

Legal Toolkit: Notes and Resources

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Non-Litigation Options

Intro: Division of Powers

- the environment is **shared** jurisdiction (federal & provincial governments)
- factors determining jurisdiction (eg, which level of government responsible and/or which level of Court hears a legal challenge):
 - **nature of the problem**, and
 - **agencies involved**
- Federal government jurisdiction (s.91, Constitution):
 - Peace, order and good government (POGG);
 - ss.91(12) Sea Coast and Fisheries;
 - ss.91(24) Aboriginal Issues;
 - ss.91(27) Criminal law; and
 - ss.92 (10) Federal works and undertakings
- Provincial government jurisdiction (s.92, Constitution):
 - ss.92(5) Management of provincial public lands
 - ss.92(13) Property and civil rights
 - ss.92(16) Matters of a local and private nature
 - ss.92A Non-renewable natural resources
- Municipal jurisdiction is *delegated* from the Province
- Aboriginal jurisdiction is *complicated* - in Canadian law, Aboriginal and treaty rights are constitutionally protected (s.35, Constitution)
- Canadian Constitution Acts: laws.justice.gc.ca/en/const/index.html

Freedom of Information

- tool for accessing government documents
- applies at all three levels of government:
 - Municipally: *Municipal Freedom of Information and Protection of Privacy Act* (municipalities, boards, public utilities, transit, conservation authorities)
 - Provincially: *Freedom of Information and Protection of Privacy Act* (provincial ministries, agencies, commissions, boards)
 - Federally: *Access to Information Act* (federal departments, ministries agencies, commissions, boards)
- How to Make a Request (Apply)
 - **Write** a letter and/or fill out appropriate form
 - **Submit** letter/form to government department/agency **that has the information** you seek
 - Don't forget the **application fee** (if required)

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- Who to Contact
 - **FOI Coordinator** (each provincial & federal ministry/agency has one - contact information available on-line or by calling, see Resources)
- "Scoping" Your Request
 - **avoid** being too broad or vague (eg, avoid unnecessary cost; search and copying fees are often very high)
 - direct to **specific type** of documents you seek
- Response
 - FOI Coordinator
 - has **30 days** to respond
 - can apply for an **extension** (written notice and reasons for the extension required)
 - if no response received after deadline, it is a "deemed refusal"
- Exemptions
 - some documents are **exempt** from FOI laws
 - Cabinet records
 - issues of law enforcement or national security
 - covered by solicitor-client privilege
 - other confidential information (eg, business trade secrets)
 - exemptions will not be released unless you can show an **overriding public interest**
- Appeals of Decision to Deny Access to Information (provincial/municipal)
 - **60-day** limitation period (from decision)
 - **apply** to Information and Privacy Commissioner (IPC) for review
 - entitled to make **representations** to IPC
 - IPC often requests mediation before **ruling**
 - Once ruling is made, **30 days** to appeal to Court
- Appeals of Decision to Deny Access to Information (federal)
 - file **complaint** with Information Commissioner (IC)
 - IC produces a **report**
 - once report is received, may apply to Federal Court of Canada for **review** of decision
 - in some cases, IC may take case to court
- Resources
 - Office of the Chief Information and Privacy Officer (Ontario): www.accessandprivacy.gov.on.ca
 - Information and Privacy Commissioner (Provincial/Municipal): www.ipc.on.ca or **1-800-387-0073** or 416-326-9883
 - Info Source (Federal): infosource.gc.ca
 - Information Commissioner (Federal): www.infocom.gc.ca or **1-800-267-0441** or 613-995-2410
 - www.righttoknow.ca

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Environmental Assessments - Ontario

- Ontario's *Environmental Assessment Act* (EAA) applies to undertakings by:
 - Public sector (provincial government, public agencies, municipalities)
 - Private sector (business enterprises, if designated by minister)
 - Anyone (can request that minister designate a specific private sector undertaking be subject to the EAA)
- Types of EA
 - Individual
 - Class
 - Electricity Sector (special regulation)
 - Note: some undertakings are **exempted** from some or all of the EAA
 - Exemptions
 - **Declaration Orders**
- Individual EA Process
 - **Proponent** prepares and submits Terms of Reference (ToR) to Ministry of Environment (MOE)
 - **MOE** coordinates review of ToR, including public consultation
 - **Proponent** prepares and submits EA according approved ToR
 - **MOE** coordinates review of EA, including public consultation
 - **Minister** may refer EA to Environmental Review Tribunal for hearings, refer EA to mediation (at any point along the way), **reject** EA, or **accept** EA (with or without conditions)
 - Each EA ToR normally includes:
 - a description of the purpose of the undertaking
 - its rationale
 - alternative methods of carrying out the undertaking
 - alternatives to the undertaking
 - a description of the environment that will be affected
 - a description of effects on the environment
 - the actions necessary to prevent, change, mitigate or remedy those effects, and
 - a description of any consultation about the undertaking by the proponent
- Class EA Process
 - A group of undertakings may receive Class EA approval if
 - are **carried out routinely** and
 - have **predictable and mitigable environmental effects**
 - currently 10 Class EAs in Ontario (if include logging Declaration Order, which was previously a Class EA)
 - **approval** of Class EA similar process to Individual EA
 - Once approved, projects that are within "class" go through **process outlined in Class EA** (do not go through individual EA process but through alternative process)
 - **anyone** can ask that an undertaking subject to a Class EA be **bumped-up** to individual EA (ask Minister for a **Part II Order**)

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- Appealing an EA
 - Most **appeals** are made to ERT
 - **Note:**
 - EAs is treated as a **planning tool**: “EA is a decision-making process used to promote good environmental planning by assessing the potential effects and benefits of certain activities on the environment.” (MOE website)
 - greater than 99% of projects with EA are approved
- EA Resources
 - Environmental Assessment in Ontario: www.ene.gov.on.ca/cons/4983e.pdf
 - ERT: www.ert.gov.on.ca
 - EA: A Vision Lost (Environmental Commissioner of Ontario): www.ecoissues.ca/wiki//index.php?title=Environmental_Assessment:_A_Vision_Lost
 - EA Registry: www.ene.gov.on.ca/envision/env_reg/ea/English

Environmental Assessments - Federal

- *Canadian Environmental Assessment Act* (CEAA) applies to **physical work/activity** when **federal government** is implicated:
 - **proponent** is federal agency
 - **project** requires federal permit
 - project is **federally funded**
 - proposal on **federal land**
- Types of EA
 - Screening
 - Comprehensive Study
 - Mediation
 - Panel Review
- All EAs must take into account
 - environmental effects of project,
 - significance of those effects,
 - public comments,
 - mitigation measures, and
 - other relevant issues.
- Additional EA requirements (comprehensive study, mediation and panel review)
 - **purpose** of project,
 - **alternative** means of carrying out project,
 - follow-up, and
 - **impacts** on renewable resources.
- EA Facts
 - **Screenings** (98.5% of EAs)
 - **least comprehensive**
 - conducted on projects **not listed in comprehensive study list or exclusion list**

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- **Comprehensive studies** (1.4% of EAs)
 - used for projects listed in **comprehensive study list**
- **Mediation and panel reviews** (0.1% of EAs)
 - used for projects where the screening or comprehensive study
 - has **uncertainty** or **likelihood** that project will cause **significant adverse environmental effects**
 - where **public concerns** warrants
 - Minister requires
- Public Participation
 - **Mandatory**
 - comprehensive studies
 - panel reviews
 - **Discretionary**
 - screenings
- Resource
 - CEAA Registry: www.ceaa.gc.ca/050/index_e.cfm
 - Federal/Provincial Agreements:
www.ceaa.gc.ca/010/0001/0003/0001/0009/2004agreement_e.htm

Law Reform & Public Processes - Legislative Reform

- convincing **government** to **change the law**
- provide **input** into **legislative process** (eg, written brief or oral testimony to legislative committee)
- get **involved** in processes that have **public participation component** (eg, some EAs)
- make use of **rights** under Ontario's ***Environmental Bill of Rights*** (EBR)
- make use of **petition processes** (eg, under Canada's ***Auditor General Act***)
- Resources
 - Ontario Legislature: www.ontla.on.ca (click "Bills & Lawmaking")
 - Canadian Parliament: www.parl.gc.ca/LEGISINFO

Law Reform & Public Processes - Ontario's EBR

- legislated public rights regarding environmental decision-making and impacts
- includes rights to know, participate, review/appeal, investigate & whistleblower protection
- **instrument** are legal approvals of activities/projects that have environmental impacts
 - Certificates of approval
 - Permits to take water
 - Landfills
- ministry notices of **proposed** instruments, Acts, regulation, policy (or changes to same) posted on Environmental Registry
 - comment period minimum 30 days

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- decision-maker mandated to consider written public comments before making final decision
- Application for **Review** (s.61, EBR):
 - amend, revoke or repeal **existing** policy, Act, regulation or instrument
 - need for **new** policy, Act or regulation
 - eg, request that Ontario government review need approach to mercury pollution in Boreal Forest
- Request for **Investigation** (s.74, EBR)
 - request must relate to an offence under listed environmental legislation
- Resources
 - Environmental Approvals in Ontario: www.ene.gov.on.ca/cons/3445e01.pdf
 - Environmental Commissioner of Ontario: www.eco.on.ca
 - EBR & You (citizen guide): www.eco.on.ca/english/publicat/usrguide.pdf
 - Environmental Registry: www.ebr.gov.on.ca

Law Reform & Public Processes - Federal petition (Auditor General Act)

- to Commissioner of the Environment and Sustainable Development (“CESD”)
- Request
 - explanation of federal policy
 - investigation of environmental problem
 - examination of enforcement
- Resources
 - CESD Petitions Guide: www.oag-bvg.gc.ca/internet/English/pet_lp_e_930.html
 - CESD Petitions Catalogue:
www.oag-bvg.gc.ca/internet/English/pet_fs_e_929.html

Law Reform & Public Processes - Federal petitions/options (Canadian Environmental Protection Act)

- Citizen may request formal **investigation** (s.17, CEPA), must refer to a CEPA offence
- Minister may recommend adding substance to **list of toxic substances**
- Minister can require **Pollution Prevention Plan** for “listed” toxic substance (s.56, CEPA)
- **Environmental Protection Compliance Orders** (s.235, CEPA) can be made by enforcement officers
- Action can be demanded if foreign country’s residents being harmed by pollutant from Canada (s.166, CEPA)

Law Reform & Public Processes - Federal “petitions” (Species at Risk Act)

- to Minister of the Environment

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- requesting that SARA apply to provincial lands
 - If provincial laws and policies are not sufficient to protect a species at risk, or
 - seeking emergency orders for the protection of species at risk

Law Reform & Public Processes - Federal “petitions” - eg, Oil and Gas Subsidies petition

- to Minister of Finance, etc.
- contradiction between subsidies to oil and gas industry in view of Canadian commitment and
- spending to comply with Kyoto Protocol

Land Trusts

- Land acquisitions held in trust for future generations
- Conservation easements
- Work directly with willing landowners to negotiate conservation deals to conserve land
- Creative real estate approaches - eg, conservation agreements
- Tax incentives - eg, federal Ecogifts, property tax programs
- Most land trusts focus on conserving biological values
- Resource: www.ontariolandtrustalliance.org

International Law

- **Commission for Environmental Cooperation (“CEC”):**
- established by Canada, Mexico and the U.S.A. under *North American Agreement on Environmental Cooperation* (NAAEC)
- Mandate
 - **foster cooperation** on environment issues
 - **oversee enforcement** of environmental laws by NAFTA parties (eg, prevent trade advantages gained at the expense of the environment)
- **NAAEC - Article 13**
 - CEC Secretariat may prepare report on any matter within scope of CEC’s annual program
 - report must NOT relate to alleged failures to enforce environmental laws (that comes under Article 14)
 - Secretariat must first notify Council and may proceed unless, within 30 days of such notification, Council objects by a two-thirds vote
- **NAAEC - Article 14**
 - allows citizens’ written submissions (petition) to CEC regarding lack of enforcement of domestic environmental law
 - CEC Secretariat
 - reviews petition

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- requests response from government
- may recommend investigation
- investigation is conducted if Council agrees (two-thirds vote)
- another two-thirds vote required to make results of investigation public
- Resource: CEC Submission on Enforcement Matters Guide - www.cec.org/files/PDF/SEM/BringingFacts-Jun02_en.pdf
- Inter-American Commission on Human Rights
 - Recent petition by Inuit for relief from climate change impacts caused by U.S. emissions: www.inuitcircumpolar.com/index.php?ID=316&Lang=En

Litigation Options

Intro: Court System

- **Ontario Court of Justice**
 - Criminal matters and regulatory matters under provincial legislation (prosecutions)
- **Superior Court of Justice & Court of Appeal**
 - Civil proceedings (actions and applications), judicial review and appeals
- Resources:
 - www.ontariocourts.on.ca
 - www.attorneygeneral.jus.gov.on.ca/english/courts
- **Federal Court & Federal Court of Appeal**
 - Claims involving
 - federal government
 - marine and inland fisheries
 - First Nations
 - Exclusive jurisdiction over federal boards and tribunals, including ministries
 - Resources:
 - cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Index
 - www.fca-caf.gc.ca/index_e.shtml
- **Supreme Court of Canada**
 - All legal matters
 - Highest (last) court of appeal
- Resource: www.scc-csc.gc.ca

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Civil Proceedings - What's a Civil Proceeding?

	action	application
starts with:	Statement of claim	Notice of application
started by:	plaintiff	Applicant

- **plaintiff or applicant** must prove **all elements** of claim/application
 - personal loss or injury,
 - interference with property rights, or
 - some other special damage
 - proof based on
 - **oral evidence** (testimony in Court), or
 - **affidavit evidence** (testimony through written material)
- Beware!
 - **limitation periods** (“expiry dates” for commencing a proceeding)
 - In Ontario, the limitation periods depend on
 - **type of proceeding**, and
 - **subject matter**
 - *Limitations Act*, other applicable legislation set out specific timelines

Civil Proceedings - Citizen's Suits

- civil action permitted by legislation
 - **Harm to a public resource** (s.84, EBR)
 - **Public nuisance** causing environmental harm (s.103, EBR)

Civil Proceedings - Judicial Review (“JR”)

- court challenge to actions/decisions made by government officials/tribunals
- two broad “grounds” for JR:
 - **Illegality of decision**
 - **Unfairness of procedure**
- *Judicial Review Procedure Act* (Ontario government & tribunal decisions)
- *Federal Court Act* (federal government decisions)
- Beware!
 - only evidence considered by a court is **decision record**
 - decision record is all material considered by decision-maker
 - need material available to decision-maker **before** decision was made

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Civil Proceedings - Alternative Dispute Resolution - Mediation

- **private** and **consensual** decision-making process
- **impartial** person (the mediator) assists people in conflict to resolve problems
- **Do you have to mediate?**
 - Not necessarily
 - Often parties to dispute must agree to mediation
 - eg, disputes before the Ontario Municipal Board (OMB) are often referred to mediation prior to hearing.

Civil Proceedings - Class Actions

- civil proceeding
- started by a **group (class)** of plaintiffs
- against one or more defendants
- In Ontario, governed by *Class Proceedings Act*
- must be “certified” by court to proceed

Civil Proceedings - Remedies - Injunctions

- Court **order** requiring a party to **refrain from** or to **take a course** of action
- For environment-related proceedings, generally
 - **prohibit** a party from doing something, or
 - force a party to **undo** something
- Must meet 3-step legal test to succeed
 - Is there a **serious issue** to be tried?
 - Is an injunction **necessary to prevent irreparable harm**?
 - What is the **balance of convenience**?
- **Generally, NO injunction against the Crown**
 - BUT **interim** or **interlocutory** injunction available against Crown agents (including a minister)
 - AND where the Crown or agent is acting **unconstitutionally**
- **Beware!**
 - applicant for interlocutory injunction may be required to provide an **undertaking**

Civil Proceedings - Remedies - Declaration

- Court **statement** clarifying legal status/rights
- **Why is it useful?**
 - not possible to get an injunction against the Crown; however may seek **interim declaratory relief**

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Civil Proceedings - Other Issues - Evidence

- Rules govern
 - what information is **admissible** (allowed), and
 - how facts must be **proved**
- Different rules of evidence apply in different contexts
- Always consider **what** facts you need to prove and **how** will you prove those facts

Civil Proceedings - Other Issues - Standing

- **legal right** to make legal claim or seek judicial enforcement of duty/right
- must be a **person** (individual or corporation) to gain standing
- **Types of Standing:**
 - Direct/Private Interest
 - Public Interest
- Legal test for public interest standing (3-part):
 - Is there a **serious issue** to be tried?
 - Is the person applying for standing **directly affected** by the issues or does s/he have a **genuine interest** in them?
 - Is there **any other reasonable way** for the issue to get to court?

Civil Proceedings - Other Issues - Costs

- **Reimbursement** for expenses for starting/defending an action
- General rule: **losing party pays** (portion of winning party's costs)
- Occasionally, a court will order **no costs**
 - eg, **sometimes** a losing party will not have to pay costs if case is in **public interest**

Civil Proceedings - Other Issues - Hiring a Lawyer

- **What do lawyers cost?**
 - Fees and disbursements
- **How do you find and pay for a lawyer?**
 - Private Bar
 - Public Interest Organizations
 - Environmental Law Groups
 - Law Society (www.lsuc.on.ca/public/a/inquiring-about-a-lawyer)
- **How do you work with a lawyer - the retainer?**

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Administrative Tribunals - Overview

- Quasi-judicial boards
- Given decision-making power by legislation
- Review decisions; hear appeals
- eg, Ontario Municipal Board, Environmental Review Tribunal, Niagara Escarpment Commission, Ontario Energy Board, National Energy Board

Administrative Tribunals - Ontario Municipal Board (OMB)

- hears appeals/applications concerning **land-use planning decisions**
 - official plans, zoning by-laws, subdivision plans
 - aggregate extraction licenses
 - resolves disputes under land/resource use laws
- OMB decisions must “**be consistent with**” Provincial Policy Statements (s.3, *Planning Act*)
- PPS deals with matters such as
 - protection of natural heritage values
 - agriculture
 - water
 - shore-line and flood plain
- Planning cases can no longer be brought to OMB before council’s decision
- Appeals from OMB go to Superior Court of Justice (Divisional Court)
- Resources:
 - www.omb.gov.on.ca
 - www.omb.gov.on.ca/english/InformationSheets/index.htm

Administrative Tribunals - Environmental Review Tribunal (ERT)

- **appeal** to ERT available for many Ontario government decisions
- may **review** orders, decisions, licenses, permits, approvals under various laws
 - *Clean Water Act, 2006*
 - *Environmental Assessment Act*
 - *Environmental Protection Act*
 - *Nutrient Management Act, 2002*
 - *Ontario Water Resources Act*
 - *Pesticides Act*
 - *Safe Drinking Water Act, 2002*
 - *matters under the Oak Ridges Moraine Conservation Act, 2001 and the Greenbelt Act, 2005*

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- hears **third party** leave (permission) to appeal applications for certain **instruments** under *Environmental Bill of Rights* (“EBR”)
 - eg, citizen group opposing approval permitting a mining company to discharge mine effluent to river
- **legal test** for leave to appeal EBR instrument to ERT
 - Appears to be good reason to believe no reasonable person would make such a decision
 - Decision could result in significant harm to environment
- application for leave to appeal
 - must be made in **writing**, and
 - usually requires strong **expert evidence**
- contact expert before government decision, given the short (15 day) deadline to file leave application
- Resource: www.ert.gov.on.ca

Prosecutions

- If you believe an **offence** has been committed, you can:
 - Report it (possible **Crown** prosecution)
 - Do it **yourself** (private prosecution)
- **Private Prosecution**
 - legal action brought in criminal court by an **individual**
 - every individual in Canada has the **right to swear an information** (commence a prosecution)
 - usually used in respect of an offence under legislation (e.g., under the *Fisheries Act*)
- **Conducting a Private Prosecution**
 - Observe an offence
 - Speak to other witnesses and gather evidence (the who, what, when and where)
 - Swear an information before a Justice of the Peace
 - requires “reasonable grounds” (accused has committed offence)
- Resource: James S. Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution* (Edmonton: Environmental Law Centre, 2004), see www.elc.ab.ca/publications
- Beware!
 - Attorney General may step in and **withdraw/stay** your prosecution
 - Costs may be awarded against unsuccessful private prosecutors

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Prosecutions	
Pros (General)	Cons (General)
<ul style="list-style-type: none"> • expert investigators • public welfare offences do not require proof of intent • public and media interest in cases 	<ul style="list-style-type: none"> • proof “beyond a reasonable doubt” and evidence of lack of “due diligence” • no right to “discover” the other side’s case
Pros (Private)	Cons (Private)
<ul style="list-style-type: none"> • no need for standing • no waiting for government action • may be entitled to portion of monetary penalty (eg, <i>Fisheries Act</i>) 	<ul style="list-style-type: none"> • Attorney General may intervene (withdraw/stay) • expert evidence may be difficult/expensive to obtain • costs may be awarded against unsuccessful private prosecutors

Interventions

- **group** or **individual** that is **not a party** to a proceeding may **request** to intervene
- intervene as either a **friend of the court** or as an **added party**
- with the Court’s leave (permission), can provide **meaningful contribution** to case
- **Group** or **individual** must
 - have an **interest** in the subject matter of the proceedings, or
 - be **adversely affected** by the judgment to be given
- With **leave**, or by **invitation**, of the court, a group or individual may intervene as a friend of the court for purpose of rendering assistance
- Ecojustice has intervened several cases, making submissions as to effect Court’s decision may have re. environmental protection
 - *St. Lawrence Cement*
 - *Hudson*
 - *Toronto*
 - *Imperial Oil*
 - *Canfor*
 - *North Fraser*
 - *Lake Superior*

