

# An Overview of the Hearing Process Before the Environmental Review Tribunal

April 2009



# The Tribunal and its Members

- ▶ Established by legislation
- ▶ Arm's length, independent and impartial
- ▶ Members appointed by Cabinet
- ▶ Members have diverse backgrounds

Members Wear Three Hats:

1. Environmental Review Tribunal
2. Niagara Escarpment Hearing Office
3. Office of Consolidated Hearings



# The Tribunal Role

- ▶ Efficiently and effectively resolve environmental and development issues through:
  - ▶ Mediation
  - ▶ Public hearings
  - ▶ Decisions/recommendations
- ▶ Provide excellent customer service through:
  - ▶ Website search engine
  - ▶ Guides



# ERT/NEHO/OCH Proceedings

- ▶ *Clean Water Act, 2006*
- ▶ *Consolidated Hearings Act*
- ▶ *Environmental Assessment Act*
- ▶ *Environmental Bill of Rights, 1993*
- ▶ *Environmental Protection Act*
- ▶ *Greenbelt Act, 2005*
- ▶ *Niagara Escarpment Planning and Development Act*
- ▶ *Nutrient Management Act, 2002*
- ▶ *Oak Ridges Moraine Conservation Act, 2001*
- ▶ *Ontario Water Resources Act*
- ▶ *Pesticides Act*
- ▶ *Safe Drinking Water Act, 2002*



# Appeals

- ▶ *Clean Water Act, 2006; Environmental Protection Act; Ontario Water Resources Act; Nutrient Management Act, 2002; Pesticides Act; Safe Drinking Water Act, 2002*
- ▶ Director's Order\*
- ▶ Director's refusal to issue, or cancellation or suspension of an approval\*
- ▶ Terms and conditions of an approval
- ▶ Right to appeal within 15 days\*
- ▶ Further right of appeal to Divisional Court and/or to Minister of the Environment (except *Clean Water Act, 2006*)





# Leave to Appeal under the *Environmental Bill of Rights, 1993*

- ▶ Act's purpose is broad
- ▶ Standing (s. 38 (1))
  - ▶ 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
- ▶ Two-part test for Leave to Appeal (s. 41)
  - ▶ Leave to appeal a decision shall not be granted unless it appears to the appellate body 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; and
    - The decision in respect of which an appeal is sought could result in significant harm to the environment.
- ▶ Hearing usually conducted by written submissions
- ▶ No right of appeal

# Applications Under:

## ▶ *The Environmental Assessment Act*

- ▶ Protection, conservation and wise management of the environment
- ▶ Undertakings
- ▶ Terms of Reference for an Environmental Assessment (EA)
- ▶ Government and Public Review of EA.
- ▶ Public may request that the Minister refer a matter to the Tribunal for a Hearing
- ▶ Minister can approve the EA or require a Hearing
- ▶ Terms of Reference for a Hearing





# Applications Under:

## ▶ *The Environmental Protection Act*

- ▶ Protect and conserve the natural environment
- ▶ Approvals for waste disposal sites and waste management systems
- ▶ Discretionary/ mandatory Hearings
- ▶ Relevant considerations
- ▶ Appeal to Cabinet and Divisional Court

## ▶ *The Ontario Water Resources Act*

- ▶ Conserve, protect and manage Ontario's waters
- ▶ Prevent impairment of any water body
- ▶ Sewage works
- ▶ Discretionary/mandatory Hearings
- ▶ Appeal to Cabinet and Divisional Court



# Proceedings Under:

## ▶ *The Consolidated Hearings Act*

- ▶ A Joint Board conducts all hearings (ERT and OMB members)
- ▶ Proponent requests consolidation
- ▶ Broad powers
- ▶ Establishment of a Joint Board
- ▶ Right to appeal to Cabinet





# Proceedings Under:

- ▶ ***The Greenbelt Act, 2005 (“GA”)***
  - ▶ Greenbelt Plan amendments, OMB and Joint Board appeals stayed under the *GA*, municipal official plan and zoning by-law amendments referred by the Minister to conform with the Greenbelt Plan
  - ▶ After hearing – provide a summary of the evidence and recommendations to the Minister of Municipal Affairs and Housing
  - ▶ No statutory right of appeal
- ▶ ***The Oak Ridges Moraine Conservation Act, 2001 (“ORMCA”)***
  - ▶ Oak Ridges Moraine Conservation Plan amendments, OMB appeals stayed under the *ORMCA*, municipal official plan and zoning by-law amendments referred by the Minister to conform with the Oak Ridges Moraine Conservation Plan
  - ▶ After hearing – provide a summary of the evidence and recommendations to the Minister of Municipal Affairs and Housing
  - ▶ No statutory right of appeal

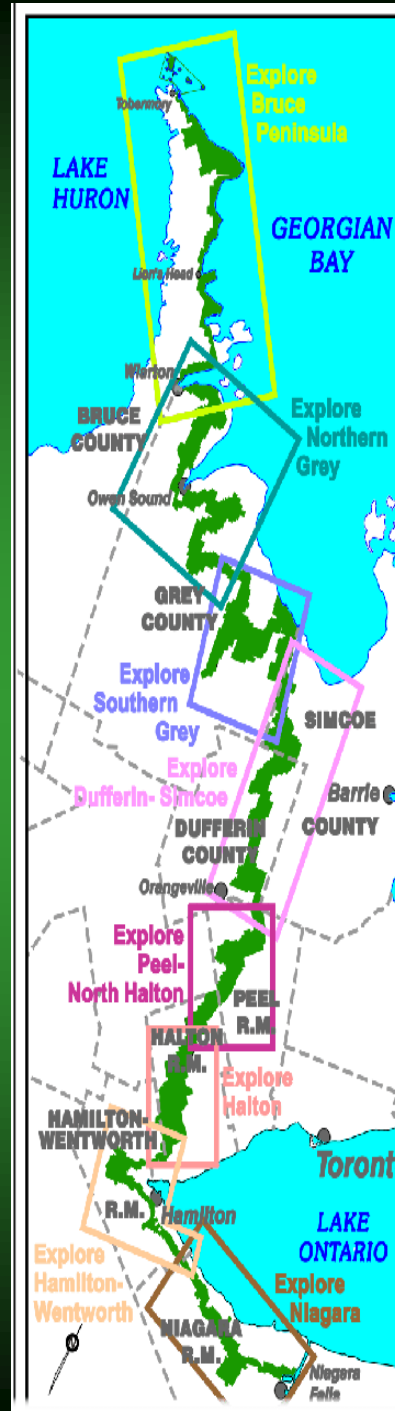
# Niagara Escarpment Planning and Development Act (“NEPDA”)

## Development Permit Appeals

- ▶ Appeal of a decision of the Niagara Escarpment Commission regarding development permits
- ▶ Hearing Officer
- ▶ Recommendations and reports given to the Minister of Natural Resources

## Plan Amendment Applications

- ▶ Must consider Act’s objectives
- ▶ Hearing Officer
- ▶ Recommendations provided to the Niagara Escarpment Commission
- ▶ Commission recommends to the Minister of Natural Resources
- ▶ Lieutenant Governor in Council considers the Minister’s recommendations



# Mediation

- ▶ Voluntary
- ▶ Conducted after the Preliminary Hearing
- ▶ Members are trained and experienced
- ▶ Confidential and without prejudice
- ▶ Governed by Rules of Practice and Practice Directions
- ▶ **Not applicable to *NEPDA*, *ORMCA* and *GA* proceedings**







# The Hearing Process

- ▶ Governed by the procedures provided by:
  - ▶ the enabling legislation
  - ▶ the *Statutory Powers Procedure Act* (where applicable)
  - ▶ the Tribunal's Rules of Practice and Practice Directions
  - ▶ the Tribunal member conducting the hearing
- ▶ Usual steps in the hearing process
  - ▶ Tribunal provides Notice of Hearing
  - ▶ Preliminary Hearing/ Pre-Hearing Conference
  - ▶ The Hearing



# Preliminary Hearings/ Pre-Hearing Conferences

- ▶ Are usually conducted in person, except under *NEPDA*, where the Pre-Hearing Conference is usually conducted by teleconference
- ▶ Identify/Designate persons who wish to participate
  - ▶ Parties
  - ▶ Participants
  - ▶ Presenters
- ▶ Determine and simplify issues
- ▶ Determine whether any agreed facts
- ▶ Identify the witnesses
- ▶ Set deadlines for exchange of information
- ▶ Schedule dates, set location for the hearing
- ▶ Develop Procedural Directions, if appropriate
- ▶ Hear preliminary motions

# Participating in a Hearing

- ▶ **As Presenter**
  - ▶ May be a witness and present evidence at a pre-arranged time
  - ▶ Be questioned by the Tribunal and the Parties
  - ▶ Upon request, receive a copy of documents exchanged by the Parties
  - ▶ Cannot call or cross-examine witnesses, make submissions, seek review, ask for or be subject to costs
- ▶ **As Participant**
  - ▶ In addition to the above, make oral and written submissions to the Tribunal
- ▶ **As Party**
  - ▶ All of above plus, call or cross-examine witnesses
  - ▶ Seek costs (if legislation or Rules permit)
  - ▶ Seek review of the Tribunal's Decision, where available

# Witnesses / Sharing Information

- ▶ Rules of Practice and Practice Directions for Technical/Opinion Evidence
  - ▶ fair and full disclosure
  - ▶ plain language
- ▶ A **witness statement** should indicate:
  - ▶ the witness' interest in the application
  - ▶ whether the evidence is factual or opinion
  - ▶ a complete statement of the evidence
- ▶ Rules regarding summons to witness do NOT apply to proceedings under the *ORMCA* and *GA*
- ▶ Exchange of Documents
  - ▶ Relevant documents must be disclosed, and documents relied on by the Parties that are submitted to the Tribunal prior to the start of the Hearing, other than the Appeal or Application, shall be provided in duplicate
- ▶ Representatives
  - ▶ Where a Party, Participant or Presenter is represented, all communication to them from either the Tribunal or the other Parties shall be through their representative

# The Tribunal's Decision: Dismissal

- ▶ **Dismissal for non-compliance**
  - ▶ Failure to comply with Rules, orders, undertakings or written requests from the Tribunal that cause persistent undue delay may result in dismissal of the proceedings
  - ▶ Does NOT apply to proceedings under *ORMCA* and *GA*, or to Niagara Escarpment Plan amendments under *NEPDA*, unless the Niagara Escarpment Plan amendment is under the *CHA*
- ▶ **Motion for Dismissal: A party may bring a motion to dismiss proceedings if:**
  - ▶ The matter is outside the jurisdiction of the Tribunal
  - ▶ The matter is frivolous, vexatious or is commenced in bad faith
  - ▶ Statutory requirements have not been met
  - ▶ Another party has caused undue delay or has not complied with the Rules, orders, undertakings, or written requests from the Tribunal
  - ▶ Does NOT apply to: *NEPDA*, *ORMCA* or *GA*



A vertical photograph of a waterfall cascading down a rocky ledge, surrounded by lush green foliage. The image is positioned on the left side of the slide, partially overlapping the green background.

# The Tribunal's Decision: Dismissal (cont'd)

- ▶ **Dismissal on Tribunal's initiative**
  - ▶ The matter is outside the jurisdiction of the Tribunal
  - ▶ Statutory requirements have not been met
  - ▶ Does NOT apply to proceedings under *ORMCA* and *GA*, or to Niagara Escarpment Plan amendments under *NEPDA*, unless the Niagara Escarpment Plan amendment is under the *CHA*
- ▶ **Motion for Dismissal of Appeals of Development Permits under *NEPDA*: a party may bring motion to dismiss proceedings if:**
  - ▶ The appeal does not disclose a planning justification, is not in the public interest, is without merit, is frivolous or vexatious or is made only for the purpose of delay
  - ▶ Notice of appeal does not specify reasons for appeal
  - ▶ Person who appealed decision has not responded to a request by the Tribunal for further information within the time specified by the Tribunal
  - ▶ The matter is outside the jurisdiction of the Tribunal



A vertical photograph of a waterfall cascading down a rocky ledge in a lush, green forest. The water is white and frothy as it falls, surrounded by dense foliage and trees.

# The Tribunal's Decision: Review

- ▶ A Party can apply for a reconsideration of an Order or Decision of the Tribunal. The Party must:
  - ▶ Serve and file a Notice of Motion within
    - 10 days for orders and decisions made under the *Environmental Bill of Rights* or the *Consolidated Hearings Act*
    - 30 days for any other statute
  - ▶ Factors Tribunal will consider:
    - jurisdiction
    - material errors of law or fact
    - new evidence
    - extent to which any person or other Party relied on the order or decision
    - whether decision is under appeal or judicial review
    - whether the public interest in finality of orders and decisions is outweighed by the prejudice to the requester
  - ▶ NOT applicable to:
    - *EAA*, *NEPDA*, *ORMCA* or *GA* proceedings

# Power to Award Costs

- ▶ Two Tiers of Cost Powers:
  1. Broad cost powers under specific statutes
    - *Consolidated Hearings Act* – section 7
    - *Environmental Assessment Act* – section 21
    - *Environmental Protection Act* – section 33
    - *Ontario Water Resources Act* – section 7
  - ▶ Costs do not follow the event
  - ▶ Are not limited to considerations that govern the award of costs in any Court
  2. Under section 17.1 of *SPPA* Tribunal has limited authority to award costs in situations of improper conduct
    - ▶ applies to all proceedings before the Tribunal **except** proceedings under *ORMCA* and *GA*, and Niagara Escarpment Plan Amendments under *NEPDA*
    - ▶ When will tribunal make order for costs?
      - The conduct of a party has been unreasonable, frivolous or vexatious or a party has acted in bad faith
- ▶ Only Parties are liable to pay cost orders and are eligible to receive cost awards.

# For Further Information . . .



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