



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

January 24, 2005

Ms. Karla Heath  
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1 Nicholas Street, Suite 1404  
Ottawa, ON  
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CELA Publication #493

**Re: EBR Registry Number XQ04E0002**  
**"Looking Forward: The *Environmental Bill of Rights*"**  
**Discussion Paper - November 2004**

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Dear Ms. Heath:

The purpose of these comments from the Canadian Environmental Law Association (CELA) is to provide feedback on the Discussion Paper, prepared by the Environmental Commissioner of Ontario (ECO), "Looking Forward: The *Environmental Bill of Rights*".

**PART I - BACKGROUND:**

CELA is a non-profit organization founded in 1970 for the purpose of using and improving laws to protect the environment and conserve natural resources. Funded as a legal aid clinic specializing in environmental law, CELA represents individuals and citizen's groups before trial and appellate courts and administrative tribunals on a wide variety of environmental issues. CELA also undertakes public education, community organization, and law reform activities.

The Discussion Paper (*Looking Forward*) was placed on the Environmental Bill of Rights Registry (EBR Registry Number XQ04E0002) on November 10, 2004, with comments accepted until January 24, 2005. The purpose of *Looking Forward* is to summarize comments and suggestions received during the first part of the ECO process of the *Environmental Bill of Rights* (EBR) 10-Year Review. The comments received will be included as an appendix to the Discussion Paper.

CELA has a long history of involvement with the EBR, including participation in the current 10-year review.<sup>1</sup> In addition to its contribution to the current 10-year review, CELA has been involved in related law reform efforts dating back to the 1970s and throughout the EBR's

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<sup>1</sup> See *The Environmental Bill of Rights Turns 10 Years-Old: Congratulations or Condolences?*, (CELA: Toronto), R. Lindgren, June, 2004, prepared for the Environmental Commissioner's EBR Law Reform Workshop. Mr. Lindgren also served as CELA's representative on the Minister's Task Force on the *Environmental Bill of Rights*.

evolution. CELA is pleased to provide comments on *Looking Forward*, as part of its ongoing participation in EBR development and reform efforts.

## **PART II - GENERAL COMMENTS**

*Looking Forward* seems to have identified many of the key EBR issues for which improved policies, procedures and law reform activities should be considered. We commend the work of the ECO and stakeholders in participating in the 10-year review, and believe it is a positive step towards the needed reform of the current regime. Progress in any of the 10 areas identified in the paper would undoubtedly address shortcomings of the current EBR regime. Amendments to the EBR that would address or overcome *all* of the deficiencies identified, would bring the EBR demonstrably closer to achieving what the Ontario Legislature intended when enacting the legislation.

It is crucial that the priority identification process for EBR improvement and reform, as well as the development and implementation of those reforms, be undertaken with the participation of all stakeholders in an open and consultative fashion.

## **PART III - SPECIFIC COMMENTS**

### **1. Updating the Principles underlying the EBR**

CELA supports the suggestion that each Ministry be required to explain in its Statement of Environmental Values (SEVs) how environmental principles such as the precautionary principle, the polluter-pays principle, and the principle of intergenerational equity are considered and applied in decision-making within the Ministry. We recommend that each Ministry prepare, within six months, a guidance document for staff on what is meant by the precautionary principle, the polluter-pays principle, and the principle of intergenerational equity, and how this guidance document is to be applied in the day-to-day operations of the various departments of the Ministry. The development of the guidance documents, and planning for their implementation should be undertaken in an open and consultative fashion involving stakeholders and the public.

**Recommendation #1: Each Ministry should prepare, within six months, a guidance document for staff on what is meant by the precautionary principle, the polluter-pays principle, and the principle of intergenerational equity. Stakeholders and the public should be involved in the development of the guidance documents, and in the planning for their implementation.**

### **2. Making Statements of Environmental Values Meaningful**

Despite the mandatory language contained in the EBR regarding the content and application of SEVs, the current SEVs do not provide the operational detail needed to ensure governmental accountability and environmental sustainability. Originally intended to direct day-to-day

decision-making within ministries, SEVs are instead, overgeneralized statements regarding the purposes of the EBR and the importance of protecting the environment. Consequently, strengthening SEVs is a matter that should be given priority. CELA supports the suggestion that each ministry periodically review, republish, and recommit to its SEV. In fact, the government should set a timeline immediately that would require ministries to review, update, consult and publish SEVs. In addition, CELA supports the suggestion for an amendment to s.10 (1) of the EBR that would require a set periodic review of each ministry's SEV.

Further, mechanisms should be put in place that would require ministries to consider *and apply* the SEV when making environmentally significant decisions. Some form of recourse should be made available when a ministry does not consider the SEV, or acts contrary to it.

**Recommendation #2: Each ministry should periodically review, republish, and recommit to its SEV. In addition, s.10 (1) of the EBR should be amended to require a set time period for review of each ministry's SEV. The government should set a timeline immediately that would require ministries to review, update, consult and publish SEVs. Also, mechanisms should be put in place that would require ministries to consider *and apply* the SEV when making environmentally significant decisions.**

### **3. Improving the Effectiveness of the Registry**

The electronic registry, and in particular the search capabilities, should be revamped to provide a more user-friendly tool which allows for easier access to information. As well, information notices should be designed to provide better descriptions of instruments, including potential impacts on the environment.

Where a notice on the registry involves an amendment to an instrument, the existing instrument should be posted for public review. If a notice involves a decision to approve an instrument, the approved instrument should also be posted. The public should have access to these documents in order to make decisions about whether or not, in the first instance, to comment on a proposal for an instrument, or in the second instance, to appeal a decision to approve an instrument.

Comment periods for proposed instruments, policies, Acts or regulations are often inadequate. The minimum requirement of 30 days, which is the period of time usually allowed for comment, is often much too short for the public to participate in a meaningful way. This is particularly true when complex matters are involved, and/or the background materials required for a thorough understanding are difficult to access.

**Recommendation # 3: The electronic registry portion of the EBR website, in particular the search capabilities, should be redesigned to allow for more user-friendly access to information.**

**Recommendation # 4: Information notices should provide clear and easily understood descriptions of instruments, and include potential impacts on the environment.**

**Recommendation # 5: If a registry notice involves an amendment to an instrument, the existing instrument should be posted for public review. If a notice involves a decision to approve an instrument, the approved instrument should also be posted.**

**Recommendation # 6: The minimum comment period for proposed instruments, policies, Acts or regulations should be changed from 30 days to 45 days.**

#### **4. Providing Clarification through Exception Notices**

At the present time only two types of exception notices are required to be posted on the Registry; emergency exceptions under s. 29, and equivalent public participation exceptions under s. 30. In CELA's view, Ministries have often overused or misused the exceptions to the EBR's notice/comment provisions. For example, public comments are solicited in postings categorized as for "information purposes" only. However, postings such as these will not trigger the third-party appeal provisions under Part II. We recommend that where proposals posted on the Registry solicit public comment, they should also be subject to the mandatory notice/comment regime under Part II (including third-party appeal if an instrument is involved).

**Recommendation # 7: All prescribed instruments should receive notice on the Registry, whether as regular notices or exception notices.**

**Recommendation # 8: Where proposals posted on the Registry solicit public comment, they should also be subject to the mandatory notice/comment regime under Part II of the EBR (including third-party appeal in the case of an instrument).**

#### **5. Refining the Relationship between EBR and EAA Consultation Processes**

Over the years, many decisions have lacked public scrutiny because of the section 32 exception. This problem is well recognized and should be dealt with immediately. Essentially, there are two issues. First, all instruments further implementing the *Environmental Assessment Act* (EAA) should be subject to the EBR notice regime, with few exceptions. Further, the EBR notice regime should also apply to undertakings exempted from the environmental assessment process.

Second, the public should have third party appeal rights available with respect to instruments implementing the *Environmental Assessment Act* where there was no hearing under the EAA. The underlying principle for this issue is that there should be no duplication between the EBR and EAA processes. Where there has been an exemption, it is clear that the EAA processes are not triggered and thus, there can be no duplication of process. It is imperative that all decisions have some level of public review.

**Recommendation # 9: With a minimum of exceptions, all instruments implementing the *Environmental Assessment Act* and those exempted instruments should be subject to the EBR notice regime. Further, the public should have third party appeal rights available with respect to instruments implementing the *Environmental Assessment Act* where there was no hearing under the EAA.**

## **6. Increasing Access to Applications for Leave to Appeal**

The leave to appeal mechanism within the EBR is one of the most important tools within the law. The short timeframe, however, has been a limiting factor in its application. The timeframe for exercising leave should be at least 30 days. A substantial, competent leave application takes time and resources. The public must be given time to assemble the application. Often, the public does not realize that a decision has been made until days after the clock has begun within the 15 day timeframe for appeal.

CELA also supports the notion of granting discretion to the tribunal to extend this time. Often there are circumstances that justify an extension of time.

Finally, one of the real limiting factors with respect to the leave to appeal mechanism is the test itself. The existing test is simply too onerous and should be simplified to allow the public to challenge decisions in appropriate circumstances. No precise wording for a new test is offered at this time, but could be given if the government is interested in furthering this issue.

**Recommendation # 10: The timeline with respect to leave to appeal should be extended to 30 days. The tribunal should have discretion to extend this timeline. The test for leave to appeal to should be reviewed to make the test more clear and less onerous for the public to meet.**

## **7. Expanding ECO Powers**

CELA supports the expansion of ECO powers to require Ministry staff to provide information or documents relevant to matters under review by the ECO. Furthermore, CELA recommends that the ECO should have the authority under the EBR to self-generate applications for review. The office of the ECO is to be commended for the high quality of its annual and special reports, workshops and outreach efforts.

**Recommendation # 11: The EBR should be amended to include provisions that require Ministry staff to provide information or documents relevant to matters under review by the ECO.**

**Recommendation # 12: The EBR should be amended to give the ECO the authority to self-generate applications for review.**

## **8. Clarifying ECO Compellability**

CELA shares the concerns of the ECO that a negative perception of the ECO's impartiality may result from the Commissioner and ECO staff being engaged as witnesses in legal proceedings, and supports an amendment to the EBR which explicitly states that the Commissioner and ECO staff cannot be compelled to give evidence in legal proceedings.

**Recommendation # 13: The EBR should be amended to explicitly state that the Commissioner and ECO staff cannot be compelled to give evidence in legal proceedings.**

### **9. Reconsidering the Test for a Harm to Public Resource Action**

The action for harm to a public resource has rarely been used because of the complexity and multiple pre-conditions for its use. As *Looking Forward* suggests, both the change of onus to establish environmental harm and lessening of the requirements with respect to the need to first request an investigation are welcomed and appropriate. However, more needs to be done to make this part of the EBR work. The public should be empowered to bring an action in a simplified way when someone is breaching a provincial environmental law.

**Recommendation # 14: While CELA supports the suggested changes to the Public Resource Action, it is recommended that the harm to a public resource action be reviewed as a whole with the goal of making the action more workable and accessible to the public. This would include making the tests and preconditions for its use less onerous and removing a number of the defences that can now be employed by the defendant.**

### **10. Considering Participant Funding for EBR Proceedings**

As identified in *Looking Forward*, it has been CELA's experience that many environmental non-governmental organizations (ENGOS) have found it difficult to engage in EBR processes since funding under the *Intervenor Funding Project Act* ended in 1996. In order to level the playing field for all who wish to participate in EBR processes, participant funding, provided by proponents or government, or a combination of both, should be reintroduced.

**Recommendation # 15: The EBR should be amended to include provisions for participant funding to enable groups or individuals to pursue their rights under the EBR.**

## **PART IV - ADDITIONAL COMMENTS**

The EBR would be greatly enhanced if another recommendation was adopted. At the present time, the government is under no obligation to formally respond to the recommendations of the ECO report. Hence, despite insightful and very positive recommendations, the government may simply ignore any or all recommendations.

**Recommendation # 16: The EBR should be amended to require a formal response by the government to the ECO Annual Report and the ECO should be given the power to reply to the formal response with respect to their adequacy.**

## **PART V - CONCLUSION**

Thank you for the opportunity to provide comments on the discussion paper. CELA generally endorses the broad suggestions contained in *Looking Forward*, but strongly recommends that all of the implementation details should be developed with stakeholders in an open and consultative fashion. CELA's recommendations for EBR reform are summarized below:

**Recommendation # 1:** Each Ministry should prepare, within six months, a guidance document for staff on what is meant by the precautionary principle, the polluter-pays principle, and the principle of intergenerational equity. Stakeholders and the public should be involved in the development of the guidance documents, and in the planning for their implementation.

**Recommendation # 2:** Each ministry should periodically review, republish, and recommit to its SEV. In addition, s.10 (1) of the EBR should be amended to require a set time period for review of each ministry's SEV. The government should set a timeline immediately that would require ministries to review, update, consult and publish SEVs. Also, mechanisms should be put in place that would require ministries to consider *and apply* the SEV when making environmentally significant decisions.

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**Recommendation # 16:** The EBR should be amended to require a formal response by the government to the ECO Annual Report and the ECO should be given the power to reply to the formal response with respect to their adequacy.

Sincerely,

**CANADIAN ENVIRONMENTAL LAW ASSOCIATION**



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