Summary of Concerns: Need for New Regulation Providing for Stays Pending Leave to Appeal

Introduction

The *Environmental Bill of Rights* (*EBR*)[1] grants Ontario's citizens important rights to participate in the provincial government's environmental decision making. The *EBR* confers regulation making power onto the Lieutenant Governor in Council to provide for stays pending the outcome leave to appeal applications to the Environmental Review Tribunal (ERT). The Lieutenant Governor in Council has not exercised that power and, as a result, the integrity of the environment and the participatory rights of Ontarians are at risk.

A new regulation providing for stays pending leave to appeal would give the ERT the jurisdiction to temporarily stay the operation of an instrument while it determines whether a dispute over the government's decision to issue the impugned instrument will be resolved by appeal. Jurisdiction over this matter would improve the ERT's ability to protect the environment and would safeguard participatory rights.

Given the purposes of the *EBR* and the gaps in the current regulatory structure, the public interest warrants a review of the need for a new regulation. If this review is not undertaken, it could result in significant harm to the environment. On these bases, we respectfully request that the Minister of the Environment undertake this review immediately and communicate to the Lieutenant Governor in Council the importance of a new regulation providing for stays pending leave to appeal.

[1] *Environmental Bill of Rights*, S.O. 1993, Chapter 28.

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Background

Leave to Appeal Process

The *EBR* was enacted in 1993 and came into effect in 1994. The *EBR* created procedures and systems that provide citizens with opportunities to comment on the government's proposed environmental decisions, and to challenge finalized environmental decisions.

When citizens wish to challenge an environmental decision that has already been made, they must bring their challenge to Ontario's Environmental Review Tribunal (ERT). In order to do this, citizens must apply for leave to appeal to the ERT. Although the ERT attempts to render decisions on leave to appeal within thirty days of an application, there are many factors which can prolong the ERT's deliberation on whether to grant leave.[2] Delays in the leave to appeal process become problematic because, as the regulatory structure now stands, there is no way for the ERT to stay the government's decision pending determination on whether leave should be granted. This lack of jurisdiction creates a situation where an impugned decision can be completely acted upon and powers under it exhausted before Ontario's citizens have an opportunity to question its merits.

Power to "stay"

A "stay" is a form of injunction. It is used to "stay" or stop the use of a government issued instrument while the legitimacy of the instrument is under dispute. The *EBR* contains provisions that automatically stay an instrument once leave to appeal is granted by the ERT. The *EBR* also contains provisions delegating power for creating a regulation that provides for stays pending leave to appeal; subsection 121(1)(s) of the *EBR* gives the Lieutenant Governor in Council the power to make regulations "providing for stays pending decisions on applications for leave to appeal." However, to date, no regulation has been

[2] *Rules of Practice and Practice Directions of the Environmental Review Tribunal*, November 15th, 2007, Rules 48 – 50.

made and to the best of our knowledge, there have been no reviews of this regulation making power.

Resources

It is the Applicants' position that the requested review will take minimal resources. Legislative authority is already in place that gives the Lieutenant Governor in Council the power to create a regulation providing for stays pending leave to appeal. Furthermore, as explained below, rules of practice are already in place that set out the criteria necessary for obtaining an interim stay.

A new regulation is needed to meet the purposes of the *EBR*

In the absence of a regulation giving the ERT jurisdiction to order a stay pending leave to appeal, the integrity of the entire leave to appeal process could be undermined. This presents a risk to two key purposes of the *EBR*: environmental protection and enhancement of public participation rights in environmental decision making.

The purposes of the *EBR* are set out in s. 2(1) of the Act. The purposes clearly speak to the importance of protecting and enhancing the integrity of the environment:

> The purposes of this Act are,
> (a) to protect, conserve and, where reasonable, restore the integrity of the environment by the means provided in this Act;
> (b) to provide sustainability of the environment by the means provided in this Act; and
> (c) to protect the right to a healthful environment by the means provided in this Act.

The purpose of the Act is further elaborated to highlight the importance of public participation for environmental protection. Section 2(3) states:

> In order to fulfil the purposes set out in subsections (1) and (2), this Act provides,
> (a) means by which residents of Ontario may participate in the making of environmentally significant decisions by the Government of Ontario;

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As will be illustrated by the *Greenspace* cases from 2008 and 2009 (below), the lack of a regulation providing for stays pending leave to appeal threatens to undermine the twin goals of environmental protection and public participation. In brief, this occurs because a substantial amount of time can lapse between the submission of an application for leave to appeal and a decision on whether leave to appeal is granted. Within that time, the very environmental features that the leave applicants seek to protect can be irreparably harmed.

Without a new regulation, there is potential for environmental harm

The lack of a regulation providing for stays pending leave to appeal has created a situation where significant harm can be inflicted on the environment pending a decision on leave to appeal. Such a situation is unacceptable. The case of *Greenspace Alliance of Canada's Capital v. Director, Ministry of the Environment* (2008)[3] provides an illustration of the length of time that can elapse between the time when an application for leave to appeal is filed and a decision on whether leave to appeal is granted.

In *Greenspace* (2008), the leave applicants attempted to exercise their statutory right to challenge a six-month Permit to Take Water (PTTW) issued by the Director, Ministry of Environment. The PTTW is an instrument under the *EBR*. The instrument was issued for an area adjacent to a provincially significant wetland and the leave applicants contended that water takings in the designated area would have a detrimental impact on the wetland. The leave applicants were community organizations concerned with protecting the environment. The leave applicants followed the appropriate routes for challenging the instrument and retained numerous experts who provided reports that corroborated their position.

[3] *Greenspace Alliance of Canada's Capital v. Director, Ministry of the Environment* (2008) (Case Nos.: 07-164/07-165).

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The leave applicants filed their leave to appeal application on March 11th, 2008. However, a series of motions brought by the instrument holders delayed the ERT's decision on leave to appeal for several months. By the time that the motions were dealt with or withdrawn, the water takings allowed for in the instrument had been fully completed. A final decision on leave to appeal was not reached until November 27th, 2009 – over eight months from when the application was filed. In the end, the instrument expired and the leave application became moot. Attached as part of this application for review are the ERT's decisions from July 21st, August 6th, September 25th, and November 27th, 2008.

Greenspace (2008) demonstrates a number of problems that militate in favour of a new regulation providing for stays pending leave to appeal. It also demonstrates how the lack of a regulation undermines the purposes of the *EBR*:

First, harm can be caused to the environment pending a decision on leave to appeal. Harm to the environment often occurs very rapidly and causes significant impacts that last for decades, if not forever. Anything that delays the environment from being protected in a situation where there is strong evidence that it is threatened, clearly puts the integrity of the environment at risk. If a new regulation is not put into place, a situation similar to *Greenspace* (2008) could occur where significant and irreversible harm will be inflicted on the environment while the ERT would be powerless to prevent it, even in the face of a strong challenge to the government's decision.

Second, *Greenspace* (2008) demonstrates that there are incentives for instrument holders to bring interlocutory motions that delay the leave to appeal process. Each motion brought by instrument holders must be considered by the ERT and each motion therefore acts to delay the ERT's final decision on leave to appeal. The delay allows instrument holders to keep using the impugned instrument, even though the wisdom of the government's decision to issue the instrument is being challenged. This not only makes the leave to appeal process costly, but it also adds to the ERT's workload.

Third, *Greenspace* (2008) demonstrates that a situation has been created where public participation rights can be rendered hollow. Since the ERT is powerless to order a stay, instrument holders are free to fully use their permits even though the public is exercising its statutory right to challenge it. When a situation arises where an instrument is completely used during the leave to appeal period, as it did in *Greenspace* (2008), it is obvious that the statutory rights of citizens are rendered virtually meaningless.

In summary, a new regulation is necessary not only to protect the environment and participatory rights, but also to create disincentives to parties who might otherwise bring time-consuming motions that frustrate the purposes of the *EBR*.

The ERT has recognized the need for a new regulation

The ERT has, itself, expressed the need for a new regulation providing for stays pending leave to appeal. The ERT made such a statement in the context of a motion for a stay pending leave to appeal in the ongoing case of *Greenspace Alliance of Canada's Capital v. Director, Ministry of the Environment* (2009).[4] The leave applicants in that case were the same as in *Greenspace* (2008) and were similarly seeking to challenge a PTTW for an area near a provincially significant wetland. The PTTW was similarly an instrument under the *EBR*.

In *Greenspace* (2009), the leave applicants requested a stay of the instrument pending leave to appeal. The challenged instrument allows the instrument holders to take water on a massive scale (pumping up to approximately 25 million litres of water per day and diverting up to approximately 206 million litres of water per day).[5] The leave applicants argued that such significant water takings would cause immediate and irreparable harm to the environment; the stay pending leave to appeal was

[4] *Greenspace Alliance of Canada's Capital v. Director, Ministry of the Environment* (Case Nos.: 09-031/09-032; 4 June 2009).
[5] Instrument Decision Notice, Permit to Take Water 8130-7HNPVW, 5 May 2009.

intended to prevent such significant environmental alterations during the leave to appeal process. The leave applicants' position was based on evidence that they had diligently obtained from highly qualified experts. One expert in particular warned that the impacts of water taking would include heavy metal contamination of downstream waterways, deterioration of air quality, and damage to soil structure. He advised that the impacts would be felt within days and would last for decades.[6]

Despite this evidence, the ERT was powerless to order an interim stay. The ERT's hands were tied because it found that, absent a new regulation providing for stays pending leave to appeal, it has no jurisdiction to order a stay in such circumstances.[7] The ERT warned that the lack of jurisdiction could threaten the integrity of the leave to appeal process as well as the environment:

> [t]he purpose of EBR is to protect the environment by facilitating the public's participation in environmental decision-making and by ensuring governmental accountability for its decisions. These are interests that must be balanced against the interests of instrument holders. While not necessarily the usual case, it is not difficult to envision circumstances that could arise where the inability of the Tribunal to issue a stay pending a Leave to Appeal decision could <u>irreparably prejudice the environment or the interests of leave applicants and thereby undermine the integrity of the Leave to Appeal process</u>. (Emphasis added.)[8]

As a result, as of July 1st, 2009, the instrument holders were in a position to potentially cause significant harm to the environment under the authority of a instrument that was subject to an application for leave to appeal to the ERT. The fact that the ERT is powerless to stay the operation of an instrument – and the associated environmental harms – while citizens are exercising their statutory right to seek leave to appeal the instrument severely undermines the

[6] Letter from Dr. David Lean, May 16th, 2009.
[7] *Greenspace* (2009) at p. 9.
[8] *Greenspace* (2009), at p. 9.

purpose of the *EBR* to enhance public participation in environmental decision making and to protect the integrity of the environment.

Given the problems identified with the current regulatory structure, and given the fact that the Legislature has empowered the Lieutenant Governor in Council to make regulations providing for stays pending leave to appeal, the public interest warrants a review of the need for a new regulation. The ERT's statement in the *Greenspace* (2009) ruling clearly supports this position. If a review is not conducted, and a new regulation not enacted, the environment could be irreparably harmed and the integrity of the leave to appeal process in the *EBR* would be undermined.

Content of Regulation

If the Lieutenant Governor in Council chooses to exercise its power to create a regulation providing for stays pending leave to appeal, it is suggested, with respect, that the stay application process be tailored to the unique circumstances of an *EBR* application for leave to appeal.

Typically, the most problematic feature of interim injunctions and stays is that they impact the rights of one party before the merits of a case have been heard. By their very nature, interim stays require the ERT to decide whether one party should be given a temporary remedy against the other party, without having the benefit of hearing all of the evidence and arguments. For this reason, the stay application process must be designed with safeguards to weed out all but the strongest and most serious cases.

The criteria for obtaining a stay should be based on the accepted test for interlocutory injunctions established by the Supreme Court of Canada (SCC) in *RJR-MacDonald*. In the context of applications for leave to appeal, the regulation should also include additional guidelines to make the stay process more efficient and true to the purposes of the *EBR*.

Basic Test

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In the context of interlocutory injunctions, courts have developed three criteria to create a basic test that helps balance the risks between opposing parties and that safeguard against unmeritorious motions. The test for interlocutory injunctions is summarized in the SCC's decision in *RJR-MacDonald Ltd. v. Canada (Attorney General)*:

> First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.[9]

The test set out in *RJR-MacDonald* for interlocutory injunctions is reflected in the ERT's *Rules of Practice and Practice Directions* as the test to meet for a stay. According to rule 101, a party seeking an interim stay must address the following matters:

a) how the relevant statutory tests that are applicable to the granting or removal of a stay are met;
b) whether there is a serious issue to be decided by the Tribunal;
c) whether irreparable harm will ensue if the relief is not granted; and
d) whether the balance of convenience, including effects on the public interest, favours granting the relief requested.

In *Greenspace* (2009) the ERT suggested that, if the ERT is given jurisdiction over stays pending leave to appeal, the test in ERT Rule 101 could be used to balance the interests of leave applicants and instrument holders. The ERT stated that:

> [t]he test that must be met to obtain a stay under the Tribunal's Rules could operate as a way to ensure that the competing interests of the Parties would be balanced. Concerns about delays in the leave process must be balanced against the goals of the EBR and the SPPA and the importance of ensuring a process that is fair to all parties.[10]

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[9] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] S.C.J. No. 17, at para. 43 and cited in *Dow Agrosciences Canada Inc. v. Director, Ministry of the Environment* [2007] O.E.R.T.D. No. 69 (Environmental Review Tribunal) at para. 62.
[10] *Greenspace* (2009) at p. 9.

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The applicants respectfully submit that the safeguards present in Rule 101 of the ERT's *Rules* are well suited to balancing the needs of leave applicants and instrument holders. However, in order to meet the purposes of the *EBR*, the new regulation should specify how each stage of the test will be dealt with in the unique context of leave to appeal applications. Some suggestions about how each stage of the test should be framed are explained below.

Irreparable harm

Rule 101 requires stay applicants to argue that irreparable harm will ensue if a stay is not granted. Irreparability is usually referred to as something that cannot be compensated for in damages either because it is not possible to quantify the harm that will be caused, because damages will not be available, or because the available damages will not be sufficient to compensate for the harm.

The new regulation should include a presumption that harm to the environment is inherently irreparable. By its very nature, harm to the environment is difficult, if not impossible to quantify. In the leave to appeal context, harm to the environment is especially irreparable because there is often no legal route to seek damages from a party holding a government issued permit, particularly if the impugned activity is being carried out on private lands.

A presumption that environmental harm is inherently irreparable would be backed by strong legal precedents. In *RJR MacDonald* the SCC acknowledged that the permanent loss of natural resources would constitute irreparable harm, even though the court was not dealing directly with an environmental issue in that case.[11] In other cases, irreparable harm to the environment has been found on the basis of: possible contamination of water, deterioration of air quality, impact on soil structure, loss of vegetation that takes a long time to

[11] *RJR-MacDonald*, supra at para. 59.

re-establish to its present state, risk of harm to a unique geophysical formation, and risk of harm from introduction of foreign invasive species.[12]

The instrument holders would be free to adduce evidence and arguments to rebut the presumption. The benefit of the presumption is that it would avoid wasting the ERT's time on lengthy arguments about the value of the environment. Rather, it would accept the *EBR*'s premise that the environment is inherently valuable and that harm to it is irreparable. In this way, the ERT could save time and resources by focusing its attention to the central issue of whether the type of harm in this specific case is somehow unique and reparable.

Such a presumption would also be in keeping with the spirit of the *EBR* that recognizes the innate value of the environment and the purpose of the *EBR* to protect the environment.

Risk of Environmental Harm

At the irreparable harm stage of the test, the new regulation should also incorporate a principle to the effect that leave applicants only need to demonstrate the potential for environmental harm. This approach is the correct one for environmental cases, according to the Ontario Superior Court in the case of *Ottawa (City) v. Ottawa (City)*.[13] In that case, the court was dealing with whether to stay a permit for building a pig farm that had been issued by the Chief Building Official and later upheld by a judge. Lalonde J. of the Ontario Superior Court granted the stay pending appeal and explained that when dealing with a stay where there is a potential for environmental harm, the party seeking the stay does not need to show irrefutable evidence of potential harm:

> When dealing with environmental problems in particular, it is dangerous for courts to insist on irrefutable evidence before being satisfied as to the potential for harm. This would be akin to a

[12] *Canadian Parks & Wilderness Society v. Canada* (Minister of Canadian Heritage) [2001] F.C.J. No. 1961 (Fed Ct.) at para. 5; *Jagtoo v. 407* (1999) O.J. No. 4944 (Ont. Sup. Ct.) at para. 37.
[13] *Ottawa (City) v. Ottawa (City)(Chief Building Official)* [2003] O.J. No. 2292 (Ont. S.C.)

> Walkerton situation where immense and irreparable harm already occurred before any measures could be taken. If such an attitude were adopted, then a party requesting a stay would have to wait until the harm occurred or would soon occur, prior to bringing an application. This was not what was intended by the Supreme Court in *RJR-MacDonald Inc.*, supra, and this is not the interpretation that this Court will accept. Once a party is able to demonstrate evidence to support a finding that irreparable harm would be suffered, this is sufficient: Noble v. Noble, supra, 16, Himel J.[14]

Lalonde J. went further to warn "that when dealing with potential or existing environmental problems, a 'wait and see' approach should not be adopted".[15]

On this basis, and on the basis of common sense, it is suggested that the test in the new regulation only require the leave applicants to show a potential for harm.

<u>Balance of Convenience</u>

Rule 101(d) of the ERT's *Rules of Practice* require the public interest to be taken into consideration when assessing the balance of convenience. Given the purpose of the *EBR* to create public participation rights in environmental decision making, the new regulation should presume that citizens seeking to appeal a decision and therefore uphold participatory rights and environmental protection, represents a substantial public interest. And, given that the ERT aims to render decisions on leave to appeal within thirty days of an application, the period of the interim stay is anticipated to be brief.

<u>Undertaking</u>

Besides the three part test outlined in *RJR-MacDonald,* a party seeking a stay is sometimes required to give an undertaking for damages as an additional safeguard. The purpose of the undertaking is to ensure that the stay applicant will not dispute any award of damages arising form the injunction if, in the

[14] *Ottawa*, at para. 24.
[15] *Ottawa*, at para. 26.

end, it is determined that the stay was wrongly awarded. However, in the context of a stay pending leave to appeal, it would be completely inappropriate to require an undertaking from the leave applicant.

The preamble and purpose sections of the *EBR* recognize that the public has an important role to play in maintaining the integrity of the environment. Requiring leave applicants (often community groups and concerned citizens with limited funds) to give an undertaking for damages when requesting an interim stay would make it nearly impossible for many applicants to apply for stays and would limit their ability to act to protect the environment. While we agree that it is necessary for there to be criteria that limit the use of interim stays, it would be completely counter to the purpose of the *EBR* to limit the public's access to interim stays based on their financial resources. The three step test outlined in *RJR-MacDonald* is sufficient for safeguarding against unmeritorious claims.

Waiving the requirement for an undertaking would also be in keeping with the goal of improving public access to the courts, as stated in subsection 2(3)(c) of the *EBR*. Moreover, it is consistent with recent developments in the common law that recognize that special considerations apply to public interest litigants in regards to standing and costs awards. The goal of increasing the public's access to courts for protecting the environment would be undermined if litigants with strong cases but limited financial resources were unable to get a stay to protect the environment.

Finally, the ERT's rules do not require that undertakings be given when interim stays are sought by instrument holders. In the case law, when an interim stay is granted, the party requesting the stay has not been required to give an undertaking for damages if the stay of an order is wrongly granted.[16] Similarly, the new regulation should stipulate that there be no requirement for citizens to provide an undertaking when appealing a decision under the *EBR*.

[16] *Dow Agrosciences Canada Inc. v. Ontario (Ministry of the Environment)*, [2007] O.E.R.T.D. No.69, case nos. 07-067 and 07-068, Dec. 10, 2007 and Jan. 16th, 2008.