

## Commentary on the Environmental Review Tribunal in Ontario, Canada

### *Introduction*

The Environmental Review Tribunal of Ontario<sup>1</sup> is an independent and impartial tribunal established by provincial legislation. The Environmental Review Tribunal<sup>2</sup> holds public hearings and appeals arising from, amongst other things, decisions regarding the issuance, alteration, or revocation of an order, approval, license or permit under the Clean Water Act, 2006,<sup>3</sup> the Environmental Protection Act,<sup>4</sup> the Nutrient Management Act, 2002,<sup>5</sup> the Ontario Water Resources Act,<sup>6</sup> the Pesticides Act,<sup>7</sup> the Safe Drinking Water Act, 2002<sup>8</sup> and the Toxics Reduction Act, 2009.<sup>9</sup>

### *Access to the Courts/Standing to Sue*

The first issue this commentary will address is the availability of access to the courts by removing barriers to sue and whether or not this legislation will enhance access to the courts (and

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<sup>1</sup> Environment and Lands Tribunal Ontario, <http://www.ert.gov.on.ca/english/about/ert/index.htm> (last visited May 16 2011)

<sup>2</sup> This particular commentary only deals with the Environmental Review Tribunal in Ontario so any reference to the "Environmental Review Tribunal" will relate to the one in Ontario. Environmental Tribunals have also been established in British Columbia. A comprehensive paper has been written on the Environmental Tribunals in British Columbia in November of 2009 by Mark Haddock, Project Director of the Environmental Law Center which can be found at Environmental Tribunals in British Columbia, Discussion Paper, November 2009, published by the Environmental Law Centre of the University of Victoria, <http://www.elc.uvic.ca/press/documents/ET-Discussion-V8.pdf> (last visited May 16 2011)

<sup>3</sup> Clean Water Act, 2006, Service-Ontario, [http://www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_06c22\\_e.htm](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_06c22_e.htm) (last visited May 16 2011)

<sup>4</sup> Environmental Protection Act, Service-Ontario, [http://www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_90e19\\_e.htm](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90e19_e.htm) (last visited May 16 2011)

<sup>5</sup> Nutrient Management Act, 2002, Service-Ontario, [http://www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_02n04\\_e.htm](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_02n04_e.htm) (last visited May 16 2011)

<sup>6</sup> Ontario Water Resources Act, Service-Ontario, [http://www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_90o40\\_e.htm](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90o40_e.htm) (last visited May 16 2011)

<sup>7</sup> Pesticides Act, Service-Ontario, [http://www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_90p11\\_e.htm](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90p11_e.htm) (last visited May 16 2011)

<sup>8</sup> Safe Drinking Water Act, 2002, Service-Ontario, [http://www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_02s32\\_e.htm](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_02s32_e.htm) (last visited May 16 2011)

<sup>9</sup> Toxics Reduction Act, 2009, Service-Ontario, [http://www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_09t19\\_e.htm](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_09t19_e.htm) (last visited May 16 2011) Information about these acts can also be found at "About the Environmental Review Tribunal", Environmental Review Tribunal <http://www.ert.gov.on.ca/english/about/ert/index.htm> (last visited May 16 2011)

justice). The first clause of Principle 10 of the Rio Declaration is that: "Environmental issues are best handled with participation of all concerned citizens, at the relevant level".<sup>10</sup>

With respect to the Environmental Tribunal of Ontario, Part IV of the Environmental Bill of Rights of 1993 deals with the right to sue.<sup>11</sup> According to Section 84, entitled 'Right of action', "Where a person has contravened or will imminently contravene an Act, regulation or instrument prescribed for the purposes of Part V and the actual or imminent contravention has caused or will imminently cause significant harm to a public resource of Ontario, any person resident in Ontario may bring an action against the person in the court in respect of the harm and is entitled to judgment if successful. 1993, c. 28, s. 84 (1)."<sup>12</sup>

### *Scientific Knowledge*

The next inquiry addresses the question of whether the Environmental Review Tribunals in Canada facilitate the application of environmental science to decision-making.

The Environmental Review Tribunal of Ontario has a system whereby the members of the tribunal, who conduct hearings and make decisions on appeals are appointed by the Lieutenant Governor in Council for the Province of Ontario. The members have a variety of experience and include environmental lawyers, academics, planners and mediators. None of the

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<sup>10</sup> Principle 10 of the Rio Declaration on Environment and Development states the following: "Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.", Rio Declaration on Environment and Development,

<http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163>

(last visited May 16, 2011)

<sup>11</sup> Environmental Bill of Rights, 1993, [http://www.e-laws.gov.on.ca/html/regs/english/elaws\\_regs\\_940681\\_e.htm](http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_940681_e.htm)

(last visited May 16 2011)

<sup>12</sup> Right of Action Section 84, *Environmental Bill of Rights, 1993*,

[http://www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_93e28\\_e.htm#BK105](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_93e28_e.htm#BK105) (last visited May 16 2011)

members of the tribunal are an employee of the Ministry of the Environment. Members' biographies are included in the Tribunal's Annual Report.<sup>13</sup>

### *Effectiveness*

The next factor that must be evaluated is the extent to which the legal process protects nature and improves the environment instead of simply determining that one particular party prevails and the other party does not. The fourth clause of Principle 10 of the Rio Declaration states that, "Effective access to judicial and administrative proceedings, including redress and remedy shall be provided."

In the Rules of Practice and Practice Directions of the Environmental Review Tribunal,<sup>14</sup> Sections 227 to 235 concern Reviews of Orders and Decisions (Reconsideration). This section of the rules identifies the steps in reviewing any order or decision. In particular section 230, which states the factors that must be taken into consideration, is interesting. Section 230 reads, "In deciding whether it is advisable to review all or part of its order or decision, the Tribunal may consider any relevant circumstances including:

- a) Whether the Tribunal acted outside its jurisdiction;
- b) Whether there is a material error of law or fact such that the Tribunal would likely have reached a different decision but for that error;
- c) Whether there is new evidence admissible under the conditions of Rule 226;
- d) The extent to which any person or any other Party has relied on the order or decision;

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<sup>13</sup> Annual Report Environmental Review Tribunal April 1, 2008 to March 31, 2009, <http://www.ert.gov.on.ca/stellent/groups/public/@abcs/@www/@ert/documents/webasset/ec081607.pdf> (last visited May 16 2011)

<sup>14</sup> Rules of Practice and Practice Directions of The Environmental Review Tribunal, [http://www.ert.gov.on.ca/files/Rules/Rules\\_of\\_Practice\\_Nov\\_15\\_2007.pdf](http://www.ert.gov.on.ca/files/Rules/Rules_of_Practice_Nov_15_2007.pdf) (last visited May 16 2011)

- e) Whether the order or decision is under appeal or is the subject of a judicial review application; and
- f) Whether the public interest in finality of orders and decisions is outweighed by the prejudice to the requester.

This careful review and scrutiny of the court's decision which encompasses the consideration of a variety of factors including public interest demonstrates the incorporation into the rules of a plan to prepare for long term environmental balance rather than solely remedying the situation at hand.

#### *Procedural Elements*

Procedural issues with respect to the environmental courts and tribunals can be evaluated in a variety of ways. This includes general accessibility, the costs in creating environmental tribunals, the efficiency or lack thereof when multiple states in one country have to create environmental tribunals, the existence of an appellate system, the issue of transparency, the existence of online electronic filing systems to make access to the courts logistically easier, and global transparency as a whole.” The second clause of the Rio Declaration is that at the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous activities in their communities and the opportunity to participate in the decision-making process.<sup>15</sup>

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<sup>15</sup> Rio Declaration on Environment and Development, United Nations Environment Programme, <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163&l=en> (last visited May 16 2011)

As far as appeals are concerned, under the authority of the Environmental Bill of Rights, 1993,<sup>16</sup> the Tribunal holds hearings to decide whether to grant a person's application for leave, (that is, grant permission) 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.

With respect to the availability of information online, The Environmental Tribunal of Ontario has three online services available. The first is e-filing, the second is feedback and the third is case search. There are three appeals and/or applications that can be filed online from the e-filing system. The first is a notice of appeal/application to the Environmental Review Tribunal, the second is a Notice of Appeal of a Decision of the Niagara Escarpment Commission, and the third is an application for a joint board hearing.<sup>17</sup>

### *Access To Information*

The concept of access to information is that whereby the public is given access to information that is being decided by a particular court or jurisdiction. The third clause of Principle 10 of the Rio Declaration is that "States shall facilitate and encourage public awareness and participation by making information widely available. The objective of the Aarhus Convention is that in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public-participation in decision

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<sup>16</sup> Environmental Bill of Rights, 1993, [http://www.e-laws.gov.on.ca/html/regs/english/elaws\\_regs\\_940681\\_e.htm](http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_940681_e.htm) (last visited May 16 2011)

<sup>17</sup> eFiling can be conducted at the following website :eFiling , Environmental and Lands Tribunal Ontario, <http://www.ert.gov.on.ca/english/forms/eFiling/index.htm> (last visited May 16 2011)

making, and access to justice in environmental matters in accordance with the provisions of this Convention.<sup>18</sup>

The website for the Environmental Review Tribunal has a function whereby one can search decisions and orders. It is difficult without putting in a variety of dates, to ascertain how far the decisions go. The positive aspect about the decisions and orders being online is that they are very recent. The website for the Environmental Review Tribunal also has a case search feature. Unfortunately, it looks as though the cases can only be searched by number and not party, etc. However, the website also has a website-based search where one might be able to search information without having the specific case number.

#### *Traditional measures*

How does this legislation/tribunal/court address traditional concerns expressed by courts that litigation is costly and wastes time?

The rules creating the Environmental Review Tribunal provides for alternative dispute resolution,<sup>19</sup> and specifically mediation.<sup>20</sup> This can save a litigant both time and money.

Environmental Tribunals have been using ADR techniques, mostly on an ad-hoc basis, and in a few tribunals, on a more formal basis. It is clear that most of this activity has been shaped by the

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<sup>18</sup> Introducing the Aarhus Convention, United Nations Economic Commission for Europe, <http://www.unece.org/env/pp/>. (last visited May 16 2011)

<sup>19</sup> The phrase "alternative dispute resolution" generally refers to any type of procedure used to resolve disputes other than litigation; S. Goldberg et. al *Dispute Resolution: Negotiation, Mediation and Other Processes* (Boston: Little Brown, 1992) at 3-5. In the environmental law field, this would include procedures used to resolve disputes other than formal administrative hearings. In Canada, such procedures can be found in pre-hearings, and preliminary meetings used by the administrative tribunals as cited in Matthew Taylor, Patrick Field, Lawrence Susskind and William Tileman, *Using Mediation in Canadian Environmental Tribunals: Opportunities and Best Practices* 22 *Dalhousie L.J.* 51 1999

<sup>20</sup> Guides and Rules, Environment and Land Tribunals Ontario, <http://www.ert.gov.on.ca/english/guides/index.htm> (last visited May 16 2011)

growing popularity of ADR in the context of Canadian civil litigation, and in several other areas of public law. It also appears that they have been influenced by the writings of academics and practitioners claiming impressive time and cost savings through the use of ADR.<sup>21</sup>

### *History*

A final factor one must consider when analyzing environmental acts creating environmental tribunals is that of the rationale which led to the creation of the environmental tribunal.

International developments have already exerted a considerable influence on Canadian Environmental Law. It was in the aftermath of *Our Common Future*,<sup>22</sup> the report of the World Commission on Environment and Development, that the concept of sustainable development found its way into the preambles and purpose clauses of numerous federal and provincial environmental statutes. The precautionary principle followed a similar trajectory and it was with explicit reference to international experience that the Supreme Court of Canada speculated as to its possible relevance in determining the validity of municipal by-law decisions.<sup>23</sup>

The statutory entrenchment of these international law principles, alongside environmental science-based principles (such as adaptive management or ecological integrity), and ethical

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<sup>21</sup> Matthew Taylor, Patrick Field, Lawrence Susskind and William Tileman, *supra* note 19, *Using Mediation in Canadian Environmental Tribunals: Opportunities and Best Practices* 22 Dalhousie L.J. 51 1999.

<sup>22</sup> World Commission on Environment and Development, *Our Common Future* (Oxford: OUP, 1987) cited in Jamie Benidickson and Heather McLeod-Kilmurray, CANADA The Role of the Judiciary in Environmental Governance 239 (Louis J. Kotzé & Alexander R. Paterson eds., Wolters Kluwer Law & Business) (2009).

<sup>23</sup> 114957 Canada Ltee (Spraytech) v. Hudson (Town) 2001 SCC 40 cited in Jamie Benidickson and Heather McLeod-Kilmurray, CANADA, The Role of the Judiciary in Environmental Governance 239, (Louis J. Kotzé & Alexander R. Paterson eds., Wolters Kluwer Law & Business) (2009).

principles (such as intergenerational equity), represent a future source of challenge and opportunity for the judiciary.<sup>24</sup>

Several of the concepts have already played central roles in Canadian environmental litigation, with mixed results. Judicial application of sustainability in the context of Ontario forest management legislation strongly reinforced the underlying principle.<sup>25</sup> Ecological integrity as a decision-making standard was to a significant degree undermined by judicial interpretation. The polluter pays principle has been vigorously endorsed at the highest level of Canadian jurisprudence.<sup>26</sup> However, the value of environmental loss for which such payment might be expected remains less certain.<sup>27</sup>

Effective implementation of environmental values throughout the Canadian legal system will entail more widespread acceptance of sustainability as a fundamental norm taking its rightful place alongside fairness within the constellation of overarching judicial principles.

The Canadian judiciary has shown that it can, and does, play a role in allowing the law to evolve to meet the needs of modern problems, and can influence social attitudes towards these issues, while remaining within its limited role as only one branch in the process of environmental

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<sup>24</sup> J. Benidickson et al., *Practicing Precaution and Adaptive Management: Legal, Institutional and Procedural Dimensions of Scientific Uncertainty* (Ottawa: UOIE, 2005) cited in Jamie Benidickson and Heather McLeod-Kilmurray, CANADA, *The Role of the Judiciary in Environmental Governance* 239, (Louis J. Kotzé & Alexander R. Paterson, eds., Wolters Kluwer Law & Business) (2009).

<sup>25</sup> See, e.g.: *Algonquin Wildlands League v. Ontario (Minister of Natural Resources)* (1998), 26 CELR (NS) 163 (Ont Div Ct); (2000), 32 CELR (NS) 233 (Ont. CA) cited in Jamie Benidickson and Heather McLeod-Kilmurray, CANADA, *The Role of the Judiciary in Environmental Governance* 239, (Louis J. Kotzé & Alexander R. Paterson, eds., Wolters Kluwer Law & Business) (2009).

<sup>26</sup> *Imperial Oil Ltd v. Quebec (Minister of the Environment)* [2003] 2 SCR 264. cited in Jamie Benidickson and Heather McLeod-Kilmurray, CANADA, *The Role of the Judiciary in Environmental Governance* 240, (Louis J. Kotzé & Alexander R. Paterson, eds., Wolters Kluwer Law & Business) (2009).

<sup>27</sup> *British Columbia v. Canadian Forest Products Ltd* 2004 SCC 38 cited in Jamie Benidickson and Heather McLeod-Kilmurray, CANADA, *The Role of the Judiciary in Environmental Governance* 240, (Louis J. Kotzé & Alexander R. Paterson, eds., Wolters Kluwer Law & Business) (2009).

governance. Judges in Canada have assured its populace that the environment is important, as is the role of the judiciary in its protection and governance.