



# Consultation on the Ontario Land Tribunals Draft Rules

Date: February 2021

Submitted to: Ontario Land Tribunals

Submitted by: Ontario Bar Association



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## Introduction

The Ontario Bar Association (the “**OBA**”) appreciates the opportunity to provide a submission on the Ontario Land Tribunals’ proposed draft Rules of Practice and Procedure (the “**Draft New Rules**”).

## The OBA

Established in 1907, the OBA is the largest legal advocacy organization in the province, representing lawyers, judges, law professors and law students in Ontario, on the frontlines of our justice system in no fewer than 40 different sectors. In addition to providing legal education for its members, the OBA assists key decision makers in the province with many policy initiatives each year - both in the interest of the legal profession and in the interest of the public.

This submission was prepared by the OBA’s Municipal and Environmental Law Sections, with input from the Administrative Law and the Natural Resources Sections (the “**Sections**”). The Sections, have a combined membership of approximately 700 lawyers who are leading experts in their respective fields, representing municipalities, residents, developers, environmentalists and environmental interests, companies and other stakeholders. Members of the Sections often advocate before the various tribunals comprising the Ontario Land Tribunals cluster (the “**OLT**”) and all levels of court in the Province of Ontario. Though we represent a broad spectrum of clients with diverse and sometimes competing interests, our goal is to provide decision-makers with commentary that represents a balance of the various interests of our members and their clients.

## Overview

The OBA appreciates the presentation made by the OLT Associate Vice-Chair, Sharyn Vincent, at the Building Communities Conference on February 5, 2021. Based on the comments made at the session, the OBA looks forward to working with the OLT to provide our members guidance and best advice as outlined in this submission.

The Sections have reviewed the Draft New Rules and note that they are modeled extensively on the current LPAT Rules of Practice and Procedure (the “**LPAT Rules**”). There are relatively few substantive changes from the LPAT Rules and the majority of those are meant to address the procedural requirements of electronic or virtual hearing events, which, as a result of the COVID-19 pandemic, are currently the only type of hearing event being scheduled.

The Sections appreciate the complexity and difficulty of the harmonization task required, as a result of Bill 245, considering the differing natures of the statutory and regulatory authority under which each tribunal operates and the differing nature of the disputes they adjudicate.



The OLT has recognized this complexity in the Preamble to the Draft New Rules by acknowledging that the Rules are enacted to enable each Tribunal to exercise its authority as authorized by legislation or regulation and that the Rules are to be read in conjunction with the relevant statutory and regulatory requirements. Currently, each Tribunal addresses a number of different legislative regimes and appeals under a variety of pieces of legislation that cover a wide range of subject matter.

The Sections note that some of the “practice specific” and “appeal specific” guidance in the current Rules governing appeals could be lost by harmonizing the Rules and limiting the Draft New Rules to only the matters that are shared across all existing Tribunals. It is further noted that some of the individual Tribunal’s Rules contain Practice Directions.

The Sections suggest that OLT consider including a new Rule permitting the creation of Practice Directions dealing with legislation-specific appeals, procedures or practice-related issues. It is submitted that this would be helpful to both lawyers and Tribunal Members, given the wide array of statutes that have appeal rights to the new amalgamated Tribunal. For instance, there could be Practice Directions issued containing an identified list of legislation and policy documents of which the Tribunal could take judicial notice and of which the parties would not have to reproduce entire copies, either in hardcopy or electronically, as part of their Document Books; at a minimum we would suggest the legislation under which the hearing arises, the Provincial Policy Statement and any relevant provincial plans. Relevant excerpts to be relied upon by the parties would still be included in any document books filed during the hearing. It is also recommended that the Practice Directions currently included in the ERT Rules be included through this mechanism.

The Sections support the proposed overall organization of the Draft New Rules and note that “Part 1” contains procedural rules which are common across the Tribunals. Part 2 of the Draft New Rules, as currently drafted, contains guidance for proceedings initiated under specific sections of the *Planning Act* while Part 3 applies to *Expropriation Act* matters. While the Sections support including specific guidance related to appeals under specific legislation in the Draft New Rules, we note that as currently drafted, Parts 2 and 3 contain guidance and direction for specific LPAT appeals, but no guidance or direction for appeals specific to the ERT, MLT, BON, or CRB. It is thus recommended that additional details be included in Part 2 that relate to each of the OLT’s constituent Tribunals.

The Draft New Rules could be organized as follows:

- Part 1: General Rules which will apply to adjudication of all matters under the OLT’s mandate as set out in Schedule 6 of Bill 245;
- Part 2: Practice Specific/Appeal Specific Guidance. Provision of specific guidance, and, in particular, of specific rules, is very helpful and will assist the OLT and members of the Bar in addressing disputes involving undertakings that necessitate consolidation of OLT hearings as set out in section 21 of Bill 245. Providing specific guidance for appeals brought under



the specific legislation prescribed under the proposed OLTA would be extremely helpful and is encouraged. It is further recommended that this guidance be divided into headings specific to each area, for ease of reference.

- Part 3 – Legislation Specific Practice Directions: In the past thirty years, some current tribunals such as the ERT have developed Practice Directions. The OBA recommends that these Practice Directions be incorporated into the harmonized Rules, in this Part.
- Part 4 – Forms and Applications.

In our submission below, given the level of complexity amongst the current rules of the five Tribunals that fall under the OLT, we have divided our comments in to two sub-sections based on our members' expertise and our primary concerns. Our Municipal Section has provided detailed commentary on the proposed changes to the LPAT rules and the Environmental Section has provided detailed commentary on proposed changes to the ERT rules.

## Comments

### Local Planning Appeal Tribunal

Members of the Municipal Law Section (the “**Municipal Section**”) have diverse practices that deal with all matters that arise at the OLT. For the purposes of this submission, the Municipal Section has focused on the proposed changes related to the work of the current LPAT and hearings conducted by the LPAT under the *Planning Act*, the *Ontario Heritage Act*, the *Expropriation Act*, the *Conservation Authorities Act*, etc.

The Municipal Section is generally supportive of the Draft New Rules as they relate to our members' practice before the LPAT. We highlight below a few matters that we believe can be further refined in the Draft New Rules. Matters requiring clarification and matters potentially to be added to the Draft New Rules have also been identified.

#### ***Proposed Revisions to the Draft New Rules***

The Municipal Section suggests that OLT consider eliminating the requirement for hardcopy filings under Rule 5, particularly under Rules 5.1 and 5.4. This would reduce costs and unnecessary paper consumption, as only those documents to be referred to in the hearing will be included in document books, which will likely only be printed in an in-person hearing.



Similarly, we suggest that OLT consider revising proposed Rule 13 (1) (g) to permit electronic service of a summons on a witness and electronic transfer of the attendance money to the witness as of right.

The Municipal Section is concerned that the wording of proposed Rule 7.5 (d) may be too narrow in scope. This rule proposes to add an additional duty upon an expert testifying before a Tribunal, specifically not to seek or receive communication or assistance other than technical support from any third party while under cross examination. This duty is to be included in the Expert's Acknowledgement of Duty Form. Although it applies generally to all hearing events, the proposed rule codifies the existing rule against communicating with witnesses under cross examination and provides an exemption therefrom to address technical difficulties arising in the electronic hearing scenario. While the proposed rule appropriately addresses the cross-examination scenario, it does not address similar opportunities for communication with witnesses giving evidence in chief or reply, particularly in electronic hearings. In order to address the potential for inappropriate communication with witnesses during examination in chief and reply, while recognizing the more expansive nature of the prohibition on communicating with witnesses under cross examination, we suggest that OLT consider expanding the wording of proposed Rule 7.5 (d) to prohibit the seeking or receiving of assistance or communication other than technical support "while giving *viva voce* evidence in chief or reply or while under cross-examination ...".

We are somewhat concerned with the removal of the Executive Chair's discretion to determine that there is a valid and well-founded reason to permit a non-party to request a review of a Tribunal decision in proposed Rule 25.4 (b). Although this discretion would presumably be exercised in very limited situations, its elimination removes the right to request a review from those limited non-parties who could establish a valid and well-founded reason that they were not a party. Maintaining the discretion does not appear to significantly detract from the need for finality and certainty in Tribunal decisions, at least in hearings before the LPAT. When balanced against the potential harm to limited non-parties who would have been permitted to request a review, the denial of this avenue of redress appears to be unwarranted. Perhaps an explanation of the harm this is meant to avoid or whether this revision is meant to address the concerns of the bar practicing before a particular Tribunal would provide sufficient information to either assuage our concern or lead us to suggest a tribunal-specific rule or Practice Direction to address the issue.

### ***Matters Requiring Clarification***

It should be clarified whether the phrase "Mediator or mediation service approved by that Tribunal's Associate Chair" in Rule 18 refers only to mediators/mediation services pre-approved and included on a publicly available list from time to time or whether the parties to a hearing may propose private mediators/mediation services to the Associate Chair for approval on an *ad hoc* basis to conduct a mediation in a specific hearing.

### ***Suggested Additions to the Draft New Rules***



In general, the Municipal Section supports the OLT's goal of producing a single harmonized set of Rules applicable to each and every one of its constituent Tribunals. We also appreciate the complexity and difficulty of the task considering the differing natures of the statutory and regulatory authority under which each Tribunal operates and the differing nature of the disputes they adjudicate. OLT has recognized this complexity in the Preamble to the Draft New Rules by acknowledging that the Rules are enacted to enable each Tribunal to exercise its authority as authorized by legislation or regulation and that the Rules are to be read in conjunction with the relevant statutory and regulatory requirements.

The Municipal Section suggests that OLT consider permitting each constituent Tribunal, or the amalgamated Tribunal, to issue Practice Directions dealing with legislation-specific procedural or practice-related issues. Practice Directions could be issued to deal with the following:

- For each Tribunal/the amalgamated Tribunal there could be an identified list of legislation and policy documents of which the Tribunal could take judicial notice and of which the parties would not have to reproduce entire copies, either in hardcopy or electronically. As a minimum we would suggest the legislation creating the Tribunal, the legislation under which the hearing arises, the Provincial Policy Statement and any relevant provincial plans. Relevant excerpts to be relied upon by the parties would still be included in the document books filed during the hearing. In a hearing before the current LPAT we would suggest the list of legislative and policy documents to include the *Planning Act*, the *City of Toronto Act, 2006*, The Provincial Policy Statement 2020, and the relevant provincial plans.
- Although proposed Rule 12.1 is worded broadly enough to allow a Tribunal to issue any directions to the parties to enable it to hold a hearing on a settlement reached prior to the commencement of the hearing on the merits of matter, the experience of many members of the Section appearing before the LPAT is that settlement hearings are heard by way of motion and must comply with the rules applicable to motions. If settlement hearings are always or *prima facie* to be heard by way of motion, the Section suggests that this be clearly set out in a Practice Direction or in Rule 12.1.
- Providing a consistent approach to dealing with disputes over Issues Lists. Further discussions with the Bar on this area would be welcome.

## Environmental Review Tribunal

Members of the Environmental Law Section (the “Environmental Section”) also have diverse practices that deal with a wide range of matters that arise at OLT. For the purposes of this



submission, the Environmental Section has focused its comments on the proposed changes related to hearings that have occurred before the ERT.

The current ERT Rules apply to:

- appeals brought under: the *Clean Water Act, 2006*, the *Environmental Protection Act*, the *Nutrient Management Act, 2002*, the *Ontario Water Resources Act*, the *Pesticides Act*, the *Resource Recovery and Circular Economy Act, 2016*, the *Safe Drinking Water Act, 2002*, the *Toxics Reduction Act, 2009* and the *Waste Diversion Transition Act, 2016*; and to appeals of development permit applications and Niagara Escarpment Plan amendment proceedings under the *Niagara Escarpment Planning and Development Act*.
- proceedings under the *Oak Ridges Moraine Conservation Act, 2001* and the *Greenbelt Act, 2005* where the Tribunal is appointed as the Hearing Officer,
- applications under the *Environmental Assessment Act*, the *Environmental Bill of Rights, 1993*, the *Environmental Protection Act* and the *Ontario Water Resources Act*, and
- matters referred to the Tribunal by a Minister and to Hearings of Joint Boards under the *Consolidated Hearings Act* where the Joint Board has adopted these Rules.

### ***Recommended Inclusions in the OLT Rules from the ERT Rules***

The OBA Environmental Law Section has reviewed both the Draft New Rules and the current ERT Rules to determine if key details are missing from the Draft New Rules. There are key elements in the ERT Rules unique to environmental practice and appeals that would be of significant benefit to lawyers and Tribunal Members to have incorporated in the Draft New Rules.

As noted above, the OBA sections believe that provision of specific guidance and specific rules is very helpful and will assist the OLT and members of the Bar in addressing disputes involving undertakings that necessitate consolidation of OLT hearings as set out in section 21 of Bill 245. To that end, the Environmental Law Section makes the following recommendations for potential inclusions to the rules:

It is recommended that the terms; “Director”; “Instrument Holder”; “Proponent” and “Presenter” be added to the definitions section found under Part 1.2 of the Draft New Rules, as these are procedural elements which could apply to the amalgamated Tribunal. The terms should be defined as found in existing legislation that is relied upon for current ERT matters adjudicated under the EPA, OWRA and the EBR.

It is recommended that the definition of “applicant” in the Draft New Rules, found under Part 1.2, be merged with the definition in the ERT to reflect the two unique types of applications noted in the ERT Rules:





- *The Draft New Rules define “applicant” as follows:* means a person who makes an application to a Tribunal and includes a person requesting a matter be referred to a Tribunal. The term “applicant appellant” may also be used to describe an applicant when that person brings an appeal to a Tribunal;
- The ERT Rules define “Applicant” as follows: includes a person who brings an application for Leave to Appeal under section 38 of the Environmental Bill of Rights, 1993 or a person who has applied for a development permit that is the subject of a proceeding under the Niagara Escarpment Planning and Development Act;

It is recommended that the following elements be built into the section of the Draft New Rules addressing the commencement of proceedings:

- Commencement of Appeals: there are different procedures and timelines in place for different appeals under different statutes (Rules 26 – 39). It is recommended that details with respect to the commencement of appeals should be detailed in the Draft New Rules or in a Practice Direction to assist lawyers and the Tribunal rather than leave these details only in the applicable statute.
- Commencement of Applications: As currently presented, the Draft New Rules do not expressly indicate how applications are to be commenced under a number of Acts.<sup>1</sup> We recognize that the OLT members and staff who drafted the new OLT rules anticipated that practitioners would know the specific statutory provisions that apply. The current ERT Rules contain details with respect to the contents of the application, service and evidence required (Rules 40 – 61). In recognition that applications under these various Acts (e.g. the Environmental Bill of Rights, 1993) can be commenced by non-practicing members of the public, our view is that inclusion of additional specific detail is warranted.
- Currently ERT Rules 43 to 45 set out procedures for the appointment of Hearing Officers and the conduct of hearings pursuant to the *Niagara Escarpment Planning and Development Act*, the *Oak Ridges Moraine Conservation Act, 2001* and the *Greenbelt Act, 2005* which are not found anywhere else. It is noted that these rules need to be retained for clarity.<sup>2</sup>

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<sup>1</sup>These Acts include: the *Environmental Protection Act*, the *Ontario Water Resources Act*, the *Environmental Assessment Act*, the *Niagara Escarpment Planning and Development Act*, the *Oak Ridges Moraine Conservation Act*, the *Greenbelt Act* and the *Environmental Bill of Rights, 1993*.

<sup>2</sup> Although it is unclear as to whether Hearings Officers will be appointed by the OLT pursuant to the *Niagara Escarpment Planning and Development Act* (NEPDA) to conduct hearings, it is assumed that is the case. We note that, unlike the ORMCA, 2001 and the *Greenbelt Act, 2005*, NEPDA is not listed as an Act affected by Bill 245 and there are no references to the NEPDA in the Draft OLT Rules.



- Rules with respect to Party Status, Participant Status and Presenter Status under the ERT should be incorporated into the Draft New Rules as these matters are addressed under the ERT:
  - Parties are permitted to raise an issue that was not raised by Appellant / Applicant (different from LPAT rules) (See Rules 64 - 66 of ERT Rules);
  - Participants have broader participatory rights. They can make oral and written submissions, be cross-examined and receive documents from other parties (different from LPAT rules) (See Rules 67 - 68 of ERT Rules);
  - Presenter Status (unique to ERT regime): a presenter can present evidence orally and in writing, be cross-examined and receive documents (Rule 69).
- There are different timelines for notice of motions (5 days generally, 3 days for Renewable Energy Approvals under s. 142.1 of the *Environmental Protection Act*). These timelines should be reflected in the Draft New Rules.
- The current ERT Rules include a “notice of allegation” (Rules 84 and 85) allowing a Party to bring to the ERT’s attention the alleged acts or omissions of a person who is not a Party to an appeal.
- The current ERT Rules regarding adjournments (Rules 104 – 107) provide greater details and requirements which should be incorporated into the Draft New Rules.
- The current ERT Rules provide guidance for a motion seeking a stay (Rules 108 -110); this is unique to the ERT context, as a stay is automatic for LPAT appeals. This element of the ERT Rules should be incorporated into the Draft New Rules.
- Timelines re: notice of hearing and prehearings are different (Rule 130 - 136) and are unique for appeals under the *Niagara Escarpment Planning and Development Act*, the *Oak Ridges Moraine Conservation Act, 2001* and the *Greenbelt Act, 2005* (Rules 138 – 155), and require enhanced notice, including newspaper notice.
- The mediation process should be harmonized to include the concept of the “mediation report” included at Rules 156-161 of the ERT Rules.
- The ERT Rules provide greater detail with respect to costs awards (Rules 212 – 231), and include provisions whereby a “helpful party” may be awarded cost for their role in the hearing (Rule 224).



- With respect to a request to review a decision, there are different time-lines applicable. For example, under the *Environmental Bill of Rights, 1993*, a request must be made within ten days (Rule 236).

We appreciate that we have identified a significant amount of missing detail and we would welcome the opportunity to work with the OLT to determine the best way to address and include these important aspects of the existing ERT Rules in the Draft New Rules.

We feel the inclusion of these details would be prudent as they will help ensure the efficient administration of justice in several ways: firstly, having clear and complete Rules that contain guidance and procedures, including the requirements for the filing of appeals from a number of different legislative regimes will minimize the number of deficient appeals made to the OLT; secondly, this will assist Tribunal members in understanding the appropriate process and relevant tests; and, thirdly, complete Rules are helpful for unrepresented litigants, who frequently appear before the OLT.

Finally, some of the OLT constituent Tribunals have unique practices and procedures that are not shared by the other Tribunals. One such example, is the Notice of Allegation process contained in the ERT Rules (Rules 84 and 85). This process enables the consideration of the alleged acts or omissions of a person who is not a Party to the appeal in the determination of the substance of the matter before the ERT. As noted, this mechanism is not a feature of the other Tribunals, nor are there provisions for this in the Draft New Rules.

#### *Recommendations re: inclusions in Part 3*

It is recommended that the ERT Practice Directions be included within the harmonized rules. These are included at the end of the ERT Rules and provided direction for technical and opinion evidence, for mediation and for Site Visits.

As noted above, Practice Directions can be included for the other OLT constituent Tribunals, under a separate heading for each Tribunal or originating legislation.

## **Conclusion**

We thank you for considering this submission and the important matters it identifies. We would be pleased to answer any questions you may have or to meet with you regarding any of the comments provided herein. We look forward to continuing to develop an ongoing relationship and dialogue between the OBA and the Ontario Land Tribunal, recognizing that it is in our collective interest that this body operates in an efficient and effective manner given the important role it plays in our communities.