

The Facilitator will welcome written feedback in response to the Interim Report during the month of February 2007. A Final Report will be provided to the Minister of Government Services in summer 2007.

## **The government wishes to cluster tribunals in the municipal, environment and land planning sector.**

Clustering is the grouping together of different tribunals who work in related areas and deal with related subject matter to improve services. By working together, clustered tribunals can share different types of administrative and professional services in order to maximize the utility of their combined resources.

Clustering is not the integration of separate and distinct tribunals into one agency or "super-tribunal." It is rather, the alignment of separate tribunals, each with their own expertise, while allowing for the appropriate sharing of commonly used resources, services and expertise.

The clustering exercise presents an opportunity to identify and share best practices that already exist within the Tribunals as well as to collaborate on the development of new ones. Some of the proposed options for change represent practices that are already established by some but not all of the Tribunals. They are proposed here because the Facilitator has concluded that they would assist all Tribunals without interfering with the particular and unique work of each Tribunal.

While there are certainly features of practice and procedure which are unique to each Tribunal, there are many aspects of case management, mediation and adjudication that are similar and already to some degree offered in the same way. Where services are shared or provided in a common fashion, those practices could be harmonized and rendered in a consistent way.

## 2 WHAT THIS REPORT IS ABOUT

### **As a Tribunal Chair, the Facilitator has clustering experience.**

The Facilitator is Kevin Whitaker, Chair of the Ontario Labour Relations Board, the College Relations Commission and the Education Relations Commission. There has been significant clustering among labour and employment tribunals in the last decade.

In September 2006, Kevin Whitaker was announced as the Agency Cluster Facilitator to work with five Tribunals in the municipal, environment and land planning sector to find ways to improve services through cross-agency coordination and cooperation of operations, administration and dispute resolution.

### **Clustering is intended to improve the quality of administrative justice dispute resolution services for the public. This is done by enhancing the ability of the Tribunals to plan and control more centrally the consistent use of limited resources and the application of common best practices.**

This clustering is undertaken to provide Ontarians with a modern, accessible, efficient and effective tribunal system for municipal, environment and land planning adjudication.

Clustering may enhance consistency in tribunal practices, procedures and decision making.

Clustering may better enable the government and the Tribunals to respond quickly and effectively to shifts in demand and emerging issues.

Clustering may achieve new administrative efficiencies. Clustering is not an exercise in cost-cutting, but rather about maximizing the utility of the existing pool of resources currently committed to the Tribunals. Very simply, the principal question is: "How can we apply what we have now to improve the quality of dispute resolution services for the public?"

The public expects and is best served by dispute resolution services that are transparent, accessible, expeditious, practical and efficient. Modern streamlined approaches and consistent practices can be applied to enable users to understand the tribunal system better and receive a decision faster.

### **The administrative justice system, which includes the Tribunals, is constantly evolving.**

The administrative justice system is comprised of the collection of tribunals and agencies that enforce legal rights and obligations and resolve disputes outside of the courts.

Most Ontarians interact far more frequently with the administrative justice system than with the courts. In this way, the administrative justice system is the principal "justice portal" for most people.

The Tribunals participating in the clustering have well-established and unique roles in the administrative justice system.

At the heart of the administrative justice system is the principle that dispute resolution in particular subject areas and sectors is best provided by individuals who are expert and experienced in that sector or area of law. These experts, who generally come from a community of users of a particular tribunal and who know the community and understand their issues and concerns, will be best able to quickly and effectively assist in the resolution of disputes.



## 2 WHAT THIS REPORT IS ABOUT

### **A number of changes have recently occurred in the administrative justice system in Ontario, including changes to remuneration and terms of appointment.**

The government has taken a number of steps to strengthen and improve the administrative justice system in Ontario.

These include, among other things, a new policy for remuneration and terms of appointment, the adoption of a standard application process for appointments and the posting of vacancies on the Public Appointments Secretariat website.

More recently, the government has created an Agency Modernization Advisory Council. The Council's mandate is to provide advice on the development of governance tools for agencies and to act as a sounding board for the Facilitator.

The government has identified a particular need for a more effective and user-friendly tribunal system in the municipal, environment and land planning sector.

This clustering exercise occurs within the context of these recent developments, changes and trends.

### **The Tribunals all share a significant role in the municipal, environment and land planning process. Each Tribunal has a distinct legislative mandate but there are concurrent jurisdictions.**

The vast majority of disputes which comprise the work of the Tribunals arise out of the municipal, environment and land planning process.

There is a statutory platform for consolidated hearings through a joint board.

A variety of formal and informal relationships already link the Tribunals.

Three of the five Tribunals are co-located and share senior managers and some Order in Council (OIC) appointees on a cross-appointment basis.

### **Services are delivered more effectively, and the resources of Tribunals and parties are used most efficiently where:**

- Hearing days are kept to a minimum.
- Opportunities for mediation are maximized.
- The use of appropriate alternatives to traditional civil trial-like dispute resolution processes are maximized.
- Disposition times are reduced.
- Decision writing time is reduced.
- The utility of administrative and professional support is maximized.
- Decision makers and mediators within a Tribunal share and apply a consistent set of views on all major issues of law and policy.
- Tribunal users are treated similarly and in a uniform fashion by Tribunals who provide services in similar areas.
- Consistency of outcome is enhanced because decisions are seen and understood by the parties and the courts to be legitimate, fair and final.

## 2 WHAT THIS REPORT IS ABOUT

In order to achieve these goals, the Tribunals, Tribunal Chairs and senior Tribunal management must be able to exercise control over the methods being used to deliver dispute resolution services and the deployment of Tribunal resources.

The proposed options for change identified in this Interim Report were developed with the overall goal of improving public services and increasing access to justice, balanced with the need to use government resources prudently and responsibly. More particularly, each option for change is designed to enhance the effectiveness and efficiency of a discrete area of Tribunal operations, so that dispute resolution services can be delivered in an improved way with existing resources.

### **Clustering will adhere to the following principles that respect the independence and jurisdictions of the Tribunals:**

- The independence of Tribunal adjudication and decision making will be protected and enhanced.
- The legislative mandates of the Tribunals will be respected.
- Legislative changes may be proposed if necessary to achieve cluster objectives.
- Users will find the Tribunals easier to understand and navigate.
- Innovations will be transparent and supported by clear and appropriate accountability for outcomes.
- Resources will be focused on delivering high-quality adjudicative services.
- Access to justice and the protection of the public interest will not be compromised.

### **The clustering exercise is organized into a series of phases concluding with a Final Report in summer 2007.**

From September 1, 2006, to January 15, 2007, the Facilitator consulted with the Tribunals, their Chairs and Officers, the Bar, and users of the Tribunals. The discussions were confidential, meaning that particular comments will not be attributed to any individual or organization. Further, the discussions were quite focused on individual and institutional responses to proposals for change identified and suggested by the Facilitator.

During February 2007, the Facilitator will receive and consider written submissions made in response to this Interim Report. To reiterate, the Interim Report is not a “report card” identifying what is either deficient or well done within the Tribunals.

During March 2007, the Facilitator will work with the Tribunals to achieve consensus around viable options for change.

During April and May 2007, and further to government direction, the Facilitator will work with the Tribunals to begin to implement clustering changes.

The Facilitator will provide a Final Report to the Minister of Government Services in summer 2007.

# 3 THE PARTICIPATING TRIBUNALS

**What follows is a brief description of each Tribunal, comparative information about caseload, case management, physical location, adjudicator management and statutory and hearing responsibilities.**

## **Ontario Municipal Board (OMB)**

**The OMB is the oldest tribunal and exercises the broadest statutory mandate.**

The OMB hears appeals and applications on a wide range of municipal and land-related matters, including official plans, zoning by-laws, subdivision plans, consents and minor variances, land compensation, development charges, ward boundaries and aggregate resources.

The OMB has an annual budget of approximately \$6.8 million, 54 staff and 27 full-time OIC appointees.

Almost 80 per cent of OMB matters are heard in one day or less.

The OMB deals with about 2,000 new files each year of which approximately one third, and the largest category, are minor variance issues.

Hearings are held in the municipality where the dispute originates – often in municipal council chambers.

The OMB also has a Memorandum of Understanding with the CRB for the appointment of CRB members to OMB panels for appeals under the *Ontario Heritage Act*.

## **Assessment Review Board (ARB)**

**The ARB adjudicates property assessment and tax appeals.**

The ARB's general jurisdiction and authority arise principally from the *Assessment Review Board Act*. Jurisdiction in assessment appeal matters arises from the *Assessment Act*, while jurisdiction in tax appeal matters arises from the *Municipal Act, 2001*.

The ARB has a budget of roughly \$7.6 million and operates with approximately 75 staff, and 4 full-time and about 40 part-time OIC appointees.

The ARB has a caseload that varies from about 12,000 to 80,000 applications a year depending largely on the reassessment year cycle. This large fluctuation in yearly volume presents particular case management challenges.

The majority (up to 60 per cent) of appeals involve less complex residential disputes, with the balance being commercial and industrial. These two types of cases are streamed, each with an appropriate case management treatment.

Approximately 95 per cent of hearings are conducted in one day or less. Frequently, hearings will take less than two hours with an oral decision rendered at the end of the hearing and brief written reasons following within a matter of days.

Like the OMB, disputes are heard in the municipality where the appeal arises with the hearing venue being local municipal council chambers. Most disputes arise in the Greater Toronto Area.

Mediation is offered by adjudicators trained for the purpose, although most disputes are resolved by adjudication.

## Board of Negotiation (BON)

**The BON deals with compensation disputes arising from land expropriation. The Board does not adjudicate disputes but rather assists in negotiating settlements.**

The BON deals with roughly 35 disputes a year and is staffed and managed from within the OMB. The Chair of the OMB is cross-appointed as Chair of the BON, and managers are staff of the OMB. All appointees are part-time and not cross-appointed to the OMB.

Like the OMB and the ARB, the BON reports to the Attorney General.

BON proceedings are inherently mediative and occur in the municipalities where the dispute arises.

## Environmental Review Tribunal (ERT)

**The ERT deals with a range of environmental disputes arising from 10 different statutory schemes. The greatest number of disputes arise under the *Niagara Escarpment Planning and Development Act*, followed by the *Environmental Protection Act*.**

The ERT wears three hats – as the ERT, as the Niagara Escarpment Hearing Office and as the Office of Consolidated Hearings. The ERT was established in 2000 as an amalgamation of the former Environmental Assessment Board and the Environmental Appeal Board.

The ERT receives about 150 new applications and appeals each year, operates with a budget of approximately \$1.25 million and operates with approximately 9 staff, and 6 full-time and 6 part-time OIC appointees. The Chair and Vice-Chairs are full-time, and Member appointees are part-time.

Similar to the OMB, ARB and BON hearings are held in municipal council chambers in the municipality where the dispute arises.

The ERT provides mediation by adjudicators who are trained for the task.

Applications and appeals are streamed into tracks and receive specialized case management dependent on the track.

The ERT is responsible for administering the *Consolidated Hearings Act*, under which joint Boards are convened with the OMB.

The ERT reports to the Minister of the Environment and that Ministry appears as a party before the ERT in some matters.

## Conservation Review Board (CRB)

**The CRB deals with disputes concerning the designation of heritage status properties by municipalities. The CRB also deals with the designation and licensing of archeological sites.**

Hearings are held to determine whether to recommend the acceptance or rejection of a designation. The decisions of the CRB are advisory only and not binding.

The CRB's administrative staff and office support are provided directly by the Ministry of Culture. There are 9 part-time OIC appointees, including the Chair.

The CRB has approximately 12-18 new cases filed each year and typically takes one day to dispose of each case.

The CRB is required to hold hearings in the municipality where the dispute arises, often in municipal council chambers.

The CRB reports to the Minister of Culture. The CRB's financial affairs are administered directly by the Ministry of Culture.

## Case Management

The ARB, OMB and ERT each have distinct, “stand-alone,” custom-built case management systems based on different technology platforms. The CRB case management process is manual due to the small caseload.

The OMB and ARB each have distinct case management processes and streaming practices based on distinct sets of criteria.

The OMB has a comprehensive series of case management protocols in place.

The ERT has a series of case management processes and practices that are subject matter and legislation specific.

The ARB, OMB, ERT and CRB each have separate Rules of Practice and Procedure with many common features.

Mediation is not mandatory in any of the Tribunals. Most matters are not mediated. If mediation is attempted, it occurs generally after a pre-hearing conference. With the exception of the ERT, whose Vice-Chairs have extensive Alternate Dispute Resolution (ADR) training and experience, mediation is provided by adjudicators who have received some limited training for this purpose.

The ARB, OMB, BON and ERT each have their own websites, with varying degrees of access to information, guides, procedures, e-services and case tracking and status information. Both the ARB and the ERT currently provide e-filing facilities. E-filing represents 30 per cent of the ARB’s caseload intake. The CRB has a presence on the Ministry of Culture website.

The vast majority of cases for all Tribunals are heard in the municipality where the dispute arises, usually in municipal council chambers.

The ARB, OMB and ERT use teleconference facilities for pre-hearings and case management conferences.

## Current Physical Space

The OMB, BON and ARB share physical space at 655 Bay Street in Toronto with the OMB and BON on the 15th and 16th floors and the ARB on the 11th and 12th floors. The OMB and ARB are organized into five identical but separate departments (Communications; Business Planning and Corporate Services; Controllership and Finance; Information Technology; and Case Management) reporting to the CEO. The CEO and most department heads have dual reporting relationships and responsibilities to both Boards.

The OMB and ARB have separate legal counsel, libraries, file rooms, mail rooms, reception and for all purposes function as separate distinct organizations.

The ERT is located at 2300 Yonge Street in Toronto. Its structure is similar to the OMB, BON and ARB, but on a much smaller scale, with in-house Registrar, Legal, Information Technology, Case Management and Reception support services.

## Adjudicator Management

The ARB has position descriptions in place for the functions of the Chair, Vice-Chairs and Members. Training for Members consists of the Society of Ontario Adjudicators and Regulators (SOAR) programs, internal mentoring and ad hoc regional training sessions. A standing adjudicative committee is also in place.

## 3 THE PARTICIPATING TRIBUNALS

The OMB has position descriptions in place for the Chair, Vice-Chairs and Members. Annual performance reviews are conducted for all Members, which include reviews of the conduct of hearings and decisions as well as development and learning plans. A continuous education committee exists, and programs include SOAR, ad hoc and regular annual programs. A series of internal committees with membership from OIC appointments and department heads have been established for Quality Assurance, ADR, Professional Development, Rules, Technology and Case Management.

The ERT has position descriptions for adjudicators and conducts competency-based performance reviews within six months of appointment for new Members and annually for all Members. The ERT has set standards for the writing of decisions and performance measures for their issuance. Training for Members includes SOAR, Stitt Feld Handy ADR and advanced ADR for Vice-Chairs, internal mentoring, regular and ad hoc workshops and learning programs.

Training in the CRB consists of SOAR and ad hoc programs.

### Hearing Processes

The OMB, ARB and ERT exercise similar forms of statutory powers and adjudicate with similar rules and procedural practices. Although non-binding and advisory, CRB hearings closely resemble hearings conducted by the OMB, ARB and ERT. The BON does not conduct hearings.

To a significant extent, a common community of users appear before the Tribunals. It is often the same members of the Bar and their firms who appear regularly as counsel before the Tribunals. Appointees to all the Tribunals are traditionally recruited from within a broad but common community of users and counsel.

The Tribunals run and administer similar hearing processes. All are governed by the *Statutory Powers Procedure Act*.

The OMB, ARB and ERT are, in the process of adjudication, entitled and required to make findings and conclusions of law and fact.

As previously noted, the Tribunals all offer some form of non-mandatory mediation conducted mainly by adjudicators who have been provided with varying degrees of mediation training.

While some of the Tribunals are entitled in some matters to conduct written or electronic hearings, most hearings are conducted in “face to face” sessions with parties.

With the exception of the BON, the Tribunals generally resolve disputes by way of final adjudication with reasons, following a civil trial-like hearing process.

Most decision making requires the exercise of discretion and draws on the expertise of the adjudicator.

The OMB, ARB and ERT stream cases on the basis of type of application and complexity. These Tribunals use different case management protocols depending on whether a particular dispute is identified as simple or complex.

Final decisions of the Tribunals are subject to either appeal or judicial review. On review or appeal, the courts extend some degree of deference to the Tribunals in recognition of expertise and the quality of adjudication.

While the OMB, ARB and ERT each publish and administer their own Rules of Practice and Procedure, much of these sets of Rules are common and consistent.

## Preliminary Consultations

**Between September 1, 2006, and January 15, 2007, the Facilitator met and consulted with a broad range of municipal, environment and land planning stakeholders. More particularly, the Facilitator met with the following:**

- Tribunal Chairs, adjudicators, senior managers and legal counsel;
- Canadian Bar Association Municipal and Environmental Section Executive members;
- Private counsel and law firms identified by the Tribunals;
- Institutional parties who appear regularly before the Tribunals;
- Trade, industry and professional associations that represent the interests of parties who appear before the Tribunals;
- Administrative law academics.

In order to encourage an open dialogue, the informal consultations were conducted on a confidential basis. Those consulted were advised that comments, observations and input provided would be reflected in this Interim Report but not attributed to any particular source. More particularly, the Facilitator was interested primarily in individual or institutional responses to suggestions or ideas related to the clustering exercise rather than general observations about whether the Tribunals were performing well or poorly. To that extent, this Interim Report is not an assessment of current performance.

What follows is a summary of the information provided to the Facilitator during the informal consultations. This information is organized into the following categories: Structure, Operations and Procedure, and Membership.

## Structure

**All five Tribunals deal with and resolve disputes that arise out of the land assessment, use and development process. To the extent that there are opportunities to improve service through more consistent practices across the Tribunals, it makes practical sense to maximize the appropriate integration of services under one physical and technological roof.**

There is widespread support for the idea of placing the Tribunals in one common physical space. This would permit the sharing of hearing and meeting rooms and the provision of professional, administrative and support services.

The ability of the public to access, navigate and understand the work of the Tribunals would be enhanced if there were one single public interface or portal. This could be easily accomplished if the Tribunals were co-located and one single website was to be developed as a single virtual access portal.

There is a concern that some of the Tribunals may report to a line Ministry for administrative purposes and the same Ministry appears before the Tribunal as an institutional party. These circumstances may call into question the ability of the Tribunal to be seen as acting independently in treating and dealing with the Ministry as it would any other party.

There is a question of the perceived need to continue to operate the BON as a notionally separate agency from the OMB.

With respect to the relationship between the CRB and the OMB, it is noted that under recent amendments to the *Ontario Heritage Act* (OHA), the OMB increasingly deals with heritage issues and is developing the necessary expertise to deal with these issues. This sharing of issues and expertise between the CRB and the OMB is further encouraged by the new cross-appointment provision in the OHA. As experience with the new legislation is gained over time, it will be important to re-examine the respective roles of these two agencies.

The ARB and the OMB already enjoy a significant degree of integration. They are presently co-located and share a common senior management complement. Further integration of professional, administrative and support services would enhance flexibility and consistency in adjudication and capacity.

### **Operations and Procedure**

#### **The Tribunals as a group are well regarded, but there are perceived differences of ability and capacity.**

The OMB and the ERT are generally regarded as having made significant improvements in case management, standardized rules and procedures, processes and timelines over the last two to three years.

The ARB is seen to be very effective in dealing with its high volume of simple track residential tax appeals. There is some expressed concern about the ARB's capacity to deal with more complex issues and cases, such as industrial and commercial assessment litigation.

Differences in Rules and Procedures across the Tribunals may not be necessary except where they may be required by a particular legislative scheme. A shared uniform set of general Rules of Practice and Procedure may facilitate public access and understanding.

The Tribunals could benefit from an increased use of mediation and appropriate dispute resolution techniques. Mediation, and particularly early mediation, should be considered routinely in a broader range of disputes. Consideration should be given to the use of a commonly shared mediation services unit to provide mediation services to all Tribunals.

The Tribunals should consider a broader use of teleconferencing, electronic hearings and e-filing.

### **Membership**

#### **Users want to ensure that the best and most expert adjudicators can be recruited and retained by the Tribunals.**

Tribunals should move to full-time appointments where possible, so as to ensure that the first priority of adjudicators is the work of the Tribunal.

The recruitment and retention of expert adjudicators has been alleviated to some degree by the government's new remuneration and appointments policy, but appointment term and remuneration remain a continuing concern for some.

Training of adjudicators should be enhanced and regularized. Qualified and expert adjudicators are seen as perhaps the most essential feature of a successful Tribunal operation.



Options for change are proposed for purposes of further comment and discussion in response to the concerns and comments expressed during the informal consultation phase.

It should be understood that these options for change will only see eventual implementation through this exercise if individual Tribunals decide to voluntarily adopt them, consistent with government direction. The Facilitator has no mandate to direct or require Tribunal adoption or compliance with any proposed changes.

Some aspects of the options for change are based on assessment and consideration by the Facilitator in attempting to meet and address the comments received to date.

Many of the proposed options for change reflect practices that are already in place to varying degrees in some Tribunals within the group. These options are proposed so that all of the Tribunals may benefit from a particular practice and collaboratively work towards the development of best practices.

## **Options for Change are organized as either Operational, Membership or Procedural.**

### **Operational Change**

The suggested options for operational change focus on the degree to which some services either provided or used by the Tribunals can be offered in a shared fashion. These proposals are perhaps the most critical in this Interim Report and go to the heart of the clustering exercise. The use and the provision to the public of shared services will ensure the existing pool of resources within the Tribunals are used to maximum effect. The coordination of the delivery of services will create a simpler, and hence more accessible, interface for public use.

#### **1. The Tribunals should consider co-location for purposes of sharing the same physical space to provide one access portal for the public.**

The Tribunals could share a physical space. In a single physical space, the Tribunals could share common office space and administrative services. These could include: reception, security, library, mail room, printing, file storage, hearing rooms and facilities for electronic and teleconference hearings.

The governance structure and the details of the shared services arrangements would need to be determined.

#### **2. The Tribunals should consider adopting one single web access portal for “virtual” co-location.**

Virtual co-location would provide a simpler and more accessible source of information and guidance for the public.

Information technology and communications expertise could be pooled in order to simplify public access to forms, publications and decisions. E-filing and public monitoring status could be extended from some Tribunals to all Tribunals.

**3. Once co-located, the Tribunals should consider sharing operational units that provide similar and consistent types of different professional, administrative and support services.**

The Tribunals could share a full range of support services within the same physical location. These could include operational units providing legal services, planning expertise, mediation services, communications, training and education, administrator and adjudicator support.

Shared services permit greater flexibility, efficiency and access to expertise within existing resources. This will lend particular assistance to those Tribunals that experience significant fluctuating caseloads.

## **Membership Change**

Options for membership change are intended to enhance training, the acquisition and maintenance of adjudication and mediation skills and abilities, and generally the quality and consistency of dispute resolution outcomes. These options are also responsive to the government's expressed intention to promote the "professionalization" of adjudication within the Ontario Public Service.

**4. The Tribunals should consider moving over time to an adjudicator model that is mainly full-time as opposed to part-time.**

The work of the Tribunals should be the first and primary responsibility for adjudicators. The Tribunals should be able to schedule and assign work to adjudicators on a Monday to Friday basis during normal office hours and to expect and require adjudicator attendance at training and committee meetings. These objectives are difficult to obtain where adjudicators are appointed on a part-time basis and have duties, responsibilities and priorities other than the work of the Tribunals.

Part-time appointees would continue to be appropriate where there is a demonstrated need that cannot be met through a full-time appointment – for example to obtain particular forms of expertise or skill sets, meet regional or other particular representational demands or support significant fluctuations in caseloads.

Full-time appointments are more appropriate for purposes of quality control and are consistent with the government's broader objective of creating a complement of full-time professional adjudicators within the Ontario Public Service.

**5. The Tribunals should consider the development of position descriptions in a standardized format for adjudicators and Chairs.**

Position descriptions used in tandem with core competencies would enhance the Tribunals' ability to recruit, train and assess adjudicators.

Position descriptions aid recruitment and inform interested applicants of the duties and qualifications required for the position. They would bring consistency in nomenclature and requirements across the Tribunals among similar positions.

**6. The Tribunals should consider the development of a written set of core competencies for adjudicators and Chairs.**

Written core competencies should be developed using a standardized format. While there would continue to be certain skills and knowledge that are unique to each Tribunal, there are also at a general level a number of competencies that are shared across the Tribunals. Increasingly, the development and use of written core competencies are understood to be part of best practices in any tribunal across the administrative justice system.

Core competencies would further assist in the recruitment, assessment and development of adjudicators by describing how the required skills, qualifications and behaviours are used for effective performance in the position. Core competencies could therefore be used to appropriately assess and enhance the performance of Members through development while they are in the position.

Core competencies could assist in ensuring consistent quality in decision writing, expertise, hearing management and the appropriate adjudicator skill set.

**7. The Tribunals should consider the adoption of a uniform Code of Conduct for adjudicators and Chairs.**

A uniform Code of Conduct would provide needed direction to adjudicators who may be administering a greater and more challenging array of processes and procedures and will strengthen the integrity of the cluster as a whole.

The development of a Code of Conduct is consistent with broader initiatives across the Ontario Public Service and in other jurisdictions and recognized as a critical component of tribunal best practices.

**8. The Tribunals should consider the adoption of written protocols for the recruitment and assessment of adjudicators.**

Certainty around how adjudicators are recruited within the Tribunals and assessed once they are in the position would further enhance the ability of the Tribunals to control the quality of adjudication.

Certainty around adjudicator assessment would also enhance the professionalism and accountability of Tribunal Members.

Tribunal protocols for adjudicator recruitment contribute to the legitimacy of the process.

**9. The Tribunals should consider the adoption of a common and formalized adjudicator training program.**

Current training is mixed and informal across the Tribunals. While training tailored to the particular expertise and subject matter of each Tribunal would continue to be appropriately delivered by each Tribunal to its own adjudicators, there are broad areas of required skills and competencies that are shared across the Tribunals. Common and regularized training could be provided in these latter areas. The pooling of training resources may allow better access for the smaller Tribunals and more opportunities to meet specific training needs. Analysis of individual member core competencies can augment internal opportunities and would not only recognize excellence of individual members, but also further enhance consistency among similar duties and skills.

## Procedural Change

Options for procedural change are driven by the need to take maximum advantage of the entire range of flexible practices and procedures now available to administrative tribunals. At the same time, these should be as simple and consistent as possible so as to ensure public understanding and accessibility.

### **10. The Tribunals should consider taking steps to harmonize those portions of their Rules of Practice and Procedure that are of general application and not specifically tied to particular statutory regimes. These Rules of general application should be described and explained in appropriate Practice Directions and Information Bulletins.**

The Tribunals should consider the adoption of one set of general Rules of Practice and Procedure to deal with matters of process that are not necessarily tied to a particular statutory scheme.

There are and would remain certain Rules that are unique and specific to each Tribunal. General and shared Rules would remain subject to those specific Rules as required by legislation or regulation.

The use of practice directions, notices to the community and information bulletins would assist in managing community expectations around issues of practice and procedure.

### **11. The Tribunals should consider adopting the practice that all written decisions be reviewed by the Chair, Vice-Chairs or Counsel to the Chair for adherence to style, format and expression of reasoning.**

For purposes of quality control, it is an accepted practice within the administrative justice system for Chairs to establish some form of decision review to ensure consistency of style, format and the expression of reasoning. Like many of the proposed options for change, this practice already occurs to different degrees within the Tribunals.

Consistent decision review does not deal with the content of the decision or the outcome, and in this way does not compromise the independence of the individual decision maker.

### **12. Chairs should exercise clear and primary responsibility for the assignment of panels of adjudicators.**

The assignment of work by the Chair reinforces and strengthens the reporting relationship between adjudicators and the Chair. Although some aspects of case assignment can be appropriately delegated to senior Tribunal staff, the Chair should retain final control over the assignment of cases to adjudicators and panels.

### **13. The Tribunals should consider the use of a commonly shared mediation unit whose primary skill set is mediation.**

While each of the Tribunals offers mediation to varying degrees, there are significant opportunities for the use of persons deployed as mediators, with that being their primary skill set.

**14. The Tribunals should consider in appropriate cases the assignment of mediators early in the case management process.**

While mandatory mediation is not recommended, the expectation that parties should be prepared to participate in mediation in the normal course is becoming a standard feature of contemporary tribunal best practices.

There are some types of disputes where early mediation may not be appropriate – for example where overriding public interest, rights-based and multi-party issues could necessarily limit the scope of mediation. Where it is appropriate however, the increased use of early mediation could significantly free up and redirect resources now used for scheduling and conducting hearings.

**15. The Tribunals should encourage and facilitate regular meetings and discussions amongst adjudicators to deal with issues of policy, law and practice.**

Balanced against the principle that “she who hears decides” is the principle that similarly situated litigants should receive comparable and consistent adjudicative outcomes. This is only possible in a tribunal that encourages a culture of internal communication to deal with issues of practice, policy and discretion.

Tribunals should be designed in a manner that facilitates and promotes interaction between adjudicators and staff so that there are regular opportunities to discuss and reflect on the work of the Tribunal.

While this goal is particularly challenging in tribunals with regional and/or part-time adjudicators, this is usually where the need for this type of process is even more critically important.

Adjudicators should be encouraged and supported in their discussions and exchanges with colleagues. Decisions that change or run counter to established understandings should be discussed internally before release.

**16. The Tribunals should consider the establishment of a common Community Advisory Committee.**

A Community Advisory Committee is comprised of individuals who use the services of the Tribunal and provides advice and feedback to the Tribunal about its operations. Some of the Tribunals already utilize such a forum. The establishment of such a committee is understood to be a tribunal best practice.

There will be common and shared issues that will be of concern to the broader community of users and counsel who appear before all the participating Tribunals. While individual Tribunals should continue their own committees, there would be value in having a commonly shared forum to deal with issues affecting all Tribunals.

The Agency Cluster Facilitator welcomes your comments on the proposed options for change. You are invited to provide your written submissions by February 28, 2007.

You may send your comments by mail, fax or e-mail to:

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All submissions received by the Agency Cluster Facilitator will be used to assist the Facilitator in assessing the proposed options. This process may involve disclosing comments or summaries of information provided in submissions to other interested parties, and the information obtained may form part of a future public report.

Disclosure of information received in submissions will be without attribution. The personal information of individuals providing submissions, such as names and contact details, will not be disclosed without consent.

If you have any questions about the collection, use or disclosure of information provided in submissions, please contact Michael Uhlmann, Senior Project Consultant, at (416) 326-7345.

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