



ENVIRONMENTAL REVIEW TRIBUNAL

A Guide to Applications for Leave to Appeal
under the *Environmental Bill of Rights, 1993*

www.ert.gov.on.ca

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This Guide provides a general overview of Leave to Appeal applications under the *Environmental Bill of Rights, 1993* 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. Under the authority of the *Environmental Bill of Rights, 1993*, the Tribunal holds Hearings to decide whether to grant a person's application for Leave to Appeal certain types of decisions made by a person appointed as a Director under the *Environmental Protection Act*, the *Ontario Water Resources Act*, and the *Pesticides 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 Bill of Rights, 1993*?

The *Environmental Bill of Rights, 1993* was proclaimed into law in February 1994. It provides the public with a number of rights that permit them to play a full and meaningful role in protecting the environment.

The *Environmental Bill of Rights, 1993* provides the public with the right to participate in significant environmental proposals by ensuring that the public is given advance notice and the opportunity to comment on those proposals.

What is a Leave to Appeal?

Another right provided to the public by the *Environmental Bill of Rights, 1993* is the right to seek Leave to Appeal the issuance or approval of a Class I or II instrument. Prior to the *Environmental Bill of Rights, 1993*, only the person to whom a decision of a Director was addressed could appeal that decision. The *Environmental Bill of Rights, 1993* provides an Ontario resident the right to seek Leave to Appeal the issuance or approval of a Class I or II instrument.

What is a Class I or II instrument?

The types of decisions that are deemed to be a Class I or II instrument are listed in Ontario Regulation 681/94, as amended. Some examples of these types of decisions include a certificate of approval for the release of contaminants into the air (issued under section 9 of the *Environmental Protection Act*), a permit for the taking of water (issued under section 34 of the *Ontario Water Resources Act*), and an order to remove waste from a site (issued under section 43 of the *Environmental Protection Act*).

What is the significance of obtaining Leave to Appeal?

If the Tribunal grants Leave to Appeal, then the Applicant has the right to file a Notice of Appeal within 15 days from the date the Applicant receives the Tribunal's decision. At the appeal Hearing, the Tribunal will receive evidence and decide whether the Director's

decision should be overturned or upheld, or if warranted, whether any additional conditions should be attached to the Director's decision.

Who may commence an application for Leave to Appeal?

A person seeking Leave to Appeal a decision regarding a Class I or II instrument must be an Ontario resident and have an "interest" in the decision.

Any person who has exercised their right under the *Environmental Bill of Rights, 1993*, to comment on the proposal has demonstrated an "interest" in the decision. As well, any person who could be affected by the decision has an "interest" in the decision.

When will Leave to Appeal be granted?

It should be noted that upon reviewing a Leave to Appeal application, the Tribunal is not deciding the actual case but only if Leave to Appeal should be granted based on the two-part test set out in section 41 of the *Environmental Bill of Rights, 1993*:

Part 1 – Whether it appears that there is good reason to believe that no reasonable person, having regard to the relevant law and any relevant government policies, could have made the decision?

Part 2 – Whether it appears that the decision being appealed could result in significant harm to the environment?

An Applicant will be granted Leave to Appeal if he or she can satisfy both parts of the above test.

What is the deadline for filing an application for Leave to Appeal?

An application for Leave to Appeal must be filed with the Environmental Review Tribunal within 15 days after the day on which the Minister of the Environment gives notice of a decision regarding an instrument on the Environmental Registry. The Applicant should serve a copy of the application for Leave to Appeal on the Environmental Commissioner of Ontario, the Director who issued the instrument and the Instrument-holder on or before the day on which the application is filed with the Tribunal.

If an application for Leave to Appeal is submitted late, the Tribunal has no legal authority to consider the application.

For guidance on how to file an application for Leave to Appeal, please refer to the Tribunal's Rules of Practice.

What is the Environmental Registry?

The Environmental Registry is a website that provides electronic access to environmentally significant proposals and decisions, including Class I and II instruments. The maintenance of the Registry is not the responsibility of the Environmental Review Tribunal. It is managed by the Ministry of the Environment and is accessible through their website at www.ene.gov.on.ca.

What information must an application for Leave to Appeal contain?

An application for Leave to Appeal must include:

- a copy of the instrument issued by the Director that is the subject of the application;
- a copy of all documents and a statement of all facts and evidence upon which the Applicant relies in support of the application;
- a statement describing the Applicant's interest in the Director's decision to issue the instrument and any facts that the Applicant wants taken into account in deciding whether he or she has an interest in the decision;
- a statement describing the portions of the instrument in respect of which the Leave to Appeal is sought;
- the grounds for granting Leave to Appeal on which the Applicant intends to rely;
- a statement of the reason(s) why it appears that there is good reason to believe that no reasonable person, having regard to the relevant law and to any government policies developed to guide decisions of that kind, could have made the decision;
- a statement of the reason(s) why it appears that the decision could result in significant harm to the environment; and
- the Applicant's telephone number, facsimile number and/or email address where he or she can be contacted during business hours.

What happens if the Applicant is unable to submit all the required information at the time of filing?

If the Applicant is unable to submit all the required information at the time of filing, the Applicant should state this fact in his or her application. The Applicant shall then have five days for filing the additional information unless he or she explains in writing why it would be impossible to meet this five-day deadline. The Tribunal may then grant an extension. If there is any information missing, the Tribunal will send a letter explaining the deficiencies. Unless the deficiencies are corrected within the time frame provided by the Tribunal, the Tribunal may dismiss the application for Leave to Appeal.

How does the Tribunal hear an application for Leave to Appeal?

Applications for Leave to Appeal will be made in writing and disposed of wholly in writing unless the Tribunal decides that it wishes to conduct the Hearing in person, by teleconference, or by a combination of all three.

What principles govern the Tribunal's Hearing and decision?

The Tribunal's objective is to consider all the evidence presented by the Parties and make its decision with written reasons in a manner that is consistent with the *Environmental Bill of Rights, 1993*.

Applicants are strongly encouraged to review the *Environmental Bill of Rights, 1993*, the statute governing the Director's decision, and the Rules of Practice and Practice Directions of the Environmental Review Tribunal.

Is a lawyer needed?

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

What language services are available?

A person should inform the assigned Case Manager in advance of the Hearing and, in any event, at least 14 days before the Hearing if he or she requires the Hearing to be translated into French.

What type of decision can the Tribunal make?

The Tribunal may grant Leave to Appeal the Director's decision on certain specified grounds outlined in the Applicant's application for Leave to Appeal, or it may refuse to grant Leave to Appeal.

Is the instrument suspended if Leave to Appeal is granted?

Yes. A decision by the Tribunal to grant Leave to Appeal automatically suspends the operation of the Class I or II instrument under appeal until the disposition of the appeal, unless the Tribunal orders otherwise.

When will the Tribunal make a decision?

The Tribunal is required to make its decision within 30 days after the day on which the application is filed, unless it determines that, because of unusual circumstances, a longer period is required. A copy of the decision is mailed to all Parties. Decisions of the Tribunal are also available on the Tribunal's website usually within 24 hours of the release of the decision.

Is mediation available?

Although the Tribunal's Members are available to provide mediation services to help resolve disputes, mediation is not normally requested by Parties involved in this type of application because of the speedy Hearing process required for these types of applications. Should the Tribunal grant Leave to Appeal, mediation services could be requested prior to the appeal Hearing. The member of the Tribunal who conducts the mediation will not conduct the Hearing unless all Parties consent.

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 applications for Leave to Appeal 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?

No, the legislation does not provide for an appeal of the Tribunal's decision on whether to grant Leave to Appeal. However, the opportunity exists for judicial review of the decision by Divisional Court and review by the Tribunal under the limited circumstances set out in Rules 227 to 235.

What happens if Leave to Appeal is granted?

If Leave to Appeal is granted, then the Applicant has the right to appeal the Director's decision to the Tribunal within 15 days from the date that the Applicant received the Tribunal's decision granting Leave to Appeal.

In such circumstances, the Tribunal has the same powers as it would normally have in hearing an appeal.

For more information:

For more information, please refer to the *Environmental Bill of Rights, 1993*, Ontario Regulation 681/94, as amended, and Ontario Regulation 73/94, as amended, as well as to the statute governing the Director's decision and to the Rules of Practice and Practice Directions of the Environmental Review Tribunal.

This information is available on the Tribunal's website at www.ert.gov.on.ca. Ontario Regulations 681/94 and 73/94, as amended, are available at www.e-laws.gov.on.ca.