

Part II - Role of Staff

This part of the paper looks at the role of Board staff in decision making. Within the last several years, the Board has employed a different role for staff and Board Members in the two types of decision making: in non-adjudicative processes and written hearings, staff provide legal, technical and policy expertise and analysis and Board Members take that into account when making a decision. In most oral hearings, staff does not provide this role. The Board relies on parties (applicants and intervenors) to provide substantive input; staff facilitates this input. Specifically, the parties are responsible to put forward and evaluate all options that may be considered by a panel in a proceeding. Thus, in the vast majority of processes at the Board that do not involve oral hearings, there is a division of responsibility within the Board that allows the expertise of the entire institution to be drawn upon to provide input respecting the identification and evaluation of options for the Board to take into account in its decision making. In oral hearings, the universe of possible solutions must come from the parties to the proceeding. The institutional expertise of the Board is not drawn upon by panels.

This practice may not facilitate the optimal achievement of the Board's statutory mandate.

The Board has a statutory mandate to exercise its expertise in both adjudicative and non-adjudicative decision making. The practice of isolating its adjudicative function from its institutional expertise is inconsistent with the expectations of a body with substantive expertise which the courts have recognized as meriting deference.

An issue which then arises is how to integrate the Board's substantive expertise in its adjudicative processes to ensure that processes are consistent with the Board's commitment to procedural fairness.

Each of these will be addressed in turn.

(i) Expertise: Adjudicative and Substantive

The distinction between adjudicative and substantive expertise arises in the context of identifying the level of deference that courts accord decisions of tribunals on the grounds that the tribunal is exercising expertise. In determining the tribunal's expertise, a key issue is whether the tribunal is primarily responsible for the resolution of disputes between parties (adjudicative expertise) or the implementation of policy (substantive expertise). Where the tribunal exercises substantive expertise the courts will accord its decisions with greater deference.

Thus, for example, in *Monsanto v. Ontario (Superintendent of Financial Services)*¹⁵, the Supreme Court of Canada considered the degree of deference owing to a decision of the Financial Services Tribunal ("FST") respecting the distribution of actuarial surplus upon the partial wind up of a pension plan. The Court reviewed the statutory mandate and make up of the FST and held, although the FST had an expertise in holding hearings, it did not have substantive expertise deserving of deference. According to the Court:

"...the Tribunal does not have specific expertise in this area. The Tribunal is a general body that was created under the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28 ("*FSCOA*"), s. 20, to replace the specialized Pension Services Commission. It is responsible for adjudication in a variety of "regulated sector[s]" (*FSCOA*, s. 1), including co-operatives, credit unions, insurance, mortgage brokers, loans and trusts, and pensions (*FSCOA*, s. 1). In addition, the nature of the Tribunal's expertise is primarily adjudicative. Unlike the former Pension Services Commission or the current Financial Services Commission, the Tribunal has no policy functions as part of its pensions mandate (see *FSCOA*, s. 22). As noted in *Mattel Canada, supra*, and in *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, involvement in policy development will be an important consideration in evaluating a tribunal's expertise. Lastly, in appointing members to the Tribunal and assigning panels for hearings, the statute advises that, to the extent practicable, expertise and experience in the regulated sectors should be taken into account (*FSCOA*, ss. 6(4) and 7(2)). However, there is no requirement that members necessarily have special expertise in the subject matter of pensions. The Tribunal is a small entity

¹⁵ [2004] 3 S.C.R. 54

of 6 to 12 members which further reduces the likelihood that any particular panel would have expertise in the matter being adjudicated (*FSCOA*, s. 6(3)).

Overall, there is little to indicate that the legislature intended to create a body with particular expertise over the statutory interpretation of the Act. The Tribunal would not have any greater expertise than the courts in construing s. 70(6). Thus, this factor also suggests a lower amount of deference is required to be given to the Tribunal's decisions on the issue of statutory interpretation."

As a result, there are two major indications that a tribunal has substantive expertise: first, a statutory requirement that tribunal members have expertise; and second, that the tribunal has a non-adjudicative policy role.

These two components were also considered by the Federal Court of Appeal in *Canada (Commissioner of Competition) v. Superior Propane Inc.*¹⁶ In that case, the Federal Court of Appeal found that the appointment process of members to the Competition Tribunal was sufficient to inject the requisite expertise in the Tribunal.¹⁷ However, the Court also held that the substantive policy expertise of the Competition Bureau could not clothe the Tribunal with expertise because the Bureau and the Tribunal were not part of an integrated organization. According to the Court:

"...the Tribunal is an adjudicative body. Just as it has done with the administration of human rights legislation, Parliament has divided responsibility for administering the Competition Act between the Competition Bureau, the policy-making, investigative and enforcement agency, headed now by the Commissioner, and the Tribunal, the adjudicative agency. In this respect, the Tribunal is different from multi-functional administrative agencies, such as securities commissions in many provinces, which typically have wide powers that match their regulatory mandate. The absence of broad policy development

¹⁶ [2001] F.C.J. NO. 455

¹⁷ Specifically, the Court noted that, prior to appointing members of the Tribunal, "the Minister must consult with an Advisory Council comprising not more than ten members, who, the CTA, subsection 3(3) provides, are appointed from those

"...who are knowledgeable in economics, industry, commerce or public affairs and may include, without restricting the generality of the foregoing, individuals chosen from business communities, the legal community, consumer groups and labour."

powers is a factor that limits the scope of the Tribunal's expertise: *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at page 596.”

It was therefore the separation of the policy role of the Bureau from the adjudicative role of the Tribunal which limited the scope of the latter's expertise. As the Court noted, the Tribunal is an adjudicative, not a policy body.

Given that the *Ontario Energy Board Act* does not contain a requirement that Board Members may only be selected from a pool of experts, it is helpful to focus on how the non-adjudicative policy making role feeds into a tribunal's expertise. This has been referred to in several cases. For example, in *Mattel*, the Court noted that, in addition to statutory requirements for expert appointments, the Courts will also look to “whether any special procedures or non-judicial means of implementing the Act apply, and whether the tribunal plays a role in policy development” when determining whether a tribunal has substantive expertise. In that case, the Court found that there was some limited expertise in the Tribunal because its “policy-making role is limited in that its function is primarily research oriented, and the CITT cannot elevate its policy recommendations to the status of law.”

Similarly, in *Pezim v. British Columbia (Superintendent of Brokers)*¹⁸, the Supreme Court of Canada said the following with respect to securities commissions:

Where a tribunal plays a role in policy development, a higher degree of judicial deference is warranted with respect to its interpretation of the law. This was stated by the majority of this Court in *Bradco [United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.]*, [1993] 2 S.C.R. 316] at pp. 336-37:

... a distinction can be drawn between arbitrators, appointed on an *ad hoc* basis to decide a particular dispute arising under a collective agreement, and labour relations boards responsible for overseeing the ongoing interpretation of legislation and development of labour relations policy and precedent within a given labour jurisdiction. To the latter, and other similar specialized tribunals responsible for the regulation of a specific industrial or technological sphere, a greater degree of deference

¹⁸ [1994] 2 S.C.R. 557

is due to their interpretation of the law notwithstanding the absence of a privative clause. (emphasis added)

In the case at bar, the Commission's primary role is to administer and apply the Act. It also plays a policy development role. Thus, this is an additional basis for deference. However, it is important to note that the Commission's policy-making role is limited. By that I mean that their policies cannot be elevated to the status of law; they are not to be treated as legal pronouncements absent legal authority mandating such treatment.

As indicated, in the *Superior Propane* case, the Federal Court of Appeal held that the Tribunal did not share the policy expertise of the institution because the Bureau staff's policy function was isolated from adjudicative decision making.

The non-adjudicative and policy roles are particularly important in considering whether it is appropriate for decision makers to be isolated from the institutional expertise of the Board. The Board clearly has extensive non-judicial tools through its rule and code making authority. In fact, because the Board's rule and code making authority imposes rules that are binding on both of panels and industry participants, this authority is much stronger than the non-binding policy powers referred to by the courts in *Mattel*, *Pezim* and *Superior Propane*.

The key point here is that, when exercising those non-judicial means, the Board decision makers are not quarantined from the rest of the institution. Board Members make the rules and codes after receiving input from staff as well as stakeholders. The ultimate code or rule is the culmination of the work of the institution — both staff and Board Members. The expertise reflected in rule and code making is thus an institutional expertise. It is difficult to argue that this institutional expertise can infuse the adjudicative decisions of the Board if the Board deliberately quarantines the adjudicative decision-making process from that expertise. To the contrary, such an approach would mirror, on a voluntary basis, the mandatory separation of policy functions and adjudicative functions in agencies such as the Competition Bureau and the Competition Tribunal.

There are two key consequences of insulating panels from the institutional expertise of the Board. The first, as indicated, is that the Board may not be able to claim the degree of deference that is accorded expert tribunals.

The second and more fundamental problem is that the Board is not meeting its statutory mandate. If the Board has a policy mandate but exercises only an adjudicative function, it is not meeting the responsibility that the legislature has assigned to it. Dean Landis of Harvard Law School identified the defining feature of administrative processes as follows:¹⁹

“The [administrative] process to be successful in a particular field, it is imperative that controversies be decided as ‘rightly’ as possible, independently of the formal record the parties themselves produce. The ultimate test of the administrative is the policy that it formulates; not the fairness as between the parties of the disposition of a controversy on a record of their own making.”

The Board’s public interest mandate approach not only runs counter to the approach which would have the Board only adjudicate upon parties’ disputed issues, it puts an affirmative duty on the Board to ensure that public interest issues are addressed. This was expressed by the United States Court of Appeal in the context of the Federal Power Commission (the predecessor to the FERC):²⁰

“In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.”

This in turn puts a positive duty on staff to identify and evaluate options to present to the panel in a proceeding. The authors of Macaulay and Sprague, *Practice and Procedure before Administrative Tribunals* quote approvingly from a statement by the U.S. Federal

¹⁹ Landis, *the Administrative Process* (Harvard, 1938) at 39.

²⁰ *Scenic Hudson Preservation Conference* U.S. App. LEXIS 3514 [32-33]

Trade Commission: "...if the staff fails adequately to present the public interest and to raise all the relevant questions, no one else will".²¹ According to Macaulay and Sprague:²²

"What is essential to realize is that a tribunal has a duty to provide a balanced record, to test every assumption, to challenge every impact and wring out every issue. *No tribunal* can wait for the apple to fall. It must shake the tree. This balance is obtainable through the active participation by staff in the hearing process."

In other words, for Board staff to proactively put before the Board the public interest position on matters where it is relevant is both a distinct role from that of the parties and is consistent with the Board's statutory mandate and responsibilities. Specifically, in making its decisions, the Board should not be limited to the options put forward by parties or the evaluation of those options by the parties. Panels will benefit from staff's identification and evaluation of options for the Board to consider.

In conclusion on this point, the Board's policy mandate and expertise should inform decisions that result from the adjudicative process. It is therefore inappropriate to quarantine the decision makers from the institutional expertise in making those decisions. The next part of this report reviews the way in which this may be done in a manner consistent with the Board's commitment and legal responsibilities as they relate to a fair and open hearing process.

(ii) Open and Fair Hearings

As an adjudicative tribunal, the OEB must make its decisions in accordance with the statutory and common law rules respecting fairness and due process. The issue is the content of these rights as they relate to positions taken by staff. Specifically, given that staff may assist panels in the deliberative process, the question is whether it is appropriate for the same staff to identify and evaluate options in an oral hearing. In legal terms, the

²¹ (Toronto: Carswell, 1988), at 14-8.2.

²² Ibid., at 14-12.

question is whether this dual role is consistent with the requirements of fairness that attend the Board's hearing process. Addressing this first requires an elaboration of the role of staff being advocated in this report.

The staff role being proposed here is the identification and evaluation of options for consideration by the panel. This involves demonstrating leadership in the hearing room, but not for the purpose of supporting or opposing a party's position. Staff's only driver is the public interest, and they remain neutral as between parties. Their analysis may lead them to see one argument or option as having greater public interest value than another. This is not the same as taking an adversarial position against a party. There are clearly limitations on how adversarial staff may be in pursuing its positions. The courts have noted that tribunal staff, where leading evidence and making submissions, represents the public interest, and therefore have a different responsibility than a private party. The seminal statement in the area is from the British Columbia Supreme Court in *Omenieca Enterprises Ltd. v. British Columbia (Minister of Forests)*:²³

“...counsel for the tribunal may be called upon to lead evidence, cross-examine witnesses and make submissions with a view to putting the tribunal as fully in the picture as possible. In so doing, it is important for counsel to proceed in a spirit of disinterested inquiry and to avoid the appearance of partisanship of behalf of any interest. It is undesirable to be too dogmatic in attempting to define the proper functions of counsel to administrative tribunals in all circumstances. The overriding objective is always to ensure that the proceedings are fair and impartial.”

Provided that staff are pursuing a public and non-partisan interest, and provided that staff positions are put on the record or otherwise disclosed to the parties, staff involvement both in the hearing and in assisting the Board following a hearing is consistent with the duty of fairness owed to the parties in the circumstances of a Board hearing.

The Supreme Court of Canada described the underlying purpose of the duty of fairness as follows in *Baker v. Canada*:²⁴

²³ (1992), 7 Admin. L.R. (2d) 95 (B.C.S.C.) at 99-100.

²⁴ (1999), 174 D.L.R. (4th) 193 at 211.

“I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained with the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.”

The Court listed a number of factors to be considered in identifying the content of the duty of fairness in any particular case. The analytic framework employed by the Court to evaluate the duty of fairness is based on a contextual assessment of the tribunal and its operations. As the Court observed in *2747-3174 Quebec Inc. v. Quebec*:²⁵

“As is the case with the courts, an informed observer analysing the structure of an administrative tribunal will reach one of two conclusions: he or she either will or will not have a reasonable apprehension of bias. That having been said, the informed person's assessment will always depend on the circumstances. The nature of the dispute to be decided, the other duties of the administrative agency and the operational context as a whole will of course affect the assessment. In a criminal trial, the smallest detail capable of casting doubt on the judge's impartiality will be cause for alarm, whereas greater flexibility must be shown toward administrative tribunals. As Lamer C.J. noted in *Lippe, supra*, at p. 142, constitutional and quasi-constitutional provisions do not always guarantee an ideal system. Rather, their purpose is to ensure that, considering all of their characteristics, the structures of judicial and quasi-judicial bodies do not raise a reasonable apprehension of bias. This is analogous to the application of the principles of natural justice, which reconcile the requirements of the decision-making process of specialized tribunals with the parties' rights. I made the following comment in *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, at pp. 323-24:

"I agree with the respondent union that the rules of natural justice must take into account the institutional constraints faced by an administrative tribunal. These tribunals are created to increase the efficiency of the administration of justice and are often called upon to handle heavy caseloads. It is unrealistic to expect an administrative tribunal such as the Board to abide strictly by the rules applicable to courts of law. In fact, it has long been recognized that the rules of natural justice do not have a

²⁵ (1996), 42 Admin. L.R. (2d) 1 at para. 45:

fixed content irrespective of the nature of the tribunal and of the institutional constraints it faces."

In addition to the attention paid to the institutional context of the tribunal and its operations, another clear point arising from the case-law is that the content of the duty can change depending upon the impact of the decision on the party to a proceeding. As the Court held in *Baker*:

"The more important the decision is to the lives of those affected and the greater its impact on that person or persons, the more stringent the procedural protections that will be maintained. This was expressed for example by Dickson J. (as he then was) in *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105 at p. 1113, 110 D.L.R. (3d) 311:

'A high standard of justice is required when the right to continue in one's profession or employment is at stake...A disciplinary suspension can have grave and permanent consequences upon a professional career.'

...

The importance of a decision to the individuals affected, therefore, constitutes a significant factor affecting the content of the duty of procedural fairness."

As a result, it is too simplistic to identify a single duty of fairness that the Board must meet in all of its proceedings. Some Board decisions have a greater impact on persons than others. It is therefore best to identify the content of the duty of fairness by reference to the impact of different types of Board decisions on the rights of various parties.

There is considerable case-law and academic discussion on the role of staff in administrative proceedings and how the boundaries of that role are different depending on the nature of the proceeding. For example, where staff acts as a prosecutor in a proceeding, the duty of fairness requires that staff not assist in the deliberative process. The Supreme Court of Canada put it as follows in 2747-3174 *Quebec Inc. v. Quebec*:²⁶

²⁶ (1996), 42 Admin. L.R. (2d) 1 at 125:

“This is not to say that jurists [i.e., lawyers] in the employ of an administrative tribunal can never play any role in the preparation of reasons. An examination of the consequences of such a practice would exceed the limits of this appeal, however, as I need only note, to dispose of it, that prosecuting counsel must in no circumstances be in a position to participate in the adjudicative process. The functions of prosecutor and adjudicator cannot be exercised together in this manner.”

In this decision, the Supreme Court of Canada endorsed the following quotation from the Ontario Court of Appeal in *Sawyer v. Ontario (Racing Commission)*²⁷

“But there is no doubt that his role was to prosecute the case against the appellant and he was not present in a role comparable to that of a legal assessor to the Commission as discussed by Schroeder, J.A. in *Re Glassman and Council of Colleges of Physicians & Surgeons*, [1966] 2 O.R. 81 at p. 99 [“Glassman”]. He was counsel for the appellant’s adversary in proceedings to determine the appellant’s guilt or innocence on the charge against him. It is basic that persons entrusted to judge or determine the rights of others must, for reasons arrived at independently, make that decision whether it or the reasons be right or wrong. It was wrong for the Commission, who were the judges, to privately involve either party in the Commission’s function once the case began and certainly after the case was left to them for ultimate disposition. To do so must amount to a denial of natural justice because it would not unreasonably raise a suspicion of bias in others, including the appellant, who were not present and later learned what transpired.”

Both of these decisions related to cases where the tribunal’s counsel was both a prosecutor and an advisor: these two functions were held to be incompatible.

Where staff is not in a prosecutorial role, the legal requirements are different. As indicated earlier, this is largely because the law imposes different types of procedural restrictions on tribunals where different rights of a person before it are at stake. Where, such as in the case of a prosecution, a person’s career and livelihood are at stake, the courts will impose greater restrictions on tribunals. Where the Board acts in its function as an economic regulator, these restrictions are reduced. Specifically, in this context, the courts’ concern with tribunal practices has tended to focus more on ensuring that staff submissions are disclosed to the parties. In other words, the courts do not require that

²⁷ (1979), 24 O.R. 673 (“*Sawyer*”) at 676

staff not make submissions in proceedings; rather, the emphasis is that parties are made aware of and have an opportunity to respond to staff submissions.

For example, in the *Glassman* decision referred to by the Ontario Court of Appeal in *Sawyer*, the College of Physicians & Surgeons retained independent counsel to advise on matters of law. Although the advice would be provided in prosecutions, the counsel was not a prosecutor. Counsel provided legal advice on the record and parties were given the opportunity to respond. Counsel was also present during the course of deliberations. The Court of Appeal held that the requirement for disclosure of counsel's advice was sufficient to meet any concerns about a denial of natural justice. In coming to this conclusion, the Court explicitly relied upon its earlier decision in *R. v. Public Accountants Council Ex p. Stoller*.²⁸ In that case, the Court again held that, in a non-prosecutorial position, counsel in the hearing may continue to advise the decision maker: "I point out again that on the authorities, a case such as this is not comparable to a trial where there is a prosecutor and an accused."²⁹

Thus, in the non-prosecutorial context, the courts' emphasis has been on ensuring that parties have the right to know and answer the case they have to meet. This involves a requirement that a decision maker not base his or her decision on facts which are not on the record and parties have the opportunity to respond to legal and policy arguments that are considered by the decision maker. The Supreme Court of Canada characterized this right as follows in *Consolidated Bathurst Packaging Ltd.* (1990), 42 Admin L.R. 1 at 38:

"Since its earliest development, the essence of the *audi alteram partem* rule has been to give the parties a 'fair opportunity of answering the case against [them]...It is true that on factual matters the parties must be given a 'fair opportunity...for correcting or contradicting any relevant statement prejudicial to their view'...However, the rule with respect to legal or policy arguments not raising issues of fact is somewhat more lenient because the parties only have the right to state their case adequately and to answer contrary arguments. This right

²⁸ [1960] O.R. 631.

²⁹ *Sawyer*, at . 698. For a more recent example of the restrictions in disciplinary proceedings, see: *Ahluwalia v. College of Physicians and Surgeons of Manitoba*, [1999] M.J. No. 55

does not encompass the right to repeat arguments every time the panel convenes to discuss the case.”

Similarly, in *Carlin v. Registered Psychiatric Nurses’ Association* Binder J. stated the following:³⁰

“In my opinion, in general, it is proper for counsel to:

1. Attend at the hearing of a tribunal, to provide advice to the tribunals, when *requested* by the tribunal to do so, provided, except in very special circumstances, that such advice is given *openly and in the presence of all interested parties*.
2. Assist the hearing tribunal in preparing and even drafting the reasons for decision of the tribunal.” (emphasis in the original)

The above passages suggest that, in the non-prosecutorial context, a fair trial requires ensuring that parties have the opportunity to know the case they have to meet. That right consists of being able to respond to law and policy arguments put forward by staff.

This approach is also demonstrated in cases where the courts have been critical of tribunals for not giving parties the opportunity to respond to staff positions. For example, in *B.P. Canada Energy Co. v. Alta (Energy & Utilities Bd.)*, the Alberta Court of Appeal found that a party’s right to know the case it had to meet was arguably violated because the Alberta Energy Utilities Board staff and the panel conducted examinations of “core logs and other data not in evidence at the hearing... The fact that the parties were not present for these examinations contributes to this issue’s seriousness.”³¹ The same Court, although dismissing a leave to appeal motion as premature, acknowledged that there may have been arguable issues for appeal with respect to staff’s presentation to the Board of “evidence or interpretation of evidence [that] is not disclosed to hearing participants.”³²

³⁰ (1996), 39 Admin L.R. (2d) 177 (Alta. Q.B.), at 199 (emphasis in the original).

³¹ (2003), 6 Admin. L.R. (4th) 163 at 173.

³² *Devon Canada Corp. v. Alberta (Energy & Utilities Bd)*, (2003), 3 Admin. L.R. (4th) 154 at 158

This is also aligned with academic opinion. In *Regulations of Professions in Canada*, J.T. Casey proposes the following approach:³³

“...the solution lies in the adoption of a procedure which permits counsel to a discipline tribunal to be present during deliberations but which also ensures that the dictates of procedural fairness are met. A commitment that the ‘prosecutor’ and counsel to the member facing charges will be given the opportunity to address any new legal issues or arguments which arise during deliberations and which were not previously canvassed by the parties in open hearings, would alleviate most of the concerns.”

This approach is supported in Jones and deVillars, *Principles of Administrative Law* (3d), where the authors state that providing parties with the opportunity to respond to any new issues raised in deliberations “is entirely consistent with the principles set out in *Consolidated Bathurst* and *Tremblay* and provides the better view of what are the appropriate constraints on counsel to an administrative tribunal.”³⁴

Finally, in the American context, William F. Pedersen has argued that openness in administrative tribunal decision making reflects an improved method of policing fairness than imposing restrictions on staff’s ability to communicate with panels.³⁵

“All these measures abandon splitting up the agency internally as a means of reducing bias. Instead, they treat the agency as a unit in which all staff members are available to advise in a final decision. They then open up the deliberations of that unit to the scrutiny of outside forces to a much greater extent than has been customary. The checks and balances on the agency remain, but they depend much less than they did on analogizing the agency to a court.”

A review of the case law and the literature suggests little support for the position that, as a legal matter, staff cannot both make submissions in a proceeding and continue to assist panels in preparing decisions in non-prosecutorial hearings. The key requirement is that parties be made aware of staff positions and have the opportunity to respond.

³³ (Toronto: Carswell, 1994) at 8-38 to 8-39)

³⁴ (Toronto: Carswell, 1999) at 325.

³⁵ “The Decline of Separation of Functions in Regulatory Agencies” (1978), 64 Virginia Law Review, 991 at 1031.

It is therefore recommended that:

- Board staff should participate in hearings with the objectives of identifying and evaluating options for the Board's consideration in a proceeding by reference to the public interest. Staff should be required to present its view of the public interest on the record so that parties may respond to it. Only in very rare cases, staff's participation in a proceeding in this role may be incompatible with its ability to assist the panel in its deliberative process. An example of this is where staff is in a prosecutorial role in a compliance proceeding in Part VII.1 of the Act.

Part III – Role of Parties

The role of the parties in OEB proceedings is linked to the role of staff. The minimal role of staff over the last several years has been accompanied by an increased reliance on parties to the proceeding. This has led to both benefits and costs. The benefit is that the OEB benefits from having a fully engaged stakeholder community. It is not unusual for a Board proceeding to have several representatives of groups representing residential customers, institutional customers, commercial customers, industrial customers, retailers, generators and environmental groups. These intervenors bring their perspective to bear on the complex problems addressed by the Board. The Board encourages intervenor participation through cost awards for hearings, Code/Rule development, and policy initiatives. It is one of the most extensive cost awards regimes in the country.

The cost of this approach is that the parties have been relied upon to represent, not just the particular interests they are retained to advance, but the totality of the public interest. As indicated, staff have not been used to add to the options presented to the Board. In addition to the issues respecting the Board's mandate discussed earlier, there are additional concerns to leaving the development of issues entirely to the parties.

One concern is that the interests claimed to be represented before the Board are extremely broad and cannot reasonably be presumed to align within the organizations that intervene

before the Board. For example, most parties before the Board claim to represent vastly broad and divergent groups, such as “residential customers”. Residential customers of energy consist of virtually every person resident in Ontario. It is inconceivable that every resident in Ontario is capable of constituting a single interest on complex matters of energy policy before the Board. For example, what is the interest of residential customers on the creation of retail commodity purchase options? Some customers, who have no interest in retail competition receive no benefit from this option. Other customers, who are interested in retail options, or who are served by retailers, may benefit from having more options available. In these circumstances, residential customers will have quite varied, and even conflicting, interests. A related example is whether residential customers benefit from policies that reduce price volatility of system supply. Some customers may and some may not. When faced with these types of issues, residential customer representatives who wish to advocate on behalf of residential customers must make a determination of which approach to support. In making this choice, they are effectively making policy trade-offs between different categories of customers.

Allowing these representatives to make the trade-offs themselves is not a problem for the Board if the intervenors’ representation is accepted as a meaningful but not exclusive input into the Board’s determination of what is in the interests of residential customers. In this case, intervenors representing residential customers present a perspective that the Board should consider. This only becomes a problem if the Board treats the customer representatives as representing the “sole” voice of residential customers and is unwilling to consider the matter further. In such a situation, the Board is expecting the intervenor to make the trade-offs that are involved in deciding on a position. In this case, the Board’s mandate to represent the interests of consumers (as well as other interests) is exercised by merely registering the opinion of the intervenor.

Another consequence of not using a proactive staff model is that the role of the parties may arguably have become somewhat open ended. Applicants and intervenors provided the entire landscape of options before the Board. With the participation of a proactive

staff that is representing the public interest, the role of parties to proceedings may take on a sharper focus. Intervenor, in particular, will have a clearer and more precise mandate to represent the interests of their constituency. This clarity should make their participation more valuable to the Board and perhaps even allow them to more clearly represent their client's interest.

The expectation of a clear and precise representational interest in an intervenor's participation may be demonstrated in a number of ways: standing, costs and conduct in a proceeding. Each will be addressed in turn.

With respect to standing, the Board's Rules of Practice provide that a "person applying for intervenor status must satisfy the Board that he or she has a substantial interest and intends to participate actively and responsibly in the proceeding..." The Rules also provide that every intervention application must identify "the interest of the intervenor in the proceeding and the grounds for the intervention."³⁶ While the Board has rarely refused a party standing to participate in a hearing, intervenor status has been denied in cases where the issues are beyond the Board's jurisdiction. Furthermore, it is very rare that an application for intervention status has gone beyond a *pro forma* statement that the outcome of a decision may have an impact on a constituency. To be fair, requiring greater specificity to support an intervention application is more difficult where proceedings are open ended and the issues are not developed with any level of specificity until well into the pre-hearing and even hearing stage. Unless issues are clearly identified at the outset of the proceeding, it is not realistic to expect that intervenors can clearly identify the issues that they are interested in pursuing as early as the standing stage of the proceeding. To the extent that the Board does move clear issue development to an early stage of the proceeding, it may be possible to consider more rigorous standing requirements at that early stage.

With respect to costs, the Board's practice is identified in its *Practice Directions on Cost Awards*. These directions set out eligibility requirements as well as granting the panel the

³⁶ *Ontario Energy Board Rules of Practice and Procedure*, Rules 23.02, 23.03

discretion to award partial or full costs of participating depending on a number of factors, especially the party's contribution to the proceeding. The Board's practice has been to occasionally discount an intervenor's cost awards based on its contribution. There is no known case of the Board refusing to allow an applicant the ability to recover its costs from utility customers. The Board's Business Plan indicates that it will carry out a review of its current funding model in this fiscal year. Given the complexity and contentiousness of the issues at stake in funding, it is probably better to not consider changes to the cost award regime at this stage, and leave that issue to be addressed in a more thorough review as planned. However, where a party (whether applicant or intervenor) needlessly extends proceedings, the Board's authority over cost awards and cost recovery provide it with the ability to impose financial consequences.

Finally, there is conduct in the proceedings – that is, the hearing itself (the pre-hearing process will be addressed below). Panels have the ability to control their process. They are thus clearly in the position to require parties to demonstrate how their participation relates to the interest that they represent. It may be that, as cases are more thoroughly developed through a more proactive staff, panels will be better placed to direct parties to clearly identify this role. This includes asking parties at the commencement of a hearing to indicate which issues they have an interest in and how the issue affects their constituency, and querying an intervenor representative if that representative's participation in cross-examination or argument does not appear to relate to the intervenor's constituency. This requirement can be expressed through greater engagement by the panel in supervising the questions and submissions of parties. As indicated, the Board's authority over cost awards and recovery of regulatory costs could also be used in this regard.

In summary, recommendations in this area are as follows:

- Parties to a proceeding should be required to demonstrate how their participation relates to the specific and particular interest of their constituency. This can be achieved through various methods, including asking parties at the commencement of a hearing to indicate which issues they have an interest in and how the issue

affects their constituency, and querying an intervenor representative if that representative's participation in cross-examination or argument does not appear to relate to the intervenor's constituency. This requirement can be expressed through greater engagement by the panel in supervising the questions and submissions of parties.

Part IV - Pre-Hearing Processes

The Board has broad authority to develop pre-hearing processes, specifically disclosure requirements and pre-hearing conferences. Each will be considered in turn.

(i) Disclosure

The Board has very broad powers to order disclosure of documents and other types of information.³⁷ The Board's standard practice has been to use the written interrogatory process. This process has some limitations. First, parties write interrogatories independently and at the same time; the result is considerable duplication of questions. Second, there is little cost to asking a large number of questions, so a large number are asked. Third, applicants face little consequence for providing non-responsive answers to questions. They may therefore avoid answering questions and, in anticipation of this, intervenors state their questions very broadly. The number of irrelevant interrogatories is also increased by the lack of clear issue definition in proceedings.

The Board has recently been experimenting with alternatives to written interrogatories, namely, technical conferences and written records. Technical conferences involve discovery of witnesses in the presence of other parties. Transcripts of conferences are admissible as part of the record in the proceedings. Where a witness cannot immediately provide an answer, an undertaking may be provided. An alternative to technical conferences is written records where affidavit evidence is filed and parties may schedule

³⁷ See S.P.P.A., s. 5.4.

their own cross-examinations where required. The key difference between the two is that the first is an event sponsored and organized by the Board, while cross-examination in the latter is scheduled and conducted by individual parties as required. Both of these discovery mechanisms have an advantage over written interrogatories in that answers are provided in real time and made available to others. They may also be more effective at clarifying technical issues. They are therefore timelier and less duplicative than the written interrogatory process.

A theoretical issue, which has not yet arisen in practice, is that disputes over appropriateness of questions may not be resolved at the technical conference. The Board's Rules of Practice do not explicitly address this issue, but it would be consistent with the Rules for a party to bring a motion to the Board to determine whether answers should be provided. Another alternative would be for a Board Member to attend at technical conferences to provide rulings as required. This would require an amendment to the Board's Rules of Practice.

It has been the practice that transcripts from technical conferences are used as a supplement to a witness's oral testimony, while transcripts from cross-examination on affidavits are used in lieu of oral testimony. However, that is not a necessary distinction, and transcripts may be used in either way. Where transcripts are used in lieu of oral testimony, the parties have been required to file written arguments addressing both factual and legal submissions. Using transcripts as an alternative to oral testimony has greater potential than is currently exercised at the Board. It is widely available in the courts, and can be used wherever there are no material facts in dispute, or where the real issue relates to the inference to be drawn from facts.³⁸ Given that it is the case in many Board proceedings, the Board could make much greater use of this process than is currently the case. Making greater use of this would be facilitated by explicitly outlining the process in the Board's Rules of Practice.

³⁸ Rules of Civil Procedure, Rule 38 and, for example, *Somerleigh v. Lakehead Region Conservation Authority*, [2005] O.J. 4798 and *Collins v. Canada (Attorney General)*, [2005] O.J. 2317.

(ii) Settlement

The *S.P.P.A* grants the Board broad authority to address the settlement or simplification of issues in a proceeding.³⁹ The Rules of Practice provide for settlement negotiations at the direction of the Board. Settlement discussions are often facilitated by external consultants or Board staff and are carried on without prejudice. Staff attend settlement discussions, but do not sign settlement agreements and information obtained in settlement negotiations is kept in confidence and, in particular, is not shared with the panel assigned to the proceeding.

Settlement negotiations sometime result in comprehensive proposals that resolve most or even all issues between the parties. Settlement proposals are filed with the Board. Where a settlement proposal is unanimous, the Board may approve the proposal and dispose of the issues that are subject to the proposal. A party who does not agree with the settlement of an issue is entitled to offer evidence in opposition to the settlement proposal and cross-examine on that issue at the hearing.⁴⁰

The Board has not explicitly adopted a policy towards settlements and, for example, has not expressly endorsed settlement as generally in the public interest. Given the public interest mandate of the Board, it is unlikely that such a general proposition would be possible.⁴¹ Although the Board has, on occasion, identified some specific issues that should not be settled, it has done so only rarely.⁴² Further, the Board has never indicated which issues it believes should be settled or the consequences for parties if there is no settlement. Rather, the settlement process has been largely left to the parties to work out among themselves.

³⁹ See *S.P.P.A.*, s. 5.3.

⁴⁰ See Ontario Rules of Civil Procedure, Rule 14.05(3)(c), Rule 38.01.

⁴¹ In the analogous example of negotiated rulemaking, the American courts have rejected the proposition that a regulator could bind itself to a negotiated agreement. The United States Court of Appeal stated that "It sounds like an abdication of regulatory authority to the regulated, the full burgeoning of the interest-group state, and the final confirmation of the 'capture' theory of administrative regulation." See: *USA Group Loan Services Inc. v. Riley* 82 F. 3d 708 (7th Cir. 1996) at 714. Quoted in, Alfred Aman, "Administrative Law for a New Century", in Michael Taggart (ed), *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 90 at 107.

⁴² The two examples where this has occurred are the IESO proceeding and the current NGEIR proceeding.

Given the lack of guidance from the Board as to the value of negotiated settlement, it is difficult to conclude whether the current process is successful or not. However, there are structural reasons inherent in the Board's process that may work against settlement.

First, the parties do not have clear incentives to settle in order to avoid a hearing. Specifically, the costs of both funded intervenors and utility applicants are passed through to ratepayers. The parties therefore do not bear the expense of proceeding with a hearing.

Second, the reasonableness of parties' positions or conduct within settlement negotiations is kept secret from the panel. Parties therefore do not face consequences for taking unreasonable positions. This may be contrasted with the judicial Rules of Civil Procedure where parties face cost consequences for turning down settlement offers that are more favourable than that obtained by a judgment.⁴³

The Board should provide guidance in the course of a proceeding with respect to its expectations for settlement and then provide incentives and other measures to encourage settlement. Specifically:

- The Board's expectations for settlement should be identified in a proceeding. Specifically, the Board should, prior to settlement discussions, advise parties which issues the Board believes should be settled and which issues the Board believes should go to a hearing.
- Board Members (other than the panel) should be made available to participate in the settlement of selected issues, such as through an in-chambers settlement conference or to review proposed settlement options and provide insight and perspective on the reasonableness of parties' positions;

⁴³ See Rules of Civil Procedure, Rule 49.

- Parties may be required to file their final offer on issues that the Board identifies should be settled. The panel may review these offers after releasing its substantive decision and may consider it in making cost awards and determining whether all of a utility's regulatory costs may be recovered from customers.