

## “This Board Has a Duty to Intervene”: Challenging the Spadina Expressway through the Ontario Municipal Board, 1963–1971

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Article abstract

This article examines the pivotal role played by the unelected Ontario Municipal Board (OMB) in the opposition to the Spadina Expressway, from initial proposals in 1963 to the expressway's 1971 cancellation by the provincial government. After considerable grassroots protests, the matter came to a head in a full OMB hearing in late 1970. There, the OMB had to balance majority interests—as expressed by Metro Council, strongly in favour of the project—versus minority interests of community activists, residents in the path of the expressway, and a growing international network of expressway opponents. Indeed, because the scope of the OMB's mandate was wide, it was able to study the effects of expressways elsewhere in North America. While the OMB eventually voted in favour of the expressway, this was the first non-unanimous decision in its long history. Chairman Joseph Kennedy's dissenting opinion stood up for minority rights, set the stage for a debate on the role of the OMB in municipal planning and governance, and made it palatable, legitimate, and respectable for the Ontario premier to cancel the expressway four months later. This article also discusses the OMB more generally, exploring its significance in light of continuing municipal debates surrounding the role of unelected land use tribunals versus local governments.

# ***“This Board Has a Duty to Intervene”: Challenging the Spadina Expressway through the Ontario Municipal Board, 1963–1971***

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*This article examines the pivotal role played by the unelected Ontario Municipal Board (OMB) in the opposition to the Spadina Expressway, from initial proposals in 1963 to the expressway's 1971 cancellation by the provincial government. After considerable grassroots protests, the matter came to a head in a full OMB hearing in late 1970. There, the OMB had to balance majority interests—as expressed by Metro Council, strongly in favour of the project—versus minority interests of community activists, residents in the path of the expressway, and a growing international network of expressway opponents. Indeed, because the scope of the OMB's mandate was wide, it was able to study the effects of expressways elsewhere in North America. While the OMB eventually voted in favour of the expressway, this was the first non-unanimous decision in its long history. Chairman Joseph Kennedy's dissenting opinion stood up for minority rights, set the stage for a debate on the role of the OMB in municipal planning and governance, and made it palatable, legitimate, and respectable for the Ontario premier to cancel the expressway four months later. This article also discusses the OMB more generally, exploring its significance in light of continuing municipal debates surrounding the role of unelected land use tribunals versus local governments.*

*Le but de cet article est d'examiner le rôle important des commissaires de la commission des affaires municipales de l'Ontario (CAMO), qui ne sont pas élus, dans l'opposition de l'autoroute Spadina entre la période initiale, en 1963, jusqu'à l'abandon du projet, en 1971. Après des années d'opposition populaire, l'enjeu d'autoroute est arrivé devant la CAMO au cours des derniers mois de 1970. La CAMO a alors dû peser les intérêts majoritaires—comme ceux du Metro Council, qui était en faveur de l'autoroute—et les intérêts minoritaires des militants communautaires, des propriétaires qui auraient été déplacés par l'autoroute et le réseau croissant des individus et institutions qui s'opposaient à la construction de l'autoroute. Le mandat de la CAMO lui a donné une grande marge de manoeuvre pour évaluer cet enjeu et elle a étudié l'influence de plusieurs exemples d'autoroutes dans d'autres villes en Amérique du Nord. Après cette étude, la CAMO a voté en faveur de l'autoroute. Mais, pour la première fois dans la longue histoire de cette institution, ses membres n'étaient pas unanimement d'accord. L'opinion de Joseph Kennedy, le président de la CAMO, était en faveur du groupe minoritaire. Avec son opinion, il a créé un terreau fertile pour un débat sur le rôle de la CAMO dans l'aménagement urbain et la gouvernance municipale. De plus, il a créé les bonnes conditions pour le premier ministre de*

*l'Ontario lui permettant d'intervenir et d'annuler l'autoroute quatre mois plus tard. Cet article traite aussi du rôle général de la CAMO et son importance dans les débats municipaux entre les commissions d'aménagement du territoire, qui ne sont pas composées d'élus, et les conseils municipaux.*

“I do not believe that citizens have a right to overrule their elected representatives,” Ontario Municipal Board (OMB) chairman Joseph Aloysius Kennedy argued in February 1971, “but I do believe this Board has a duty to intervene in cases such as this one.”<sup>1</sup> In delivering the OMB's first dissenting opinion in its sixty-five years of existence, Kennedy noted the unusual nature of the case before him. His ruling affected an application by a group of community activists to rescind approval for the Municipality of Metropolitan Toronto's William R. Allen (Spadina) Expressway, which threatened to drive through several downtown neighbourhoods and set a further precedent for car-oriented municipal planning. Disagreeing with the two other men on the board, Vice-Chairmen William Shub and Robert McLennan McGuire, Kennedy issued an unprecedented minority opinion. While Shub and McGuire had expressed some reservations about the project, they ultimately bowed to the perceived legitimacy of the democratic process. Kennedy was instead willing to exercise the power of the OMB and stand for local rights against interests that threatened to drive a below-grade highway through the neighbourhoods of a minority of downtown residents. This case was significant not only because it was the first split decision reached by the OMB,<sup>2</sup> setting the stage for a debate about its role in municipal planning and governance, but also because this landmark decision helped make it palatable, legitimate, and respectable for Premier Bill Davis to cancel the Spadina Expressway less than four months later. This article will explore why activists took the approach they did, were heartened by the fight before the OMB, and celebrated Kennedy's dissent as setting the stage for the expressway's final defeat.

This case casts light on a number of issues not yet explored in the small literature on both the Spadina Expressway and the OMB. The article will begin by introducing the OMB, providing a brief institutional history while noting that the period under Kennedy's chairmanship (1960–1972) was an exceptional one due to his explicit balancing of the rights of the majority (as expressed by council decisions) with those of a minority, understood as the people affected by council decisions. Following this, the OMB's activities throughout the saga of the Spadina Expressway will be discussed, showing how this unelected, administrative tribunal

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was involved at almost every step of its planning and construction, culminating in the landmark split decision of January 1971. Throughout, this article will explore the role of the OMB, a particularly important question given the controversial role it continues to play vis-à-vis elected municipal governments.

The OMB, an administrative tribunal with members then appointed for life and without formal training, was involved in all steps of this monumental public works project in Metropolitan Toronto, from the Spadina Expressway's initial approval through to the tumultuous legal battles and its eventual cancellation by the province. The OMB's decision exemplifies the power placed in the hands of unelected officials to override democratic decisions based on the idea of “natural justice.”<sup>3</sup> Legal scholar John Chipman has noted that the OMB has exerted a greater influence on municipal life than the much-more-studied decisions of the formal judiciary.<sup>4</sup> However, Chipman's study of the OMB mentions the Spadina Expressway only in passing. Not surprisingly, given his focus on more contemporary concerns, he passes over the issue without mentioning Kennedy's dissenting opinion.<sup>5</sup> Indeed, his discussion of the OMB's decision in the Spadina case refers only to the majority opinion.<sup>6</sup> The role of the OMB is also briefly discussed in Albert Rose's study of Metropolitan Toronto, noting that the Spadina case exposed the question of whether the OMB should be an “ombudsman-like agency” or should focus on capital expenditures.<sup>7</sup> Alongside these works, the Spadina Expressway dispute has also been the subject of several studies.<sup>8</sup>

The Stop Spadina movement was a local example of a continental pattern. Freeway disputes had been emerging throughout the United States since the late 1950s, beginning in San Francisco but quickly spreading to New York City, Baltimore, Vancouver, and elsewhere.<sup>9</sup> The intellectual inspirations for them came from the works of writers like Jane Jacobs, Lewis Mumford, and others, who called for “coordinated planning, mass transit, and preservation of small-scale neighbourhood life in the modern world.”<sup>10</sup> In his study of several freeway revolts, historian Raymond Mohl has argued that success depended on grassroots activism, support from local politicians and newspapers, cities with a long history of planning, and legal action. Crucially, Mohl argues, “Grassroots, populist struggle against the urban interstates was crucial, of course, but without these other ingredients, there was a very good chance that the freeway would get built anyway.”<sup>11</sup> Too often, our scant understanding of the Spadina Expressway celebrates grassroots activism without mentioning the unique legal battles that took place before the OMB. While grassroots activism was the impetus behind the push towards the OMB, and made the entire process possible, the tools that activists used to secure their victory deserve a complete explanation. Without this, the story is not complete.

### ***“A Minimum of Rules and a Wide Spectrum of Discretion”: The Development, Power, and Leadership of the Ontario Municipal Board***

The OMB was established in 1906 as the Ontario Railway and Municipal Board (ORMB), which had its initial impetus during the Long Depression of the late nineteenth century. Many Ontario municipalities had defaulted on their debts, leading to the establishment of a provincial municipal auditor in 1897 that then grew into the ORMB in 1906.<sup>12</sup> The ORMB became the OMB in 1932, following further municipal

defaults during the Great Depression. This change reflected a wider jurisdictional scope that included the right to approve all municipal borrowing, forming an appointed—and controversial—check against elected municipal officials.<sup>13</sup> This came out of an intention to regulate municipal patronage, improve administrations, and remove important urban decision making “from the supposedly sinister influences of domestic politics.”<sup>14</sup> It was this role that the Spadina opponents called upon. By the 1970s, the responsibilities and duties of the OMB were essentially the same as they had been in the 1930s, minus the loss of some “extraneous functions.”<sup>15</sup> The jurisdiction of the OMB was given in its 1971 annual report as the “responsibility for the sound growth and development of municipalities within the framework of statutes with particular regard to economic stability.”<sup>16</sup> Particular jurisdictional areas included the management of municipal constitutions, boundaries, and dissolutions, approval of capital projects and subdivisions, and official plans, as well as area by-laws and assessment appeals. Indeed, the OMB had played a large role in the creation of Metropolitan Toronto itself, finding a compromise between outright amalgamation of the suburban regions and lack of centralized planning through the creation of regional government.<sup>17</sup>

This wide scope is all the more notable when one considers the degree of discretion bestowed upon the OMB. While other provinces have had boards to review official plans and involve themselves in some zoning issues, only the Ontario Municipal Board has had such a wide mandate.<sup>18</sup> As expected with such a discretionary scope, the OMB was no stranger to controversy.<sup>19</sup>

This discretionary power was made explicitly clear in the 1971 OMB annual report. Until then, annual reports had simply been carbon copies of previous ones. The authors of the 1971 version sought to make an explicit break with this tradition, probably in response to the added attention given to the OMB in the wake of the Spadina Expressway hearing.<sup>20</sup> The OMB may have felt a need to justify its policies and practices. Indeed, the unnamed authors—presumably including Chairman Kennedy—claimed a wide degree of discretion based on an idea of “natural justice”: “When the Board holds a hearing it is subject in law to the rules of natural justice which, as applied in this case, could be stated as follows: (1) The tribunal shall be free from bias. (2) All persons having an interest in the subject matter shall be heard. . . . Administrative boards, such as this Board, administer what is sometimes called discretionary justice, having a minimum of rules and a wide spectrum of discretion.”<sup>21</sup> In essence, the OMB recognized that individual members had considerable leeway of interpretation when writing their decisions. In his dissertation on the OMB, Carl Goldschmidt argued that this leeway stemmed from several related issues, including the lack of a professional OMB staff, despite being permitted one in the legislation, its “timid approach” to guidelines, and inaccessible OMB reports.<sup>22</sup> The OMB had a nebulous nature, as according to a provincial committee, “usually it is administrative; sometimes it is judicial; but always it must be judicious,” with few constraints.<sup>23</sup> Even the form of the hearings was up in the air, with no set rules of procedure. However, the Spadina hearing was certainly a judicial arena, in keeping with the OMB's tradition.<sup>24</sup> The proceedings were undertaken in the manner of a courtroom, with examinations and cross-examinations, and they were conducted within general legal principles.

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The lack of organizational rigour, coupled with the OMB's nebulous nature, would be highlighted in the 1972 report of the Select Committee on the OMB conducted by the Government of Ontario. Drawing on public hearings in cities throughout Ontario, the committee observed strong public support for the OMB but continued to note that the “appointed body is not directly responsible to the people and may interject its own views on what the municipal legislation should be.” Even more problematically, the OMB could either approve or reject projects without having to bear any responsibility for the consequences—unlike an elected body.<sup>25</sup> The provincial government appointed members to the OMB “at pleasure, which effectively meant until retirement.”<sup>26</sup> Qualifications also varied. While lawyers were the most frequently appointed, as befitting a quasi-judicial tribunal, other members included such professionals as engineers and accountants, municipal officials such as planners and administrators, as well as politicians and activists.<sup>27</sup> Most members had previous experience in the municipal field, but it was not mandatory.<sup>28</sup> The members who heard the Spadina case thus had tremendous leeway in their decision-making powers and their rules of conduct, and they were hardly accountable—outside of an appeal to the provincial Cabinet by a dissatisfied party—to anybody.

Without overarching structures to constrain rulings, the chair could influence overall OMB policies. Kennedy (chair 1960–1972) certainly had a profound impact on the OMB's direction, representing a distinctive approach that was neglected before his tenure and perhaps consciously repudiated after his 1972 retirement. Chipman, among others, has argued that Kennedy's chairmanship saw the OMB consciously balancing majority rights (municipal councils) versus minority rights (people affected), and the Spadina case certainly exemplifies this.<sup>29</sup> Throughout the late 1960s, Kennedy had been decrying “the loss of open space, parks and recreation facilities,” as well as sympathizing with homeowners threatened with destruction by the construction of new modern apartment buildings.<sup>30</sup> The very idea of what constituted majority and minority rights were contested, especially in a large municipality such as Metropolitan Toronto.

In light of the significant influence the chair has on the direction of the OMB, Kennedy's personal biography is notable. Like the chairs before him, Joseph Aloysius Kennedy (1902–1978) was a lawyer.<sup>31</sup> Born in Sudbury, the son of a carpenter, Kennedy was called to the bar in 1929 and subsequently specialized in municipal law. Interestingly, he was part of the same Osgoode Hall Law School class as John Josiah (“J. J.”) Robinette, who led the anti-Spadina case at the OMB.<sup>32</sup> Kennedy had municipal experience, serving as a Windsor alderman between 1941 and 1946 before being called to the OMB by the provincial Progressive Conservatives in 1960.<sup>33</sup> Beyond his credentials, Kennedy was a personally imposing figure. Looking back on the OMB, urban affairs journalist David Stein remembered Kennedy as a “cantankerous, owlsh, old conservative, but he liked to tell people the board's initials stood for ‘ombudsman.’”<sup>34</sup> This last dimension certainly came out in his activities during the Spadina Expressway debate, with Kennedy eventually taking upon himself the role of minority rights champion. Lawyer Jeffrey Sack, who represented ratepayers during the OMB hearings, recalls Kennedy as “exceptional,” a “rate-payer champion.”<sup>35</sup>

Of the other two members of the OMB who heard the Spadina Expressway dispute, Vice-Chairmen William Shub and Robert McGuire,

comparatively little is known. Both were lawyers. Unlike Kennedy, however, according to the Law Society of Upper Canada's records, McGuire had no elected municipal political experience before being appointed to the Ontario Land Compensation Board and the OMB.<sup>36</sup> Even less is known about William Shub, who practised in Timmins before being appointed to the OMB.<sup>37</sup> The Spadina opponents noted a strong contrast between Kennedy and his two vice-chairmen. Sack recalls that the latter two were seen as “typical OMB types,” as opposed to the exceptionality of Kennedy.<sup>38</sup> David and Nadine Nowlan, who had written *The Bad Trip*, an activist booklet outlining the flaws of the Spadina Expressway before becoming involved with the legal challenges, recall that they felt Shub and McGuire were strongly biased against the expressway opponents, based on their body language as well as their tones and lines of questioning.<sup>39</sup> They also took their lunches together without Kennedy.<sup>40</sup> Given the lack of structure and the importance of personalities on the OMB, these seemingly trivial personal issues assumed great importance as the chairmen deliberated.

The image of the OMB during the 1960s and 1970s that emerges is of an important, unelected, administrative, and judicial tribunal in Ontario. The OMB derived its authority from statute, consisted of appointed lay officials, and was independent of both the central government (Ontario) and the local government (in this case, Metropolitan Toronto), yet appeal was still possible to the provincial Cabinet for an unsatisfied party. Indeed, the OMB provided a forum for local issues to be aired and discussed while still allowing some central influence—in this case an ability to gauge minority versus majority interests—in decisions relating to municipal planning. By allowing contestation to take place outside of the “high law” world of courts and appeal, as well as with its wide discretion, the OMB can be seen as a modern “low law” institution.<sup>41</sup> Harry Arthurs has argued that “inferior” administrative tribunals, which are lesser in law, often have a larger role in the lives of those involved.<sup>42</sup> Despite its often judicial conduct, the OMB does not occupy the “high law” world, instead occupying the netherworld of the administrative or judicial tribunal. As Arthurs argued, “States have deliberately decided that the norms, procedures, personnel, or costs of the central legal system will not permit it to do what has to be done.”<sup>43</sup> However, the Spadina Expressway OMB hearing did come to resemble much of the formal legal system, as exemplified by the role of lawyers within the system.

During the Spadina Expressway struggle, activists came to focus on the OMB as a site of contest. While the focus of this article will be on the 1971 hearing, which received the most attention and provided the most valuable exploration of the complicated role the OMB played in municipal governance and land planning, this must be placed in the historical context of the OMB's previous dealings on the Spadina issue. The activists who sought to stop the Spadina Expressway had a complicated relationship with the OMB. “Stop Spadina Save Our City Coordinating Committee” Chairman Alan Powell described it as an “independent, despotic but incredib[y] intelligent independently appointed Ontario Municipal Board.”<sup>44</sup>



***The Ontario Municipal Board, the Spadina Expressway, and Civic Activism, 1963–1970***

On 25 June 1963, the OMB met at 145 Queen Street West in downtown Toronto—across from Osgoode Hall, the epitome of Canadian “high law”—to review a two-part application from the municipality of Metropolitan Toronto. The first request was to approve the construction of the Spadina Expressway from Wilson Heights in North York to Bloor Street in the City of Toronto, with the Spadina rapid transit line (running in the expressway’s median), at a cost of \$74,580,000 (roughly \$536,509,875 in 2010 dollars).<sup>45</sup> The second request was more pragmatic: to approve Metropolitan Toronto Council’s borrowing of that amount.<sup>46</sup> Metropolitan Toronto had marshalled an impressive volume of evidence to support its case: estimated costs, reports by the Roads and Traffic Committee, a report by the Metropolitan Toronto Planning Board, as well as detailed alternative routes. This was a polished submission, as befitted Canada’s largest municipal government.

In addition to Metropolitan Toronto’s submission were two documents, one from the Metropolitan Toronto Planning Board and another from a private citizen, illustrating the long road that lay ahead for the OMB. In its report, the Metropolitan Toronto Planning Board laid out both the municipal arguments in favour of the expressway and those of ratepayer associations that had begun to challenge the plan before the Metropolitan Roads and Traffic Committee. The committee condensed opposition opinion into terse statements, such as “the effect on residential areas” and noted that it had been forced to edit out of the document the more heated, emotional language used by the opposition.<sup>47</sup> On the other hand, the report provided detailed responses to the oppositional points. For example, replying to claims that the Spadina Expressway would have a negative effect on residential areas, the committee replied by noting that people could simply buy new homes in the area, upon examination of annual turnover in the affected Forest Hill and Annex neighbourhoods.

Yet the committee was not able to play the role of citizen gatekeeper convincingly. A document from outside the governments of Metropolitan Toronto (both Metropolitan Toronto and its constituent cities and borough were represented in the OMB submission) made it into the OMB submission. Edward Ruse, a private citizen, wrote a letter to the premier, Cabinet, and especially members of the OMB. Perhaps he had realized the board’s potential. Ruse emphatically stressed the Spadina Expressway’s problems, arguing that the cost estimates were flawed—a prophetic claim—and that the traffic plan was inadequate. The planned Spadina Expressway was to channel traffic downtown from Highway 401 in the north to Bloor Street. There was no provision to accommodate the expressway’s traffic as it exited the expressway. It was simply to be dumped onto Bloor Street West at Spadina Avenue. In Ruse’s opinion, the Metropolitan Toronto plan was essentially a modern expressway colliding with local traffic on these two major arterial roads. On that basis, Ruse asked the OMB to “deny, or at least to defer the Spadina.”<sup>48</sup> Ruse concluded by calling for a holistic approach to Metropolitan Toronto infrastructure: free mass public transportation—more economical than roads and parking facilities—accompanied by a thorough economic accounting of the transportation plan. The paucity of documents in this first hearing stands in stark contrast to the later 1971 hearings, indicative of the fact that at this time the few expressway opponents (“virtually no opposition” had greeted the initial Spadina plans before

council in 1962)<sup>49</sup> were focusing on the democratic council level rather than the unelected administrative tribunal level. The OMB approved the request by Metropolitan Toronto in a one-day hearing and subsequently approved capital funding increases on 3 June 1965 and 8 December 1967.

Public opposition to the expressway had been growing throughout the mid-to-late 1960s, tapping into not only local antagonism surrounding the destruction of people’s homes, but also broader North American opposition towards expressway projects. In New York City, Jane Jacobs and other concerned citizens had stood up to the master planner Robert Moses and defeated the Lower Manhattan Expressway. In that battle, which was fought in a number of stages, Jacobs rallied community members, and municipal and state politicians, and successfully advanced a critique of master planning as a destructive force, sapping the lifeblood out of vital cities.<sup>50</sup> In Toronto, larger numbers of professionals were moving downtown, and there was a growing realization that urban expressways had the potential to destroy neighbourhoods and cities, as had happened in Buffalo, Detroit, and elsewhere.<sup>51</sup> Community organizations began forming against the expressway as early as 1965, boosted by Jane Jacobs, who had moved to Toronto from New York City in protest of the Vietnam War.

In October 1969, the movement became far more organized with the establishment of the Stop Spadina Save Our City Coordinating Committee by University of Toronto urban sociologist and professor Allan T. R. Powell. By this point, many diverse organizations were being drawn together: ratepayers and residents associations, school boards, the Metro Toronto Labour Council, and even the councils of the City of Toronto and the Borough of East York.<sup>52</sup> “The City Is for People!” became the battle cry. At Stop Spadina’s “The City Is for People Day,” a mass rally at Toronto’s Nathan Phillips Square (in front of City Hall), the committee declared that “Toronto is not just a collection of buildings and streets. Toronto is a living organism, with a past, a present and hopefully, a future. It is more than just concrete and steel; it is a community of people of many different origins, who have come together to form what we think of as ‘Toronto.’”<sup>53</sup> Poets and authors composed poems and songs about the expressway. For example, Paul Reinhardt compared the Spadina Expressway to “Moloch! Robot apartments, Invisible suburbs, Granite cocks, Highrise jails, Mechanical men tearing down houses, homes, whole neighbourhoods. . . . The Spadina Expressway—poised to strike at the heart of our city.”<sup>54</sup> David and Nadine Nowlan’s anti-Spadina book, *The Bad Trip*, was widely sold and well received, and community activists such as Colin Vaughan, Ellen Adams, and David Freeman helped organize and encourage briefs before Metropolitan Toronto Council and its Transportation Committee.<sup>55</sup> Throughout March and April 1970, the Stop Spadina Save Our City Committee organized events almost every other day, including speeches, mock trials of the expressway at Osgoode Hall, bake sales, conferences, sherry and lunch get-togethers, films, and rallies.<sup>56</sup>

The movement began to plant doubt in the minds of many about the competency of Metropolitan Toronto administrators,<sup>57</sup> or at least among those living downtown. A petition submitted to the Metropolitan Toronto Transportation Committee had 15,709 signatures. As Stop Spadina co-chairman and historian Jack Granatstein noted in a press release, this represented “one of the largest petitions ever handed in to Metro Council by a citizens’ group.”<sup>58</sup> The City of Toronto and the Borough of York

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also supported the cancellation of the expressway. Of course, there were still many supporters of the expressway, mostly from the suburbs.<sup>59</sup> The Stop Spadina Committee received a number of letters from angry suburbanites. One called expressway opponents “self-seeking nuts” and another pointed out that if they wanted to drive downtown, he or she “expect[ed] an expressway to facilitate my wish!”<sup>60</sup>

Despite the strong opposition in downtown Toronto to the Spadina Expressway, expressway supporters initially carried the day. Hearings before the Transportation Committee ran from late January 1970 until mid-June, when Metropolitan Toronto Council voted again in favour of the expressway, this time by a margin of 23–7. Suburban councillors favoured the expressway, whereas their counterparts downtown were nearly unanimous in their opposition.<sup>61</sup> The democratic avenues had failed, with the local protest expressed by those in the City of Toronto (and their local council) subsumed to the majority wishes of Metropolitan Toronto.

However, in Ontario, the OMB offered recourse of appeal to it as an administrative tribunal. Immediately following the vote, the expressway opponents publicly declared that they would be taking the issue to the OMB.<sup>62</sup> They retained J. J. Robinette, one of Canada’s leading defence lawyers, to represent them before the OMB—indicative also of the strategy’s importance.<sup>63</sup> In early August, Robinette asked Metro Council to defer any further construction or contract awarding until the OMB heard the case, giving several reasons for the OMB review: the cost doubling since 1963, Metropolitan Toronto’s increasing debt, the burden of taxation, as well as changes in the expressway design since its initial OMB approval.<sup>64</sup> Following Robinette’s argument, Metropolitan Toronto dropped its opposition to the OMB review (it had earlier claimed it unnecessary), and also applied to the OMB to seek approval for a further \$92 million beyond the original cost of \$73 million.<sup>65</sup> The council also agreed to cease construction on the project until approval was granted. With construction halted and the partially constructed expressway—by now it had reached Eglinton Avenue in mid-town Toronto—sitting unpaved, all eyes now turned to the OMB to see what the future shape of the city would be.

### *A Showdown at the Ontario Municipal Board*

The stage had been set for an extraordinary showdown at the OMB by late 1970. The exceptional tenure of Kennedy’s chairmanship, with its emphasis on minority versus majority rights, would combine with the new urban zeitgeist and opposition to urban planning to create a particular coalescence of historical circumstances.<sup>66</sup> The hearings, held at 123 Edward Street in downtown Toronto, were packed and well followed by the media. Indeed, the Metro government essentially shut down during the hearings as officials flocked to the proceedings.<sup>67</sup>

Spadina Expressway opponents were hopeful about the outcome, as revealed in the enthusiasm of their literature and private correspondence. Allan Powell wrote to Stop Spadina supporters that the hearing was “a gratifying victory for us. For the first time all aspects of the issue, including finances, planning, environmental effects, and the alternatives, will be examined rationally and impartially.”<sup>68</sup> In another letter, he wrote that “the OMB should provide us with the first impartial and rational consideration of the merits of the Spadina Expressway since we began questioning the validity of the project back in September [1969].”<sup>69</sup>

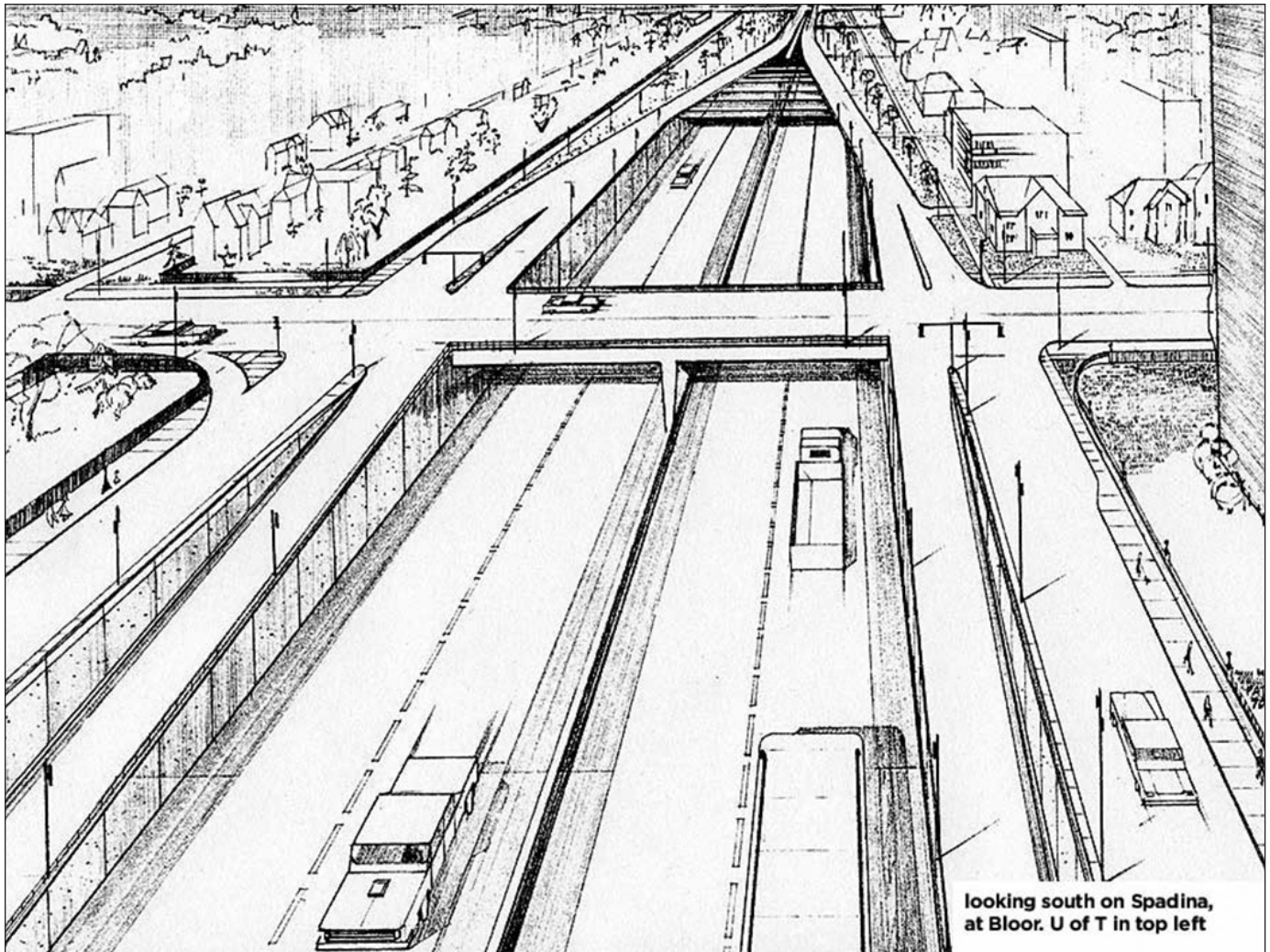
Powell noted in a private letter that the OMB was especially significant, as this would be a final showdown between expressway opponents and supporters: “Things are not as bad as you have heard, in fact, we may be much closer to final victory than we had ever dreamed possible. The Metro Council has decided to ‘sink or swim’ [sic] and to go the whole hog; they have asked independent, despotic but incredibly intelligent independently appointed Ontario Municipal Board, to guarantee and to approve *all* the costs of constructing the monster.”<sup>70</sup> Jeffrey Sack, lawyer for a coalition of ratepayers who worked with Robinette on this case, similarly recalls the optimism surrounding the hearings. The OMB was a “more policy-oriented tribunal,” which would evaluate the expressway within the *current* context; it would determine whether the expressway project was right at present, despite its earlier approvals.<sup>71</sup>

An initial hearing was held on 15 September 1970, quickly leading to debate over the scope of the examination. Jeffrey Sack described the debate in a letter: “Metro argued that the OMB should inquire only into the financial ability of Metro to pay for the Expressway. Legal counsel for the ratepayers argued that the OMB should inquire into all relevant matters, including damage to communities, air and noise pollution, loss of ravine and park lands, traffic congestion, etc. The OMB rejected Metro’s attempt to restrict the scope of the inquiry and announced that a full inquiry would be held into all matters, including the necessity and expediency of the Expressway.”<sup>72</sup> With the scope of the OMB’s inquisitorial intentions thus broadened and established for the struggle, the activists set out to raise awareness of both their argument and the role of the OMB. Faced with the high legal costs of contesting Metropolitan Toronto before the OMB, the opponents formed a private corporation—the Spadina Review Corporation—with a mandate to raise the money to pay an estimated \$60,000 legal bill.<sup>73</sup> “The fate of the Spadina Expressway has been debated for ten years,” wrote the Spadina Review Corporation in a long essay, aimed at convincing supporters both of the OMB’s importance and therefore the need to donate, and “now its merits will be judged in an impartial forum.”<sup>74</sup>

A date for the full hearing was set for early January 1971. Notices appeared in the major Toronto newspapers advertising the impending hearing. The OMB called for a “hearing of all persons who desire to be heard in support or in opposition to this application” regarding the expressway.<sup>75</sup> The next stage in the fight over the expressway was about to begin. It was a fierce struggle over the respective roles of the OMB and democratic bodies, but beyond that, it was also a battle over the future shape of Ontario’s largest metropolis. Language employed at the hearing expressed the contest in terms that pitted the majority interests expressed by democratic institutions against minority rights. Moreover, Metropolitan Toronto’s size and complexity, with its balance of urban and suburban residents, complicated matters. For many in the suburbs and businesses that relied on transportation links outside the region, the Spadina Expressway was a necessity and even a harbinger of modernity.<sup>76</sup> The opponents, especially those with the Annex Ratepayers Association, which was directly threatened by the expressway, tried to make the case that this was not simply a churlish minority standing in front of a progress-minded majority, but rather that the expressway would hurt all Torontonians. Increased pollution, congestion, and car-oriented development would leave Toronto a less liveable city for all.



*“This Board Has a Duty to Intervene”*



Source for all illustrations: William R. Allen Expressway and Rapid Transit Line by Metropolitan Roads & Traffic Department, Functional Design Report South from Eglinton Avenue, Item 131, Series 1143, City of Toronto Archives.

*An artistic rendering of what the Spadina Expressway would have meant for the intersection of Bloor and Spadina near the University of Toronto. Running in a depressed trench, the Expressway would have drastically changed the neighbourhood's character.*

On 4 January 1971, the OMB convened its hearing.<sup>77</sup> The format allowed counsel for parties to call witnesses and examine or cross-examine them, with Chairman Kennedy taking an inquisitorial role throughout. Parties to the suit included representation from the constituent cities of Metropolitan Toronto (the City of Toronto and the City of North York), Metropolitan Toronto officials from a variety of departments, and twelve ratepayer associations.

The first witness called was Sam Cass, the Metropolitan Toronto commissioner of roads and traffic, who was asked to explain why Toronto needed the Spadina Expressway. Counsel for Metropolitan Toronto, A. P. G. Joy, offered Cass an opening to question the legitimacy of the proceedings, but was cut off by Kennedy. Joy observed to Cass that Metropolitan Toronto's council had already approved the expressway with the support of the provincial government, to which Kennedy interjected that, although the expressway had been approved by the province, this “would have persuasive effect on this board in considering approval of the expenditures of money, but not binding effect.”<sup>78</sup>

He elaborated further on this position: “I like to think that as long as Section 64 [the section decreeing when the assent of electors may be dispensed with] on the Ontario Municipal Board Act stands as the law laid down by the Legislature, that any arm of the government, or even the Government itself, in giving approval, would not be by-passing the provisions of Section 64 at least [sic] they expressly said so.”<sup>79</sup> Kennedy demonstrated that his OMB was not bound by either the dictates of the elected municipality or even the province that created the board. This was to be a real hearing, one not bound by previous decisions.

His OMB would not be a rubber stamp, as Kennedy's personal conduct demonstrated. While the transcript is replete with the seemingly mundane and slightly curmudgeonly manners of the chairmen—talking about mishearing words, the difficulty of giving presentations with one's back to a board, as well as snapping at audience members who were reading newspapers—Kennedy's active role dominated. He also cut off Metropolitan Toronto's commissioner of planning, Wojciech Wronski,

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interrupting his testimony about the expressway and its connection to the overall highway network with a personal observation:

How do you fit this into your general approach? I hate to inject myself into it, but I am going to. When I drive down Avenue Road in the morning, I often think especially if I am driving to a hearing of this nature, how many of these cars ahead and behind, how many of the occupants could be accommodated in one long transit car?<sup>80</sup> . . . I wonder whether some study wouldn't be indicated to find whether it is cheaper to move people at an uneconomic rate on a Rapid Transit Line than to build expressways where the cars are. That is the point and I leave it at that for now.<sup>81</sup>

To urban planner Alan Voorhees, Kennedy asked, "How much do you consider the fact, I think it is a fact, that I would rather drive downtown in my own automobile than stand in a subway train?"<sup>82</sup> He remarked to Joy, who was discussing Jane Jacobs's earlier remarks on the effective placement of the Spadina subway extension, "Some rules of thumbs aren't bad. How do you feel about that rule, that a subway will do better if it is on an alignment that is already patronized by transit passengers?"<sup>83</sup>

Kennedy was not acting only in the interest of minority rights during the hearing, but was actively engaging in the pressing questions of urban landscapes and development. At times he seemed to question the very merits of automobile-based development, articulating the possibility of a new world, yet at other times noted the inherent limitations of mass transit.

A variety of witnesses appeared at the hearings. Officials such as Sam Cass and Wojciech Wronski represented Metropolitan Toronto. The municipality also called expert witnesses, although this approach backfired on occasion. For instance, Alan Voorhees appeared as a paid expert on urban planning to support the expressway, but his testimony was weakened by revelations that his previous writing had supported public transit, in contrast to what he said on the stand. The Spadina Review Corporation assembled many volunteer expert witnesses to argue against the expressway.<sup>84</sup> Economics professor David Nowlan based his opposition to the expressway on his expertise in program evaluation. Jack Fenterstock of the Department of Air Resources in New York City discussed the air pollution caused by expressway construction, reflecting that city's changing approach to urban expressways. Professor Stephen Clarkson appeared to argue that a "general consensus" throughout the city was unhappy with the transportation board, based on his experience as an unsuccessful mayoral candidate in the previous election.<sup>85</sup> Kennedy seemed uncomfortable, noting that Clarkson could speak only for himself and that his testimony was creeping towards the political sphere. After Clarkson mentioned that his mayoral opponent had done little to fight the Spadina Expressway, Kennedy declared, "I am becoming more uncomfortable with every question," and Clarkson's appearance came to an end.<sup>86</sup> This was to be a discussion of the expressway proper, rather than a political pulpit.

A wide array of written evidence was also presented for the OMB's consideration. There was internal evidence: Metropolitan Toronto Council rulings on the expressway, Toronto Transit Commission annual reports, other OMB rulings. More significant, however, was the external evidence that drew on a wider intellectual North American

network concerning urban development and the future shape of the city. Expressway revolts had become fairly common throughout North America, from the Lower Manhattan Expressway in New York City, to Boston, to Canadian revolts in Vancouver and Halifax. With its wide discretionary scope and flexible jurisprudence, the OMB was well positioned to move beyond locally marshalled evidence and look elsewhere for evidence on the effects of urban expressways. Metropolitan Toronto planners were part of a broader tendency in favour of central, master planning—perhaps epitomized by New York City's Robert Moses—and their opponents were similarly part of a broader grassroots current against master planning and in favour of local development and colour. The OMB was drawn into this broader debate. Thanks to its unique mandate, the OMB was able to essentially put the very idea of urban expressways on trial, collecting a wide array of information from other hearings in different cities and countries. This was not just the Spadina Expressway on trial alone, but also the very notion of expressways inserted into urban areas.

One notable example of this broader net was the introduction into evidence of testimony given to another deliberative body. Professor Alan Altshuler, a Massachusetts Institute of Technology political science professor, had given testimony before the Urban Affairs Subcommittee of the Joint Economic Committee of the American Congress, and that testimony was entered into evidence during the hearing. Altshuler had been calling for the cessation of freeway construction within the inner city of Boston. His arguments touched on the many harmful effects of urban expressways, including the diminished availability of low- or moderate-income housing, decreased supply of recreational open space, increased air and noise pollution, the impact of land-use development, the effects on social values such as racial integration and neighbourhoods, declining local tax bases and even harm to the visual attractiveness of the area.<sup>87</sup> Altshuler called for a holistic approach to municipal development, echoing many of the concerns raised by the Spadina Review Corporation. Academic journal articles were also presented, such as that by Alan Voorhees.<sup>88</sup> With the testimony of Altshuler—and even the presence and testimony of Jane Jacobs at the hearings as a veteran of the New York Expressway fights—the OMB was participating in the wider North American debate over the place of modernist planning.

Local evidence was also submitted from community groups and other interested parties. From earlier submissions to the Metropolitan Toronto Transportation Committee, the OMB was explicitly playing the role of second review. Some submissions had already been considered, and essentially dismissed, by the elected government. Here we see the "low law" aspect of the OMB at work, as well as its traditional role as a bulwark against municipal excess or folly, harkening back to the role of its 1897 predecessor, the provincial municipal auditor. The Metropolitan Toronto Transportation Committee, representing the elected municipality of Metropolitan Toronto, did not fully appreciate the minority rights that Kennedy dearly stood for. Testimony would be rehashed and considered in an entirely new light, freed from jurisprudence—or, as the OMB's detractors would put it, accountability. These submissions provided an impassioned plea for stopping the expressway. For example, the City of Toronto's Board of Education argued that if the "project is implemented these young people will have to live through another, and



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perhaps irreversible, step in the destruction of the neighbourhoods in which they live.”<sup>89</sup> The Board of Education’s argument stood alongside a group of petitions, from several ratepayers associations, citizens, as well as the Association of Women Electors of Metropolitan Toronto.

Evidence from damning reports included one on carbon dioxide emissions in the vicinity of the portion of the expressway that had already been constructed (from Wilson Heights to Lawrence Avenue West), showing increased pollution. The most significant piece of evidence, especially in light of the OMB’s subsequent decision, was the Keats, Peat, Marwick & Co. Travel Demand Study for 1995 (then twenty-four years into the future). Commissioned by the municipality, the study showed the catastrophic consequences for citywide traffic flows if the expressway network was built. The Spadina Expressway opponents received the report errantly when David Nowlan had been in a meeting with a high-level Metropolitan Toronto planner. When the planner left his office for a few minutes, Nowlan visually scanned it (it had been left on the planner’s desk) and determined that it was relevant to the anti-Spadina case. His wife, Nadine Nowlan, who was doing background planning and transportation research for the anti-Spadina lawyers, in turn mentioned it to lawyer Jeffrey Sack, who asked for it at the discovery hearings.<sup>90</sup> This study was all the more damning when it became apparent to the OMB that Metropolitan Toronto had been trying to cover up the report, with Sam Cass claiming not to have read it. The image of the infallible technocrat was sundered.

After the expert testimonies, two days were set aside for public hearings. Despite the explicit request of lawyer Jeffrey Sack that a transcript be taken, these accounts were not entered into the written record, leading Sack to recall that “[this] shows how much weight was really given to the public.”<sup>91</sup> During the public hearing period, Metropolitan Toronto’s deputy planning commissioner, Hans Blumenfeld, took the stand while the Metropolitan Toronto councillors sat despondently. The municipality had explicitly not called Blumenfeld, for reasons that would quickly become clear. He described the importance of the Spadina Expressway as just one link in a greater *network* of expressways throughout Toronto, including the as-yet unbuilt Crosstown Expressway (which had been similarly supported by Metro but opposed by the City of Toronto), Scarborough Expressway, and Richview Expressway. Blumenfeld’s approach to expressways was that they should be a “closed system,” always connecting with each other rather than terminating at city streets.<sup>92</sup> Yet his framing of Spadina as a component to a much larger essential network was contrary to Metropolitan Toronto’s plan of building expressways one at a time and then continuing construction when the ensuing off-ramp traffic became unbearable.<sup>93</sup> This eliminated all pretence of the Spadina Expressway being a singular project. Unfortunately, for lack of a written record, it is hard to tell the overall tenor of the public hearings. While Kennedy may have taken private notes, not preserved in the archival records, the fact that an official transcript was not taken—the rest of the hearings had a professional stenographer—demonstrates the degree to which power was centred on the administrative tribunal and professionals.

Following the sixteen days of hearings, the OMB adjourned for three weeks. On 17 February 1971, the OMB reached its decision, emerging with an “unprecedented 2–1 split decision . . . [the] first in municipal board history” in favour of the Spadina Expressway.<sup>94</sup> Sack recalls

his reaction as “depressing, dispiriting, total despondence. Qualified, however, by the realization that with Kennedy’s dissent there was possibility for appeal . . . It pragmatically allowed us to appeal.”<sup>95</sup> David and Nadine Nowlan recalled a similar reaction, chastened but also enthused as Kennedy’s “reputation was extremely important in the Anti-Spadina fight.”<sup>96</sup> Kennedy’s name could now be harnessed to anti-Spadina literature: the OMB chairman, who had been able to judge the expressway in a public, seemingly impartial, and technocratic process, had sided with them.<sup>97</sup>

### *A Board Divided*

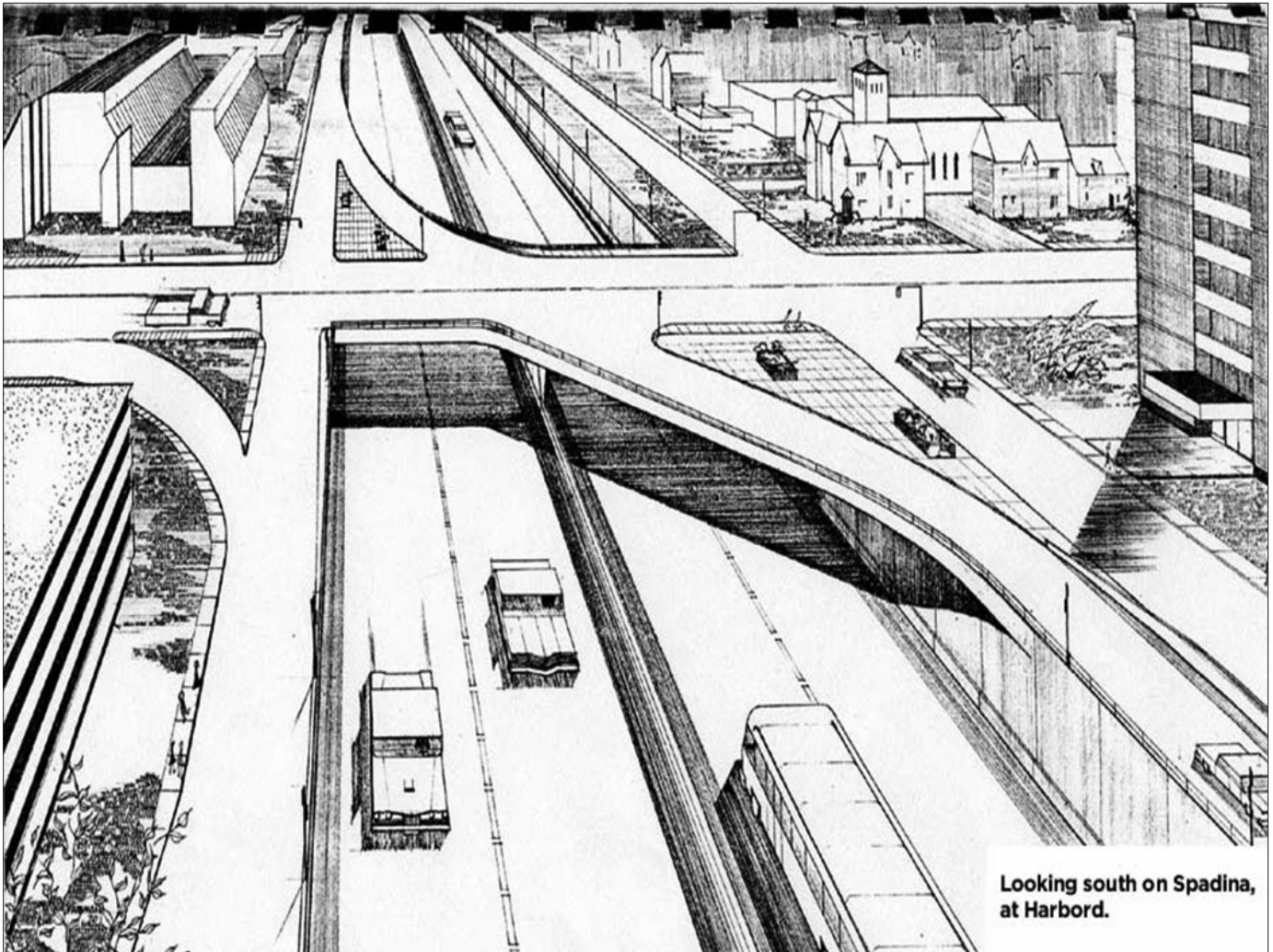
Much of the movement’s remaining optimism was focused on Kennedy’s dissenting opinion, with the activists and Robinette using it as further ammunition in their continuing fight. Appeals of OMB decisions were permitted to the provincial Cabinet. The lengthy decisions are significant for this article, as they not only debated the merits of the Spadina Expressway itself, but also addressed whether it was proper for the unelected OMB to overrule the elected Metropolitan Toronto Council. Indeed, the issue of the OMB versus democracy was the keystone of the appeal. The role of the OMB was up for debate: would it be a forum for balancing minority and majority rights, as Kennedy advanced it, or should it err on the side of generally backing elected officials, as the two vice-chairmen held?

The decision was released publicly, and the Spadina Review Corporation subsequently published the three decisions—not just Kennedy’s positive argument but those of Shub and McGuire as well—for broad redistribution.<sup>98</sup> Kennedy’s argument was vitally important, expressing a certain vision of the OMB as having not simply the power but the duty to involve itself on behalf of minority rights, whatever the expression of the democratically elected government. On the other hand, the two vice-chairmen explicitly rejected that role.

Kennedy’s extensive opinion—sixteen legal-sized pages in the official transcript—argued that the Spadina Expressway situation had changed to such a degree since the initial OMB approval in 1963 that an extensive reconsideration was in order. He pointed out that the 1963 hearings had been one day long, as opposed to sixteen days in 1971.<sup>99</sup> There were several material arguments on which Kennedy based his dissenting opinion, including air pollution, traffic congestion possibilities on the arterial roads feeding and being fed by the expressway, and even the injury to Toronto’s cityscape, as it would “increas[e] pressures for high development on good quality areas of low density residential development and by destroying a very considerable amount of the natural beauty in ravines.”<sup>100</sup> These were all issues that spoke not only to the minority of residents in the affected downtown areas, but all Torontonians. In light of the project’s scope, Kennedy argued that the planning job had been inadequate. Drawing heavily on the Keats, Peat, Marwick & Co. Travel Demand Study, that the municipality had tried to cover up, Kennedy also argued that the Spadina subway extension should not receive immediate approval for the OMB. Unlike the earlier Bloor-Danforth and Yonge Street subway lines, the Spadina subway extension did not support the tradition of building rapid-transit lines on previously highly frequented transportation corridors.

Although Kennedy’s reasoning was convincing, there was a more important justification to be made: the OMB was revisiting a project that

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Source for all illustrations: William R. Allen Expressway and Rapid Transit Line by Metropolitan Roads & Traffic Department, Functional Design Report South from Eglinton Avenue, Item 131, Series 1143, City of Toronto Archives.

**Looking south on Spadina,  
at Harbord.**

*Another rendering of the Spadina Expressway running in a depressed trench, here at Spadina and Harbord. The present-day University of Toronto Athletic Centre can be seen in the upper-left portion of the picture.*

had been repeatedly approved by the municipality (as recently as 1970 with the 23–7 expressway victory at Metropolitan Toronto's council). For Kennedy, disagreeing with his colleagues weighed heavily. It was with "considerable regret" that he had to dissent, the chairman wrote, although noting, "It is a measure of the value and strength of a tribunal if its members are able to disagree on important and difficult matters such as this one."<sup>101</sup>

The most forceful section of his ruling focused on the role of the OMB and seriously weighed the merits and disadvantages of intervening in the democratic process: "I have said in past decisions that this Board should not presume to interfere with the exercise of discretion by local elected representatives within the limits of powers conferred upon them by the Legislature without some cogent reason, some serious reason for so doing. In my opinion there are cogent reasons, serious reasons for so doing in this case. I do not believe that citizens have a right to

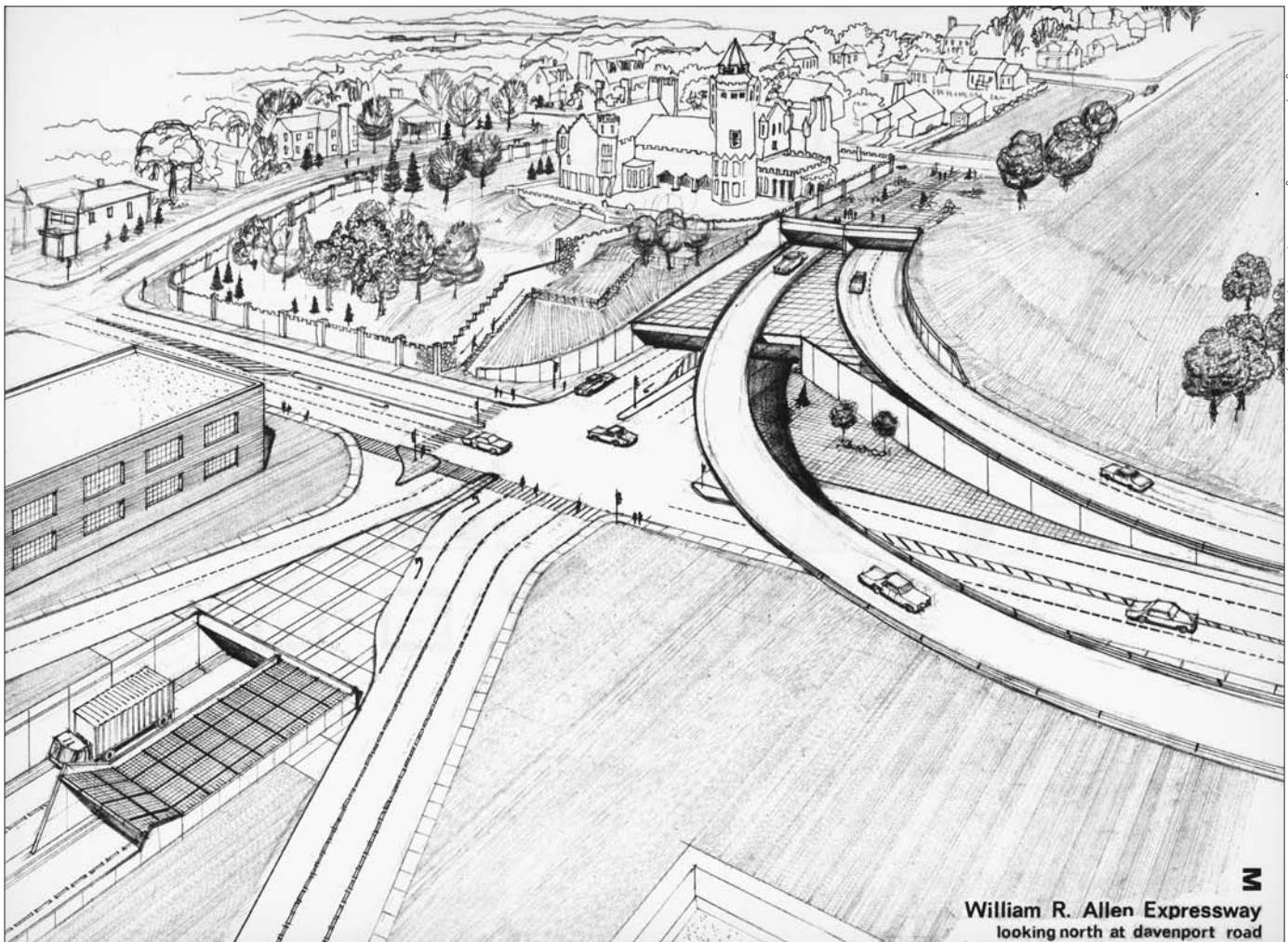
overrule their elected representatives, but I do believe this Board has a duty to intervene in cases such as this one."<sup>102</sup>

While expressing respect for the democratic process, Kennedy had been convinced by the expressway opponents on two grounds: firstly, there would be considerable damage to minority interests, but secondly he was not fully convinced that the majority interest would benefit from the expressway. Indeed, Kennedy declared that while the "fundamental duty of government is to protect the greatest common good . . . these needs should prevail over minority and individual rights and interests only if the project proposed in the public interest can be justified and supported."<sup>103</sup> Kennedy had not been convinced.

In contrast, although Shub and McGuire's decisions echoed some of Kennedy's concerns, their final opinion rested on the belief that the democratic will of Metropolitan Toronto Council should supersede the concerns placed before the OMB. Shub's decision was more supportive of the project, accepting both the need for an expressway and its



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*Proposed Spadina Expressway near Toronto's historic Casa Loma, showing a network of on- and off-ramps and traffic lanes, marking the beginning of the depressed highway running through the Annex neighbourhood.*

low social cost. Although Shub mentioned how impressed he was by the expressway opponent's witnesses, he concluded with his fundamental beliefs on the role of the OMB:

In coming to a final conclusion it is necessary to brush aside some of the human and emotional factors which governed the position taken by a large body of the opposition . . . It is suggested that the Board when making its determination should be governed by the face of Toronto it is desired to achieve. I cannot agree. This is precisely the function of council. . . .

There is, of course, a duty on this Board to protect minority rights, but not at the expense of majority interests. Surely it is axiomatic that when there is a conflict between minority and majority interests, the plan which favours the common weal is paramount.<sup>104</sup>

Despite reservations about the project, Shub had a narrowly construed vision of the OMB's role in municipal planning.

McGuire took an approach similar to Shub's, laying out his vision of the OMB's role before moving into the evidence on which he based

his decision to proceed with the Spadina Expressway's construction. McGuire felt that citizen opposition—grassroots activism—should play only an advisory role to the proper decision-making bodies of the municipality, continuing to argue that the OMB “must not lightly interfere with the opinion of council because one of the potential results could be to wipe out much of the good the system may encourage.”<sup>105</sup> McGuire defended council as well, noting that “the subject application was not made in a vacuum by Metropolitan Council but after due consideration of the advice of its experts, with the awareness of the issues raised by ratepayers in opposition, and the consequences of their decision.”<sup>106</sup> He did raise the role of protecting minority rights, but in limited contexts: the establishment of costly noise barriers, for example. While Kennedy had been willing to play the role of second review on the depositions before Metropolitan Toronto's council and committees, McGuire saw the value of that previous deliberative undertaking and had a different view of how the OMB should relate to elected bodies.

The OMB's split decision highlights the varying conceptions of the role of the OMB versus democratically elected institutions, as well



as minority versus majority rights. How did the right of a suburban commuter to a theoretically quick ride to the central business district stack up against the right of a homeowner or renter in the path of the expressway? What weight should individuals' fears of the negative impact of urban expressway development—traffic patterns, crime, aesthetics, the shape of the city—have on the tribunal? Given the content and depth of the evidence laid before the OMB, it was not just the Spadina Expressway that was on trial, nor even simply the role of the OMB. This was an intervention in a growing continental trend against urban expressway development, even if state or provincial legislatures or larger municipalities were in favour of them. Despite the negative decision for the opponents, the fight was not over. The power and language coming from Kennedy's decision provided a respectable means to contest the Spadina Expressway.

### ***Stopping the “Monster”: Harnessing Kennedy in the Appeal to Cabinet and the Subsequent Decision***

The varying visions of the OMB's roles expressed by Kennedy, McGuire, and Shub formed the core of the Spadina Review Corporation's appeal to the Ontario Cabinet (the Lieutenant Governor-in-Council). On 23 February 1971, six days after the decision, expressway opponents announced their intention to appeal. The appeal was further complicated on 1 March 1971, when the new provincial Progressive Conservative leadership of William Davis now took power, replacing John Robarts as premier of Ontario. The decision fell before Davis's government. Colin Vaughan highlighted Kennedy in his first declaration, arguing that “Kennedy's decision left us with no other choice . . . We feel we have a moral obligation to appeal to the cabinet. No one . . . can turn his back on the Kennedy decision.”<sup>107</sup> While the opponents could have appealed a unanimous decision, the split decision gave them the legitimate opening to highlight the expressway's problems and how the OMB, especially Shub and McGuire, had misconstrued its oversight role. Given its importance, it is worth quoting the appeal at length:

The extremely unusual aspects of the application to the Ontario Municipal Board in 1970 and the importance of the application with regard to the shape of the City of Toronto for the future moved Mr. Kennedy in exercising his jurisdiction under Sections 62 and 68 of The Ontario Municipal Board Act to interfere with the decision of the elected representatives. Messrs. McGuire and Shub agreed with Mr. Kennedy in recognizing the need, from the evidence presented, of future studies but deferred to the decision of the Metropolitan Toronto Council and determined not to usurp the legislative powers conferred on Council. *It is submitted that Messrs. McGuire and Shub misconstrued their function under the Ontario Municipal Board Act and should have made decisions in accordance with their findings of fact, which decisions would have been consonant with that of Mr. Kennedy.*<sup>108</sup>

The role of the OMB itself became the contested territory during these discussions, thanks to Kennedy.

The activists did not idly sit by while waiting for Cabinet to consider their appeal. Colin Vaughan wrote Premier Davis in late April. Although he expressed some hesitation in contacting the premier while the OMB appeal was before him, Vaughan argued that his decision was “not taken lightly nor in haste.” For Vaughan, the highly unusual nature of the OMB's decision and the importance and relevance of Kennedy's

dissent were the keystones of the appeal.<sup>109</sup> The emphasis on Kennedy's dissent was also articulated by the Spadina Review Corporation in a letter to supporters, which argued that “the contrasting points of view . . . give a clear image of two alternatives for the development of the City of Toronto.”<sup>110</sup>

On 3 June 1971, William Davis rose in Queen's Park to address the Spadina Expressway. “If we are building a transportation system to serve the automobile, the Spadina Expressway would be a good place to start,” Davis declared. “But if we are building a transportation system to serve people, the Spadina Expressway is a good place to stop.”<sup>111</sup> He explicitly referred to the role of the OMB in securing initial approval for the expressway “as they saw it in 1963 . . . but the government and legislature of Ontario have their responsibilities as well, and their interests.”<sup>112</sup> With the Ontario government refusing to support further construction, the Spadina Expressway was dead.

Why did Bill Davis's Cabinet make the decision it did? While there is no authoritative account, some ministers privately admitted after the decision that Davis had been supporting the expressway as late as early March, but that ultimately the expressway would have strayed close to two influential downtown ridings—home to constituents who had made their views known before council and the OMB. The government had also recognized that it had to respect intangible factors such as citizen lifestyle.<sup>113</sup> Nadine Nowlan recalled, “In the end, I've been told by a Cabinet minister that it was Davis alone. There was no vote in Cabinet.”<sup>114</sup> This was a purely political decision, however, as Cabinet had no legal constraints or precedents to follow in such an appeal.<sup>115</sup> That such an esteemed political figure as Kennedy had ruled against the expressway must have also played a role in Davis's reasoning. The unprecedented split decision placed the weight and legitimacy of the venerable chairperson behind the opposition. As Davis defied the democratic will expressed by Metro Council, this provided him with political cover. In addition, the OMB process had provided a crucial period during which expressway opponents were mobilized to send letters, rally, and garner significant media coverage. In any case, one thing was clear: after years of fighting, the expressway opponents had won. The ditch between Lawrence Avenue West and Eglinton Avenue West lay unpaved and unused until 1976.

### ***Conclusion***

The OMB certainly played a significant role in the fight against the Spadina Expressway. Kennedy's decision had “left a small opening for the ratepayers by voting against the extension,” argued the *Toronto Telegram*, lending legitimacy and political cover in the opponents' appeal to Cabinet.<sup>116</sup> Judging by the close battle in the Ontario Cabinet alluded to by private sources and the *Toronto Star*, Kennedy's dissenting decision must have helped to tip Davis over to the side of the expressway opponents. David Nowlan agrees, recalling that the “Kennedy decision certainly allowed Davis to make the decision he did.”<sup>117</sup>

Furthermore, the battle between the OMB and interest groups, heightened by the dichotomy between majority and minority rights, highlighted the role unelected administrative and judicial tribunals played in modern Ontario. While the OMB approved the Spadina only to be overruled by the premier, this exercise served as a forum to discuss majority and minority rights. By overruling the OMB, Davis came down clearly on

the side of minority rights. While the current historiography neglects the exceptional nature of this decision, the case reveals how the OMB's role was contested at all levels of government as well as in the community.

Following the expressway's cancellation, a new period of Toronto municipal politics was ushered in with “reform councils” led by Mayor David Crombie after his victory in 1972 and John Sewell after 1978. Policies were established to improve public transportation, curb police excess, and restrict large development projects from expressways to massive apartment blocks.<sup>118</sup> However, in many cases, car-oriented development continued. The Spadina subway line, which opened along the route of the shortened Allen Expressway in 1978, was the last significant subway route constructed until the abbreviated Sheppard subway opened in 2002 (although there were smaller piecemeal extensions in 1980 and 1996). Large arterial roads remained choked with traffic, and the commuter modal split continued to skew in favour of the car.<sup>119</sup> Yet there were no more expressway megaprojects. Indeed, in 1997, a brand new streetcar right of way was opened between Bloor Street and the waterfront along Spadina Avenue, favouring transit vehicles over private automobiles.

The OMB changed almost immediately following the hearings. After Kennedy retired in 1972, his replacement W. H. Palmer sought to explicitly “pull the Board back from open combat with civic politicians.”<sup>120</sup> In his detailed study of Palmer's first full year as OMB chairman, Bruce McKenna argued that the OMB was becoming and was likely to continue becoming less sympathetic to citizen complaints.<sup>121</sup> Indeed, the City of Toronto opposed the Metro Council-supported Spadina subway routing, running along the median of the truncated expressway. J. J. Robinette was retained by the city to argue the case, but the new board—in contrast with Kennedy's approach—explicitly noted that municipalities had control over routing matters. Unlike in the case of Spadina, Premier Davis rejected the city's appeal to Cabinet. In part, he had championed public transportation in his decision to cancel the expressway, and feared appearing contradictory.<sup>122</sup>

The controversial role played by the OMB continues to this day. In 1988, appointments changed from being essentially lifetime to three-year contracts, with only an option of renewal based on political support. For example, several New Democratic Party appointees were not re-appointed by Premier Mike Harris during the mid-1990s.<sup>123</sup> Yet while the OMB may be more accountable to the provincial government, it continues to have high-profile fights with municipalities. Former mayor and urban commentator John Sewell has argued that in light of these changes to the appointment process, the “OMB's new role seemed to be simply to approve development that in recent years had been stalled or rejected by local councils.”<sup>124</sup> In the City of Toronto, for example, after the OMB approved a condominium development over council oppositions, councillors renamed the local street “OMB Folly.”<sup>125</sup> In another high-profile case, despite the City of Ottawa's opposition to a large development in the rural town of Manotick, the OMB overruled council and was supported by the judicial system after a challenge.<sup>126</sup> Current land-use planning debates on urban sprawl feature the OMB as a significant and controversial actor. These debates, with the OMB at the centre, continue to hash out the questions of majority rights versus minority rights, developer rights versus those of municipalities, and the role of unelected administrative tribunals.

This article has shown the role that unelected administrative tribunals had—and continue to have—in the lives of Ontario residents. While decisions of high courts and legislatures receive attention, as evidenced by newspaper diaries and notebooks of even the most mundane details of both the legal and parliamentary worlds, the OMB exists in the seemingly mundane and obscure world of “low law.” However, on an issue of severe majority versus minority disagreement, the OMB was seen as recourse to stop a municipality from trampling the latter to benefit the former. It was not a group of magistrates who decided the outcome of the Spadina Expressway; the judicial system was not even involved. Instead, the future direction of the City of Toronto was decided before three unelected men in a hearing room in a small building.

## Notes

1. Annex Ratepayers Association et al., vs. Municipality of Metropolitan Toronto, Ontario Municipal Board Decision, F. 1424-63, 2.
2. Claire Hoy, “Municipal Board Approves Spadina Expressway,” *Toronto Star*, 18 February 1971.
3. Ontario Municipal Board, *66th Annual Report of the Ontario Municipal Affairs upon the Affairs of the Board during the Year Ended December 31, 1971*, 5.
4. John G. Chipman, *A Law unto Itself: How the Ontario Municipal Board Has Developed and Applied Land Use Planning Policy* (Toronto: University of Toronto Press, 2002), 4–5.
5. *Ibid.*, 76.
6. *Ibid.*, 43, 76.
7. Albert Rose, *Governing Metropolitan Toronto: A Social and Political Analysis* (Berkeley: University of California Press, 1972), 141–142. The OMB is also discussed in Gerald M. Adler, *Land Planning by Administrative Regulation: The Policies of the Ontario Municipal Board* (Toronto: University of Toronto Press, 1971).
8. The best account of the Spadina Expressway is still David M. Nowlan and Nadine Nowlan, *The Bad Trip: The Untold Story of the Spadina Expressway* (Toronto: New Press / House of Anansi, 1970), even though it was published before the end of the saga. A good legal and planning account is found in Rose, *Governing Metropolitan Toronto*, 134–144. Another dedicated work is Darryl Newbury, *Stop Spadina: Citizens against an Expressway* (Mississauga: Commonact, 1989), an expanded York University undergraduate thesis. See also Christopher Leo, *The Politics of Urban Development: Canadian Urban Expressway Disputes* (Toronto: Institute of Public Administration of Canada, 1977), 36; Donald J. H. Higgins, *Local and Urban Politics in Canada* (Toronto: Gage Publishing, 1986), 285–286; Jack Batten, *The Annex: The Story of a Toronto Neighbourhood* (Erin, ON: Boston Mills, 2004). See also Alice Sparberg Alexiou, *Jane Jacobs: Urban Visionary* (Toronto: HarperCollins, 2007), 158–163.
9. There has been work done on the freeway project in Vancouver, which threatened to destroy Vancouver's Chinatown. Kay Anderson's *Vancouver's Chinatown: Racial Discourse in Canada, 1875–1980* (Montreal and Kingston: McGill-Queen's University Press, 1991) demonstrates how the Chinese were able to harness racial conceptions of themselves in order to turn racial discourse to their side and persuade Vancouver's city council to back down in 1968. Another account of the grassroots struggle from a policy perspective of this is V. Setty Pendakur, *Cities, Citizens & Freeways* (Vancouver: n.p., 1972).
10. Raymond A. Mohl, “Stop the Road: Freeway Revolts in American Cities,” *Journal of Urban History* 30, no. 5 (July 2004): 675.
11. *Ibid.*, 676.
12. Carl Goldschmidt, “Supervision of Local Land Use Control: The Ontario Municipal Board,” (PhD diss., University of Pittsburgh, 1970), 20–21.

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13. Chipman, *Law unto Itself*, 12. Also discussed in Bruce McKenna, “The Ontario Municipal Board: Citizen’s Rights in 1973,” in *Citizen Advocacy: Term Papers Prepared for a Course Given by Professor James Lorimer*, ed. James Lorimer (Toronto: Osgoode Hall Law School, 1974), 3.
14. Leo, *Politics of Urban Development*, 6.
15. McKenna, “Ontario Municipal Board,” 3.
16. Ontario Municipal Board, *66th Annual Report*, 6.
17. John Sewell, *The Shape of the Suburbs: Understanding Toronto’s Sprawl* (Toronto: University of Toronto Press, 2009), 18–23.
18. Chipman, *Law unto Itself*, 205.
19. A high-profile example was the Sherway Gardens controversy. In 1964, the City of Etobicoke (a western suburb of Metropolitan Toronto) applied for a modification to their official plan to allow the construction of this large shopping centre. While the OMB allowed the construction, they dramatically lowered the square footage and disallowed a planning bylaw to proceed until traffic concerns could be rectified. They also had to balance majority versus minority rights, as local businesspeople protested the centre. In the end, the smaller shopping centre allowed a transition period of sorts. For more, see Adler, *Land Planning*, 137–138.
20. Chipman, *Law unto Itself*, 1.
21. *Ibid.*, 6. Italics are mine.
22. Goldschmidt, “Supervision,” 36–37. The lack of a professional staff was highlighted in Adler, *Land Planning*, 229.
23. Government of Ontario, *Report of the Select Committee on the Ontario Municipal Board*, 21 November 1972, 1.
24. Chipman, *Law unto Itself*, 13.
25. Government of Ontario, *Report*, 21 November 1972, 1. This was also raised in Rose, *Governing Metropolitan Toronto*, 142.
26. Chipman, *Law unto Itself*, 13.
27. *Ibid.*
28. McKenna, “Ontario Municipal Board,” 3.
29. Chipman, *Law unto Itself*, 43.
30. Rose, *Governing Metropolitan Toronto*, 142.
31. Leo, *Politics of Urban Development*, 6.
32. Batten, *Annex*, 135.
33. “Kennedy, Joseph Aloysius,” Law Society of Upper Canada Archives Past Member Database. Susan Lewthwaite (research coordinator at the Law Society of Upper Canada), e-mail message to author, 16 March 2007.
34. David Lewis Stein, “The Board That Rules over Our Lands,” *Toronto Star*, 29 May 2000.
35. Jeffrey Sack, interview with author, 24 August 2007.
36. “McGuire, Robert McLennan,” Law Society of Upper Canada Archives Past Member Database. Susan Lewthwaite, e-mail message to author, 16 March 2007.
37. David Vanek, *Fulfillment: Memoirs of a Criminal Court Judge* (Toronto: Dundurn, 1999), 71.
38. Sack, interview.
39. David Nowlan and Nadine Nowlan, interview with author, 22 August 2007.
40. Batten, *Annex*, 138; also mentioned in Nowlan and Nowlan, interview.
41. For this, I wish to thank Professor Paul Craven who has introduced students to the concept of “low law” in his York University seminar “Low Law and Petty Justice.”
42. Harry Arthurs, *“Without the Law”: Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto: University of Toronto Press, 1985), 6.
43. *Ibid.*, 192.
44. Alan Powell to Gordon Fellman, 2 November 1970, file “Correspondence, 1970–1971,” box 1975-013/001, F0417, Stop Spadina Save Our City Coordinating Committee Fonds (hereafter SSSOCCC), Clara Thomas Archives and Special Collections, York University (hereafter YUA).
45. These figures were obtained through the Bank of Canada’s Inflation Calculator, which calculates approximate changes using the Consumer Price Index. While not perfect, it is a useful indicator of buying power. It is available online at [http://www.bankofcanada.ca/english/inflation\\_calc.htm](http://www.bankofcanada.ca/english/inflation_calc.htm).
46. “Application by Metropolitan Toronto for Approval of Spadina Expressway,” 26 June 1963, file F. 142-63, box 4, RG 37-6-4, Archives of Ontario (hereafter AO).
47. “Metropolitan Toronto Planning Board Report on Spadina Expressway Briefs and Ratepayer Presentations,” February 1962, box 4, RG 37-6-4, AO.
48. Edward Ruse to the Ontario Municipal Board, 15 June 1963, box 4, RG 37-6-4, AO.
49. Alexiou, *Jane Jacobs*, 158.
50. For more on the Lower Manhattan Expressway fight, see Anthony Flint, *Wrestling with Moses: How Jane Jacobs Took on New York’s Master Builder and Transformed the American City* (New York: Random House, 2009). Her critique of master planning can be found in Jane Jacobs, *The Life and Death of Great American Cities* (New York: Random House, 1961).
51. Alexiou, *Jane Jacobs*, 159.
52. “Groups Opposing the Spadina Expressway or Desiring an Independent Review,” undated but ca. 1969–1970, file “Citizens Concerned to Stop the Spadina Expressway, 1969–1970,” box 1975-013/002, F0417, SSSOCCC, YUA.
53. “The City Is for People Day,” undated but ca. early 1970, file “The City Is for People Day, 1970,” box 1975-013/002, F0417, SSSOCCC, YUA.
54. Paul Reinhart, poem presented to the Metropolitan Toronto Transportation Committee, 10 April 1970, file “Poems and Songs Concerning the Spadina Expressway,” box 1975–013/007, F0417, SSSOCCC, YUA.
55. Nowlan and Nowlan, interview.
56. *Newsletter #2, Newsletter #3, and Newsletter #4*, undated but ca. March–April 1970, file ‘SSSOCCC Newsletters, 1970,’ box 1975-013/007, F0417, SSSOCCC, YUA.
57. Sack, interview.
58. “Press Release,” 25 April 1970, file “Press Releases, 1969–1971,” box 1975-013/007, F0417, SSSOCCC, YUA.
59. Not all suburbanites were supporters of expressways, however, a point raised in Steve Penfold, “‘Are We to Go Literally to the Hot Dogs?’ Parking Lots, Drive-Ins, and the Critique of Progress in Toronto’s Suburbs, 1965–1975,” *Urban History Review / Revue d’histoire urbaine* 33, no. 1 (Fall 2004), 8–23.
60. An assortment can be found in subfile on pro-Spadina correspondence, file “Correspondence, July 1970–1971,” box 1975-013/001, F0417, SSSOCCC, YUA.
61. Sewell, *Shape of the Suburbs*, 181.
62. William Bragg, “Metro Votes 23–7 to Resume Spadina, Foes Plot Next Move,” *Toronto Star*, 17 June 1970; and Brian Hartley and Claire Hoy, “Spadina Approved but Foes Still Fighting,” *Toronto Telegram*, 17 June 1970, 8.
63. J. J. Robinette’s family had roots in the Annex area and was regarded by the legal establishment as the pre-eminent trial lawyer of his time. For more, see George D. Finlayson, *John J. Robinette, Peerless Mentor: An Appreciation*



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- (Toronto: Dundurn Group, 2003).
64. James Mackenzie, “Robinette Retained to Seek OMB Review of Spadina Rulings,” *Globe and Mail*, 5 August 1970.
  65. Jeffrey Sack to Douglas W. Ambridge, 3 November 1970, file 5, series 427, Spadina Review Corporation 1970–72 Files (hereafter SRC), Alan Powell Fonds, City of Toronto Archives (hereafter CTA).
  66. Sack, interview.
  67. Ibid.
  68. Powell to All Supporters, 5 October 1970, file “Correspondence, July 1970–71,” box 1975-013/001, F0417, SSSOCCC, YUA.
  69. Powell to All Supporters, 29 August 1970, file “SSSOCCC Newsletters, 1970,” box 1975-013/007, F0417, SSSOCCC, YUA.
  70. Alan Powell to Gordon Fellman, 2 November 1970, file “Correspondence, 1970–1971,” box 1975-013/001, F0417, SSSOCCC, YUA.
  71. Sack, interview.
  72. Jeffrey Sack to Douglas W. Ambridge, 3 November 1970, file 5, series 427, SRC, CTA. This was also discussed in James MacKenzie, “OMB Is Cool to Metro’s Bid for \$66 Million to Finish the Spadina Expressway,” *Globe and Mail*, 16 September 1970.
  73. “Group Seeks Funds for Spadina Fight,” *Toronto Citizen*, 3 December 1970.
  74. Untitled document, n.d., file 5, series 427, SRC, CTA.
  75. Affidavits concerning the insertion of notices contained proof that the notice was printed in the *Toronto Telegram* on 15 December 1970, the *Toronto Star* on 15 and 24 December 1970, and the *Globe and Mail* on 15 and 24 December 1970.
  76. See, for example, Letter from Businessmen’s League against Spadina Termination (BLAST) to Powell, n.d., file “Correspondence, 1970–1971,” box 197-013/001, F0417, SSSOCCC, YUA. These expressway supporters tied the expressway into the overall modernization of Toronto, allowing the city to erect modern high-rise apartment blocks in place of “run-down stores and homes” and “other such blighted areas.”
  77. “OMB Hearing Transcript, Annex Ratepayers Association et al., vs. Municipality of Metropolitan Toronto,” 4–5 January 1971, box 4, RG 37-6-4, AO.
  78. Ibid.
  79. Ibid.
  80. “OMB Hearing Transcript, Annex Ratepayers Association et al., vs. Municipality of Metropolitan Toronto,” 6–7 January 1971, box 4, RG 37-6-4, AO.
  81. Ibid.
  82. “OMB Hearing Transcript, Annex Ratepayers Association et al., vs. Municipality of Metropolitan Toronto,” 11, 12, and 19 January 1971, box 4, RG 37-6-4, AO.
  83. “OMB Hearing Transcript, Annex Ratepayers Association et al., vs. Municipality of Metropolitan Toronto,” 27–28 January 1971, box 4, RG 37-6-4, AO.
  84. “Spadina Review Corporation Brochure,” n.d., file 5, series 427, SRC, CTA.
  85. “OMB Hearing Transcript, Annex Ratepayers Association et al., vs. Municipality of Metropolitan Toronto,” 14–15 January 1971, box 4, RG 37-6-4, AO.
  86. Ibid.
  87. “Alan Altshuler Testimony before Congress, Entered as Evidence,” n.d., box 3, RG 37-6-4, AO.
  88. Alan M. Voorhees, “Land Use / Transportation Studies,” *Journal of the Town Planning Institute* 54, no. 7 (July/August 1968): 331–337.
  89. “Toronto Board of Education Brief to the Metropolitan Transportation Committee,” n.d., box 3, RG 37-6-4, AO.
  90. Nowlan and Nowlan, interview; Sack, interview; Batten, *Annex*, 134.
  91. Sack, interview.
  92. Sewell, *Shape of the Suburbs*, 40.
  93. Ibid.
  94. Claire Hoy, “Municipal Board Approves Spadina Expressway,” *Toronto Star*, 18 February 1971.
  95. Sack, interview.
  96. Nowlan and Nowlan, interview.
  97. “Support the Appeal to the Cabinet,” undated flyer, file “Handouts, Leaflets, Posters, 1970,” box 1975-013/007, F0417, SSSOCCC, YUA.
  98. Spadina Review Corporation, “Ontario Municipal Board: Decision on the Spadina Expressway,” file “Ontario Municipal Board,” box 1975-013/003, F0417, SSSOCCC, YUA. This document was also found in the City of Toronto Archives and in the library. It is also telling that the official transcript of the Spadina decision is one of the few decisions made publicly available in several university libraries.
  99. Ontario Municipal Board, “Annex Ratepayers Association et al., vs. Municipality of Metropolitan Toronto,” decision F1424-63, 17 February 1971.
  100. Ibid.
  101. Ibid.
  102. Ibid.
  103. Ibid.
  104. Ibid.
  105. Ibid.
  106. Ibid.
  107. “Cabinet to Be Asked to Review Approval of Spadina Extension,” *Toronto Star*, 24 February 1971.
  108. “Petition to the Lieutenant-Governor in Council in the Matter of the Ontario Municipal Board and in the Matter of the Spadina Expressway,” n.d., box 3, RG 37-6-4, AO. (Italics are mine).
  109. Colin Vaughan to William Davis, 23 April 1971, file 5, series 427, SRC, CTA.
  110. Untitled document on Spadina Review Corporation letterhead, 10 March 1971, file 5, series 427, SRC, CTA.
  111. “Statement by the Honourable William Davis, Prime Minister of Ontario on the Future of the Spadina Expressway in the Legislature,” 3 June 1971, file 5, series 427, SRC, CTA.
  112. Ibid.
  113. Claire Hoy, “Davis Calls Decision the ‘Most Agonizing’ for His Government,” *Toronto Star*, 4 June 1971, 9.
  114. Nowlan and Nowlan, interview.
  115. Sack, interview.
  116. “23 Years, \$75.6m Later: A Highway to Nowhere,” *Toronto Telegram*, 4 June 1971, 4.
  117. Nowlan and Nowlan, interview.
  118. Julie-Anne Boudreau, Roger Keil, and Douglas Young, *Changing Toronto: Governing Urban Neoliberalism* (Toronto: University of Toronto Press, 2009), 40–41.
  119. Amer Shalaby and Austin Smith, “Analysis of Mode Split in the Greater Toronto Area: Long-Range Temporal Trends and Underlying Travel Behaviour,” in *Efficient Transportation and Pavement Systems: Characterization, Mechanisms, Simulation, and Modeling*, ed. Eyad

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120. McKenna, "Ontario Municipal Board," 4, citing D. C. Hefferton, *Cases and Materials on Land Use Planning* (Toronto: Osgoode Hall Law School, 1974).
121. *Ibid.*, 42.
122. Jason Young, "Its Natural State: Toronto's Spadina Subway and the Battle over the Cedarvale-Nordheimer Ravine, 1971–1978" (paper presented at the 6th International Conference on the History of Transport, Traffic and Mobility, Ottawa, Ontario, 19 September 2008).
123. Chipman, *Law unto Itself*, 13.
124. Sewell, *Shape of the Suburbs*, 183.
125. Paul Moloney, "It's Street Revenge on Developer," *Toronto Star*, 8 October 2008. As of early 2010, the name continues to stand, despite developer protests.
126. Mohammed Adam, "Watson Calls for Further Changes at OMB," *Ottawa Citizen*, 15 April 2009. Council eventually relented and approved the project, despite its official plan: "Plan for Big Manotick Expansion Clears Council," *Ottawa Citizen*, 24 February 2010.



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