



ENVIRONMENTAL REVIEW TRIBUNAL

A Guide to Appeals under the Clean Water Act, 2006, Environmental Protection Act, the Nutrient Management Act, 2002, the Ontario Water Resources Act, the Pesticides Act, and the Safe Drinking Water Act, 2002

www.ert.gov.on.ca

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This Guide provides a general overview of appeals under the *Clean Water Act, 2006*, the *Environmental Protection Act*, the *Nutrient Management Act, 2002*, the *Ontario Water Resources Act*, the *Pesticides Act*, and the *Safe Drinking Water Act, 2002* and should not be relied upon as an authoritative text. The statutes, regulations, and Rules of Practice and Practice Directions of the Environmental Review Tribunal prevail.

Information about specific Hearings is available from:

The Environmental Review Tribunal
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The Environmental Review Tribunal accepts collect calls.

What is the Environmental Review Tribunal?

The Environmental Review Tribunal is an independent and impartial Tribunal established by provincial legislation. The Environmental Review Tribunal holds public Hearings on appeals arising from, amongst other things, decisions regarding the issuance, alteration or revocation of an order, approval, license or permit under the *Clean Water Act, 2006*, the *Environmental Protection Act*, the *Nutrient Management Act, 2002*, the *Ontario Water Resources Act*, the *Pesticides Act* or the *Safe Drinking Water Act, 2002* made by a person appointed as a Director, or as a Risk Management Official or Inspector under one of those statutes.

The Members of the Tribunal are appointed by the Lieutenant Governor in Council for the Province of Ontario to conduct Hearings and make decisions on appeals. The Members have a variety of experience. None of the Members of the Tribunal are employees of the Ministry of the Environment. Members' biographies are included in the Tribunal's Annual Report.

Who can file an appeal?

Any person (including a corporation) that:

- has been refused a license, permit or approval;
- had a license, permit or approval issued with the conditions amended, or has had new terms or conditions added to it;
- has had a license, permit or approval suspended or revoked;
- has been refused a renewal of a license, permit or certificate of approval;
- has been issued or refused an order, or refused a notice by a Risk Management Official or Inspector
or
- has been issued an order to prevent or control pollution;

may appeal this decision of the Director or Risk Management Official or Inspector to the Tribunal.

This person shall be referred to as "the Appellant".

What is the deadline for filing an appeal?

The Appellant must file a Notice of Appeal with the Tribunal and the Director within 15 days of receiving notification of the Director's decision, or within 60 days of receiving notice of the decision of a Risk Management Official or Inspector.

If a Notice of Appeal is submitted late, there is a very limited opportunity to extend the time to appeal. Unless the time to appeal is extended, the Tribunal has no authority to hold a Hearing.

What information does a Notice of Appeal contain?

There is no required form for a Notice of Appeal. Most people send Notices of Appeal in a letter format.

The Notice of Appeal must include:

- the Appellant's name and address along with the name and address of anyone representing him or her;
- the address to which the Appellant wants notices and other official documents to be delivered;
- the telephone number, facsimile number and/or e-mail address where the Appellant can be contacted during business hours;
- a statement that the Appellant is appealing the decision of the Director or Risk Management Official or Inspector;
- a copy of the decision under appeal and, where applicable, a copy of the Provincial Officer's order, report and any attachments;
- the portions of the decision that the Appellant is appealing;
- the grounds for the appeal (i.e. the reasons why the Appellant is appealing);
- a description of the relief requested (i.e. what decision the Appellant would like the Tribunal to make); and
- an indication of whether the Appellant will seek a stay of the decision.

The reasons for the appeal should be specific. A reason such as "the Director was wrong to make this decision" is not specific and may result in the dismissal of the appeal.

Following the receipt of the Notice of Appeal, the Tribunal will send the Appellant a letter specifying that, within 14 days of the date of the letter, the Appellant is to provide the Tribunal with:

- a list of the names and addresses of all owners of property within 120 metres of the boundary of the property which is the subject of a decision of the Director, or the Risk Management Official or Inspector. This information can be obtained from the Assessment Roll available from the local municipality; and
- a list of the names and addresses of any other persons who should be notified of the proceedings because they may have an interest in the outcome.

What happens if the Notice of Appeal is incomplete?

The Tribunal will send a letter explaining the deficiencies. The Tribunal may dismiss the appeal unless the deficiencies are corrected within the time frame provided by the Tribunal.

Is a lawyer needed?

An Appellant may represent himself or herself or hire a lawyer or other representative to act on his or her behalf.

Does the appeal result in the Director's decision not taking effect?

In most cases, no. Decisions of a Director or a Risk Management Official or Inspector generally take effect as soon as they are issued. Even though a decision is being appealed, it must be complied with immediately, unless the Tribunal issues a stay order. A stay order postpones this legal obligation to implement all or part of a decision.

Some orders, such as orders to pay the costs of work, costs and expenses, or environmental penalties, are automatically stayed on appeal.

The right to apply for a stay is not available for all types of decisions. For example, if a Director has refused to issue a Certificate of Approval, the Tribunal cannot stay the Director's decision (i.e. the Tribunal cannot order the Director to issue the Certificate of Approval before holding the Hearing). Nor can the Tribunal stay an order to monitor, record and report. Additionally, the Tribunal cannot stay any order if the stay of the order would cause danger to the health or safety of any person, the impairment or serious risk of impairment of the quality of the natural environment for any use that can be made of it, injury or damage or serious risk of injury or damage to any property or to any plant or animal life, or result in a drinking-water health hazard, in the case of an order under the *Clean Water Act, 2006*.

How is a stay requested?

A person who intends to apply for a stay of a decision of the Director or the Risk Management Official or Inspector, should include an indication of this intention in his or her Notice of Appeal. A stay is sought by making a motion to the Tribunal.

A person seeking a stay shall arrange through the assigned Case Manager a teleconference call with the Chair of the Tribunal or his or her designate, the Director, Risk Management Official or Inspector, and any other Parties to seek directions as to the form and content of the motion; the exchange of necessary supporting materials, including affidavit materials; the scheduling of dates for cross-examination of witnesses, if required; and the scheduling of the Hearing of the motion.

After a date, time and place for the stay Hearing is established, the person seeking a stay must serve the Director, Risk Management Official or Inspector, and any other Parties with a formal Notice of Motion at least seven days before the Hearing of the motion and file two copies with the Tribunal. The Tribunal may shorten this period if requested. The Notice of Motion must set out the grounds for requesting a stay and the date, time, and place of the stay Hearing. The Notice of Motion must also include evidence and submissions respecting:

- how the relevant statutory tests that are applicable to the granting or removal of a stay are met;
- whether there is a serious issue to be decided by the Tribunal;
- whether irreparable harm will ensue if the relief is not granted; and
- whether the balance of convenience, including effects on the public interest, favours granting the relief requested.

How can neighbours and other concerned people participate?

Neighbours and other people who feel that they are affected by a decision under appeal may apply to the Tribunal for permission to participate in the Hearing – either to support the Appellant, to support the decision of the Director or the Risk Management Official or Inspector, or to advance a different position.

To participate in the Hearing, a person should appear at the Preliminary Hearing and request to be added as either a Party, Participant or Presenter or he or she should notify the Tribunal in writing before the commencement of the Hearing of his or her wish to be added as a Party, Participant or Presenter. A person may also attend at the Hearing and request to be added as a Party, Participant or Presenter.

What is the difference between a Party, Participant, and Presenter?

The Tribunal has established various levels of participation to ensure that all those interested in the Hearing can be involved. The Tribunal encourages participation in its Hearings. A choice of participation levels addresses different needs and interests.

Who can be a Party?

Those persons specified as Parties by the statute under which the proceeding arises and persons otherwise entitled by law to be Parties are automatically Parties to the proceeding. Additionally, if a person requests Party status, the Tribunal may name that person to be a Party after considering relevant matters including: whether the person's interests may be directly and substantially affected by the Hearing or its result; whether the person has a genuine interest, whether public or private, in the subject matter of the proceeding; and whether the person is likely to make a relevant contribution to the Tribunal's understanding of the issues in the proceeding.

What is the role of a Party?

Those who request and receive Party status from the Tribunal assume the fullest range of rights and responsibilities. Most Parties are represented by either a lawyer or an agent, but a Party may act on its own behalf. A Party can be either an individual or a group. A Party may:

- be a witness at the Hearing;
- be questioned by the Tribunal and the Parties;
- bring motions;
- call witnesses at the Hearing;
- cross-examine witnesses called by other Parties;
- make submissions to the Tribunal including final argument;
- receive copies of all documents exchanged or filed by the Parties;
- attend site visits; and
- claim costs and be liable for costs, where permitted by law.

Who can be a Participant?

A person who has an interest in the subject matter of the Hearing may be named as a Participant. In deciding whether to name a person as a Participant rather than as a Party, the Tribunal may consider whether the person's connection to the subject matter of the proceeding or issues in dispute is more remote than a Party's would be. A person who may otherwise qualify as a Party may request Participant status.

What is the role of a Participant?

In addition to the right to observe and present his or her views at a Hearing, a Participant may:

- be questioned by the Tribunal and the Parties;
- make submissions to the Tribunal at the commencement and end of the Hearing;
- upon request, receive a copy of the documents exchanged by the Parties that are relevant to the Participant's interests; and
- attend site visits.

However, someone with Participant status cannot:

- raise grounds not already raised by a Party;
- call witnesses;
- cross-examine witnesses;
- bring motions; and
- claim costs or be liable for costs.

Who can be a Presenter?

A person who has an interest in the subject matter of the Hearing may be named as a Presenter. In deciding whether to name a person as a Presenter rather than as a Party or Participant, the Tribunal may consider whether the person's connection to the subject matter of the proceeding or issues in dispute is more remote than a Party's or

Participant's would be. A person who may otherwise qualify as a Party or Participant may request Presenter status.

What is the role of a Presenter?

A Presenter need only attend at the Hearing when he or she is presenting his or her evidence. In addition to the right to observe and present his or her views at a Hearing, a Presenter may:

- be a witness and present his or her views either during the regular daytime sessions or, where there is a large public interest, at a special evening session;
- be questioned by the Tribunal and the Parties;
- provide the Tribunal with a written statement as a supplement to oral testimony; and
- upon request, receive a copy of documents exchanged by the Parties that are relevant to the Presenter's interests.

However, someone with Presenter status cannot:

- raise grounds not already raised by a Party;
- call witnesses;
- cross-examine witnesses;
- bring motions;
- make oral and written submissions to the Tribunal at the commencement and at the end of the Hearing;
- claim costs or be liable for costs; and
- attend site visits unless a request to attend is made to the Tribunal and the Tribunal grants the request.

What is a Preliminary Hearing?

The Tribunal may decide to hold a Preliminary Hearing (which forms part of the Hearing) in order to facilitate preparation for the main Hearing. The Member will issue a written order after the Preliminary Hearing regarding what was decided at the Preliminary Hearing.

A Preliminary Hearing may be held to:

- identify Parties, Participants and Presenters, and the scope of their participation in the Hearing;
- determine the length, schedule and location of the Hearing;
- determine whether the Hearing will be conducted orally, electronically or in writing;
- hear preliminary motions such as motions to dismiss for non-compliance with a direction of the Tribunal;

- identify, define, scope and simplify issues;
- establish dates for the exchange among Parties and with the Tribunal of all documents relevant to the proceeding, witness lists, witness statements, and resumes of any expert witnesses;
- where applicable, establish dates for the exchange among all Parties and with the Tribunal of a common document book and a list of all documents in the possession, power and control of the Parties;
- develop an agreed statement of facts and evidence;
- canvass the possibility of the settlement or withdrawal of any or all the issues; and
- consider any other matters that may assist in the just and expeditious disposition of the proceeding.

Is mediation available?

Mediation is offered to all parties and is voluntary. Mediation is conducted after the Preliminary Hearing and generally 30 days prior to the commencement of the main Hearing. The member of the Tribunal who conducts the mediation will not conduct the Hearing unless all Parties consent.

The Tribunal's Members are trained and experienced in providing mediation services to help resolve disputes. This service is provided at no cost to the Parties. The mediator may exclude everyone but the Parties from the mediation, and all documents submitted and all statements made at the mediation are confidential and without prejudice. A settlement agreement will be reviewed by the mediator to ensure that it is in accord with the Tribunal's Rules of Practice and Practice Directions. If the mediator is satisfied that the settlement agreement is in accordance with the Rules, the mediator will accept the settlement agreement and attach the settlement agreement to his or her decision dismissing the proceedings.

How does one prepare for a Hearing?

The key to effective participation in a Hearing is being well informed and prepared to provide one's views and evidence at the Hearing. The Tribunal can only consider the information provided at the Hearing. The evidence intended to be relied upon should be relevant to the issues before the Tribunal.

Parties, Participants and Presenters are strongly encouraged to review the statute under which the decision or order was made and the Rules of Practice and Practice Directions of the Environmental Review Tribunal.

What are the disclosure requirements?

All Parties must provide without charge to all other Parties a copy of every relevant document that is in their possession, control or power, no later than the disclosure date set

at the Preliminary Hearing. Participants and Presenters may request to receive a copy of all documents relevant to their interests. Privileged documents are excepted.

All documents intended to be relied upon at the Hearing must be filed with Tribunal. Two copies of each document must be provided if the document is filed prior to the commencement of the Hearing. If the document is filed during the course of the Hearing, a sufficient number of copies must be provided so that there is a copy for each Panel member and for the record file.

The obligation to disclose is continuing. All relevant documents discovered during the course of the Hearing must be provided to the other Parties and, if the document is to be relied upon at the Hearing, the Tribunal.

How are special needs accommodated?

A person with a disability should inform the assigned Case Manager in advance of the Hearing of any special needs that must be accommodated.

What language services are available?

A person should inform the assigned Case Manager in advance of the Preliminary Hearing or Hearing and, in any event, at least fourteen days before the Preliminary Hearing or Hearing if he or she requires the Preliminary Hearing or Hearing to be translated into French.

What is a Witness Statement?

Witnesses may be trained professionals, members of the community, academic specialists, or individuals with specific knowledge who can give the Tribunal relevant information.

A witness statement is a concise, but complete, written statement of the evidence a witness intends to present.

A witness statement should be direct and to the point. It is intended that the statement be complete in the sense that the witness should not have to add anything new to the evidence at the Hearing. However, the witness is entitled to explain more fully anything contained in the statement.

A witness statement should contain the following information:

- the name, address and telephone number of the witness;
- whether the evidence will be factual evidence or, if the witness is a qualified expert, opinion evidence;
- the qualifications of the witness, where the witness is to give opinion evidence;

- whether or not the witness has an interest in the application and, if so, the nature of the interest;
- a summary of the opinions, conclusions and recommendations of the witness;
- reference to those portions of other documents which form an important part of the opinions, conclusions and recommendations of the witness;
- a summary of answers to any interrogatories to or from other Parties that will be relied on at the Hearing;
- where applicable, a discussion of proposed conditions of approval that are in controversy among the Parties or agreed upon conditions that may be related to issues in dispute;
- the date of the statement; and
- the signature of the witness.

If the witness statement does not contain all of the above information Parties may jeopardize their right to have the evidence admitted or may delay the Hearing.

Witnesses will normally attend in person to give oral evidence and be subject to cross-examination.

Witness statements should be exchanged between the Parties and filed with the Tribunal within the time directed by the Tribunal, which is usually no later than 15 days prior to the commencement of the Hearing.

Summons to Witness

The Tribunal has the power to summon a witness to attend a Hearing, to give evidence and to bring relevant documents and material. A summons can be issued because the Tribunal wants to hear from the witness or because a Party has requested that the Tribunal require the person to act as a witness. The person calling a witness is responsible for paying for the witness' attendance costs at the same rate as is paid to a person summoned to appear before the Superior Court. It is the responsibility of a person calling a witness to obtain and serve the summons as soon as possible before the commencement of the Hearing.

Can a Hearing be postponed or adjourned?

All Hearing dates are considered peremptory; that is, once a date has been set for a Hearing, the Hearing will proceed on that date except in exceptional circumstances, such as the sudden illness of a Party. If a person has been notified of the time, date and place of a Hearing and fails to attend, the Tribunal may proceed with the Hearing and make its decision in the absence of that person.

For information on adjournments, please refer to the Tribunal's Rules of Practice.

How does the Tribunal hear an appeal?

The Tribunal may conduct a Hearing by a panel of one, two or three members. An appeal will normally be conducted by way of an oral Hearing. It might sometimes be conducted electronically (for instance by telephone), by way of written submissions, or by a combination.

At an oral or electronic Hearing, each Party will have an opportunity to present evidence and submissions, call and cross-examine witnesses and explain his or her case to the Tribunal.

At a written Hearing, all Parties will be provided with the opportunity to make written submissions and to comment on other Parties' written submissions.

What is the order of presentation at a Hearing?

Once the Parties are identified, they will be asked in turn to give a very brief opening statement outlining what they feel are the issues in the case before the Tribunal, a brief summary of the evidence they intend to present, the names of the witnesses that they intend to call, and the amount of time they feel they will require to present their case.

While the Tribunal can direct the order of the presentation of evidence, the Director, or the Risk Management Official or Inspector will usually present his or her case first. At the conclusion of the examination of each of the Director's or the Risk Management Official's or Inspector's witnesses, the Parties are given an opportunity to cross-examine the witness. Upon completion of the cross-examination of each witness, the Director or the Risk Management Official or Inspector is entitled to re-examine his or her witness on any issue that arose for the first time during the cross-examination of the witness.

When the Director's, or the Risk Management Official's or Inspector's evidence has been presented, other Parties, Participants and Presenters will be given an opportunity to present their case following the same procedures.

After any supporting evidence of the Director, or the Risk Management Official or Inspector has been presented, the Appellant can call its witnesses. Any other Parties can then present their witnesses. Cross-examination and re-examination will be allowed of any evidence presented.

The Appellant will next be given an opportunity to present any additional evidence that arises out of the evidence of the other Parties. This reply will be limited to evidence that the Appellant could not reasonably have been expected to anticipate during their initial presentation of evidence.

When all the evidence has been heard, each Party and Participant will be entitled to make a final submission. This submission gives the Parties and Participants a chance to summarize the important facts on which they are relying, to summarize any points of law

or policy which they think are relevant for the Tribunal's consideration, and to persuade the Tribunal to accept their argument or position.

At any time during the Hearing, the Tribunal may ask questions of witnesses or of counsel or representatives.

What principles govern the Tribunal's Hearings?

The Tribunal's objective is to consider all the evidence presented, and make a decision with written reasons in a manner that is consistent with the Act under which the application is submitted.

What type of decision can the Tribunal make?

The Tribunal may confirm, alter or revoke the decision that is the subject matter of the Hearing, and may by order direct the Director or the Risk Management Official or Inspector to take such action as the Tribunal considers appropriate. The Tribunal may substitute its opinion for that of the Director or the Risk Management Official or Inspector.

When will Tribunal make a decision?

Usually the Tribunal issues a written decision, and the reasons for its decision, within 60 days following the Hearing.

A copy of the decision is mailed to all Parties and Participants. Decisions of the Tribunal are also available on the Tribunal's website usually within 24 hours of its release.

Can the Tribunal award costs?

Participating in a Hearing invariably entails some costs. Typically these costs might include:

- fees for lawyers, representatives or agents;
- fees for expert assistance and witnesses;
- travel and accommodation expenses;
- costs for materials used for presentations (such as photographs, graphics, etc.).

In rare circumstances, costs may be awarded in the types of proceedings covered by this Guide but only where there has been unreasonable conduct by a Party. Rules 204 to 212 and Rules 217 to 223 of the Tribunal's Rules of Practice should be consulted.

Can the Tribunal's decision be appealed/reviewed?

An appeal of the Tribunal's decision, except with respect to a hearing under section 70 of the *Clean Water Act, 2006*, may be made in writing to the Minister of the Environment on any matter other than a question of law. The Minister of the Environment will then confirm, alter or revoke the decision of the Tribunal if the Minister considers that it is in the public interest to do so.

The appeal must be made within 30 days after releasing the Tribunal's decision, or, for matters under the *Safe Drinking Water Act, 2002* where an appeal has been made to Divisional Court, within 30 days of the disposition of that appeal.

An appeal of the Tribunal's decision on a question of law may be made to the Divisional Court. This appeal must be filed in accordance with the *Ontario Rules of Civil Procedure*.

The opportunity also exists for judicial review of the decision by the Divisional Court and review by the Tribunal under the limited circumstances set out in Rules 227 to 235.

For more information:

For further information, please refer to the statute under which the application was made (eg. the *Clean Water Act, 2006*, the *Environmental Protection Act*, the *Nutrient Management Act, 2002*, the *Ontario Water Resources Act*, the *Pesticides Act*, or the *Safe Drinking Water Act, 2002*) and to the Rules of Practice and Practice Directions of the Environmental Review Tribunal. All of these documents are available on the Tribunal's website at www.ert.gov.on.ca.