



June 14, 2010

Ms. Donna Symonds
Acting Tribunal Secretary
Environmental Review Tribunal
655 Bay Street, Suite 1500
Toronto, ON M5G 1E5

Dear Ms. Symonds:

**Re: Proposed Environmental Review Tribunal Rules Respecting s. 142.1 of the
*Environmental Protection Act***

Introduction

The Ontario Bar Association (“OBA”) consists of 17,500 lawyers from a broad range of sectors. Our members have, over the years, analyzed and provided comments to the Ontario government and its administrative tribunals on numerous legislation, policy and procedural initiatives. More than 355 of these lawyers are members of the Environmental Law Section, which represents many diverse points of view.

We welcome the opportunity to comment on the proposed new Environmental Review Tribunal (“ERT”) Rules of Procedure (the “Rules”) set out in the draft [“Guide to Appeals by Members of the Public regarding Renewable Energy Approvals under Section 142.1 of the *Environmental Protection Act*”](#) (the “Guide”). Our comments, which represent the views of the OBA and its Environmental Section as a whole, are contained below and are not necessarily the views of each individual member or other organizations with which they may be involved.

Comments

1. Rules in the Context of Other Changes to Administrative Tribunals

The revisions to the Rules are both necessary and, in a number of areas, helpful. However, they are taking place at a time when it is reasonable to anticipate that changes may be coming to the practices and procedures of the other four tribunals that now make up the Environment and Land Tribunals Ontario. We foresee these changes will come pursuant to the *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*. The OBA trusts that, before the revisions to the Rules are finalized, consideration will have been given to any changes to the rules and

functioning of the other tribunals that may in turn affect the ERT. It would clearly be desirable to make any further changes that may arise from this process at the same time.

2. *The Guide*

(A) *Generally*

As a general comment, we believe that it would be helpful if excerpts or links were provided to appropriate locations throughout the Guide in order to direct the reader to the relevant rule or legislation.

(B) *Specific Provisions in the Guide*

Please find below our specific comments with respect to the particular sections of the Guide.

(i) “What appeals does this Guide deal with?” page 2

The Guide should be clear that (a) there are only two possible grounds for a challenge to a decision (as opposed to stating that “there are only two issues which can be considered”), and (b) the ERT has jurisdiction only to deal with these two grounds. Further, it would be appropriate to provide a specific reference to the onus provisions of Section 145.2.1 (3) of the *Environmental Protection Act* (“EPA”) in this section, rather than later on in the document.

(ii) “Is a Lawyer Needed?” page 3

The Guide should advise that parties and/or their representatives will be required to attend all hearings and proceedings, and that the attendance of participants or presenters may also be required (depending on the proceeding). Appellants should be notified that the Rules include consequences for failure to attend.

(iii) “What are the deadlines for filing appeals?” page 3

We suggest here a provision directing the reader to the Rules governing service of documents.

(iv) “What information must a Notice of Appeal contain?” page 4

It should be made clear in the Guide that, except with leave of the ERT, an appellant is not entitled to appeal a portion of a renewable energy approval that is not enumerated in the Notice of Appeal.

To avoid ambiguity, we also suggest adding a statement that (a) an appellant must file a Notice of Motion seeking a stay in order to obtain the stay and (b) under the circumstances, enumerated in Subsections 143(2) and 143(3) of the EPA, the Tribunal cannot grant a stay

(v) “What decisions can the Tribunal make on the appeal?” page 5

We suggest shortening this section as it may be confusing and repeats previously stated information regarding the grounds of appeal. We propose that it read: “if either of the tests described in subsection 142.2(3) of the EPA are met, the Tribunal may: revoke the decision of the Director; by order, direct the Director to take such action as the Tribunal considers the Director should take in accordance with the Act and regulations, or; alter the decision of the Director, for which purpose the Tribunal may substitute its opinion for that of the Director”.

(vi) “When will the Tribunal make a decision?” page 5

We suggest removing the reference to applications for judicial review from the Guide in order to avoid confusion.

(vii) “How will the hearing process be expedited?” page 6 and 7

The Guide should clarify that witnesses who wish to present opinion evidence must be qualified as experts before their evidence can be admitted.

(viii) “How can neighbours and other concerned people participate” page 7

We suggest including an additional bullet to advise that any persons participating in the hearing should indicate whether they are seeking party, participant or presenter status. The reader could also be directed to the next pages of the Guide for information as to the distinctions between these various roles.

(ix) “What is a Preliminary Hearing?” page 10

Per the comments on Motions below, the Guide should make it clear that substantive issues can be disposed of at a preliminary hearing.

(x) “What is a Witness Statement?” page 11

The Guide should make clear that the purpose of a witness statement is to provide the Respondent and other parties with notice of what evidence will be introduced is proposed to be introduced at the hearing. The reader should then be alerted to the principle that any proposed evidence not included in the witness statement may not be introduced into evidence.

3. *Motions*

We strongly urge the ERT to specify in the Guide that preliminary motions include motions to dismiss and to set out a specific timetable for preliminary motions. Such clarity is required to maintain the integrity of the appeals process (i.e., to deliver fair results in accordance with the renewable energy approval regulatory framework, including its timelines). More specifically, in the view of the OBA, participants in the appeal process should be made aware (through the Guide) of the scope of, and requirements for, preliminary motions so that the prescribed timelines are respected and complied with.

While in our experience many of the preliminary motions in matters previously heard by the ERT related to purely administrative (i.e., non-substantive) matters, we anticipate that under the renewable energy approvals process that motions to dismiss will not be uncommon. We therefore recommend that as much clarity be brought to the scope of, and requirements for, preliminary motions.

Further to the above, and consistent with the timeline set out in Appendix A of the Proposed Rules, the OBA submits that the following additional timelines should be incorporated into the Guide:

- the moving party must provide to the other participants notice of its preliminary motions within two business days of the exchange and filing of all existing documents and summary of intended evidence and responses to appellant's issues;
- any responding parties has two business days from receipt of the moving party's notice of motion to provide any response to it;
- all responses must be provided at least one full business day prior to the preliminary hearing; and
- the ERT must render its decisions on preliminary motions as soon as possible and in any event, within two weeks of the preliminary hearing (so that all participants (and the ERT) know the issues, if any, to be addressed at the hearing and can use their resources efficiently).

To make the preliminary motions process work effectively and efficiently, we strongly believe that the timelines described above (or similar timelines) must be included in the new Rules and Guide.

4. *Resources*

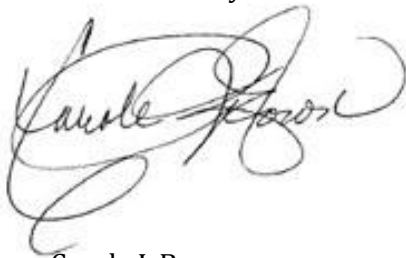
We understand that the wording of the EPA requires strict and quick timelines with respect to s. 142.1 appeals. We are also aware that the ERT has limited resources. Accordingly, we request that the new Rules not result in delays in processing or hearing other appeals.

Conclusion


In general, the OBA supports the amendments to the proposed Rules to address this new area of environmental law. We believe that our comments above will assist in bringing clarity and efficiency to the new Rules and in avoiding delays with other appeals before the ERT.

We would be pleased to meet with the ERT to discuss our comments in more detail.

Yours sincerely

A handwritten signature in cursive script, appearing to read "Carole J. Brown".

Carole J. Brown
President

A handwritten signature in cursive script, appearing to read "Barry Weintraub".

Barry Weintraub
Chair, Environmental Law Section