PRACTICE AND PROCEDURE BEFORE THE ONTARIO ENVIRONMENTAL APPEAL BOARD

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The Environmental Appeal Board is an important tribunal whose responsibilities frequently touch upon the rights of the Ontario public to a healthy and safe natural environment.

This article discusses the statutes under which this tribunal is empowered to hear specific matters, appeals from the Environmental Assessment Board, jurisdiction, how the Environmental Appeal Board is constituted, procedure, appeals from the Environmental Appeal Board, and further participation where a project is approved but conditions imposed on the approval allow the opposing parties to remain involved.

I. Appeals to the Environmental Appeal Board

Although the Environmental Appeal Board is created and given its powers under Part XI of the *Environmental Protection Act*[1] ("EPA"), it is empowered to hear appeals under the *Ontario Water Resources Act*[2] ("OWRA") and the *Pesticides Act*.[3] This article deals with the Environmental Appeal Board's powers under each of these Acts separately.

1. The Environmental Protection Act

Among the various powers given to the Ministry of the Environment ("MOE") under the EPA are the issuance of certificates of approval, control orders, stop orders, repair and clean-up orders, and equipment orders. The levels of decision-making applicable to each one are explained in relation to the particular type of permit or order.

(*a*) *Certificates of approval*

A certificate of approval is required before anyone can operate a potential source of pollution. If the Director of approvals refuses to issue a certificate of approval or issues one on terms and condi-

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[1] R.S.O. 1980, c. 141.
[2] R.S.O. 1980, c. 361.
[3] R.S.O. 1980, c. 376.

tions with which the polluter disagrees, the polluter has the right to appeal to the Environmental Appeal Board ("Appeal Board") within 15 days of having been served with written notice (s. 121(1)).

The most controversial instances of issuance or non-issuance of certificates of approval are probably in relation to waste disposal sites or waste management systems under Part V of the EPA. In most cases under this Part a hearing will have been held by the Environmental Assessment Board ("EAB"), after which the Director will have acted on the recommendations of the full Board, although only two or three members will have held a hearing and heard the evidence.

Interested persons usually have no trouble becoming parties and participating in the EAB hearings. However, only the applicant or proponent has the power to require a hearing by the Appeal Board (ss. 121 and 122).

(*b*) *Control orders*

The MOE has power to impose stringent conditions on any person or corporation whose operations are adding, emitting or discharging a contaminant into the natural environment. The polluter then has the right to appeal to the Appeal Board and to the courts.

The procedure, generally, is that the Director must serve upon the polluter a notice of intent that he will impose a control order (s. 116(1)). The order will be issued 15 days after service of the notice, but meanwhile the polluter has had 15 days within which to make submissions as to the suitability of the control order (s. 116(2)). After the control order itself is served, he has 15 days to serve notice on the Director and the Appeal Board requiring a hearing by the Board (s. 122). There can then be no enforcement of the order, unless it is a stop order, until final disposition of the appeal or until time for the appeal has passed (s. 122(2)).

(*c*) *Stop orders*

Under s. 7 of the EPA, the Ministry may issue a stop order where the Director has reasonable and probable grounds to believe that contaminant emissions may cause an immediate danger to life, health or property. It takes effect immediately on issuance, but the operator can appeal the stop order to the Appeal Board (s. 122(1)) and to the courts (s. 123(2)).

(*d*) *Repair or clean-up orders*

The Director is given a "clean-up" power under s. 42 of the EPA, but this power is probably limited to waste disposal situations. In *Re Canadian Pacific Limited and the Ministry of the Environment*[4] the Appeal Board heard an appeal from C.P. Limited after the Director made an order under s. 42 (now s. 41) that C.P. Limited remove PCB contaminated soil after a spill. The Appeal Board ordered C.P. Limited and the MOE to pay half of the clean-up costs each. On appeal from the Appeal Board's order, the Sudbury District Court[5] quashed the Appeal Board's order, stating that if there is any power under the EPA to deal with this type of clean-up it lies with the Minister under s. 17 (now s. 16).

If the order had been made by the Minister, the Appeal Board would have had no jurisdiction to hear an appeal since s. 122 provides for appeals of orders made by the Director.

(*e*) *Equipment orders*

Where the Director believes on reasonable and probable grounds that it is necessary or advisable for the protection or conservation of the natural environment, he may order any person to keep on hand equipment or material to alleviate the effect of any contamination that he might cause (s. 17). Since this requirement is in the form of an order, s. 122 allows for an appeal within 15 days.

2. The Ontario Water Resources Act

Certificates of Approval for waterworks (see definition in s. 1(*u*)) and for sewage works (see definition in s. 1(*r*)) are required under ss. 23 and 24 of the OWRA respectively. Where the Director refuses to grant an approval or attaches terms and conditions to it, the applicant may, within 15 days, require a hearing by the Environmental Appeal Board (s. 61(2)). Only the applicant may appeal, not an affected third party.

Hearings by and appeals from the Appeal Board are provided for in the same way as those allowed under the EPA (s. 61(3) OWRA).

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[4] December, 1977, CELN, Vol. 6, No. 6, p. 173.

[5] See *Re Canadian Pacific Ltd. and Director of Ministry of Environment* (1978), 19 O.R. (2d) 498 (Dist. Ct.).

3. The Pesticides Act

Under the *Pesticides Act*, the Environmental Appeal Board, established under Part XI of the EPA, exercises the powers and duties which were previously exercised by the Pesticides Appeal Board. Its function is to hear appeals from the Director of the Pesticides Control Section's decisions to refuse to issue or renew a licence, to suspend or revoke a licence, or to make, amend, or vary, a control order.

Where the Director decides to take any of the above-noted actions, he must send a notice of his intention to the applicant, licensee or person to whom the control order is directed (s. 13(1)). If that person wishes, he may require a hearing into the Director's decision within 15 days of receiving this notice (s. 13(2)) or within a longer time-period where a control order is proposed by the Director and the applicant can establish *prima facie* grounds for the extension of time (s. 13(5)). The Board can order the Director to carry out his proposal, or refrain from carrying it out, and to take such action as the Board considers necessary, and for such purposes the Board may substitute its opinion for that of the Director (s. 13(4)).

No order can come into effect until the Board has reached its decision, unless the Director is of the opinion that an emergency exists. The applicant in such a case can require a hearing by the Board, but the terms of the Director's order will come into effect as soon as the order is served (s. 13(7)).

II. Appeals from the Environmental Appeal Board

(*a*) *The current law*

Section 123(2) of the EPA provides that within 30 days after receipt of the Appeal Board's decision, a party may appeal to the county court on a question of law.

After the Appeal Board's decision or the county court decision, a party may appeal to the Minister within 30 days on any matter other than a question of law (s. 123(3)). The Minister then has the power to confirm, alter or revoke the Board's decision "as he considers in the public interest".

(*b*) *A proposed amendment*

The repeal and replacement of subsecs. (1) and (2) of s. 123 has been proposed in s. 3(1) of Bill 143, *An Act to amend the Environmental Protection Act*.[6] The proposed amendment to s. 123(2) would change the court to which an appeal may be launched from the County Court to the Divisional Court.

III. How the Appeal Board is Constituted

Part XI of the EPA deals with the Appeal Board generally. Section 120 states that the Board shall consist of at least five members appointed by the Lieutenant-Governor in Council, that a chairman and vice-chairman shall be appointed, that three members constitute a quorum, that one member may be authorized by the chairman to conduct a hearing, and that the report of such a member may be adopted as the decision of the Board by two other members, one of whom shall be the chairman or vice-chairman.

The Appeal Board now consists of 13 members. A current list of members, with biographical information, is available from the secretary of the Environmental Assessment Board.

The Board members sit on a part-time basis, which makes scheduling of long hearings difficult. Long adjournments can stretch hearings out over extended periods of time. The solution to this problem is probably to appoint full-time Board members, but this step has not been taken to date.

IV. Jurisdiction

The case of *Re Rockcliffe Park Realty Ltd. and Director of the Ministry of the Environment*[7] dealt with the scope of the Appeal Board's powers. The respondent developer had been dumping clean fill into private marsh property to develop land for single-family dwellings. The Director of the MOE's Waste Management Branch issued control and stop orders against the developer under ss. 6 and 7 of the EPA. On appeal, the Appeal Board confirmed the Director's orders and further required the developer to landscape filled areas. The Court of Appeal, on appeal from the County Court, decided that the Appeal Board had no jurisdiction to confirm the Director's order because the Director had no juris-

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[6] Bill 143, 1st Sess., 32nd Legisl. 30 Eliz. II, 1981, was given 1st Reading on October 15, 1981.

[7] (1975), 10 O.R. (2d) 1, 62 D.L.R. (3d) 17 (C.A.).

diction to make such an order. Neither the Appeal Board nor the Director had the power to order landscaping because only the Minister has such remedial powers, and then only when the Act (s. 14 or 15 (now s. 13 or 14)) is contravened.

This case offers an interesting discussion of the interpretation of the EPA as a remedial statute, and its effect on activities on private lands.

A more recent case has brought into question the definition of an "order" which can be appealed to the Appeal Board. *Re Macfarlane and Anchor Cap & Closure Corp. of Canada Ltd.*[8] determined that where the Director refused to amend a control order he was making an order capable of being appealed under the EPA, s. 79(1) (now s. 122(1)).

Mr. Justice Henry, in a dissenting opinion, accepted the MOE's argument that the EPA does not prescribe any procedure allowing initiative to be taken by persons other than the Director, so the refusal to amend the control order was not itself an order. He also recognized that the right to appeal is important to the administration of the EPA because an appeal has the effect of prohibiting enforcement of the control order pending disposition of the appeal.

This case would seem to afford to an industry already subject to a control order the opportunity to use the Appeal Board hearing as a delaying tactic against enforcement. Whether the EPA will be amended to prevent such manoeuvres remains to be seen.

V. Procedure

1. Application of the Statutory Powers Procedure Act

Since the Appeal Board is a decision-making tribunal, its procedures are subject to the *Statutory Powers Procedure Act*.[9] This is in contrast to the EAB which makes recommendations rather than decisions.

2. Parties

The applicants or proponents who require a hearing, as well as the Director whose decision is being appealed, are the only parties

[8] (1981), 33 O.R. (2d) 317, 124 D.L.R. (3d) 303 (Div. Ct.). Leave to appeal has been refused.

[9] R.S.O. 1980, c. 484.

specified as such; however, the Board may specify any other person as a party to the hearing (s. 124). Usually parties who obtained that status at the EAB hearing will have no difficulty becoming parties at the second hearing, but s. 124 would allow even a newcomer to become a party. Also, in some cases, especially under the *Pesticides Act*, the Appeal Board hearing is the first to be held.

There is also a second category of person involved in many of these hearings. It includes persons who have no inclination or time to attend the hearing full-time. Usually these people can be designated as "participants" so that they will be allowed to make a presentation at the end of the hearing. If no status is sought, however, they may not be allowed to speak except as witnesses for another party. For example, at the Appeal Board's hearing into the Maple landfill application ("Maple appeal hearing"), which had been turned down by the director of approvals on the recommendation of the EAB, many neighbouring landowners who had been parties to the first hearing, but had been inactive or simply presented a brief, did not seek party or participant status before the Appeal Board. When they then wished to make submissions near the end of the Appeal Board hearing, they were denied that right and instead had to make their submissions as witnesses for those who were parties to the Appeal Board hearing.

3. Hearing *de novo*

(*a*) *Scope and extent*

The Appeal Board hearing is, in most cases, the second full hearing. Grounds of appeal are sometimes provided by the appellant but are not required or relied upon even where they are provided. In the "Maple appeal hearing", the applicant companies both filed detailed grounds of appeal, but neither relied on these grounds at the appeal hearing. In fact, the appellants had changed their proposal so substantially that it is doubtful that their grounds of appeal would have been relevant. As a consequence of the changed proposal the Canadian Environmental Law Association ("CELA") on behalf of a local ratepayers group, Maple Against Dumping ("MAD"), argued before the Appeal Board that the appellants could not be allowed to change their evidence completely, or the hearing would not be an appeal, but a new application which should be heard by the EAB. The differences

apparent from documents filed just prior to the Appeal Board hearing included a much smaller acreage, smaller waste tonnages and quantities, a shorter period of time during which the landfill would operate, a new type of leachate control system, and a new proposal for a methane recovery plant.

CELA based this argument partially on s. 80(1) (now s. 123(1)) of the EPA which states:

> 80(1) A hearing by the Board shall be a hearing *de novo* and the Board may confirm, alter or revoke the order, refusal or requirement that is the *subject of the hearing*. [Emphasis added.]

Since s. 80 (now s. 123) appears to contemplate that the refusal by the Director is relevant to the deliberations of the Appeal Board, and the Director's refusal notice gave details of why the proposal by each of the applicants was unsatisfactory, CELA argued that this was not a proper appeal.

CELA also argued that the requirement under s. 38 (now s. 37) of the EPA obliged the applicants to use their original concept at the appeal. Section 38 (now s. 37) states that the "applicant for a certificate of approval shall submit to the Director plans and specifications of the work to be undertaken together with such other information as the Director may require". Although CELA did not take these arguments further than the Appeal Board, the preceding arguments as well as that arising from s. 38 (now s. 37) are relevant and useful grounds of argument.

If the provisions of the EPA cannot be interpreted to require similarity between the original application and that before the Appeal Board, the general law evolved from criminal cases may not offer much scope for arguments based on differences in the evidence. For example, in the case of *R. v. Dennis*,[10] Ritchie J. held that in a trial *de novo* "the issue is to be determined without any reference, except for the purposes of cross-examination, to the evidence called in the Court appealed from and upon a fresh determination based upon evidence called anew and perhaps accompanied by entirely new evidence".[11]

In the case of *Re Union Gas Co. of Canada Ltd. and White*[12] the Ontario Court of Appeal dealt with the issue of whether the Ontario Municipal Board, acting under the authority of *The*

[10] (1960), 125 C.C.C. 321, [1960] S.C.R. 286.
[11] *Ibid.*, at p. 325 C.C.C., p. 290-1 S.C.R.
[12] [1970] 2 O.R. 85, 10 D.L.R. (2d) 39 (C.A.).

Ontario Energy Board Act, 1964, had the power to increase the amount of compensation awarded by the board of arbitration notwithstanding that the owner respondent had not delivered a notice of appeal or cross-appeal. The court found that the board could deal with matters other than those placed in appeal by the appellant, and in passing noted that the OMB must come to a decision unmindful of what the board of arbitration decided.

However, it is still difficult to say what the court would decide if asked to deal with the particular wording in the EPA where evidence brought before the appeal forum included evidence so different that the original application was unrecognizable.

The use of trial *de novo* in non-criminal matters is discussed in a recent article[13] which identifies many of the relevant issues. These include the fact that although the requirement for a trial *de novo* is an appeal provision, grounds of appeal are not needed, new evidence may be introduced, and minimal attention is paid to the original trial and to the judge's findings.[14] The authors criticize this procedure on several grounds, including the following:[15]

(i) one party is subjected to a completely new trial even where the only complaint of the appellant is that the decision was not in his favour;
(ii) by ignoring the findings of the summary conviction judge, the confidence of the public in these judgments is undermined; and
(iii) the original trial is a waste of judicial resources and court facilities because of the initial trial's absolute irrelevance after the decision is appealed.

This raises the question of whether the EPA should be amended to provide for only one hearing, rather than allowing the applicant to wear down the opposition through two long and expensive hearings.[16] It would seem equitable to simply dispense with the Appeal Board hearings under the EPA in cases where EAB hearings have already been held. This would involve, as a pre-

[13] W. T. Little, G. L. Young, Michael Di Paolo, "The Appeal Process — Trial de Novo: Its Present Nature and Procedure, Weaknesses and Recommendations for Reform with Special References to the Deserted Wives' and Children's Maintenance Act of Ontario", 12 R.F.L. 1 (1974).
[14] *Ibid.*, at p. 12.
[15] *Ibid.*, at p. 15.
[16] For example, the Maple landfill hearings were 80 and 29 days before the EAB and the Appeal Board respectively.

condition, that the EAB would make decisions rather than recommendations. This is especially reasonable as only the applicant has the right to appeal to the Appeal Board in any event (s. 122(1)).

In respect to the criticisms noted above, there are two recent legislative proposals which will in some measure change the functioning of the Appeal Board. The first is s. 3(1) of Bill 143, discussed *supra*. This amendment appears to have been proposed for the purpose of clarifying that the proponent appellant may substantially change his proposal from that which was submitted at the original hearing, since it states that the Appeal Board shall conduct a "new hearing" rather than a "hearing *de novo*". It also sets out in greater detail the power of the Appeal Board to direct the Director to take such action as the Appeal Board considers should be taken. Subsections (2), (3), (4) and (5) of s. 3 of Bill 143 set out the transitional provisions for application of the amendments.

The second change, which is already law, is found in the *Consolidated Hearings Act*.[17] This statute provides for joint hearings under two or more of the 12 statutes listed as a Schedule to the Act. Where the EAB is one of the tribunals holding a joint hearing, it, as part of the joint board, makes a final decision in respect of the matters considered by the joint board.

Section 13 of the *Consolidated Hearings Act* allows any person entitled to be heard at or take part in proceedings before the joint board to appeal to the cabinet for a variance, rescission, or substitution of the joint board's decision, or for a new hearing. Subject to the appeal provisions in s. 13, no proceedings can be taken by way of appeal except in accordance with the *Consolidated Hearings Act* (s. 15(*c*)). The result is that the provisions in the EPA relating to appeals to the Appeal Board do not apply where a joint hearing is required.

(*b*) *Procedure*

Depending on the complexity of the hearing, it is often the case that a pre-hearing discussion is held to determine procedure at the Appeal Board hearing. Matters such as order of appearance, issues to be dealt with, use of transcripts from the previous hearing, notice of contents of upcoming evidence, estimated length of the hearing, etc., should be discussed at that time. This

[17] S.O. 1981, c. 20.

preliminary discussion constitutes the commencement of the hearing, but it may be held several months before the rest of the hearing is scheduled to take place.[18]

In *Re Haldimand-Norfolk and Nanticoke Ratepayers Assoc.*[19] it was decided that the Appeal Board had jurisdiction, under s. 15(1)(*b*) of *The Statutory Powers Procedure Act*,[20] ("SPPA"), to admit in evidence the transcript of proceedings before the EAB. The court held that the Appeal Board, in coming to its decision on the preliminary motion before it, had properly considered the length of the hearing before the EAB, the number of witnesses that gave evidence before the Board, and the costs to the parties of a prolonged hearing. The Board had also properly allowed the respondents the right to cross-examine the appellant's witnesses who testified before the EAB, and to call further witnesses.

A reporter will be present at Appeal Board hearings, and the transcripts made available to the parties at approximately 25¢ per page. The transcripts are necessary in long hearings because the evidence is often spread out over long periods. For example, the Maple landfill appeal hearing stretched out over the period of a year although it was only 29 days long.

(*c*) *Onus*

It is difficult to say that an onus exists, but it is reasonable to argue that the appellant must establish that the proposed project or practice is safe and feasible. This latter point is probably the hardest to argue, because it is difficult to establish that the appellant's promises will not actually be met. However, where an approval is granted, conditions attached to it can do much to ensure that what was promised will be done or the project will not proceed.[21]

(*d*) *Evidence*

The amount of detail given by the appellants in evidence is often a contentious point. Their position is that they must have approval for the concept on the evidence they have accumulated, while the

[18] The preliminary discussion for the Maple landfill appeal was held on November 20, 1978, but the balance of the hearing did not commence until March 26, 1979.

[19] (1979), 11 M.P.L.R. 34, 9 C.E.L.R. 37 (Ont. Div. Ct.).

[20] S.O. 1971, c. 47, now R.S.O. 1980, c. 484.

[21] See also discussion under "The Post Appeal Stage", *infra*.

opponent's position is often that the evidence presented will not ensure the results alleged. The question is really whether the proper point in the design stage has been reached. The determination is a practical one: is the evidence in relation to suitability of the site, safety of the technology, and implementation of the design persuasive?[22]

In the author's experience, there will be many areas of evidence which the opponents of the proposal consider important but which the Appeal Board will not give emphasis to or will not require the appellants to produce. Examples include:

(i) *convictions.* While the Maple appeal hearing was taking place, one of the appellant companies pleaded guilty in Provincial Court to illegally operating a waste disposal site. Drums of liquid industrial waste were found in the area for which approval was being sought. CELA entered a certified copy of the information upon which the conviction was endorsed. Although the document was accepted, it was obvious that it would not be given much weight.

(ii) *contractual arrangements.* Throughout the course of the Maple appeal hearing CELA asked for copies of agreements between the company which was to manage the site, the parent company, and the company which owned the property. This agreement was relevant to the question of which company would take responsibility if problems occurred, and to the relationship of the companies involved. The appellants argued that this was a business arrangement and was therefore confidential, and the Board ruled that it did not require production of the document.

CELA also requested a copy of the insurance policy which would come into force after the appellants had begun to prepare and operate the site. CELA had introduced evidence relating to the difficulty of providing adequate pollution liability insurance, and considered that the coverage provided was relevant because of potential damage to properties surrounding the site. The Appeal Board did not require this document during the hearing but in its final order required that the appellants provide financial guarantees, including insurance, satisfactory to the MOE.

(*e*) *Reply evidence*

Reply evidence is allowed before the Appeal Board on the same

[22] *Ibid.*

basis that it is allowed before courts and other tribunals. One case frequently relied upon by those seeking to limit reply evidence is *Allcock Laight & Westwood Ltd. v. Patten, Bernard and Dynamic Displays Ltd.*[23]

At the Maple appeal hearing one of the appellant's witnesses was to be called in reply to technical evidence given by one of CELA's witnesses. CELA was warned of this in advance in the summary of his evidence presented five days before the witness was scheduled to appear. The summary stated that this witness would "re-affirm" his evidence relating to the time predicted for seepage to occur.

CELA argued that the appellants were splitting their case and were merely re-affirming their previous evidence. Reference was made to the general rule on reply evidence,[24] to the *Allcock* case and to the SPPA, ss. 15(1) and 23(1), dealing, respectively, with the exclusion of unduly repetitious evidence and the Board's ability to prevent abuse of its process.

The Board first contemplated calling a witness of its own to give evidence on the controversial point but later decided to allow CELA's witness to return a second time to respond to the appellant's reply evidence. Although this was a fair compromise, several additional hearing days were taken up with this technical evidence which had already been covered once by each side although in less detail.

(*f*) *Costs*

The EPA makes no provision for the ordering of costs by the Appeal Board in relation to proceedings before it. However, in hearings under the *Consolidated Hearings Act*, costs may be awarded by the joint board (s. 7(4), (5) and (6)).

VI. The Post Appeal Stage

The appeal hearing may not be counsel's final involvement with the subject-matter of the hearing. For example, in the Maple appeal hearing CELA included in its argument a request for several conditions which involved the provision of further data by the appellants. When the Appeal Board released its order, one of the conditions imposed required that the appellants provide

[23] [1967] 1 O.R. 18 (C.A.).

[24] See Sopinka and Lederman, *The Law of Evidence in Civil Cases* (Toronto, Butterworths, 1974), p. 517.

baseline data of existing conditions within an area which could reasonably be affected by the landfill operation. A further condition stated that all reports required under the conditions were to be considered as public information.

Because of the condition of making all required reports part of the public record, the director of approvals took the position that all parties to the hearing would be allowed to provide comments on the MOE's interpretation of the Appeal Board's order. CELA took the opportunity provided and made extensive comments relating to a revised wording for the certificate of approval. This is not the end of the process, however. The certificate of approval has been issued in final form, but the consultants hired to do the baseline study have met with the parties and provided them with their reports to date. Final reports will also be distributed.

The author can only commend this type of process, although it does require large amounts of time and resources. However, attempts must be made to continue to comment if the process is to be made truly useful in terms of the provision of detailed information and public involvement in implementation after the hearing is over and the proposal is implemented.

However, it should be of concern to practitioners and members of the public that detailed studies are provided only after the hearing is concluded and the decision is made. This may be a matter that will have to be addressed by the Legislature.