CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

CELA Publication #518

September 23, 2005

Ms. Toby Vigod, Chair
Environmental Review Tribunal
2300 Yonge Street, Suite 1201
Toronto, Ontario
M4P 1E4

Dear Ms. Vigod:

RE: DRAFT ERT RULES AND PRACTICE DIRECTIONS

These are the comments of the Canadian Environmental Law Association (CELA) regarding changes to procedural rules and practice directions that have been recently proposed by the Environmental Review Tribunal (ERT).

CELA agrees that there is a need to update, expand or clarify the ERT's existing procedural requirements in order to ensure fair, timely and effective hearings. We also agree that it is preferable to have two rather than three levels of direction, and therefore CELA supports the ERT's proposal to incorporate the content of current guidelines into Rules and/or Practice Directions.

In general, CELA has no objection to most of the proposed modifications of the Rules and Practice Directions. In our view, however, there are a number of discrete issues which require further consideration and/or revision by the ERT, as described below.

ISSUE #1. APPLICATION OF THE RULES

Rule 2 provides that the Rules generally apply to the statutory hearings which may be held by the ERT under various environmental laws. However, Rule 2 indicates that they do not apply to matters under the *Consolidated Hearings Act* unless the Joint Board has decided to "adopt" the Rules.

In our view, the updated and amended ERT rules are more comprehensive than the current rules of practice employed by the Ontario Municipal Board, which is the other tribunal whose hearings are potentially caught by the CHA. Therefore, CELA's preference is to have the ERT rules automatically apply to CHA hearings, unless otherwise ordered by the Joint Board. While a statutory or regulatory amendment (i.e. to subsection 7(3) of the CHA or Regulation 173) may be

necessary to achieve this objective, CELA strongly believes that there should be a presumption that the ERT rules should apply in CHA matters in which the ERT forms part of the Joint Board.

ISSUE #2: DOCUMENT FORMAT

Rule 14 prescribes standards for written documents that are filed with the ERT. For the purposes of encouraging resource and energy conservation, CELA submits that this Rule should either require documents to be submitted as two-sided copies where possible, or should at least express the ERT's preference or willingness to accept double-sided copies: see Rule 4.01(2) of the *Rules of Civil Procedure*. A similar preference should be expressed in relation to recycled paper: see Rule 4.01(1), para.3 of the *Rules of Civil Procedure*.

We would also suggest that Rule 14 should be expanded to specify format or software specifications for electronic documents that may be filed with the ERT and/or served on the parties: see Rule 4.01(3) of the *Rules of Civil Procedure*. We are aware that Rule 79 prescribes the PDF format for documents, but this Rule only applies to documents served by email, and perhaps should be expanded to specify other forms of acceptable information technology (i.e. Word format for facta, final arguments, or other documents from which the Tribunal may wish to "cut-and-paste").

ISSUE #3: APPLICATIONS UNDER THE EA ACT

Rule 31 specifies the various documents that must be filed by proponents once the Minister has, in whole or in part, referred an application under the *Environmental Assessment Act* (EA Act) to the ERT.

In our view, the prescribed list of documents in Rule 31 should be expanded to include the EA summary, list of reports and documents, and other materials that are currently mandated under section 2 of Regulation 334 under the EA Act. In our experience, proponents rarely if ever comply with this regulatory disclosure obligation. Nevertheless, requiring these documents to be filed with the ERT would greatly assist Tribunal members and hearing parties or participants to obtain a concise understanding of the issues requiring adjudication.

ISSUE #4: APPLICATIONS FOR LEAVE TO APPEAL UNDER THE EBR

In Rules 35 to 50, the ERT has proposed various requirements for serving, filing and responding to applications for leave to appeal under the *Environmental Bill of Rights* (EBR). For the most part, CELA does not object to these detailed procedural requirements.

However, given that many EBR leave applicants are unrepresented, CELA submits that it will be incumbent upon the ERT (perhaps in conjunction with the Environmental Commissioner and/or Ministry of the Environment) to undertake public education/outreach efforts (i.e. plain language Guides specifically focused on new EBR-related requirements) to ensure that Ontarians are aware of, and comply with, the ERT's expectations regarding EBR leave applications.

CELA supports the right of reply conferred upon EBR leave applicants by Rule 45. However, given the voluminous nature of materials typically filed at the last minute by the Director and

instrument-holders, CELA does not believe a limited three-day period is sufficient for reply purposes. Accordingly, it is our submission that a minimum of 5 to 7 days should be provided for reply by EBR leave applicants.

Rule 49 purports to empower the ERT to grant partial leave to appeal under the EBR. While CELA does not necessarily object to the concept of partial leave, we believe that, for the purposes of greater certainty, it would be preferable to entrench the ERT's jurisdiction to grant partial leave in a legislative or regulatory amendment under the EBR itself.

ISSUE #5: MOTIONS FOR DISMISSAL

Rule 94 enables parties to bring motions to dismiss proceedings on specified grounds (i.e. the proceeding is frivolous, vexatious or commenced in bad faith; the matters are outside the jurisdiction of the ERT; or there has been statutory non-compliance).

CELA acknowledges that this Rule simply mirrors the language of section 4.6(1) of the *Statutory Powers Procedure Act*. However, when applied in the context of ERT proceedings (especially EBR leave applications), we anticipate that Rule 94 may be excessively used by proponents, instrument-holders, and Directors to launch premature attacks on proceedings commenced by public interest representatives. Even if such motions were ultimately dismissed by the ERT, they still have the potential to significantly delay matters and run up the bill for public interest representatives.

Accordingly, CELA suggests that a new subsection should be added to Rule 94 to clarify that where such motions are brought but dismissed, the moving party shall be ordered to pay costs pursuant to Rule 198, unless otherwise ordered by the ERT. In our view, this cost sanction will send a strong message by the ERT that it wants to decide proceedings on their merits, and may provide a fiscal disincentive for some parties who are tempted to bring ill-conceived motions for dismissal.

Moreover, if a matter is truly outside the ERT's jurisdiction, or if there has been statutory non-compliance, the ERT itself is empowered to dismiss the proceeding, provided that parties have been given an opportunity to make submissions: see Rules 100 to 103. In our view, this is the preferable procedure for dealing with such matters, rather than inviting proponents, instrument-holders, and Directors to bring a multiplicity of Rule 94 motions.

ISSUE #6: HEARING TRANSCRIPTS

Rule 157 places the onus on hearing parties to arrange and pay for verbatim reporters to prepare transcripts. In CELA's view, this rule makes sense in relatively "small" hearings lasting a few days, where it is not usually necessary for the ERT or parties to resort to transcripts of evidence or argument.

However, Rule 157 makes considerably less sense in longer, phased or more complex hearings (i.e. under the EA Act or CHA). In such proceedings, it is often important for Tribunal members and parties to have access to accurate records of examinations-in-chief, cross-examinations, and legal submissions, rather than engage in endless comparisons of hearing notes and protracted *ex*

post facto debate about who said what at the hearing. For example, in the "scoped" Adams Mine Landfill EA hearing (which lasted 15 hearing days spread over three months), it was absolutely necessary for all involved to have transcripts that accurately captured the detailed technical and scientific evidence adduced by the parties.

Accordingly, CELA suggests that a new subsection should be added to Rule 157 to indicate that in proceedings involving 10 or more hearing days, the ERT may order the proponent to make arrangements for verbatim reporters to prepare transcripts.

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We trust that the foregoing comments will be taken into account as the ERT finalizes its proposed changes to the Rules and Practice Directions.

Please contact the undersigned if you have any questions or comments about this matter.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Richard D. Lindgren
Counsel

cc. Gord Miller, Environmental Commissioner