



ENVIRONMENTAL REVIEW TRIBUNAL

A Guide to Hearings arising from Applications
under the *Environmental Assessment Act*, the
Environmental Protection Act and the *Ontario
Water Resources Act*

www.ert.gov.on.ca

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This Guide provides a general overview of applications under the *Environmental Assessment Act*, the *Environmental Protection Act*, and the *Ontario Water Resources Act* 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 Tribunal holds public Hearings to assess the merits of an undertaking that will have an impact on the environment. The Tribunal hears applications under the *Environmental Assessment Act*, the *Environmental Protection Act*, and the *Ontario Water Resources Act*.

The Members of the Tribunal are appointed by the Lieutenant Governor in Council for the Province of Ontario. 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.

What is the *Environmental Assessment Act*?

The *Environmental Assessment Act* is designed to provide for “the betterment of the people of the whole or any part of Ontario by providing for the protection, conservation and wise management in Ontario of the environment.”

All provincial or municipal undertakings are subject to the Act unless exempted. Private sector undertakings are not subject to the Act unless specifically designated by regulation. Common types of undertakings that are subject to the Act include applications for the establishment or expansion of a landfill or highway.

The environmental assessment process begins long before the commencement of a Hearing. Under the *Environmental Assessment Act*, a Proponent (the person proposing an undertaking) submits an environmental assessment document to the Minister describing the environmental impacts of the project in accordance with the terms of reference approved by the Minister of the Environment.

After an environmental assessment has been reviewed by the government and the public, the Minister may, on his own initiative or at the request of any person, refer the application, or any part of the application, to the Tribunal for a Hearing and decision.

If an application is referred for a Hearing, the Tribunal must determine whether to grant approval to proceed with the undertaking, grant approval to proceed with the undertaking subject to conditions, or refuse to grant approval.

What is the *Environmental Protection Act*?

The *Environmental Protection Act* is designed to provide for “the protection and conservation of the natural environment”.

After receiving an application for a Certificate of Approval under Part V of the *Environmental Protection Act* for a waste disposal site or waste management system, a person appointed as a Director under section 5(1) of the *Environmental Protection Act* by

the Minister of the Environment can request that the Tribunal conduct a Hearing. However, the Act provides that a Hearing by the Tribunal is required if the application involves the disposal of hauled liquid industrial waste or hazardous waste, or deals with domestic waste equivalent to the output of more than 1500 persons.

Unlike *Environmental Assessment Act* Hearings, Hearings under the *Environmental Protection Act* do not include a review of alternatives to the undertaking. The issues in such Hearings revolve around the nature and degree of the impacts the proposed undertaking will have on the natural environment, and whether conditions can be imposed that will mitigate those impacts.

What is the *Ontario Water Resources Act*?

The *Ontario Water Resources Act* is designed to prevent the impairment of the quality and quantity of any water body, such as a lake, river or well.

Prior to a Director making an order defining an area of public water or sewage service, a Hearing before the Environmental Review Tribunal is required. When a municipality proposes to construct a sewage works in or onto a municipality which is not itself the Proponent, a Hearing is mandatory. However, should the undertaking be entirely within the Proponent municipality, the Director assigned under the *Ontario Water Resources Act* may require the Environmental Review Tribunal to conduct a Hearing.

Once the Director of Approvals has decided that a Hearing is necessary and gives notice to the Environmental Review Tribunal, the Tribunal must give notice to the public. If there is no response to the Notice of Hearing, the Tribunal can make a decision on the application without holding a Hearing.

How can neighbours and other concerned people participate?

Neighbours and other people who feel that they are affected by an undertaking may apply to the Tribunal to participate in the Hearing – either to support the Proponent or to advance a different position.

To participate in the Hearing, a person must appear at the Preliminary Hearing and request to be added as either a Party, Participant or Presenter or he or she must 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 his or her 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 their 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 the application 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 application 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. That is, 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 14 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 Rules of Practice.

How does the Tribunal hear an application?

The Tribunal may conduct a Hearing by a panel of one, two or three members. A Hearing 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 expect will be required to present their case.

While the Tribunal can direct the order of the presentation of evidence, the Proponent will usually present his or her case first. At the conclusion of the examination of each of the Proponent's witnesses, the Ministry of the Environment and any other Parties in turn are given an opportunity to cross-examine the evidence given by the witness. Upon completion of the cross-examination of each witness, the Proponent is entitled to re-examine the witness on any issue that arose for the first time during the cross-examination of the witness.

When all the Proponent's evidence has been presented, other Parties, Participants and Presenters whose interests or concerns are similar to those of the Proponent will be given an opportunity to present their case following the same procedures.

After the Proponent's and any supporting evidence has been presented, any Parties opposing the application can call their witnesses. Cross-examination and re-examination will be allowed regarding any evidence presented.

Finally, the Proponent will 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 he or she could not reasonably have been expected to anticipate during his or her 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 grant approval to proceed with the undertaking, subject to whatever conditions it sees fit, or it may refuse to approve the undertaking.

When will the Tribunal make a decision?

Usually the Tribunal issues a written decision, and the reasons for its decision, within 60 days following the Hearing. Sometimes the Tribunal will announce its decision orally at the end of 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 the release of the decision.

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.).

Costs may be awarded by the Tribunal. Rules 204 to 212 of the Rules of Practice should be consulted. Rules 217 to 223 apply specifically to the types of proceedings covered by this Guide but the remaining costs Rules are also relevant. Costs awards may be ordered to help defray the costs of participation borne by Parties, other than the Proponent, the Director and government decision makers, who make a substantial contribution to the proceedings through responsible participation. Costs awards may also be ordered to sanction unreasonable conduct by any Party.

Can the Tribunal's decision be appealed/reviewed?

The appeal procedures vary accordingly to the legislation governing the Hearing.

Under the *Environmental Protection Act* and the *Ontario Water Resources Act*, the Tribunal's decision may be appealed to Cabinet directly or, if a question of law is involved, to Divisional Court.

Under the *Environmental Assessment Act*, the Tribunal's decision can be reviewed by the Minister of the Environment.

The opportunity exists for judicial review of the decision by the Divisional Court. With the exception of proceedings under the *Environmental Assessment Act*, the opportunity also exists for 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 *Environmental Assessment Act*, the *Environmental Protection Act*, or the *Ontario Water Resources Act*) and to the Rules of Practice and Practice Directions of the Environmental Review Tribunal.

All these documents are available on the Tribunal's website at www.ert.gov.on.ca.